



UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021

2021 asp 4

The Bill for this Act of the Scottish Parliament was passed by the Parliament on 22nd December 2020 and received Royal Assent on 29th January 2021

An Act of the Scottish Parliament to make provision for Scotland in connection with the withdrawal of the United Kingdom from the European Union, in particular to enable provision to be made that corresponds to provision in EU law after the United Kingdom's withdrawal; to establish guiding principles on the environment and to require public authorities to have due regard to those principles in making policies; to establish a body with the functions of ensuring compliance by public authorities with environmental law and monitoring the effectiveness of environmental law in protecting and improving the environment; to require the preparation and publication of an environmental policy strategy; and for connected purposes.

PART 1

ALIGNMENT WITH EU LAW

1 Power to make provision corresponding to EU law

- (1) The Scottish Ministers may by regulations—
- (a) make provision—
 - (i) corresponding to an EU regulation, EU tertiary legislation or an EU decision,
 - (ii) for the enforcement of provision made under sub-paragraph (i) or otherwise to make it effective,
 - (iii) to implement an EU directive, or
 - (iv) modifying any provision of retained EU law relating to the enforcement or implementation of an EU regulation, EU tertiary legislation, an EU decision or an EU directive,so far as the EU regulation, EU tertiary legislation, EU decision or EU directive has effect in EU law after IP completion day, or
 - (b) otherwise make provision for the purpose of dealing with matters arising out of, or related to, the operation from time to time of—

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- (i) any rights, powers, liabilities, obligations or restrictions created by regulations made under this subsection, or
 - (ii) any remedies or proceedings provided for by those regulations.
- (2) In making regulations under subsection (1)(a)(i), (ii) or (iii), the Scottish Ministers may, in particular—
- (a) omit anything which has no practical application in relation to Scotland or is otherwise redundant or substantially redundant,
 - (b) omit functions of, or in relation to, EU entities which no longer have functions in that respect under EU law in relation to Scotland,
 - (c) omit provision for, or in connection with, reciprocal arrangements between—
 - (i) the United Kingdom or Scotland or a public authority in the United Kingdom, and
 - (ii) the EU, an EU entity, a member State or a public authority in a member State,
 which no longer exist or are no longer necessary,
 - (d) omit provision for, or in connection with, other arrangements which—
 - (i) involve the EU, an EU entity, a member State or a public authority in a member State, or
 - (ii) are otherwise dependent upon the United Kingdom’s membership of the EU,
 and which no longer exist or are no longer necessary,
 - (e) omit provision for, or in connection with, any reciprocal or other arrangements not falling within paragraph (c) or (d) which no longer exist, or are no longer necessary, as a result of the United Kingdom ceasing to be a party to any of the EU Treaties,
 - (f) confer functions or impose restrictions which—
 - (i) are in an EU directive and in force (including any power to make EU tertiary legislation), and
 - (ii) it is appropriate to retain,
 - (g) omit EU references which are not necessary.
- (3) Regulations under subsection (1)(a)(i), (ii) or (iii) may provide for functions of EU entities or public authorities in member States (including making an instrument of a legislative character or providing funding) to be—
- (a) exercisable instead by a Scottish public authority (whether or not established for the purpose), or by any person whom the authority authorises to carry out functions on its behalf, or
 - (b) omitted or otherwise differently provided for.
- (4) Regulations under subsection (1)(a)(iv) may, in relation to any functions in EU instruments that are already exercisable by a Scottish public authority—
- (a) provide for the authority to—
 - (i) delegate any of the functions to another person, or
 - (ii) arrange for any of the functions to be carried out by another person, or
 - (b) otherwise provide for the functions to be conferred instead on another Scottish public authority.
- (5) Regulations under subsection (1) may make provision for, or in connection with, the charging of fees or other charges in connection with the exercise of a function (“the

relevant function”) which a Scottish public authority has by virtue of provision made under that subsection, including—

- (a) specifying fees or charges or making provision as to how they are to be determined,
 - (b) providing for the recovery or disposal of any sums payable under the regulations,
 - (c) conferring power on the Scottish public authority to make, by subordinate legislation, any provision that the Scottish Ministers may make by virtue of this subsection in relation to the relevant function.
- (6) Regulations under subsection (1) may make any provision that could be made by an Act of the Scottish Parliament.

2 Purpose of maintaining and advancing standards

- (1) The purpose of section 1(1) is, among other things, to contribute towards maintaining and advancing standards in relation to the following matters—
- (a) environmental protection,
 - (b) animal health and welfare,
 - (c) plant health,
 - (d) equality, non-discrimination and human rights,
 - (e) social protection.
- (2) When using the power under section 1(1), the Scottish Ministers must have due regard to the purpose referred to in subsection (1).
- (3) In subsection (1)(a), “environmental protection” has the meaning given by section 45(1).

3 Limitations on the section 1(1) power

- (1) Regulations under section 1(1) may not—
- (a) impose or increase taxation,
 - (b) make retrospective provision,
 - (c) create a relevant criminal offence,
 - (d) provide for the establishment of a Scottish public authority,
 - (e) remove any protection relating to the independence of judicial decision-making, or decision-making of a judicial nature, by a person occupying a judicial office, or otherwise make provision inconsistent with the duty in section 1 of the Judiciary and Courts (Scotland) Act 2008 (guarantee of the continued independence of the judiciary),
 - (f) confer a function on a Scottish public authority that is not broadly consistent with the general objects and purposes of the authority,
 - (g) modify any of the matters listed in section 31(5) of the Scotland Act 1998 (protected subject-matter),
 - (h) modify the Scotland Act 1998,
 - (i) modify the Equality Act 2006, or
 - (j) modify the Equality Act 2010.

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- (2) Paragraphs (e) and (j) of subsection (1) do not prevent the removal of a protection or the making of a modification if alternative provision is made in the regulations that is equivalent to the protection being removed or the provision being modified.
- (3) In subsection (1)—
- “judicial office” means—
 - (a) the office of judge of any court,
 - (b) the office of member of any tribunal,
 - (c) any other office, or appointment, having functions of a judicial nature,
 - “relevant criminal offence” means an offence for which an individual who has reached the age of 21 is capable of being sentenced to imprisonment for a term of more than 2 years (ignoring any enactment prohibiting or restricting the imprisonment of individuals who have no previous convictions),
 - “retrospective provision”, in relation to provision made by regulations, means provision taking effect from a date earlier than the date on which the regulations are made.

4 Duration of the section 1(1) power

- (1) No regulations may be made under section 1(1) after the end of the period of 6 years beginning with the day on which section 1(1) comes into force.
- (2) The Scottish Ministers may by regulations extend the period mentioned in subsection (1).
- (3) That power may be exercised more than once.
- (4) But the period mentioned in subsection (1) may not be extended by regulations under subsection (2) beyond the end of the period of 10 years beginning with the day on which section 1(1) comes into force.
- (5) Subsection (1) does not affect the continuation in force of any regulations made under section 1(1) during the period mentioned in subsection (1) (including any period of extension provided by regulations under subsection (2)).
- (6) Regulations under subsection (2) are subject to the affirmative procedure.

5 Scrutiny of regulations under section 1(1)

- (1) Regulations under section 1(1) which contain provision falling within subsection (2) are subject to the affirmative procedure.
- (2) That provision is provision which—
 - (a) abolishes a function of an EU entity or a public authority in a member State without providing for an equivalent function to be exercisable by any person,
 - (b) provides for a function mentioned in section 1(3) or (4) to be exercisable by a Scottish public authority, or by a different Scottish public authority (as the case may be), or by any person whom the Scottish public authority authorises to carry out functions on its behalf,
 - (c) falls within section 1(5), regarding the charging of fees or other charges in connection with the exercise of a function by a Scottish public authority, except for provision which relates only to altering the amount of a fee or charge to reflect changes in the value of money,

- (d) creates, or widens the scope of, a criminal offence,
 - (e) creates or amends a power to legislate.
- (3) Any other regulations under section 1(1) are (if they have not been subject to the affirmative procedure) subject to the negative procedure.

6 Policy statement on the section 1(1) power

- (1) The Scottish Ministers must publish, in such manner as they consider appropriate, a statement of their policy on—
- (a) the approach to be taken,
 - (b) the factors to be taken into account, and
 - (c) the process to be followed,
- when considering whether to use the power under section 1(1).
- (2) The Scottish Ministers may from time to time revise the policy statement and publish the revised policy statement.
- (3) Where the Scottish Ministers make a statement referred to in subsection (9) of section 9, by virtue of paragraph (c) of that subsection, they must as soon as reasonably practicable after making the statement—
- (a) review the policy statement, and
 - (b) either—
 - (i) revise the policy statement and publish the revised policy statement, or
 - (ii) lay before the Scottish Parliament a document explaining why, in the Scottish Ministers' opinion, it is not necessary to revise the policy statement.
- (4) In this Part, references to a policy statement under this section include references to the policy statement as revised from time to time.
- (5) It is not necessary for a policy statement to have been published under this section before the power under section 1(1) may be used.

7 Procedure for publication of policy statement

- (1) Before publishing a policy statement under section 6, the Scottish Ministers must lay a copy of the statement before the Scottish Parliament for approval.
- (2) The Scottish Ministers must not publish the policy statement before the end of the 28-day period mentioned in subsection (5).
- (3) Before laying a copy of the policy statement before the Scottish Parliament under subsection (1), the Scottish Ministers must—
- (a) lay a draft of the statement before the Parliament, and
 - (b) in preparing the copy of the policy statement that is to be laid before the Parliament under subsection (1), have regard to any representations about the draft statement that are made to them before the end of the period of 28 days beginning with the day on which the draft statement is laid before the Parliament under paragraph (a).

- (4) When laying a copy of the policy statement before the Scottish Parliament under subsection (1), the Scottish Ministers must at the same time lay before the Parliament a document describing how they have had regard to any representations made about the draft statement in accordance with subsection (3)(b) in preparing the copy of the statement.
- (5) If, within 28 days of a copy of the policy statement having been laid before the Scottish Parliament under subsection (1), the Parliament resolves that the statement should not be approved, the Scottish Ministers must not publish the statement but instead—
 - (a) review and revise the policy statement, having regard to any views expressed by the Parliament in relation to the statement, and
 - (b) lay a copy of the policy statement as revised before the Parliament.
- (6) Subsection (5) applies in relation to any policy statement as revised under that subsection as it applies in relation to the first copy of the policy statement laid before the Scottish Parliament under subsection (1).
- (7) In calculating the period of 28 days mentioned in subsections (3)(b) and (5), no account is to be taken of any period during which the Parliament is dissolved or in recess for more than 4 days.
- (8) The Scottish Ministers must lay a draft of the first policy statement under subsection (3)(a) as soon as reasonably practicable after section 1(1) comes into force.

8 Explanatory statements for regulations under section 1(1)

- (1) This section applies where a Scottish statutory instrument containing regulations under section 1(1), or a draft of such an instrument, is to be laid before the Scottish Parliament.
- (2) When the instrument or draft is laid, the Scottish Ministers must make each of the statements listed in section 9.
- (3) If the instrument or draft is laid when the Scottish Parliament is in recess, the Scottish Ministers must make a statement explaining why the instrument or draft was laid at that time.
- (4) If the Scottish Ministers fail to make a statement required by subsection (2) or (3) when the instrument or draft is laid, they must make a statement explaining why they have failed to do so.
- (5) A statement under subsection (2), (3) or (4) must be made in writing and be published in such manner as the Scottish Ministers consider appropriate.
- (6) This section does not apply in relation to any laying before the Scottish Parliament of an instrument or draft instrument where an equivalent instrument or draft (ignoring any differences relating to procedure) has previously been laid before the Parliament.

9 Explanatory statements: good reasons, human rights etc.

- (1) The statements referred to in section 8(2) are as follows.
- (2) A statement explaining—
 - (a) the instrument or draft,

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- (b) why, in the Scottish Ministers’ opinion, there are good reasons for making the provision contained in the instrument or draft,
 - (c) the law before IP completion day which is relevant to the provision, and
 - (d) the effect (if any) of the provision on retained EU law.
- (3) A statement explaining the effect (if any) of the instrument or draft on—
 - (a) the Convention rights within the meaning of section 1 of the Human Rights Act 1998, and
 - (b) other human rights contained in any international convention, treaty or other international instrument ratified by the United Kingdom.
- (4) A statement—
 - (a) as to whether the instrument or draft amends, repeals or revokes any provision of equality legislation, and
 - (b) if it does, explaining the effect of each such amendment, repeal or revocation.
- (5) A statement to the effect that, in relation to the instrument or draft, the Scottish Ministers have, so far as required to do so by equality legislation, had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.
- (6) A statement explaining the effect (if any) of the instrument or draft on—
 - (a) rights and duties relating to employment and health and safety,
 - (b) matters relating to consumer protection,so far as it is within devolved competence (within the meaning of section 54 of the Scotland Act 1998) for the instrument or draft to have any such effect.
- (7) A statement—
 - (a) as to whether, in relation to the instrument or draft, the Scottish Ministers have consulted—
 - (i) such persons appearing to them to be representative of the interests of local authorities,
 - (ii) any other person, and
 - (b) if they have, setting out details of the consultation that they carried out.
- (8) Except where the regulations are subject to the negative procedure, a statement setting out the likely financial implications of the provision contained in the draft.
- (9) If the instrument or draft—
 - (a) is laid before a policy statement is published under section 6(1),
 - (b) is laid during the period beginning with the day on which a copy of a revised policy statement is laid before the Scottish Parliament under section 7(1) and ending with the day on which the revised policy statement is published under section 6(2) or (3)(b)(i), or
 - (c) contains provision that involves using the power under section 1(1) in a way that is not in accordance with the policy statement published under section 6,a statement explaining why, in the Scottish Ministers’ opinion, there are good reasons for laying the instrument or draft at that time or, as the case may be, for using the power in that way.
- (10) In this section, “equality legislation” means the Equality Act 2006, the Equality Act 2010 or any subordinate legislation made under either of those Acts.

10 Reports relating to the use of the section 1(1) power

- (1) The Scottish Ministers must, for each reporting period, prepare and lay before the Scottish Parliament a report explaining—
 - (a) how the power under section 1(1) has been used during the reporting period,
 - (b) how that use of the power under section 1(1) contributes or has contributed towards maintaining and advancing standards in relation to the matters mentioned in section 2(1)(a) to (e),
 - (c) how they intend to use the power under section 1(1) in the period (of such length as they may determine) following the reporting period,
 - (d) how their intended use of the power under section 1(1) would contribute towards maintaining and advancing standards in relation to the matters mentioned in section 2(1)(a) to (e), and
 - (e) any use of the power under section 1(1) that has been considered by the Scottish Ministers during the reporting period.
- (2) The reporting periods are—
 - (a) the period beginning with the day on which section 1(1) comes into force and ending with 31 August 2021,
 - (b) each subsequent period of one year (during the total period in which regulations may be made under section 1(1) in accordance with section 4), and
 - (c) the period (the “final reporting period”) beginning with the day after the end of the last period of one year determined under paragraph (b) and ending with the day on which the power to make regulations under section 1(1) expires in accordance with section 4.
- (3) Paragraphs (c) and (d) of subsection (1) do not apply to the report for the final reporting period.

11 Consultation on reports under section 10(1)

- (1) Before laying a report before the Scottish Parliament under section 10(1), the Scottish Ministers must—
 - (a) lay a draft of the report before the Parliament, and
 - (b) in preparing the report, have regard to any representations about the draft report that are made to them before the expiry of the consultation period.
- (2) References in this section to a draft of the report are references only to a draft of the provision to be contained in the report under section 10(1)(c).
- (3) The draft report must be laid before the Parliament under subsection (1)(a) as soon as practicable, and no later than 2 months, after the end of the reporting period to which it relates.
- (4) Where the Scottish Ministers lay a draft report before the Scottish Parliament under subsection (1)(a), they must not lay the report before the Parliament under section 10(1) before the expiry of the consultation period.
- (5) When laying the report before the Scottish Parliament under section 10(1), the Scottish Ministers must at the same time lay before the Parliament a document setting out—
 - (a) a summary of any representations about the draft report made during the consultation period, and
 - (b) how they have had regard to those representations in preparing the report.

- (6) Where the representations about the draft report made during the consultation period include representations that any particular intended use or uses of the power under section 1(1) as explained in the draft report should instead be provided for by means of an Act of the Scottish Parliament, the document laid under subsection (5) must cover those representations separately.
- (7) In this section, “consultation period” means the period of 28 days beginning with the day on which the draft report is laid before the Scottish Parliament under subsection (1) (a).
- (8) In calculating the period of 28 days mentioned in subsection (7), no account is to be taken of any period during which the Parliament is dissolved or in recess for more than 4 days.

12 Interpretation of Part 1

(1) In this Part—

“EU decision” means—

- (a) a decision within the meaning of Article 288 of the Treaty on the Functioning of the European Union, or
- (b) a decision under former Article 34(2)(c) of the Treaty on European Union,

“EU directive” means a directive within the meaning of Article 288 of the Treaty on the Functioning of the European Union,

“EU entity” means an EU institution or any office, body or agency of the EU,

“EU reference” means—

- (a) any reference to the EU, an EU entity or a member State,
- (b) any reference to an EU directive or any other EU law, or
- (c) any other reference which relates to the EU,

“EU regulation” means a regulation within the meaning of Article 288 of the Treaty on the Functioning of the European Union,

“EU tertiary legislation” means—

- (a) any provision made under—
 - (i) an EU regulation,
 - (ii) a decision within the meaning of Article 288 of the Treaty on the Functioning of the European Union, or
 - (iii) an EU directive,

by virtue of Article 290 or 291(2) of the Treaty on the Functioning of the European Union or former Article 202 of the Treaty establishing the European Community, or

- (b) any measure adopted in accordance with former Article 34(2)(c) of the Treaty on European Union to implement decisions under former Article 34(2)(c),

but does not include any such provision or measure which is an EU directive,

“member State” (except in the definition of “EU reference”) does not include the United Kingdom,

“public authority”—

- (a) means a public authority within the meaning of section 6 of the Human Rights Act 1998, but

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- (b) does not include the Scottish Parliament or a person exercising functions in connection with proceedings in the Scottish Parliament,
 “Scottish public authority” means a public authority whose functions are exercisable only in or as regards Scotland.
- (2) References in section 1(1) to an EU regulation, EU tertiary legislation, an EU decision or an EU directive include references to any provision or part of the EU regulation, EU tertiary legislation, the EU decision or the EU directive.
- (3) References in subsection (1) to former Article 34(2)(c) of the Treaty on European Union are references to that Article as it had effect at any time before the coming into force of the Treaty of Lisbon Amending the Treaty on European Union and the Treaty establishing the European Community signed at Lisbon on 13 December 2007.
- (4) Any other reference in subsection (1) to an Article of the Treaty on European Union or the Treaty on the Functioning of the European Union includes a reference to that Article as applied by Article 106a of the Euratom Treaty.

PART 2

ENVIRONMENT

CHAPTER 1

ENVIRONMENTAL PRINCIPLES

13 The guiding principles on the environment

- (1) In this Chapter, references to the guiding principles on the environment are references to the following principles—
- (a) the principle that protecting the environment should be integrated into the making of policies,
 - (b) the precautionary principle as it relates to the environment,
 - (c) the principle that preventative action should be taken to avert environmental damage,
 - (d) the principle that environmental damage should as a priority be rectified at source,
 - (e) the principle that the polluter should pay.
- (2) Those principles are derived from the equivalent principles provided for in Article 11 of Title II and Article 191(2) of Title XX of the Treaty on the Functioning of the European Union.
- (3) Accordingly, in preparing guidance under section 17 relating to the interpretation and application of the principles, the Scottish Ministers must have regard to the interpretation of those equivalent principles by the European Court from time to time.
- (4) The Scottish Ministers may by regulations—
- (a) modify this section so as to—
 - (i) add or remove guiding principles on the environment,

- (ii) amend any of the guiding principles for the time being specified in this section,
 - (b) further define any of the guiding principles for the time being specified in this section.
- (5) Regulations under subsection (4) may remove, amend or further define a guiding principle on the environment that is derived from the equivalent principles mentioned in subsection (2) only so far as necessary—
 - (a) to reflect the removal of or an amendment to the equivalent principle in accordance with EU law, or
 - (b) otherwise to ensure that the guiding principle reflects the equivalent principle as it has effect in EU law from time to time.
- (6) Regulations under subsection (4) are subject to the affirmative procedure.
- (7) Before laying a draft of regulations under subsection (4) before the Scottish Parliament for approval, the Scottish Ministers must consult—
 - (a) a Minister of the Crown,
 - (b) each responsible authority that is subject to the duty in section 15,
 - (c) such persons appearing to them to be representative of the interests of local government, industry, agriculture, fisheries or small businesses as they consider appropriate, and
 - (d) such other persons as they consider appropriate.
- (8) In this Chapter—
 - “making policies” includes developing, adopting or revising policies,
 - “Minister of the Crown” has the same meaning as in the Ministers of the Crown Act 1975.

14 Ministers’ duties to have due regard to the guiding principles

- (1) The Scottish Ministers must, in making policies (including proposals for legislation), have due regard to the guiding principles on the environment.
- (2) Ministers of the Crown must, in making policies (including proposals for legislation) so far as extending to Scotland, have due regard to the guiding principles on the environment.
- (3) The duties in subsections (1) and (2) do not apply in relation to any policy or proposal so far as relating to—
 - (a) national defence or civil emergency,
 - (b) finance or budgets.
- (4) In this section, “legislation” includes—
 - (a) an Act of Parliament,
 - (b) an Act of the Scottish Parliament,
 - (c) subordinate legislation.

15 Other authorities’ duty to have due regard to the guiding principles

- (1) A responsible authority must, in doing anything in respect of which the duty under section 1 of the Environmental Assessment (Scotland) Act 2005 (“the 2005 Act”)

applies (requirement for environmental assessment), have due regard to the guiding principles on the environment.

- (2) In subsection (1), “responsible authority” is to be construed in accordance with section 2 of the 2005 Act but does not include the Scottish Ministers or a Minister of the Crown.

16 Purpose of the duties under sections 14 and 15

- (1) Those to whom the duties in sections 14 and 15 apply are to comply with the duties with a view to—
- (a) protecting and improving the environment, and
 - (b) contributing to sustainable development.
- (2) In subsection (1), “the environment”—
- (a) means all, or any, of the air, water and land (including the earth’s crust), and “air” includes the air within buildings and the air within other natural or man-made structures above or below ground, and
 - (b) includes wild animal and plant life and the habitats of wild animal and plant life.
- (3) In subsection (2)(b), “animal and plant life” includes any living organisms.

17 Guidance

- (1) The Scottish Ministers must publish guidance on—
- (a) the guiding principles on the environment, and
 - (b) the duties in sections 14 and 15 as read with section 16.
- (2) The guidance may, in particular, include provision about—
- (a) the interpretation of the principles,
 - (b) how the principles relate to each other,
 - (c) how the duties relate to other duties relating to the environment including the duties in the Environmental Assessment (Scotland) Act 2005,
 - (d) complying with the duties,
 - (e) how those who are subject to the duties should demonstrate that they have complied and are complying with the duties.
- (3) A person who is subject to one or other of the duties must, in doing anything in respect of which the duty applies, have regard to the guidance published under this section.
- (4) The Scottish Ministers must from time to time review guidance published under this section and may revise the guidance and publish the revised guidance.
- (5) References in subsections (2) to (4) and in section 18 to guidance under this section include references to revised guidance.

18 Procedure for publication of guidance

- (1) Before publishing guidance under section 17, the Scottish Ministers must lay the guidance before the Scottish Parliament.

- (2) The Scottish Ministers must not publish the guidance before the end of the 40-day period mentioned in subsection (5).
- (3) Before laying guidance before the Scottish Parliament under subsection (1), the Scottish Ministers must consult the following persons about the guidance—
 - (a) a Minister of the Crown,
 - (b) each responsible authority who is subject to the duty under section 15, and
 - (c) such other persons as they consider appropriate.
- (4) When laying guidance before the Scottish Parliament under subsection (1), the Scottish Ministers must at the same time lay before the Parliament a statement setting out—
 - (a) details of the consultation about the guidance that was carried out under subsection (3),
 - (b) a summary of any views expressed in response to the consultation, and
 - (c) either—
 - (i) details of how those views (if any) have been taken into account in preparing the guidance that is laid before the Parliament, or
 - (ii) a statement that no views were expressed in response to the consultation or that no account has been taken of views expressed.
- (5) If, within 40 days of guidance having been laid before the Scottish Parliament under subsection (1), the Parliament resolves that the guidance should not be published, the Scottish Ministers must not publish the guidance.
- (6) In calculating the period of 40 days, no account is to be taken of any period during which the Parliament is dissolved or in recess for more than 4 days.

CHAPTER 2

ENVIRONMENTAL GOVERNANCE

Establishment of Environmental Standards Scotland

19 Environmental Standards Scotland

- (1) Environmental Standards Scotland (in Gaelic, Ìrean Àrainneachdail na h-Alba) is established.
- (2) It is a body corporate.
- (3) Schedule 1 makes further provision about Environmental Standards Scotland.

Functions of Environmental Standards Scotland

20 Functions

- (1) Environmental Standards Scotland's functions are—
 - (a) to monitor as it considers appropriate—
 - (i) public authorities' compliance with environmental law,

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- (ii) the effectiveness of environmental law and of how it is implemented and applied,
 - (b) to investigate (either on its own initiative or in response to any representations made to it by another person) any matter concerning—
 - (i) whether a public authority is failing (or has failed) to comply with environmental law,
 - (ii) the effectiveness of environmental law or of how it is (or has been) implemented or applied,
 - (c) to take the steps it considers appropriate to secure—
 - (i) a public authority’s compliance with environmental law,
 - (ii) improvement in the effectiveness of environmental law or in how it is implemented or applied, and
 - (d) the additional functions conferred on it by this or any other enactment.
- (2) In exercising its functions, Environmental Standards Scotland may, in particular—
- (a) carry out, commission or support any research it considers appropriate,
 - (b) seek any independent and expert advice it considers appropriate,
 - (c) make recommendations in relation to any matter relevant to its functions,
 - (d) consider, assess and review data on the quality of the environment in Scotland,
 - (e) keep under review implementation of any international obligation of the United Kingdom relating to environmental protection,
 - (f) have regard to developments in, and information on the effectiveness of, international environmental protection legislation,
 - (g) collaborate with any other environmental governance body in the United Kingdom, including the Office for Environmental Protection, or such other persons as Environmental Standards Scotland considers appropriate,
 - (h) request information from public authorities about the exercise of their functions under environmental law.
- (3) In exercising its functions, Environmental Standards Scotland must act objectively, impartially, proportionately and transparently.

21 Power to modify functions

- (1) The Scottish Ministers may by regulations modify Environmental Standards Scotland’s functions for the purpose of implementing an international obligation that arises or may arise under an agreement or arrangement between the United Kingdom and the EU following the withdrawal of the United Kingdom from the EU.
- (2) Regulations under subsection (1) may modify this Act.
- (3) Regulations under subsection (1) are subject to the affirmative procedure.
- (4) Before laying a draft of regulations under subsection (1) before the Scottish Parliament for approval, the Scottish Ministers must consult—
 - (a) Environmental Standards Scotland, and
 - (b) such other persons as the Scottish Ministers consider appropriate.
- (5) In subsection (1), “modify” includes confer or remove a function.

22 Duty to prepare and publish strategy on exercise of functions

- (1) Environmental Standards Scotland must—
 - (a) prepare and publish a strategy that sets out how it intends to exercise its functions, and
 - (b) exercise its functions in accordance with the strategy.
- (2) Schedule 2 makes further provision about the strategy.

23 Co-operation duties of public authorities and Environmental Standards Scotland

- (1) A public authority must co-operate with Environmental Standards Scotland, and give it such reasonable assistance as it requests (including the provision of information), in connection with the exercise of its functions.
- (2) In addition, a public authority must make all reasonable efforts to—
 - (a) swiftly resolve any matter which Environmental Standards Scotland raises concerning the authority’s failure to comply with environmental law, to make effective environmental law or to implement or apply it effectively, and
 - (b) reach agreement with Environmental Standards Scotland on any remedial action the authority should take for the purpose of environmental protection.
- (3) If Environmental Standards Scotland considers that a particular exercise of its functions may be relevant to the exercise of an environmental governance function by the Office for Environmental Protection, or any other environmental governance body in the United Kingdom, Environmental Standards Scotland must consult that body.

Information notices

24 Power to require information

- (1) Environmental Standards Scotland may, by issuing a notice in writing (an “information notice”), require a public authority to provide information which Environmental Standards Scotland reasonably requires for the purpose of exercising any of its functions.
- (2) An information notice must specify—
 - (a) the information, or the nature of the information, which is to be provided,
 - (b) the purposes for which, and the particular matters in connection with which, it is required,
 - (c) the form in which it is to be provided,
 - (d) the means by which it is to be provided, and
 - (e) the date on or by which, or the period within which, it must be provided.
- (3) Environmental Standards Scotland may withdraw an information notice by giving notice in writing to that effect to the public authority to whom the information notice was issued.
- (4) In this section, “information” includes—
 - (a) any document or a copy of, or extract from, any document,
 - (b) documents of any type or copies of, or extracts from, such documents,

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- (c) any explanation or other information (including unrecorded information).

25 Failure to comply with an information notice

- (1) Where a public authority fails, without reasonable excuse, to comply with an information notice issued to it under section 24(1), Environmental Standards Scotland may report the matter to the Court of Session.
- (2) After receiving a report under subsection (1), and hearing any evidence or representations on the matter, the Court may (either or both)—
 - (a) make such order for enforcement as it considers appropriate,
 - (b) deal with the matter as if it were a contempt of the Court.

Improvement reports and improvement plans

26 Improvement report

- (1) Environmental Standards Scotland may prepare an improvement report if it considers that, in exercising its functions (including regulatory functions), a public authority has failed to—
 - (a) comply with environmental law,
 - (b) make effective environmental law, or
 - (c) implement or apply environmental law effectively.
- (2) Environmental Standards Scotland may also prepare an improvement report if it considers that the combined effect of two or more public authorities exercising their functions (including regulatory functions) in the same or a similar way constitutes a systemic failure by those authorities to—
 - (a) comply with environmental law,
 - (b) make effective environmental law, or
 - (c) implement or apply environmental law effectively.
- (3) Before preparing an improvement report in respect of any failure arising out of a public authority exercising its regulatory functions, Environmental Standards Scotland must be satisfied that the failure could not be addressed more effectively by issuing a compliance notice under section 31(1) instead.
- (4) An improvement report is a report setting out the details of the alleged failure and recommending measures that the Scottish Ministers, or any other public authority, should take in order to—
 - (a) comply with environmental law, or
 - (b) improve the effectiveness of environmental law or of how it is implemented or applied.

27 Restrictions on preparing an improvement report

Environmental Standards Scotland may not prepare an improvement report in respect of—

- (a) a failure to comply with environmental law arising out of any decision taken by a public authority in the exercise of its regulatory functions in relation to a

particular person or case (for example, a decision on an application for a licence or a decision on regulatory enforcement in a specific case), or

- (b) a failure to comply with environmental law arising out of particular conduct if—
 - (i) it has issued a compliance notice under section 31(1) in respect of the same failure arising out of the same conduct, and
 - (ii) it has not subsequently withdrawn the compliance notice under section 35(1).

28 Content of an improvement report

An improvement report must—

- (a) set out the grounds for preparing the report, including details of the alleged conduct and circumstances which have caused Environmental Standards Scotland to conclude that a public authority has failed, or (as the case may be) that two or more public authorities have collectively failed, to—
 - (i) comply with environmental law,
 - (ii) make effective environmental law, or
 - (iii) implement or apply environmental law effectively,
- (b) explain Environmental Standards Scotland's reasons for reaching that conclusion (including details of the relevant environmental law and any evidence, research, expert advice or other information which it took into account),
- (c) set out the impact of the failure (including any environmental harm, risk of environmental harm or missed opportunity to improve the quality of the environment), and
- (d) propose a timescale for the Scottish Ministers, or other public authority, to take the remedial measures recommended in the report.

29 Improvement report: procedural requirements

Where Environmental Standards Scotland prepares an improvement report under section 26(1), it must—

- (a) send a copy of the report to the Scottish Ministers,
- (b) lay a copy of the report before the Scottish Parliament, and
- (c) publish a copy of the report.

30 Improvement plan

- (1) Where Environmental Standards Scotland lays a copy of an improvement report before the Scottish Parliament under section 29, the Scottish Ministers must respond to the report by preparing an improvement plan.
- (2) An improvement plan must set out—
 - (a) what the Scottish Ministers propose to do in response to the recommendations in the improvement report, including in particular—
 - (i) the measures that the Scottish Ministers propose to take to implement the recommendations (in full or in part),
 - (ii) the proposed timescale for implementing the recommendations,

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- (iii) the arrangements for reviewing, and reporting on, progress in implementing the recommendations, and
 - (b) if the Scottish Ministers do not intend to implement the recommendations in the improvement report (in full or in part), the reasons for that.
- (3) The Scottish Ministers must lay a copy of the improvement plan before the Scottish Parliament either—
 - (a) before the end of the period of 6 months beginning with the date on which the improvement report was laid before the Parliament, or
 - (b) before the end of the period of 9 months beginning with that date, if the Scottish Ministers consider that it is necessary to consult other persons (or the public more generally) about the plan.
- (4) When laying a copy of the improvement plan before the Scottish Parliament in accordance with subsection (3)(b), the Scottish Ministers must at the same time lay before the Parliament a statement setting out—
 - (a) details of the consultation about the plan that was carried out under that subsection,
 - (b) a summary of any views expressed in response to the consultation, and
 - (c) either—
 - (i) details of how those views (if any) have been taken into account in preparing the plan that is laid before the Parliament, or
 - (ii) a statement that no views were expressed in response to the consultation or that no account has been taken of views expressed.
- (5) If, within 40 days of a copy of the improvement plan having been laid before the Scottish Parliament under subsection (3), the Parliament resolves that the plan should not be approved, the Scottish Ministers must—
 - (a) review and revise the plan, having regard to any views expressed by the Parliament in relation to the plan, and
 - (b) lay a copy of a revised improvement plan before the Parliament before the end of the period of 3 months beginning with the date on which the Parliament resolved not to approve the plan.
- (6) Subsection (5) applies in relation to any revised improvement plan as it applies in relation to the first improvement plan.
- (7) Once the Scottish Parliament resolves that the improvement plan laid under subsection (3), or any revised improvement plan laid under subsection (5)(b), should be approved, the Scottish Ministers must publish the plan.
- (8) In calculating the period of 40 days mentioned in subsection (5), no account is to be taken of any period during which the Parliament is dissolved or in recess for more than 4 days.

Compliance notices

31 Compliance notice

- (1) Environmental Standards Scotland may issue a compliance notice to a public authority if Environmental Standards Scotland considers that—
 - (a) in exercising its regulatory functions, the public authority—

- (i) is failing to comply with environmental law, or
 - (ii) has failed to comply with environmental law in circumstances that make it likely that the failure will continue or be repeated, and
 - (b) its failure to comply with environmental law is causing, or has caused, environmental harm or a risk of environmental harm.
- (2) A compliance notice is a notice requiring the public authority to whom it is issued to take the steps set out in the notice in order to address its failure to comply with environmental law.

32 Restrictions on issuing a compliance notice

- (1) Environmental Standards Scotland may not issue a compliance notice in respect of—
- (a) a failure to comply with environmental law arising out of any decision taken by a public authority in the exercise of its regulatory functions in relation to a particular person or case (for example, a decision on an application for a licence or a decision on regulatory enforcement in a specific case), or
 - (b) a failure to comply with environmental law arising out of particular conduct if it has prepared an improvement report under section 26(1) or (2) in respect of the same failure arising out of the same conduct.
- (2) A compliance notice issued in contravention of subsection (1) is of no effect.

33 Content of a compliance notice

- (1) A compliance notice must include the following information—
- (a) a statement of the grounds for issuing the notice, including a statement of—
 - (i) the regulatory function of the public authority to which the alleged failure to comply with environmental law relates,
 - (ii) the provision of environmental law to which the alleged failure relates,
 - (iii) the alleged conduct which has caused Environmental Standards Scotland to conclude that the public authority is failing to comply with environmental law or has failed to comply with environmental law and the failure will likely continue or be repeated,
 - (iv) Environmental Standards Scotland’s reasons for reaching that conclusion, and
 - (v) the environmental harm or risk of environmental harm being caused, or having been caused, by the alleged failure,
 - (b) details of the steps that Environmental Standards Scotland requires the public authority to take in order to address its failure to comply with environmental law (which may include steps designed to remedy or mitigate, or prevent any continuance or repeat of, the failure),
 - (c) the date of issue of the notice,
 - (d) the period within which the required steps are to be taken,
 - (e) information about the person to whom, and as to how and by when, any representations about the notice may be made,
 - (f) information about the right to appeal, including the period within which an appeal may be made, and

(g) an explanation of the consequences of failure to comply with the requirements of the notice.

(2) The reference in subsection (1)(d) to the period within which the required steps are to be taken is a reference to such period of not less than 28 days, beginning with the date on which the notice was issued, as Environmental Standards Scotland determines.

34 Variation of a compliance notice

(1) Environmental Standards Scotland may vary a compliance notice so as to extend the period mentioned in section 33(1)(d) (“the compliance period”).

(2) A compliance notice may be varied under subsection (1)—

(a) at any time before expiry of the compliance period,

(b) by giving notice in writing to that effect to the public authority to whom the compliance notice was issued.

(3) The variation of a compliance notice under subsection (1) does not affect the date of its issue for the purpose of section 36(2)(a).

35 Withdrawal of a compliance notice

(1) Environmental Standards Scotland may withdraw a compliance notice.

(2) A compliance notice may be withdrawn under subsection (1)—

(a) at any time before completion of the steps that are to be taken to comply with the requirements of the notice,

(b) by giving notice in writing to that effect to the public authority to whom the compliance notice was issued.

(3) Where a compliance notice is withdrawn under subsection (1), it is to be treated as if it had never been issued.

36 Appeal against a compliance notice

(1) A public authority to whom a compliance notice has been issued may appeal to a sheriff against Environmental Standards Scotland’s decision to issue the notice on the ground that—

(a) it has not conducted itself in the manner alleged in the notice,

(b) the alleged conduct specified in the notice does not constitute—

(i) a failure to comply with environmental law, or

(ii) a failure to comply with environmental law in circumstances that make it likely that the failure will continue or be repeated, or

(c) the alleged failure to comply with environmental law specified in the notice is not causing, or has not caused, environmental harm or a risk of environmental harm.

(2) An appeal under this section—

(a) must be made before the expiry of the period of 21 days beginning with the date of issue of the notice (“the 21-day period”), but

(b) may be made later with the sheriff’s permission.

- (3) The sheriff may give permission under subsection (2)(b) for an appeal to be made after the expiry of the 21-day period only if the sheriff is satisfied that the public authority has a good reason for not making the appeal before the expiry of that period.
- (4) In determining an appeal under this section, the sheriff may—
 - (a) cancel the compliance notice, or
 - (b) confirm the notice, either with or without modifications.
- (5) Where an appeal is made under this section, the period mentioned in section 33(1)(d) is suspended until the appeal is finally determined or is withdrawn.

37 Failure to comply with a compliance notice

- (1) Where a public authority fails, without reasonable excuse, to comply with a compliance notice issued to it under section 31(1), Environmental Standards Scotland may report the matter to the Court of Session.
- (2) After receiving a report under subsection (1), and hearing any evidence or representations on the matter, the Court may (either or both)—
 - (a) make such order for enforcement as it considers appropriate,
 - (b) deal with the matter as if it were a contempt of the Court.

Judicial review and other civil proceedings

38 Power to apply for judicial review or intervene in civil proceedings

- (1) Environmental Standards Scotland may make an application for judicial review in relation to a public authority's conduct (whether or not it has issued a compliance notice or prepared an improvement report in respect of that conduct) if Environmental Standards Scotland considers that—
 - (a) the conduct constitutes a serious failure to comply with environmental law, and
 - (b) it is necessary to make the application to prevent, or mitigate, serious environmental harm.
- (2) Subsection (3) applies where legal proceedings relate to an alleged failure by a public authority to comply with environmental law (however the allegation is framed in those proceedings).
- (3) Environmental Standards Scotland may, either with the court's permission or at the court's invitation, intervene in the proceedings for the purpose of making a submission to the court on an issue arising in the proceedings.
- (4) Environmental Standards Scotland may apply under subsection (3) to intervene in proceedings only if it considers that—
 - (a) the allegation relates to a serious failure by a public authority to comply with environmental law, and
 - (b) it is necessary to intervene to prevent, or mitigate, serious environmental harm.

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- (5) The court may grant permission to, or invite, Environmental Standards Scotland to intervene under subsection (3) only if it is satisfied that Environmental Standards Scotland’s intervention is likely to assist the court.
- (6) For the purpose of subsection (1) or (3), Environmental Standards Scotland is to be treated as having sufficient interest in the subject matter of any application which it may make or of any legal proceedings in which it may intervene.
- (7) In this section—
 - “court” means the Court of Session, the sheriff, the Sheriff Appeal Court or the Scottish Land Court,
 - “legal proceedings” means civil proceedings before a court, including appeal proceedings and proceedings on an application for judicial review.

Disclosure of information

39 Disclosure of information to Environmental Standards Scotland

- (1) No enactment or rule of law prohibiting or restricting the disclosure of information prevents a public authority from providing Environmental Standards Scotland with information necessary for the exercise of Environmental Standards Scotland’s functions in accordance with—
 - (a) the authority’s duty to co-operate under section 23(1), or
 - (b) an information notice issued under section 24(1).
- (2) But nothing in this Chapter requires a public authority to provide Environmental Standards Scotland with information that the authority—
 - (a) would be entitled to refuse to provide in civil proceedings on grounds of confidentiality of communications, or
 - (b) would be entitled, or required by any rule of law, to refuse to provide in civil proceedings on grounds of public interest immunity.
- (3) Nothing in this Chapter requires or authorises a disclosure of information which, although made in accordance with a duty or a power provided for in this Chapter, would contravene the data protection legislation.
- (4) In subsection (3), “the data protection legislation” has the same meaning as in the Data Protection Act 2018 (see section 3(9) of that Act).

40 Confidentiality of proceedings

- (1) Environmental Standards Scotland must not disclose—
 - (a) information obtained under section 23(1) or 24(1), or
 - (b) correspondence between Environmental Standards Scotland and a public authority that—
 - (i) relates to a particular information notice or compliance notice, or to the preparation of a particular improvement report,
 - (ii) is, or contains, such a notice or an unpublished draft of such a report.
- (2) Subsection (1) does not apply to—

- (a) a disclosure (other than a disclosure of an information notice, a compliance notice or an unpublished draft of an improvement report) made with the consent of the public authority who provided the information or correspondence,
- (b) a disclosure made for purposes connected with the exercise of Environmental Standards Scotland's functions,
- (c) a disclosure made to the Office for Environmental Protection, or any other environmental governance body, for purposes connected with the exercise of an environmental governance function,
- (d) a disclosure of information, or correspondence, that relates only to a matter in relation to which Environmental Standards Scotland does not intend to take any further action under this Chapter,
- (e) a disclosure made for the purposes of civil proceedings,
- (f) a disclosure made for the purposes of the investigation or prosecution of any offence or suspected offence or for the purposes of the prevention or detection of crime,
- (g) a disclosure made in pursuance of an order of a court or tribunal,
- (h) a disclosure made in accordance with any other enactment requiring or permitting the disclosure.

Duty to consult on effectiveness of governance arrangements

41 Duty to consult on effectiveness of governance arrangements

- (1) The Scottish Ministers must—
 - (a) prepare a report on the matters mentioned in subsection (2), and
 - (b) after preparing the report, consult the persons mentioned in subsection (3).
- (2) The matters referred to in subsection (1)(a) are—
 - (a) whether the provisions of this Chapter have ensured that there continues to be effective and appropriate governance relating to the environment following the withdrawal of the United Kingdom from the EU,
 - (b) whether the law in Scotland on access to justice on environmental matters is effective and sufficient, and
 - (c) whether and, if so, how the establishment of an environmental court could enhance the governance arrangements referred to in paragraph (a).
- (3) The persons referred to in subsection (1)(b) are—
 - (a) Environmental Standards Scotland,
 - (b) such persons as appear to the Scottish Ministers to be representative of the interests of persons likely to be affected by the governance arrangements referred to in subsection (2)(a), and
 - (c) such other persons as the Scottish Ministers consider appropriate.
- (4) The consultation under subsection (1)(b) must begin before the end of the period of 6 months beginning with the date on which Environmental Standards Scotland publishes the strategy under section 22(1).
- (5) The Scottish Ministers must, as soon as reasonably practicable after the consultation under subsection (1)(b) begins, lay before the Scottish Parliament a copy of the consultation document.

- (6) Following the consultation under subsection (1)(b), the Scottish Ministers must lay before the Scottish Parliament a statement setting out—
- (a) details of the consultation that was carried out under subsection (1)(b),
 - (b) a summary of any views expressed in response to the consultation, and
 - (c) the Scottish Ministers’ recommendations in response to those views.

Interpretation of Chapter 2

42 Meaning of “public authority”

In this Chapter, “public authority” means a person exercising any function of a public nature that is not—

- (a) a function of any of the following persons—
 - (i) Environmental Standards Scotland,
 - (ii) a court or tribunal,
 - (iii) the Scottish Parliament,
 - (iv) the Parliament of the United Kingdom,
 - (v) a Minister of the Crown (within the meaning of the Ministers of the Crown Act 1975),
 - (vi) a body to which paragraph 3 (reserved bodies) of Part III of schedule 5 of the Scotland Act 1998 applies, or
- (b) a function in connection with proceedings in the Scottish Parliament or the Parliament of the United Kingdom.

43 Meaning of “failing to comply with environmental law”

For the purposes of this Chapter, any reference (however expressed) to a public authority failing (or having failed) to comply with environmental law is a reference to any of the following conduct by the authority—

- (a) the authority failing (or having failed) to take proper account of environmental law when exercising its functions,
- (b) the authority exercising (or having exercised) its functions in a way that is contrary to, or incompatible with, environmental law,
- (c) the authority failing (or having failed) to exercise its functions where the failure is contrary to, or incompatible with, environmental law,

and references to “compliance with environmental law” are to be construed accordingly.

44 Meaning of “environmental law” and “effectiveness of environmental law”

- (1) In this Chapter, “environmental law” means any legislative provision to the extent that it—
 - (a) is mainly concerned with environmental protection, and
 - (b) is not concerned with an excluded matter.
- (2) Excluded matters are—
 - (a) disclosure of, or access to, information,
 - (b) national defence or civil emergency,

- (c) finance or budgets.
- (3) In subsection (1), “legislative provision” means—
 - (a) provision contained in, or in an instrument made under, an Act of the Scottish Parliament, and
 - (b) provision contained in any other enactment which, if contained in an Act of the Scottish Parliament, would be within the legislative competence of the Parliament.
- (4) The Scottish Ministers may by regulations provide that a legislative provision specified in the regulations is, or is not, within the definition of “environmental law” in subsection (1) (and this Chapter applies accordingly).
- (5) Regulations under subsection (4) are subject to the affirmative procedure.
- (6) Before laying a draft of regulations under subsection (4) before the Scottish Parliament for approval, the Scottish Ministers must consult—
 - (a) Environmental Standards Scotland, and
 - (b) such other persons as the Scottish Ministers consider appropriate.
- (7) In this Chapter, references to the effectiveness of environmental law are references to the effectiveness of environmental law, or any particular aspect of it—
 - (a) in achieving its intended effect by reference to its contribution to—
 - (i) environmental protection, and
 - (ii) improving the health and wellbeing of Scotland’s people, and achieving sustainable economic growth, so far as consistent with environmental protection, and
 - (b) in contributing to the implementation of any international obligation of the United Kingdom relating to environmental protection,and references to “effective environmental law” are to be construed accordingly.

45 Meaning of “environmental protection”, “environmental harm” and “the environment”

- (1) In this Chapter, “environmental protection” means—
 - (a) protecting, maintaining, restoring or improving the quality of the environment,
 - (b) preventing, mitigating, minimising or remedying environmental harm caused by human activities,
 - (c) monitoring, considering, assessing, recording, reporting on or managing data on anything relating to paragraphs (a) and (b).
- (2) In this Chapter, “environmental harm” means—
 - (a) harm to the health of human beings, animals, plants or any other living organisms,
 - (b) harm to the quality of the environment, including—
 - (i) harm to the quality of the environment taken as a whole,
 - (ii) harm to the quality of air, water or land, and
 - (iii) other impairment of, or interference with, biodiversity or ecosystems,
 - (c) offence to the senses of human beings,
 - (d) damage to property, or

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- (e) impairment of, or interference with, amenities or other legitimate uses of the environment.
- (3) In this Chapter, “the environment”—
- (a) means all, or any, of the air, water and land (including the earth’s crust), and “air” includes the air within buildings and the air within other natural or man-made structures above or below ground, and
 - (b) includes wild animal and plant life and the habitats of wild animal and plant life.
- (4) In subsection (1), “human activities”—
- (a) means human activities of any kind (whether industrial, commercial or otherwise), and any connected activities, that are capable of causing, or liable to cause, environmental harm, and
 - (b) includes (with or without other activities) the production, treatment, keeping, depositing or disposal of any substance.
- (5) In subsection (3)(b), “animal and plant life” includes any living organisms.

46 Interpretation of Chapter 2: general

- (1) In this Chapter—
- “application for judicial review” means an application to the supervisory jurisdiction of the Court of Session,
 - “compliance notice” means a notice issued under section 31(1),
 - “the environment” has the meaning given by section 45(3),
 - “environmental governance body” means a person on whom an environmental governance function has been conferred,
 - “environmental governance function” means a function that is similar to a function conferred on Environmental Standards Scotland,
 - “environmental harm” has the meaning given by section 45(2),
 - “environmental law”, “effectiveness of environmental law” and “effective environmental law” have the meanings given by section 44, “environmental protection” has the meaning given by section 45(1),
 - “improvement report” means a report prepared under section 26(1) or (2),
 - “information notice” means a notice issued under section 24(1),
 - “international environmental protection legislation” means legislation of countries and territories outwith Scotland (including legislation of other parts of the United Kingdom), and of international organisations (including the EU), that is mainly concerned with environmental protection,
 - “international obligation of the United Kingdom” includes any obligation that arises or may arise under an international agreement or arrangement to which the United Kingdom is a party,
 - “Office for Environmental Protection” has the meaning given by section 21 of the Environment Act 2021,
 - “public authority” has the meaning given by section 42,
 - “regulatory functions” means—
 - (a) functions conferred by or under any enactment of—
 - (i) imposing requirements, restrictions or conditions in relation to an activity,

- (ii) setting standards and outcomes in relation to an activity, or
- (iii) giving guidance in relation to an activity, or
- (b) functions which relate to the securing of compliance with, or enforcement of, requirements, restrictions, conditions, standards, outcomes or guidance which by or under any enactment relate to an activity,

“strategy” means a strategy prepared under section 22(1).

- (2) In this Chapter, references (however expressed) to—
- (a) a public authority failing to comply with environmental law are to be construed in accordance with section 43,
 - (b) a public authority failing to make effective environmental law are references to the authority—
 - (i) failing to exercise any function it has of making, confirming or approving subordinate legislation, or
 - (ii) failing to exercise that function in such a way, so as to secure the effectiveness of environmental law.

CHAPTER 3

ENVIRONMENTAL POLICY STRATEGY

47 Environmental policy strategy

- (1) The Scottish Ministers must prepare and publish an environmental policy strategy.
- (2) The strategy must set out—
 - (a) objectives for protecting and improving the environment,
 - (b) policies and proposals for achieving the objectives (or a summary or indication of such policies and proposals), and
 - (c) arrangements for monitoring progress towards achieving the objectives.
- (3) In preparing the strategy the Scottish Ministers must have regard to the desirability of securing that environmental policy—
 - (a) aims at a high level of environmental protection,
 - (b) contributes to sustainable development,
 - (c) contributes to improving the health and wellbeing of Scotland’s people,
 - (d) contributes to objectives in policy areas other than environmental policy,
 - (e) integrates environmental policy objectives into the development of policies in other areas,
 - (f) responds to global crises in relation to climate change and biodiversity.
- (4) The strategy may consist of one or more documents (and the reference in subsection (3) to the strategy includes any document forming part of it).
- (5) The Scottish Ministers may designate one or more documents as forming the strategy or part of the strategy, whether the document or documents was or were prepared before or after this section comes into force (and whether before or after the Bill for this Act was passed).

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- (6) In preparing the strategy or any document forming part of it, and before designating any document as forming the strategy or part of the strategy, the Scottish Ministers must consult—
- (a) such persons as they consider would be likely to be affected by the proposals in the strategy or document,
 - (b) such persons as they consider have appropriate expertise or experience in relation to the matters covered by the strategy or document,
 - (c) such other persons (if any) as they consider appropriate.
- (7) For the purpose of subsection (6), it is immaterial that anything done by way of consultation was done before this section comes into force (whether before or after the Bill for this Act was passed).
- (8) Before publishing the strategy or any document forming part of it, the Scottish Ministers must lay before the Scottish Parliament—
- (a) a copy of the strategy or document, and
 - (b) a statement setting out—
 - (i) details of the consultation about the strategy or document that was carried out under subsection (6),
 - (ii) a summary of any views expressed in response to the consultation, and
 - (iii) either details of how those views (if any) have been taken into account in preparing the strategy or document or a statement that no views were expressed in response to the consultation or that no account has been taken of views expressed.
- (9) The Scottish Ministers—
- (a) must from time to time review the strategy, and
 - (b) may revise the strategy or any document forming part of it.
- (10) Subsections (3) and (6) to (8) apply to the preparation and publication of a revised strategy or any document forming part of it as they apply to the preparation and publication of the first strategy or any document forming part of it.
- (11) The Scottish Ministers must, in making policies (including proposals for legislation), have due regard to the strategy.
- (12) The Scottish Ministers must, before the end of each reporting period, lay before the Scottish Parliament a report containing an explanation of progress towards preparation of the strategy.
- (13) The reporting periods are—
- (a) the period of one year beginning with the day on which this section comes into force,
 - (b) each subsequent period of one year while the duty under subsection (12) has effect.
- (14) The duty under subsection (12) ceases to have effect when a copy of the strategy or any document forming part of it is laid before the Scottish Parliament under subsection (8) provided that consultation in accordance with subsection (6) was carried out in relation to the strategy or document after this section comes into force.
- (15) In this section—

“the environment” and “environmental protection” have the meanings given by section 45,

“making policies” includes developing, adopting and revising policies.

PART 3

GENERAL

48 Purpose and effect of this Act

- (1) The purpose of this Act is to make provision in connection with the withdrawal of the United Kingdom from the EU in consequence of the notification given under section 1 of the European Union (Notification of Withdrawal) Act 2017 (“UK withdrawal”).
- (2) In so far as any provision of this Act, or any provision made under it, would, if it were in effect before the relevant time, be incompatible with EU law, the provision is to have no effect until the relevant time.
- (3) In subsection (2), “the relevant time”, in relation to any provision of this Act or any provision made under it, means the time at which the provision of EU law with which it would be incompatible ceases to have effect in Scots law as a consequence of UK withdrawal.
- (4) For the purposes of this section, “EU law” has the same meaning as in the Scotland Act 1998 (see section 126(9) of that Act).

49 Regulations: supplementary

- (1) Any power conferred by this Act on the Scottish Ministers to make regulations includes the power to make—
 - (a) different provision for different purposes, and
 - (b) incidental, supplementary, consequential, transitional, transitory or saving provision.
- (2) This section does not apply to regulations under section 51.

50 Ancillary provision

- (1) The Scottish Ministers may by regulations make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider necessary for the purposes of, in connection with or for giving full effect to this Act or any provision made under it.
- (2) Regulations under this section may modify any enactment (including this Act).
- (3) Regulations under this section—
 - (a) are subject to the affirmative procedure if they contain provision that adds to, replaces or omits any part of the text of an Act,
 - (b) otherwise are subject to the negative procedure.

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51 Commencement

- (1) This Part comes into force on the day after Royal Assent.
- (2) The other provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint.
- (3) Regulations under this section may—
 - (a) include transitional, transitory or saving provision,
 - (b) make different provision for different purposes.

52 Repeal of Part 1 of this Act

- (1) The Scottish Ministers may by regulations repeal Part 1 of this Act.
- (2) Regulations under subsection (1) are subject to the affirmative procedure.

53 Short title

The short title of this Act is the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021.

Status: This is the original version (as it was originally enacted).

SCHEDULE 1

(introduced by section 19(3))

ENVIRONMENTAL STANDARDS SCOTLAND

Independence from Ministers

- 1 (1) In performing its functions, Environmental Standards Scotland is not subject to the direction or control of any member of the Scottish Government.
- (2) Sub-paragraph (1) is subject to any contrary provision in this or any other enactment.

Appointment of members

- 2 (1) Environmental Standards Scotland is to consist of—
 - (a) a member appointed by the Scottish Ministers to chair Environmental Standards Scotland, and
 - (b) at least 4 but no more than 6 other members appointed by the Scottish Ministers.
- (2) The Scottish Ministers may appoint a person as a member only if the Scottish Parliament has approved the appointment.
- (3) In appointing members, the Scottish Ministers must have regard, among other things, to the desirability of ensuring that the membership (taken as a whole) has expertise or experience in—
 - (a) law (including international law) relating to the natural environment,
 - (b) environmental science,
 - (c) environmental policy, and
 - (d) investigatory and enforcement proceedings.
- (4) A member is appointed for such period not exceeding 4 years as the Scottish Ministers determine.
- (5) The Scottish Ministers may reappoint a person as a member if—
 - (a) the person—
 - (i) is a member at the time of reappointment, or
 - (ii) ceased to be a member not more than 3 months before the date of reappointment, and
 - (b) the person has not previously been reappointed.
- (6) Sub-paragraphs (2) and (4) apply to the reappointment of a person as a member as they apply to the appointment of a person as a member.
- (7) The Scottish Ministers may determine other terms and conditions of membership in relation to matters not covered by this Act.
- (8) The Scottish Ministers may by regulations amend sub-paragraph (1)(b) by substituting a different number for a number for the time being mentioned there.
- (9) Regulations under sub-paragraph (8) are subject to the negative procedure.

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Persons who may not be members

- 3 (1) The Scottish Ministers may not appoint a person as a member if sub-paragraph (2) or (3) applies to the person.
- (2) This sub-paragraph applies to a person who is—
- (a) a member of—
 - (i) the Scottish Parliament,
 - (ii) the House of Commons,
 - (iii) the House of Lords,
 - (iv) Senedd Cymru, or
 - (v) the Northern Ireland Assembly,
 - (b) a member of the Scottish Government,
 - (c) a Minister of the Crown,
 - (d) an office-holder in the Scottish Administration,
 - (e) an office-holder of the Crown in right of Her Majesty’s Government in the United Kingdom,
 - (f) a councillor of a local authority,
 - (g) the holder of any other relevant elective office as defined by paragraph 1(8) of schedule 7 of the Political Parties, Elections and Referendums Act 2000,
 - (h) a civil servant,
 - (i) an employee of a local authority.
- (3) This sub-paragraph applies to a person who is or has been—
- (a) insolvent,
 - (b) disqualified as a company director under the Company Directors Disqualification Act 1986,
 - (c) disqualified as a charity trustee under the Charities and Trustee Investment (Scotland) Act 2005,
 - (d) disqualified under a disqualification provision analogous to either of those mentioned in paragraphs (b) and (c) anywhere in the world.
- (4) For the purpose of sub-paragraph (3)(a), a person is or has been insolvent if—
- (a) the person’s estate is or has been sequestrated,
 - (b) the person has granted a trust deed for creditors or has made a composition or arrangement with creditors,
 - (c) the person is or has been the subject of any other kind of arrangement analogous to either of those mentioned in paragraphs (a) and (b) anywhere in the world.

Members’ remuneration and expenses

- 4 (1) Environmental Standards Scotland may pay—
- (a) its members, and
 - (b) the members of any committee established by it,
- such remuneration as it may, with the approval of the Scottish Ministers, determine.
- (2) Environmental Standards Scotland may pay—
- (a) its members, and
 - (b) the members of any committee established by it,

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such sums as it may, with the approval of the Scottish Ministers, determine in respect of expenses incurred by them in performing their functions.

Early termination of membership

- 5 (1) A person's membership of Environmental Standards Scotland ends if—
- (a) the person gives notice in writing to the Scottish Ministers and the Presiding Officer of the Scottish Parliament that the person resigns,
 - (b) the person becomes disqualified from being a member,
 - (c) the Scottish Ministers give the person notice in writing that the person is removed from being a member.
- (2) The Scottish Ministers may remove a member under sub-paragraph (1)(c) only if—
- (a) the member has been absent, without permission or reasonable excuse, from meetings of Environmental Standards Scotland for a period of longer than 3 consecutive months,
 - (b) the member has been convicted of a criminal offence, or
 - (c) the Scottish Ministers consider that the member is—
 - (i) unable to perform the member's functions, or
 - (ii) unsuitable to continue as a member.
- (3) Where they propose to give a person, other than the person who is the member appointed to chair Environmental Standards Scotland, notice under sub-paragraph (1)(c) that the person is to be removed from being a member, the Scottish Ministers must consult the member appointed to chair Environmental Standards Scotland.
- (4) The Scottish Ministers may remove a member under sub-paragraph (1)(c) only with the approval of the Scottish Parliament.
- (5) For the purpose of sub-paragraph (1)(b), a person becomes disqualified from being a member if paragraph 3(2) or (3) applies to the person.

Chief executive and other staff

- 6 (1) Environmental Standards Scotland is to have, as a member of staff, a chief executive.
- (2) The chief executive may not be a member of Environmental Standards Scotland.
- (3) The Scottish Ministers are to appoint the first chief executive with the approval of the Scottish Parliament.
- (4) Environmental Standards Scotland is to appoint each subsequent chief executive.
- (5) Environmental Standards Scotland may appoint other staff.
- (6) The chief executive and other staff are to be appointed on such terms and conditions as Environmental Standards Scotland, with the approval of the Scottish Ministers, determines.

Committees

- 7 (1) Environmental Standards Scotland may establish committees.

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- (2) The membership of a committee may include (but may not consist entirely of) persons who are not members of Environmental Standards Scotland but those persons are not entitled to vote at meetings.

Authority to perform functions

- 8 (1) Environmental Standards Scotland may authorise—
- (a) any of its members,
 - (b) any committee established by it,
 - (c) its chief executive, or
 - (d) any other member of its staff,
- to perform such of its functions (and to such extent) as it may determine.
- (2) The giving of authority under sub-paragraph (1) to perform a function does not—
- (a) affect Environmental Standards Scotland's responsibility for the performance of the function, or
 - (b) prevent Environmental Standards Scotland from performing the function itself.

Regulation of procedure

- 9 Environmental Standards Scotland may regulate its own procedure (including quorum) and that of any committee.

Validity of things done

- 10 The validity of anything done by Environmental Standards Scotland or its committees is not affected by—
- (a) a vacancy in membership,
 - (b) a defect in the appointment of a member,
 - (c) the disqualification of a person from being a member after appointment.

General powers

- 11 Environmental Standards Scotland may do anything which appears to it—
- (a) to be necessary or expedient for the purposes of, or in connection with, the performance of its functions, or
 - (b) to be otherwise conducive to the performance of its functions.

Annual report

- 12 (1) Environmental Standards Scotland must, as soon as practicable after the end of each financial year—
- (a) prepare and publish a report on its activities during that year,
 - (b) send a copy of the report to the Scottish Ministers, and
 - (c) lay a copy of the report before the Scottish Parliament.
- (2) It is for Environmental Standards Scotland to determine the form and content of each report.

Resources

- 13 (1) The Scottish Ministers must seek to ensure that the amount of resources allocated for use by Environmental Standards Scotland is reasonably sufficient to enable it to perform its functions.
- (2) Each report prepared under paragraph 12 must include an assessment by Environmental Standards Scotland of whether the amount of resources allocated for use by it in the financial year to which the report relates was sufficient to enable it to perform its functions.
- (3) Sub-paragraph (2) does not affect the generality of paragraph 12(2).

Initial members: transitional provision

- 14 (1) This paragraph applies if—
- (a) before the commencement date, a body known as Environmental Standards Scotland is established (the “non-statutory Environmental Standards body”) in pursuance of a resolution of the Scottish Parliament—
 - (i) endorsing the establishment of the body by that name, and
 - (ii) approving the appointment of persons nominated to be its chairing and other members, and
 - (b) the body is still in existence immediately before the commencement date.
- (2) The person who was, immediately before the commencement date, the chairing member of the non-statutory Environmental Standards body is, on that date, taken to have been appointed under paragraph 2(1)(a) as the member to chair Environmental Standards Scotland.
- (3) Any person who was, immediately before the commencement date, a member (other than the chairing member) of the non-statutory Environmental Standards body is, on that date, taken to have been appointed under paragraph 2(1)(b) as a member of Environmental Standards Scotland.
- (4) A person to whom sub-paragraph (2) or (3) applies is referred to in this paragraph as an “initial member”.
- (5) An initial member’s period of appointment as a member—
- (a) is to continue to be the same as that for which the member had been appointed as a member of the non-statutory Environmental Standards body, and
 - (b) accordingly expires at the time at which the period of appointment as a member of the non-statutory Environmental Standards body would have expired.
- (6) Except as may be agreed between the Scottish Ministers and an initial member, the other terms of the member’s appointment are to continue to be the same as the terms on which the member had been appointed as a member of the non-statutory Environmental Standards body so far as consistent with this Act.
- (7) In this paragraph, “commencement date” means the day on which section 19 comes into force.

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Application of legislation relating to public bodies

- 15 (1) In schedule 3 of the Ethical Standards in Public Life etc. (Scotland) Act 2000 (devolved public bodies), before the entry relating to Food Standards Scotland insert—
“Environmental Standards Scotland”.
- (2) In schedule 1 of the Freedom of Information (Scotland) Act 2002 (Scottish public authorities: non ministerial office holders in the Scottish Administration), after paragraph 7A insert—
“7AA Environmental Standards Scotland.”.
- (3) In schedule 2 of the Public Appointments and Public Bodies etc. (Scotland) Act 2003 (specified authorities), under the heading “Executive bodies”, before the entry relating to Food Standards Scotland insert—
“Environmental Standards Scotland”.
- (4) In schedule 8 of the Public Services Reform (Scotland) Act 2010 (information on exercise of public functions: listed public bodies), before the entry relating to Food Standards Scotland insert—
“Environmental Standards Scotland”.
- (5) In the schedule of the Public Records (Scotland) Act 2011 (authorities to which Part 1 applies), under the heading “Scottish Administration”, before the entry relating to Food Standards Scotland insert—
“Environmental Standards Scotland”.
- (6) In the schedule of the Procurement Reform (Scotland) Act 2014 (contracting authorities: Scottish Administration and Scottish Parliament), after paragraph 13D insert—
“13E Environmental Standards Scotland.”.
- (7) In schedule 1 of the Gender Representation on Public Boards (Scotland) Act 2018 (public authorities), before the entry relating to Food Standards Scotland insert—

“Environmental Standards Scotland”.

SCHEDULE 2

(introduced by section 22(2))

ENVIRONMENTAL STANDARDS SCOTLAND: STRATEGY

Content

- 1 (1) The strategy prepared and published under section 22(1) must set out how Environmental Standards Scotland intends to—
- (a) monitor—
- (i) public authorities’ compliance with environmental law, and
 - (ii) the effectiveness of environmental law and of how it is implemented and applied,

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- (b) provide for persons (including members of the public, non-government organisations and other bodies) to make representations to it about any matter concerning—
 - (i) whether a public authority is failing (or has failed) to comply with environmental law,
 - (ii) the effectiveness of environmental law or of how it is (or has been) implemented or applied,
 - (c) handle those representations, including how it will keep persons informed about its handling of their representations,
 - (d) exercise its functions in a way that respects and avoids any overlap with—
 - (i) other statutory regimes (including statutory provision for appeals) or administrative complaints procedures,
 - (ii) the exercise of functions by the Scottish Public Services Ombudsman, the Commissioner for Ethical Standards in Public Life in Scotland, the Scottish Information Commissioner, Audit Scotland or the Committee on Climate Change,
 - (iii) the exercise of functions by any committee of the Scottish Parliament for the time being appointed by virtue of standing orders, whose responsibilities include considering matters relating to environmental law,
 - (e) determine whether to carry out an investigation into any matter concerning—
 - (i) whether a public authority is failing (or has failed) to comply with environmental law,
 - (ii) the effectiveness of environmental law or of how it is (or has been) implemented or applied,
 - (f) carry out and prioritise any such investigations,
 - (g) engage with the public authorities it investigates with a view to —
 - (i) swiftly resolving (so far as possible without the need to issue a compliance notice or prepare an improvement report) any matter concerning a failure to comply with environmental law, to make effective environmental law or to implement or apply it effectively, and
 - (ii) reaching agreement on any appropriate remedial action to be taken for the purpose of environmental protection, and
 - (h) identify and recommend measures to improve the effectiveness of environmental law or of how it is implemented or applied.
- (2) In addition, the strategy must set out—
- (a) the general factors that Environmental Standards Scotland intends to consider before exercising its functions (including its power to require public authorities to provide information),
 - (b) how Environmental Standards Scotland intends to—
 - (i) take account of different kinds of information (for example, evidence, research, independent and expert advice and developments in international environmental protection legislation) for the purpose of exercising its functions,
 - (ii) determine what constitutes a systemic failure for the purpose of section 26(2),
 - (iii) determine whether a failure to comply with environmental law could be addressed more effectively by issuing a compliance notice

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- (rather than by preparing an improvement report) for the purpose of section 26(3),
- (iv) determine whether a failure to comply with environmental law is serious for the purposes of section 38(1)(a) and (4)(a),
- (v) determine whether environmental harm is serious for the purposes of section 38(1)(b) and (4)(b), and
- (c) any other information that Environmental Standards Scotland considers is appropriate to include.

Procedure for publication of strategy

- 2 (1) Before publishing the strategy under section 22(1), Environmental Standards Scotland must lay a copy of the strategy before the Scottish Parliament for approval.
- (2) Environmental Standards Scotland must not publish the strategy before the end of the 40-day period mentioned in sub-paragraph (5).
- (3) Before laying a copy of the strategy before the Scottish Parliament under sub-paragraph (1), Environmental Standards Scotland must—
 - (a) consult the following persons on a draft of the strategy—
 - (i) each public authority in relation to whom Environmental Standards Scotland has functions under section 20(1),
 - (ii) any other person whom Environmental Standards Scotland considers is likely to have an interest in the exercise of its functions, and
 - (iii) the general public, and
 - (b) send a copy of the strategy that is to be laid before the Parliament to the Scottish Ministers before the end of the period of 6 weeks beginning with the day after the day on which the consultation ends.
- (4) When laying a copy of the strategy before the Scottish Parliament under sub-paragraph (1), Environmental Standards Scotland must at the same time lay before the Parliament a statement setting out—
 - (a) details of the consultation on a draft of the strategy that was carried out under sub-paragraph (3)(a),
 - (b) a summary of any views expressed in response to the consultation, and
 - (c) either—
 - (i) details of how those views (if any) have been taken into account in preparing the strategy that is laid before the Parliament, or
 - (ii) a statement that no views were expressed in response to the consultation or that no account has been taken of views expressed.
- (5) If, within 40 days of a copy of the strategy having been laid before the Scottish Parliament under sub-paragraph (1), the Parliament resolves that the strategy should not be approved, Environmental Standards Scotland must not publish the strategy but instead—
 - (a) review and revise the strategy, having regard to any views expressed by the Parliament in relation to the strategy, and
 - (b) lay a copy of a revised strategy before the Parliament before the end of the period of 3 months beginning with the date on which the Parliament resolved not to approve the strategy.

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- (6) Sub-paragraph (5) applies in relation to any strategy revised under that sub-paragraph as it applies in relation to the first strategy.
- (7) In calculating the period of 40 days mentioned in sub-paragraph (5), no account is to be taken of any period during which the Parliament is dissolved or in recess for more than 4 days.

Publication of first strategy and interim strategy

- 3 (1) Sub-paragraphs (2) and (3) apply to the publication of the first strategy under section 22(1).
- (2) Environmental Standards Scotland must lay a copy of the strategy before the Scottish Parliament under paragraph 2(1) before the end of the period of 12 months beginning with the day on which section 19 comes into force (being the day on which Environmental Standards Scotland is established).
- (3) For the purpose of paragraph 2(3)(a), it is immaterial that anything done by way of consultation was done before that paragraph comes into force (whether before or after the Bill for this Act was passed).
- (4) Before publishing the first strategy under section 22(1), Environmental Standards Scotland may publish an interim strategy that sets out how it intends to exercise its functions during the transitional period.
- (5) An interim strategy published under sub-paragraph (4) must set out the information specified in paragraph 1.
- (6) But the procedure for publication set out in paragraph 2 does not apply to the publication of an interim strategy.
- (7) Environmental Standards Scotland must exercise its functions, during the transitional period, in accordance with any interim strategy it publishes under sub-paragraph (4).
- (8) In this paragraph, “transitional period” means the period beginning with the day on which section 19 comes into force and ending on the day on which the first strategy is published under section 22(1).

Review of strategy

- 4 (1) Environmental Standards Scotland—
 - (a) must, from time to time, review the strategy published under section 22(1), and
 - (b) may, if it considers it appropriate, revise it.
- (2) The following provisions apply in relation to any strategy revised under sub-paragraph (1) as they apply in relation to the first strategy published under section 22(1)—
 - (a) paragraph 1, and
 - (b) paragraph 2, unless the revision makes only minor modifications to the strategy.