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Implications of Brexit for Devolved Environmental Law in Scotland: Second Update

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Potential implications of Brexit for devolved environmental law in Scotland have been considered in two previous articles published in September 2017¹ and December 2017² respectively. At the time these articles were published there was considerable uncertainty as to the areas of law which would remain devolved to 'Holyrood' (Scottish Government and Scottish Parliament), and which may be reserved to 'Westminster' (UK Government and UK Parliament) after the UK leaves the European Union (EU). While many aspects of Brexit remain uncertain a year later, the implications for devolved environmental law in Scotland have become clearer.

The European Union (Withdrawal) Act³ was passed by Westminster in June 2018, and impacts on devolved legislation and the Scotland Act 1998 (as amended)⁴. Holyrood has not given consent to this Act and produced the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill⁵, which resolves legislative issues created by Brexit in the absence of the European Union (Withdrawal) Act. This Bill was passed by a majority vote of MSPs in the Scottish Parliament in March 2018. However, UK Government challenged the

UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill at the Supreme Court, arguing that it fell outside Holyrood's devolved competencies. The Supreme Court ruled that as a whole the Bill was not outside Holyrood's competency at the time it was passed, but that due to changes made by Westminster to devolved competencies since March, some key areas were no longer within the competency of the devolved government⁶. At time of writing, this issue has yet to be resolved and some uncertainty remains.

Under the devolution settlement, any changes to devolved powers should be agreed with Holyrood through a Legislative Consent Motion (LCM) (underpinned by the Sewel Convention). At the centre of the disagreement between Westminster and Holyrood are areas of EU law that intersect with devolved competence, of which there are 107⁷ relevant to Scotland (of a total of 155 policy areas inclusive of Northern Ireland and Wales⁸). Clause 11 of the European Union (Withdrawal) Bill⁹ would give Westminster power to legislate for devolved areas without agreement with Holyrood, and this was passed into law as Section 12 of the European Union (Withdrawal) Act³.

However, prior to the European (Withdrawal) Act being passed into law, UK Government published a document⁸ listing these devolved powers in three categories where they believed:

1. No further action is required (49 areas)
2. Non-legislative common policy frameworks may be necessary after Brexit (82 areas)
3. Westminster would need to legislate for after Brexit (24 areas)

A small number of environmental policy areas fall into the first category (e.g. Environmental Impact Assessment (EIA) and forestry), and it seems reasonable to expect that these will remain fully devolved after Brexit. The majority of environmental policy areas fall into the second category (e.g. Strategic Environmental Assessment (SEA) and the natural environment and biodiversity). Scottish Government has stated publicly that it is committed to maintaining or exceeding EU environmental laws and standards^{10,11}, whereas UK Government appears to be exploring more substantial changes in these policy areas post-Brexit. Furthermore, a report to Scottish Government highlighted that in SEA, Scotland has deliberately legislated beyond the requirements of the EU Directive, and that a common policy framework with the rest of the UK could affect this after Brexit¹². Therefore, while non-legislative frameworks may be agreed between Scotland and other UK countries, it seems likely that environmental law will deviate further after Brexit regardless, which may present challenges for professional ecologists and wildlife conservation. It should also be noted that Section 12 of the European Union (Withdrawal) Act³ does not specify devolved policy areas, and so Westminster has the power to legislate for devolved environmental law after Brexit. However, it seems unlikely that Westminster would do so, at this time.

Neither the European Union (Withdrawal) Act³ nor the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill⁵ transpose the foundation principles of EU environmental law in to domestic legislation after Brexit. Lord Krebs tabled an amendment (3) to the European Union (Withdrawal) Bill to include the

environmental principles, and although this was objected to, Oliver Letwin's amendment in lieu was accepted, agreeing that these principles should be included in a new Environment Bill¹³. However, this would be unlikely to apply to Scotland if environmental law remains fully devolved. Scottish Government has committed to consulting on the best way to include these principles in Scotland's environmental policy¹¹, and Scottish Environment LINK has called for a new Scottish Environment Act¹⁴. After Brexit, environmental governance will also, presumably, vary between Scotland and the rest of the UK, although there remains little clarity on this and Scottish Government have committed to undertake a consultation^{11,12}.

Note that while Scottish Government's commitment to maintain environmental laws equivalent to and compatible with EU Directives is positive, Scottish Natural Heritage (SNH) has ended their programme of Site Condition Monitoring (SCM) of protected sites and a replacement monitoring programme has not yet been announced¹⁵. A report to Scottish Government highlighted that a loss of monitoring was a risk of Brexit, and recommended that a commitment should be made to continue the same monitoring programmes after Brexit¹². It is possible that the replacement monitoring programme will meet the requirements of EU Directives: this is particularly important for the current Natura 2000 sites which are the EU contribution to the Emerald Network under Bern Convention obligations (ratified by the UK in 1982).

Although the powers awarded to Westminster via the European Union (Withdrawal) Act over policy areas devolved to Scotland leave a degree of uncertainty, it appears likely that environmental law will remain fully devolved and legislated for by Holyrood. Scottish Government has publicly committed to maintain environmental standards equal to or

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exceeding EU Directives post-Brexit, and will be consulting on how best to take this forward as an Environment Strategy¹¹. In this context further deviation in environmental policy and law between Scotland and other UK countries seems inevitable. A report to Scottish Government indicated that Brexit would result in a loss of coordination of environmental protection across borders¹². Without a firm framework, this appears to be a risk between UK countries, and not just an international issue.

About the Author

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