

UK WITHDRAWAL FROM THE EUROPEAN UNION (CONTINUITY) (SCOTLAND) ACT 2021

EXPLANATORY NOTES

OVERVIEW AND BACKGROUND

Part 2 – Environment

Chapter 1 – Environmental principles

77. The Act confers on the Scottish Ministers functions relating to environmental principles, and creates duties on Scottish Ministers and other bodies. It replaces the effect of these principles on European law and policy in Scottish domestic legislation, in the preparation of environmental policy and development of environmental regulation in Scotland, following EU exit.

Section 13 - The guiding principles on the environment

78. Section 13 of the Act establishes in domestic law guiding principles on the environment which are equivalent to the requirement that environmental protection requirements are integrated into policy and the EU environmental principles established under EU law. The guiding principles listed in subsection (1) are the principle that protecting the environment should be integrated into the making of policies, the precautionary principle as it relates to the environment, the principle that preventative action should be taken, the principle that environmental damage should be rectified at source, and the principle that polluter should pay.
79. EU law contains a requirement that environmental protection requirements must be integrated into the definition and implementation of policies and activities, in particular with a view to promoting sustainable development. The guiding principle of integration in subsection (1)(a) is derived from this requirement. The other guiding principles reflect the four EU environmental principles that underpin the development of EU environmental policy, and are commonly defined as:
80. Precautionary principle. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation.
81. Prevention principle. Preventative action should be taken to avoid environmental damage.
82. Rectification at Source principle. Environmental damage should, as a priority, be rectified at source. Polluter Pays principle. The polluter should bear the cost of pollution control and remediation.
83. Subsections (2) and (3) set out how the guiding principles are derived from the equivalent principles, and integration requirement, 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.

These notes relate to the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (asp 4) which received Royal Assent on 29 January 2021

When the Scottish Ministers prepare guidance under section 17, they are to have regard to the interpretation of those equivalent principles by the CJEU from time to time.

84. Subsections (4) to (7) allow the Scottish Ministers to amend, add, further define or remove environmental principles by regulations. The guiding principles as set out in the Act may be amended, removed or further defined where that is necessary to ensure they continue to correspond to the equivalent EU principles, as they form part of EU law. Any new principle that is introduced in addition to the principles 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 may be amended or altered by regulations without limitation. Regulations will be subject to affirmative parliamentary procedure and before laying must have gone through appropriate consultation with persons or bodies as stated within the Act.

Section 14 - Ministers' duties to have due regard to the guiding principles

85. Section 14 of the Act imposes on the Scottish Ministers and Ministers of the Crown, as far as they are acting with respect to Scotland, a duty to have due regard to the guiding environmental principles when developing policies, including proposals for legislation. A Minister of the Crown would be required to consider the guiding environmental principles or to have them in view when developing policy for Scotland. The Scottish Parliament has competence to impose a requirement on both the Scottish Ministers and Ministers of the Crown to have regard to the guiding environmental principles as the conferral has a devolved purpose, environmental protection, and related effect. The duty, when read with section 16, will apply to policy development, including proposals for legislation, with the purpose of contributing to the protection and improvement of the environment and sustainable development. Exempt policy areas of national defence or civil emergency and finance or budgets are listed in subsection (3).

Section 15 - Other authorities' duty to have due regard to the guiding principles

86. Section 15 ensures that the guiding principles have effect on all decisions of public authorities in Scotland, other than reserved bodies (as defined in the Scotland Act 1998), with the potential for significant impacts on the environment. It provides that where these public authorities are responsible authorities in terms of the Environmental Assessment (Scotland) Act 2005, they must have due regard to the principles when doing anything in respect of which the duty under section 1 of that Act applies. That requires responsible authorities to carry out environmental assessments under that Act when preparing certain plans or programmes. Subsection (2) defines "responsible authority" in line with the 2005 Act (see section 2 of that Act), and excludes the effect of this section on the Scottish Ministers and Ministers of the Crown because the duty placed on the Scottish Ministers and Ministers of the Crown by section 14 applies to developing policy, which is wider than the circumstances to which the duty under section 1 of the 2005 Act applies.

Section 16 - Purpose of duties under sections 14 and 15

87. Section 16 sets out that the purpose of the duties established in sections 14 and 15 is to protect and improve the environment and contribute to sustainable development.
88. Subsection (2), read together with subsection (3), provides a definition of the environment for the purposes of subsection (1).

Section 17 - Guidance

89. Section 17 requires the Scottish Ministers to publish guidance on the guiding principles and the duties in sections 14 and 15. Subsection (2) sets out content that may be in the guidance, including provision about the interpretation of the duties, how the principles relate to each other, and how the duties relate to other duties relating to the environment (including the duties under the Environmental Assessment (Scotland) Act 2005). The

These notes relate to the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (asp 4) which received Royal Assent on 29 January 2021

guidance will support the interpretation and implementation of the principles duty by Scottish Ministers, Ministers of the Crown and responsible authorities. It is intended to set out how the Scottish Ministers and other public bodies can demonstrate their consideration of the guiding principles through the Environmental Assessment process and is intended to provide advice and case studies for policy makers.

90. Subsection (3) places an obligation on persons subject to the duties to have regard to the guiding principles to have regard to the guidance.

Section 18 - Procedure for publication of guidance

91. Section 18 sets out the procedure for preparation of guidance, placing requirements on the Scottish Ministers to consult on the guidance, and to lay it before the Scottish Parliament prior to publication. Subsection (3) sets out the requirement for the Scottish Ministers to consult a Minister of the Crown, relevant public authorities or other appropriate persons who are subject to the principles duty, and other persons as they consider appropriate, prior to laying the guidance. Subsection (4) sets out that the Scottish Ministers must report on the outcome of the consultation when presenting the guidance to the Parliament. Subsections (5) and (6) provide 40 days, not counting periods of recess or dissolution for more than four days, for Parliament to resolve that the guidance should not be published.

Chapter 2 – Environmental governance

92. This Chapter establishes a new Scottish public body, Environmental Standards Scotland, and gives it a range of functions and powers. These powers and functions enable Environmental Standards Scotland to monitor and secure compliance by public authorities in Scotland, other than reserved bodies, with environmental law, and to improve the effectiveness of environmental law and of its implementation and application. It seeks to maintain a system of environmental governance following the UK's exit from the EU, one which is equivalent to that previously provided by the institutions of the EU but adapted as appropriate to function in a domestic context.

Establishment of Environmental Standards Scotland

Section 19 - Environmental Standards Scotland

93. Section 19 provides for the establishment of a new public body called Environmental Standards Scotland, with further provision relating to the structure, membership and governance of the body set out in schedule 1.

Functions of Environmental Standards Scotland

Section 20 - Functions

94. Section 20 sets out the functions of Environmental Standards Scotland.
95. Subsection (1)(a) confers on Environmental Standards Scotland the function of monitoring public authorities' compliance with environmental law and the effectiveness of environmental law and of how it is implemented and applied.
96. Subsection (1)(b) confers on Environmental Standards Scotland the function of investigating any question of whether a public authority is failing (or has failed) to comply with environmental law, as well as any question about the effectiveness of environmental law or whether it is (or has been) implemented or applied effectively. Environmental Standards Scotland can investigate on its own initiative or in response to information from another person, who could be, for example, a member of the public, a civic society group, a business or a public body.

These notes relate to the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (asp 4) which received Royal Assent on 29 January 2021

97. Subsection (1)(c) allows for Environmental Standards Scotland to take appropriate action to secure a public authority's compliance with environmental law, and to secure improvement in the effectiveness of environmental law or in how it is implemented or applied.
98. Subsection (1)(d) provides that Environmental Standards Scotland has the additional functions conferred on it by this or any other enactment.
99. Subsection (2) provides for a range of supporting functions in exercise of the functions at subsection (1).
100. Subsection (2)(a) and (b) provides for Environmental Standards Scotland to carry out, commission or support any research, as well as seek any independent and expert advice, it considers appropriate. Subsection (2)(c) and (d) also enables Environmental Standards Scotland to make recommendations on any matter relevant to its functions as well as consider, assess and review data on the quality of Scotland's environment.
101. Subsection (2)(e) and (f) provides that Environmental Standards Scotland may also keep under review the implementation of any international obligation of the United Kingdom relating to environmental protection as well as have regard to developments in, and information on, the effectiveness of international environmental protection legislation. ("International environmental protection legislation" is defined, in section 46(1), to mean legislation in countries other than Scotland, and legislation made by international organisations, that is mainly concerned with environmental protection. The European Union is one example of an international organisation with a legislative function). This will allow Environmental Standards Scotland to make comparisons with the effectiveness of environmental law in other countries.
102. Subsection (2)(g) provides for Environmental Standards Scotland to collaborate with any other environmental governance body in the UK (as defined by section 46(1)), including the Office for Environmental Protection (an environmental governance body being established by the Environment Bill¹), or such other persons as it considers appropriate. Other persons could include relevant international bodies, such as the European Commission. This will allow joint working on policy effectiveness, and sharing of experience and best practice.
103. Subsection (2)(h) allows for Environmental Standards Scotland to request information from public authorities regarding the exercise of their functions under environmental law. This may, for example, be for monitoring or investigatory reasons.
104. Subsection (3) sets out that, when exercising its functions, Environmental Standards Scotland must act objectively, impartially, proportionately and transparently.

Section 21 - Power to modify functions.

105. Section 21 enables the Scottish Ministers, by regulations, to modify the functions of Environmental Standards Scotland in response to requirements set out in agreements on the future relationship between the UK and EU. This will ensure that Scotland is able to achieve and demonstrate compliance with the terms of such agreements without the need for further primary legislation.
106. Subsection (1) sets out the circumstances under which this regulation-making power has effect, that is for the purpose of implementing international obligations arising out of a future agreement or arrangement between the UK and the EU.
107. Subsections (2) to (5) set out further conditions for this regulation-making power, including that the Scottish Ministers are required to consult with Environmental

¹ The Environment Bill commenced its Report Stage in the House of Commons on 26 January 2021. Information on the progress of the Bill and a copy of the Bill following its Commons Committee Stage is available on the UK Parliament's website, which can be accessed via this [web link](#).

These notes relate to the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (asp 4) which received Royal Assent on 29 January 2021

Standards Scotland and any other persons they consider appropriate. Any regulations made under this section are subject to the affirmative procedure.

Section 22 - Duty to prepare and publish strategy on exercise of functions

108. Section 22 places a duty on Environmental Standards Scotland to prepare and publish a strategy on the exercise of its functions, and to exercise its functions in accordance with that strategy. Further provision on the strategy is set out in schedule 2.

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

109. Section 23 sets obligations on public authorities to co-operate with Environmental Standards Scotland. This is to ensure that Environmental Standards Scotland is able to carry out its functions, and enable public authorities and Environmental Standards Scotland to resolve matters by agreement wherever possible.
110. Subsection (1) requires public authorities to co-operate and provide reasonable assistance following requests made by Environmental Standards Scotland in connection with the exercise of its functions, including the provision of information.
111. Subsection (2) requires public authorities to make all reasonable efforts to swiftly resolve any matter which Environmental Standards Scotland raises concerning a failure to comply with environmental law, a failure to make effective environmental law or a failure to implement or apply it effectively. Public authorities are further required to make all reasonable efforts to reach agreement with Environmental Standards Scotland on any remedial action needed to be taken by the authority for the purpose of environmental protection.
112. Subsection (3) places a duty on Environmental Standards Scotland to consult the Office for Environmental Protection, or any equivalent environmental governance body in Wales or Northern Ireland, where Environmental Standards Scotland considers that the exercising of its functions may be relevant to the exercise of that body's functions (for example, where a matter has a cross-border impact). The Environment Bill² likewise places a duty on the Office for Environmental Protection to consult devolved environmental governance bodies. The intention is that this duty will be placed symmetrically on all environmental governance bodies in the UK. This duty to consult stands alongside Environmental Standards Scotland's power to collaborate with those bodies as set out in section 20(2)(g).

Information notices

Section 24 - Power to require information

113. Section 24 gives powers to Environmental Standards Scotland to require information from a public authority. It is expected that, in the vast majority of instances, information will be supplied by public authorities under the general co-operation duty at section 23. However, this power enables Environmental Standards Scotland to require the provision of information in the unusual event that a public authority is for some reason not willingly providing it.
114. Section 24 therefore provides that, for the purpose of fulfilling its functions, Environmental Standards Scotland may issue a written 'information notice' to a public authority requiring it to provide such information as Environmental Standards Scotland reasonably requires. Subsection (2) sets out the details to be specified within the information notice. This will allow a formal record to be created between the public authority and Environmental Standards Scotland. Subsection (3) allows

² Information on the progress of the Environment Bill and a copy of the Bill following its Commons Committee Stage is available on the UK Parliament's website, which can be accessed via this [web link](#).

These notes relate to the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (asp 4) which received Royal Assent on 29 January 2021

Environmental Standards Scotland to withdraw an information notice by writing to the public authority to whom the information notice was issued, for example if it decided that no further investigation of the particular matter was necessary. Subsection (4) defines 'information' for the purposes of section 24.

Section 25 - Failure to comply with an information notice

115. Section 25 provides for the enforcement of information notices. It is expected that this step will be taken extremely rarely. However, it is a necessary underpinning of Environmental Standards Scotland's functions.
116. This section allows Environmental Standards Scotland to report to the Court of Session any case where a public authority fails, without reasonable excuse, to comply with an information notice. Following receipt of such a report, and consideration of any evidence or representations on the matter, the Court may make an order for enforcement or take the matter forward as if it were a contempt of the Court, or both.

Improvement reports and improvement plans

Section 26 - Improvement report

117. Section 26 sets out the power for Environmental Standards Scotland to prepare an improvement report in respect of failures by public authorities to comply with environmental law, to make effective environmental law or to implement or apply environmental law effectively. This power is generally available to Environmental Standards Scotland for addressing matters of genuine strategic importance. The co-operation duty on public authorities at section 23, coupled with the requirement on Environmental Standards Scotland at paragraph 1(1)(g) of schedule 2 to set out how it intends to resolve issues through agreement, are intended to ensure that most matters that come to the attention of Environmental Standards Scotland are resolved without any formal exercise of its powers.
118. The power to prepare an improvement report is one of the three enforcement powers provided to Environmental Standards Scotland with respect to compliance with, and effectiveness of, environmental law. The power to prepare an improvement report should not be used where exercise of the compliance notice power under section 31 would be more effective. This will mean that the compliance notice is used in preference to the improvement report for matters relating to a public authority's exercise of its regulatory functions (as defined by section 46(1)). Environmental Standards Scotland is also given the power to apply for judicial review of a public authority's conduct or intervene in an existing case, in situations where there are serious failures to comply with the law creating serious environmental harm or risk of harm.
119. Subsection (1) gives Environmental Standards Scotland the power to prepare an improvement report if it considers that a public authority has failed to comply with environmental law, make effective environmental law or implement or apply environmental law effectively when carrying out its functions. Examples could be a strategic failure to take an action required by environmental law, such as banning a practice or substance; that an environmental duty on public bodies generally is specified in such a way that it is not achieving its goals; or that a regulatory regime is being implemented in a way that is ineffective in reaching its goals. The expectation is that improvement reports will be prepared for a broad area of environmental policy, so identified failures could span all number of these examples.
120. Subsection (2) allows Environmental Standards Scotland to prepare an improvement report if the combined effect of two or more public authorities exercising their functions in the same or a similar way constitutes a systemic failure to comply with environmental law, make effective environmental law or implement or apply environmental law effectively. This might, for example, cover the circumstance where many public bodies

These notes relate to the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (asp 4) which received Royal Assent on 29 January 2021

are failing to implement a duty, or carrying out a function in a way that systemically fails to take account of an aspect of environmental law.

121. Subsection (3) requires Environmental Standards Scotland to be satisfied that any failure arising out of a public authority carrying out its regulatory functions could not be addressed in a more effective manner by issuing a compliance notice under section 31(1).
122. This is to ensure that the compliance notice route is preferred for regulatory practice issues, such as the conditions that a regulator is placing on a class of permit, although it would be covered by subsection (1), leaving the improvement notice power for more strategic issues.
123. Subsection (4) explains what an improvement report is. It is a report that sets out the details of the alleged failure and recommends measures that the public authority should take—
 - to comply with environmental law, or
 - to improve the effectiveness of environmental law, or how it is applied.

Section 27 - Restrictions on preparing an improvement report

124. Section 27 provides that Environmental Standards Scotland may not prepare an improvement report in respect of certain failures to comply with environmental law. Firstly, it may not prepare a report in respect of a failure 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. Secondly, it may not prepare a report in respect of a failure arising out of particular conduct which has been the subject of a compliance notice that has not been subsequently withdrawn. This would ensure that the same failure was not subject to dual processes. The potential to withdraw the compliance notice and switch to an improvement report process covers the instance where Environmental Standards Scotland subsequently discovers that a failure is more systematic or widespread than it initially considered. For example, it could initially be considered that a public body was wrongly exercising a regulatory function, leading to a compliance notice, and subsequently be discovered that the problem was systematic (for example reflected in guidance and funding decisions), or widespread across public bodies. In that case, Environmental Standards Scotland might decide to withdraw the compliance notice and prepare an improvement report covering the wider, systemic issues.

Section 28 - Content of an improvement report

125. Section 28 sets out the content that an improvement report must contain.
126. Paragraph (a) requires the report to set out the grounds for preparing it. This includes details of the alleged conduct and circumstances that have led Environmental Standards Scotland to consider that a public authority has failed – or that two or more authorities have collectively failed – to comply with environmental law, to make effective environmental law or to implement or apply it effectively.
127. Paragraphs (b) to (d) require the report to set out Environmental Standards Scotland’s reasons for reaching its conclusions, including details of the relevant environmental law and any other information which it took into account during its decision-making, as well as the impact of the failure (e.g. any environmental harm or risk of environmental harm, or any missed opportunity to make improvements in environmental quality). It must also propose a timescale for the Scottish Ministers or any other public authority to take forward the recommendations.

Section 29 - Improvement report: procedural requirements

128. Section 29 requires Environmental Standards Scotland to send a copy of an improvement report to the Scottish Ministers, to lay a copy before the Scottish Parliament and to publish the report.

Section 30 - Improvement plan

129. Section 30 sets out the obligation and procedure for the Scottish Ministers to prepare an improvement plan in response to Environmental Standards Scotland laying an improvement report before the Scottish Parliament in accordance with section 29.
130. Subsection (1) establishes the requirement on Scottish Ministers to prepare an improvement plan in response to an improvement report. The obligation to prepare an improvement plan always falls on the Scottish Ministers, even if the improvement report concerns a failure that is attributable to another public authority.
131. Subsection (2) provides for the details of the improvement plan, which must include information on what the Scottish Ministers will do in response to the recommendations in the improvement report. This should include, the proposed timescale to implement the recommendations and the arrangements that will be made to review and report on progress in the implementation of the recommendations. However, if the Scottish Ministers do not intend to implement the recommendations in the improvement report (either in full or in part), the reasons for this must be set out in the improvement plan.
132. Subsection (3) states that the Scottish Ministers must lay a copy of the improvement plan before the Scottish Parliament within a set time period from the date the improvement report was laid: six months, or nine months if the Scottish Ministers consider it necessary to consult other persons (or the general public) about the plan.
133. Subsection (4) requires the Scottish Ministers to provide the Parliament with details of any consultation carried out under subsection (3) when laying an improvement plan. The Scottish Ministers must provide a summary of any views expressed in response to the consultation and provide further detail of how any views have been taken into account. A statement must also be provided confirming if no views were expressed or if no account has been taken of views expressed.
134. Subsections (5) and (6) require the Scottish Ministers to review and revise the improvement plan laid before the Parliament under subsection (3) if the Scottish Parliament has within 40 days resolved not to approve the plan. The Scottish Ministers must lay a copy of the revised improvement plan within three months of the date on which the Parliament resolved not to approve the plan. This process of revision and resubmission continues until a plan is accepted by the Parliament.
135. Once the Parliament has approved an improvement plan, subsection (7) requires the Scottish Ministers to publish the plan.
136. Subsection (8) provides that no account is to be taken of any period during which the Parliament is dissolved or in recess for more than 4 days when calculating the 40-day period mentioned in subsection (5).

Compliance notices

Section 31 - Compliance notice

137. Section 31 sets out the circumstances in which Environmental Standards Scotland may issue compliance notices to public authorities. The compliance notice process is designed to remedy failures by public authorities to comply with environmental law when exercising their regulatory functions (as defined by section 46(1)). There are two conditions that Environmental Standards Scotland must consider to be met before it may issue a compliance notice. The first condition in subsection (1) is that, in exercising

These notes relate to the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (asp 4) which received Royal Assent on 29 January 2021

its regulatory functions, a public authority is failing to comply with environmental law, or has failed to comply with environmental law and it is likely that the failure will be repeated or be continued. The second condition in subsection (1) is that the failure has caused, is causing or is at risk of causing environmental harm.

138. Subsection (2) defines a compliance notice as 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.

Section 32 - Restrictions on issuing a compliance notice

139. Section 32 provides that Environmental Standards Scotland may not issue a compliance notice in respect of certain failures to comply with environmental law. Firstly, it may not issue a notice in respect of a failure 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. This restriction ensures that compliance notices are not used as a means to review individual regulatory decisions or as a substitute appeal process. Secondly, it may not issue a notice in respect of a failure arising out of particular conduct that has already been the subject of an improvement report. This would cover the instance where the failure had already been identified as a systemic issue, either across a range of public bodies, or structurally in the funding or guidance given to the body. Any compliance notice issued in breach of either of these restrictions will not have any effect.

Section 33 - Content of a compliance notice

140. Section 33 sets out the required contents of a compliance notice. It must contain a statement of the grounds for issuing the notice, specifically: the regulatory function of the public authority to which the alleged failure to comply with environmental law relates; the relevant provision of environmental law, and the alleged conduct that has led 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 is likely to be repeated or continue. In addition, Environmental Standards Scotland must include in the notice: its reasons for reaching its conclusion; information on the environmental harm or risk of environmental harm being caused, or having been caused, by the alleged failure, and the steps that the public authority must take to address its failure to comply with environmental law.
141. A compliance notice must also contain the following details: the date of issue of the notice; the timescales within which the required steps are to be taken (not less than 28 days from the date on which the notice is issued, meaning that the steps cannot be required to be taken before expiry of the 21-day appeal period specified in section 36(2)(a)); information about the person to whom, and as to how and by when, any representations about the notice may be made; information regarding the right to appeal, including timescales for this as well as an explanation of the consequences of the public authority failing to comply with the requirements of the notice.

Section 34 - Variation of a compliance notice

142. Section 34 makes provision for Environmental Standards Scotland to vary a compliance notice by extending the compliance period referred to in section 33(1)(d). A compliance notice may be varied by Environmental Standards Scotland at any time before expiry of the compliance period by writing to the public authority to whom the compliance notice was issued. The variation of the compliance notice does not affect the date of its issue for the purpose of section 36(2)(a) (which imposes a 21-day time limit on appealing against a compliance notice).

Section 35 - Withdrawal of a compliance notice

143. Section 35 allows for Environmental Standards Scotland to withdraw a compliance notice at any time before completion of the steps that are to be taken to comply with

the requirements of the notice by giving notice in writing to that effect to the public authority to whom the compliance notice was issued.

Section 36 - Appeal against a compliance notice

144. Section 36 provides for appeal to a sheriff against a compliance notice. Subsection (1) sets out the grounds for a public authority which has received a compliance notice to appeal against any such notice. A public authority may appeal against a compliance notice on the following grounds: that it has not conducted itself in the manner stated in the notice; that the alleged conduct specified in the notice does not constitute a failure to comply with environmental law or, as the case may be, a failure to comply with environmental law that will likely continue or be repeated, or that the alleged failure is not causing, or has not caused, environmental harm or a risk of environmental harm.
145. Subsection (2) states that an appeal must be made with 21 days of the date of issue of the notice, or it may be made later with the sheriff's permission. Subsection (3) provides for the sheriff to give permission under subsection (2) 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 good reason for not making the appeal within the 21-day time limit. Subsection (4) states that the sheriff may cancel the compliance notice or confirm the notice, either with or without modifications. Where an appeal is made under this section, the period set under section 33(1)(d) for compliance with the notice is suspended until the appeal is finally determined or withdrawn. Onward appeals against a sheriff's decision will follow the routes of appeal set out in Part 5 of the Court Reform (Scotland) Act 2014.

Section 37 - Failure to comply with a compliance notice

146. This section provides for Environmental Standards Scotland to report to the Court of Session any case where a public authority fails, without reasonable excuse, to comply with a compliance notice. The Court of Session after receiving a report under this section, and hearing any evidence or representations on the matter, may make such an order for enforcement as it considers appropriate or deal with the matter as if it were a contempt of the Court, or both.

Judicial review and other civil proceedings

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

147. Section 38 sets out the circumstances in which Environmental Standards Scotland may apply for judicial review of a public authority's conduct or intervene in an existing case. These powers are expected to be used only rarely. The conditions for this are set out in subsections (1) for an application for judicial review and subsection (4) for intervening in an existing case: essentially where the conduct of the public authority constitutes a serious failure to comply with environmental law and where it is necessary for Environmental Standards Scotland to act to prevent, or mitigate, serious environmental harm. In relation to applications for judicial review, the usual rules and procedure for such court actions will apply, including for example the potential to seek interim orders at the outset if there were considered a need to prevent imminent and serious environmental harm pending the outcome of the judicial review and the requirement to obtain permission from the Court of Session for the judicial review to proceed to be fully considered by it.
148. Subsection (1) allows Environmental Standards Scotland to make an application for judicial review in relation to the conduct of a public authority if Environmental Standards Scotland considers that the conduct constitutes a serious failure to comply with environmental law, and that it is necessary to make an application to prevent or mitigate serious environmental harm. This application may be made regardless of a compliance notice or improvement notice being issued to the public authority regarding the same matter.

These notes relate to the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (asp 4) which received Royal Assent on 29 January 2021

149. Subsections (2) to (4) provide for Environmental Standards Scotland to intervene, with the court's permission or at its invitation, in existing civil proceedings relating to an alleged failure by a public authority to comply with environmental law. Subsection (4) places similar limits on this power, based on the serious nature of the failure and the serious effect on the environment, as apply in relation to the power under subsection (1). Subsection (5) permits the court to give permission to, or invite, Environmental Standards Scotland to intervene under subsection (3) only if it is satisfied that the intervention is likely to assist the court.
150. Subsection (6) provides for Environmental Standards Scotland 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.
151. Subsection (7) defines "court" and "legal proceedings" for the purposes of this section.

Disclosure of information

Section 39 - Disclosure of information to Environmental Standards Scotland

152. Section 39 ensures that public authorities are able to make appropriate disclosures to Environmental Standards Scotland.
153. Subsection (1) states that no statutory or common law prohibition or restriction on the disclosure of information prevents a public authority from providing Environmental Standards Scotland with information necessary for the exercise of its functions, in accordance with the authority's duty to co-operate under section 23(1) or an information notice issued under section 24(1).
154. However, subsection (2) sets out that a public authority is not required to provide information in certain circumstances. Firstly, where it would be entitled to refuse to provide it in civil proceedings on grounds of confidentiality of communications. Secondly, where it would be entitled (or required by common law) to refuse to provide it in civil proceedings on grounds of public interest immunity. In addition, subsection (3) (as read with subsection (4)) states that nothing in this Chapter requires or authorises disclosure of information which would contravene data protection legislation as defined by section 3(9) of the Data Protection Act 2018.

Section 40 - Confidentiality of proceedings

155. Section 40 provides for the confidentiality of information obtained under the duty of cooperation or information notice power, and correspondence relating to ongoing proceedings, where Environmental Standards Scotland is considering further action.
156. Subsection (1) prohibits Environmental Standards Scotland disclosing information or correspondence that relates to ongoing proceedings, subject to certain exceptions set out in subsection (2). Environmental Standards Scotland may disclose information it has obtained where the disclosure is made: with the consent of the public authority who provided the information or correspondence (although this does not apply to disclosure of an information notice, a compliance notice or an unpublished draft of an improvement report); for purposes connected with the performance of its functions; to the Office for Environmental Protection, or any other environmental governance body, for purposes connected with the exercise of an environmental governance function; in respect 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; for the purposes of civil proceedings; 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; in pursuance of an order of a court or tribunal; in accordance with any other enactment requiring or permitting the disclosure.

Duty to consult on effectiveness of governance arrangements

Section 41 - Duty to consult on effectiveness of governance arrangements

157. Section 41 provides that the Scottish Ministers must prepare and consult on a report on the effectiveness of governance arrangements established under this Chapter.
158. Subsection (2) sets out the matters which must be contained in the report. The matters which must be included are whether the provisions set out in this Chapter have ensured that there continues to be effective and appropriate environmental governance following the withdrawal of the UK from the EU, whether the law in Scotland on access to justice on environmental matters is effective and sufficient, and whether and, if so, how the establishment of an environmental court could enhance these governance arrangements.
159. Subsection (3) provides a list of the persons with whom the Scottish Ministers are required to consult in relation to the report. These persons are Environmental Standards Scotland, persons who appear to the Scottish Ministers to be representative of the interests of persons likely to be affected by the governance arrangements, and such other persons as the Scottish Ministers consider appropriate.
160. Subsection (4) requires that the consultation on the report must commence before the end of the period of six months beginning with the date on which Environmental Standards Scotland publishes its strategy (as required by section 22(1)). Subsection (5) requires the Scottish Ministers to lay a copy of the consultation document before the Parliament as soon reasonably practicable after the consultation commences.
161. Following the conclusion of consultation process, subsection (6) requires the Scottish Ministers to lay before Parliament a statement setting out details of the consultation that was carried out, a summary of any views expressed in response to the consultation, and the Scottish Ministers' recommendations in response to those views.

Interpretation of Chapter 2

Section 42 - Meaning of "public authority"

162. Section 42 sets out the meaning of "public authority" for the purposes of this Chapter, which determines the public authorities in relation to whom Environmental Standards Scotland has functions under section 20(1). It means a person exercising any function of a public nature, but it excludes Environmental Standards Scotland itself, courts and tribunals, the Scottish and UK Parliaments, UK Government Ministers, bodies to which paragraph 3 (reserved bodies) of Part III of schedule 5 of the Scotland Act 1998 applies, and persons exercising functions in connection with proceedings in the Scottish or UK Parliament.

Section 43 - Meaning of "failing to comply with environmental law"

163. Section 43 defines the references to a public authority "failing to comply with environmental law" for the purposes of this Chapter. They are references to a public authority failing to comply with environmental law in any of the following ways: by failing to take proper account of environmental law when carrying out its functions; by carrying out its functions in a way that is contrary to, or incompatible with, environmental law, or by omitting to carry out its functions where the omission is contrary to, or incompatible with, environmental law.

Section 44 - Meaning of "environmental law" and "effectiveness of environmental law"

164. Section 44 provides definitions of "environmental law" and "effectiveness of environmental law" for the purposes of this Chapter.

These notes relate to the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (asp 4) which received Royal Assent on 29 January 2021

165. Subsection (1) defines “environmental law” as any legislative provision that is mainly concerned with environmental protection and is not concerned with an excluded matter. Subsection (2) sets out excluded matters. Subsection (3) sets out the meaning of “legislative provision” as provision contained in, or in an instrument made under, an Act of the Scottish Parliament, and provision contained in any other enactment that would be within the legislative competence of the Scottish Parliament.
166. Subsection (4) to (6) provide for the Scottish Ministers to make regulations to set out that a legislative provision is, or is not, within the definition of “environmental law”. Regulations under subsection (4) are subject to the affirmative procedure. The Scottish Ministers must consult Environmental Standards Scotland, and any other persons they consider appropriate, before laying a draft of such regulations before the Scottish Parliament for approval.
167. Subsection (7) defines “effectiveness of environmental law” and “effective environmental law” in terms of the law’s effectiveness in achieving its intended effect by reference to its contribution to environmental protection as well as to improving the health and wellbeing of Scotland’s people, and achieving sustainable economic growth, so far as consistent with environmental protection, and also its effectiveness in contributing to the implementation of any international obligation of the United Kingdom relating to environmental protection.

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

168. Section 45 provides meanings for “environmental protection” at subsection (1), “environmental harm” at subsection (2) and “the environment” at subsection (3). Subsection (4) defines “human activities” for the purposes of the definition of environmental protection. These definitions are more developed than is generally the case in legislation that uses these terms, and are primarily required to ensure that there is clarity about the scope of the law that is within the purview of Environmental Standards Scotland.

Section 46 - Interpretation of Chapter 2: general

169. This section defines various terms and expressions used throughout Chapter 2 of Part 2 of the Act.

Chapter 3 – Environmental policy strategy

Section 47 - Environmental policy strategy

170. Section 47 requires Scottish Ministers to prepare and publish an environmental policy strategy. Subsection (2) sets out the matters which must be included within the strategy. These are objectives for protecting and improving the environment, policies and proposals for achieving the objectives (or a summary or indication of such policies and proposals) and the arrangements for monitoring progress towards achieving the objectives.
171. Subsection (3) requires that, when preparing the strategy, Scottish Ministers must have regard to the desirability of securing environmental policy which aims at a high level of environmental protection, contributes to sustainable development, contributes to improving the health and wellbeing of Scotland’s people, contributes to objectives in policy areas other than environmental policy, integrates environmental policy objectives into the development of policies in other areas, and responds to global crises in relation to climate change and biodiversity.
172. Subsections (4) and (5) specify that the strategy may consist of one or more documents, which can include designated documents prepared before this provision was enacted or came into force. Scottish Ministers are permitted to designate one or more documents as

forming the whole, or part of, the strategy. This approach will permit Scottish Ministers to bring together existing and planned strategies and plans covering topics such as climate change, the circular economy, waste, air and water quality to produce the strategy.

173. Subsection (6) requires that Scottish Ministers, when preparing the strategy, or any document which forms part of the strategy (and before designating any documents as forming all, or part of, the strategy) to consult such persons as Scottish Ministers consider likely to be affected by the proposals in the strategy or document, any persons which they consider have appropriate expertise or experience in relation to the matters covered by the strategy or document and any other such persons as Scottish Ministers consider appropriate. Subsection (7) allows for consultation carried out prior to this provision coming into effect to satisfy the requirement at subsection (6). Subsection (8) provides that before publication, the Scottish Ministers must lay a copy of the strategy, or any document forming part of it, before the Parliament, together with a statement setting out the details of the consultation on the strategy or document carried out under subsection (6), a summary of the views expressed in response to the consultation, and either details of how regard has been had to the views expressed, if any, in the preparation of the final strategy or document or a statement that no representations were received or that no account has been taken of the views expressed.
174. Subsection (9) places an obligation on Scottish Ministers to review the strategy from time to time, and enables them to revise the strategy, or any document forming part of it. Subsection (10) specifies that the requirements set out in subsections (3), (6) and (8) apply to the preparation and publication of any revised strategy, or document forming part of it.
175. Subsection (11) places an obligation on Scottish Ministers to have due regard to the strategy when making policies (including proposals for legislation).
176. Subsections (12) requires Scottish Ministers to lay a report before the Parliament containing an explanation of progress towards preparation of the strategy. The report requires to be laid before the end of each of the reporting periods specified in subsection (13) (which are one year after the coming into force of this section, and every year thereafter).
177. Subsection (14) specifies that the duty placed on Scottish Ministers under subsection (12) ceases to apply once a copy of the strategy (or any document forming part of it) has been laid before the Scottish Parliament in accordance with subsection (8), so long as consultation on the strategy (or any document forming part of it) has been carried out in accordance with subsection (6) after this section comes into force. This means that the annual reporting obligation will cease once a new strategy document has been prepared and presented to the Parliament under the provisions of this section.
178. Subsection (15) provides definitions of “the environment”, “environmental protection” and “making policies” for the purposes of this provision.