

CLIMATE CHANGE, ENERGY AND ENVIRONMENT

# ENVIRONMENTAL REGULATION IN THE UK AFTER BREXIT

Where Runs the River?

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There are a number of possible paths for EU-UK cooperation on environmental regulation, including dynamic alignment with EU law at one extreme and systematic departure from EU standards at the other.



The UK has duplicated some regulatory mechanisms, though little strategy on environmental policy had emerged until the publication of the Retained EU law (Revocation and Reform) Bill, which would repeal all EU law by the end of 2023.



The creation of a dedicated forum for environmental EU-UK cooperation, or rejoining the EEA, could present steps towards a robust maintenance of environmental standards on both sides of the channel.



# FOREWORD

We are excited to present this new report, *Environmental Regulation in the UK after Brexit: Where Runs the River?*, written by David Baldock. There have long been fears that Brexit will entail sweeping environmental deregulation, as the UK moves away from the regulatory orbit of the European Union (EU). While the report does not allay these fears, especially in the light of the sweeping deregulatory proposals in the Retained EU law (Revocation and Reform) Bill now in Parliament, up to now changes have been haphazard and relatively modest.

While friction and conflict are likely to feature prominently for quite some time in the EU-UK relationship regarding issues like the Northern Ireland Protocol, migration, and trade, both sides share great common interests in the field of environmental and climate policy. Both parties have an ambition to be seen as credible climate and environmental leaders and have an interest in persuading other countries and particularly heavy polluters to follow their policies. If the EU and UK can successfully work together on climate and environmental issues, the trust and the relationships between the two parties can potentially be rebuilt and may also facilitate cooperation in other policy areas.

Baldock raises a number of issues and evidence bases that those interested in building a better, more progressive relationship with the EU will have to be alert to going forward.

- **Regulatory nationalism.** As the body is open to non-EU members, the UK could have continued to participate in the European Environment Agency but has instead removed itself on principle, losing access to its resources and undermining the work of environmental regulators in England, Wales, and Scotland.
- **Self-defeating regulatory duplication.** The UK has left the EU REACH (Registration, Evaluation, Authorisation and Restriction of Chemicals) regime, including the European Chemical Agency, and is setting up an alternative framework adding significant costs – of as much as two billion pounds – to businesses that now have to comply with two different regimes of oversight and compliance.
- **UK falling behind the EU on energy efficiency – compounding the cost of living crisis.** Average UK household electricity prices are at least 30 per cent above those in many neighbouring EU countries due to the central role gas plays. However, regulatory proposals to insulate homes and achieve great energy efficiency lag well behind the EU's Directive on the Energy Performance of Buildings, which includes the objective of at least doubling the annual rate of energy renovation of buildings by 2030.
- **Devolution adding a crucial dimension to post-Brexit regulation.** As environmental regulation is a devolved power in the UK, England, Wales, and Scotland are pursuing different frameworks (with Scotland declaring it will shadow EU regulations). Meanwhile, in Northern Ireland, the polity's formal alignment with the European Single Market in certain key areas means that it is committed to continuing to shadow aspects of European environmental law.
- **All eyes on 2025.** With the Trade and Cooperation Agreement (TCA) up for re-negotiation in 2025 (when it will also face a vote in the Northern Ireland Assembly), there is every opportunity to seek progressive changes to the current framework that enable UK-EU cooperation to protect our environment.

This report is published as part of a cooperation between Another Europe Is Possible and the Friedrich-Ebert-Stiftung. With Brexit entailing a vast range of changes in how our society runs, there is an urgent need for greater scrutiny of the process and for discussion of alternative frameworks and outlooks. Another Europe Is Possible's website, Brexit Spotlight, exists to offer a range of analyses, from blogs to reports and events, that help citizens «take back control». This report is part of a stream of work that will provide rigorous, high-quality analysis of the changes wrought by Brexit in the years ahead – and how progressives and the left should respond.

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## INTRODUCTION

Environmental regulation was not invented in the 1970s but the great majority of substantive environmental law in the UK came onto the statute book during the period of EU membership. This body of law is amended, updated, and expanded on a continuous basis and its depth, breadth, and detail underpin its influence on a global as well as European scale.

From an EU perspective, the UK is no longer the contributor it once was to the process of making collective European decisions and the sometimes lengthy negotiation that produces this comprehensive and expanding corpus of law and policy. Nor is it bound to comply with existing and forthcoming legislation as it was previously.

On the UK side of the Channel the opportunity to adopt different approaches, styles, and measures represents a watershed. In principle, it is possible to launch more regulatory initiatives than before or to scale back, to intervene earlier or later, as well as to develop distinctive initiatives within the UK. Although it is not entirely an unfettered choice, given the requirements of the Northern Ireland Protocol, obligations under international treaties, multilateral environmental agreements, and the Trade and Cooperation Agreement with the EU, for example, there are many paths open to the UK. These include dynamic alignment with EU law at one extreme and systematic departure from EU standards or alignment with those of another jurisdiction, such as the US, at the other.

The choices made by the UK and its four constituent jurisdictions are of interest not just domestically but also more widely, especially in the EU as neighbour, for the moment sharing much the same standards, and having multiple interests, as collaborator and competitor. No other country has left the EU, and the full implications for the Union of being situated next to a previously aligned Member State that is now striking out on its own are still to be revealed.

It has been a relatively short period since the UK ceased to be an EU Member State at the end of January 2020, prior to which it had sought stability and continuity by transposing EU legislation into national law. However, a number of decisions have been taken and propositions aired in the last two and a half years, between them signalling potential directions of travel in all four UK nations and most particularly in England. These first steps and the longer-term prospects are the subject of this paper.

Before considering these, it must be underlined that environment is a largely devolved responsibility within the UK. Prior to Brexit, there were considerable limitations on the scope for independent action by the devolved administrations as well as the Westminster government because of the need to comply with overarching EU obligations. These have been removed, empowering each administration to develop their own approach and corpus of environmental law, creating five critical actors, including the UK as a whole. One of

these actors, Northern Ireland, is in the exceptional position of being subject to EU law in certain areas only, under the provisions of the Northern Ireland Protocol. A portion of environmental law falls into this category. Consequently, one of the most immediate and fundamental consequences of Brexit has been to alter both the responsibilities for the environment within the UK and the associated governance to a substantial degree, and, in effect, to activate a much more federal model than existed at the time of entry into the Union in 1973.

Differences between the four nations in the stance they take towards the EU and possible alignment with its policies have become pronounced since the Brexit negotiations began, especially between England and Scotland.

## EMERGING STANCES

If there were fundamental differences between the UK's approach to environmental regulation and that of the EU, these were not aired to any significant degree during the referendum of 2016. Pro-Brexit campaigners often voiced support for maintaining environmental standards and argued that the UK would be able to meet its own goals more readily outside the EU as a general principle, while Remain supporters concerned with environmental issues tended to see the EU's record in this area as generally successful.

Nonetheless, over the years there have been recurring themes in the posture of UK governments, especially Conservative administrations, in their approach to EU environmental law and the proposals from the European Commission to extend and amend it. These included a keen interest in the evidence base for new proposals, insistence on a strong case for EU rather than national action on each issue arising, sympathy for voluntary rather than mandatory approaches, support for «better regulation» rather than too many prescriptive requirements in legislation, concern to avoid additional EU expenditure, and enthusiasm in principle for greater focus on implementation rather than the expansion of the environmental *acquis*.<sup>1</sup> This led to strong resistance to certain European Commission initiatives, such as that for a Soils Directive in 2006, where the UK was a leading opponent alongside other influential Member States, such as Germany. At the same time, the UK was clearly amongst the European leaders in certain areas, such as trying to «green» the Common Agricultural Policy (CAP) and, more actively, in promoting international climate change politics and policies (Rayner, T., Jordan, A., 2010).

Some of these themes might be expected to recur in UK policies and regulatory initiatives post-Brexit and to a certain extent this has been the case. The high priority given to regulatory autonomy and freedom from the authority of EU institutions, such as the European Court of Justice, was cer-

<sup>1</sup> See, for example, Haigh, N. (1990): *EEC Environmental Policy and Britain*, 2<sup>nd</sup> edition, Longman, London.

tainly apparent during the negotiation of the Trade and Cooperation Agreement (TCA), including the environmental chapters. It has been maintained subsequently in England. One example of this, discussed briefly below, is the decision to set up a new domestic chemicals regulatory regime rather than seeking any accommodation or affiliation with the EU REACH regime. This seems to have been a matter of principle rather than an effort to improve public health or the environment or to protect the interests of the chemical industry in the UK.

The decision to cease membership in the European Environment Agency, which is open to European countries outside the EU, including the UK, is another manifestation of this stance. Indeed, in England there appears to be no preference for cooperating with or aligning with EU partners rather than with any other jurisdiction in addressing environmental questions. The assumption is that England will choose measures that best suit its own issues and objectives with little or no public reference by the Government to developments in the EU. The merits and drawbacks of aligning with EU environmental law as a general approach are not being discussed although some alignment may occur in certain circumstances.

In Scotland, by contrast, government ministers recently confirmed their commitment to align with EU legislation, subject to certain caveats, in line with Section 7(1) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act, 2021. «Scotland will seek to align with the EU where appropriate and in a manner that contributes towards maintaining and advancing standards across a range of policy areas. It will do so to protect the health and well-being of people in Scotland, maintain Scotland's international reputation, and, by protecting the standards that Scotland enjoys, ease the process of Scotland's return to the EU» (Scottish Government, 2022).

## OBJECTIVES AND TARGETS

In England, the first strategic document on the environment post Brexit was *A Green Future: Our 25 Year Plan to Improve the Environment*, published in 2018. The objectives were expressed in very general terms, including the Government's much-repeated ambition to «leave the environment in a better state than we found it». In a Foreword by Theresa May, then Prime Minister, there is a positive view of the environmental options offered by Brexit: «We will use this opportunity to strengthen and enhance the protections our countryside, rivers, coastline and wildlife habitats enjoy, and develop new methods of agricultural and fisheries support which put the environment first» (HM Government 2018).

Subsequently the framing for environmental law and policy has been strengthened by the Environment Act 2021. Amongst other things this creates the structure for statutory Environmental Improvement Plans of at least 15 years' duration to be reviewed every five years, commencing in 2023. A system of long-term targets is created, covering at least

air quality, biodiversity, water and resource efficiency, and waste reduction, with additional targets for airborne particulates and species abundance. These targets will be set before the end of 2022 and if they are to be met, will provide a driver for regulatory initiatives and other interventions. They complement another driver, the net zero target for 2050 and the interim target of a cut in emissions of at least 78 per cent by 2035.

In Scotland, where climate mitigation targets are more ambitious, an environment strategy published in 2020 also had rather broad objectives: «By 2045: By restoring nature and ending Scotland's contribution to climate change, our country is transformed for the better – helping to secure the well-being of our people and planet for generations to come» (Scottish Government 2020).

## POST-BREXIT ENVIRONMENTAL REGULATION – THE FIRST PHASE

Against this background, aside from the long process of putting the Environment Act 2021 in place in England, there has not been a spate of new environmental law in the UK, but rather more of a patchwork of environmental initiatives, including some regulatory changes. These have built up relatively slowly in the wake of the major exercise of bringing EU environmental law onto the UK statute books in the years leading up to December 2020 and the end of the Transition Period. Dramatic deregulatory measures have not been enacted and the response to some of the higher profile problems, such as the heavy burden of marine plastic pollution, have not given rise to cutting edge new law in the UK. Many would agree with the comments of a leading environmental lawyer in a recent review in the *ENDS Report* that little of substance has changed in relation to environmental law (ENDS Report 2022).

Those initiatives that have advanced or are now in the process of emerging have not followed a consistent grand design or an entirely new strategy. They represent a spectrum from ambition in some areas, continuity in others, right through to both active and more passive forms of deregulation, with overt divergence from established EU law and approaches becoming increasingly the mood music in England.

However, the push for deregulation escalated rather dramatically on 22.9.2022, with the publication by the new Truss government of the Retained EU law (Revocation and Reform) Bill as well as the Growth Plan 2022 released by the Treasury. Both have major implications for environmental law, as discussed in the final section below.

Other UK nations are adopting what could be seen as a more pragmatic approach. At this stage, the Scottish government shows signs of feeling its way towards a realistic level of alignment with EU environmental law, rather than aiming to replicate the substance and timing of all new EU legislation as it is agreed. However, there are already cases

of Scotland moving ahead of the UK as a whole, not least because of the aim of keeping in step with the EU. The recent Scottish regulations banning single-use plastics, which follow the model in the EU Single-use Plastics Directive, are a clear example of different standards emerging within the UK. Potentially Scotland could have been prevented from introducing standards applying to traded products under the UK Internal Market Act 2020 but in this case an exemption was granted.

The Welsh government as well has never been happy with the Internal Market Act because of its potentially restrictive provisions and conflicts over the choice of different environmental standards and the implications for the internal market, and because its regulation could arise in relation to a range of products. The complexities of regulation are particularly acute in Northern Ireland, where a number of specific conditions apply, including the obligation to align with a selection of EU legislation relating to the environment, as specified in the Northern Ireland Protocol, as well as the current absence of an Assembly. The heavy load on a relatively small administration is apparent from even the most superficial conversations with stakeholders.

## EMERGING THEMES IN THE UK AND PARTICULARLY ENGLAND

Looking more closely at two critical areas of environmental policy and some specific examples in other areas of policy reveals some of the emerging themes and developing tensions alongside a perhaps misleading sense of business as usual.

### THE CASE OF CLIMATE TARGETS

Perhaps the most significant example of post-Brexit environmental ambition in the UK was the adoption in 2019 of the binding target to bring UK greenhouse gas emissions to net zero by 2050. Although the UK was the first G20 country to adopt this commitment, it was agreed with surprisingly little political opposition under the government led by Theresa May. It presaged a number of climate policy advances, especially prior to COP26 in Glasgow in November 2021. Most critical of these was the strategy with proposals for decarbonising the UK economy by 2050, focusing on the period to 2037, entitled *Net Zero Strategy: Build Back Greener* (Department for BEIS 2021). This was ahead of the UK's peers in some respects, for example, in the aspiration to end the sale of fossil-fuelled heating systems by 2035, alongside the target of ending the sale of new petrol and diesel powered cars by 2030. However, it was also open to criticism in several respects, including the extent to which it relied on projected emission reductions from unproved sources, such as carbon capture and storage plants (ClientEarth 2021).

The independent Climate Change Committee, itself emblematic of continuity in environmental policy (it was established by the Climate Change Act 2008), acknowledges that

the UK is one of the few countries with emissions targets in line with the long-term temperature goal of the Paris Agreement. However, in its most recent review of progress submitted to Parliament in June 2022, it spells out the slow progress in delivering this goal in many areas. «Tangible progress is lagging the policy ambition», not least because of an array of policy gaps.

*«Policy gaps must be closed, notably on land use – potentially enabled by new legislation on the environment – and on energy efficiency of buildings. Strategies and detailed plans are still needed for waste management, land use and agriculture, and achieving full electricity decarbonisation by 2035»*

CCC 2022

Beyond this, the report scrutinises the credibility of the proposals now on the table:

*«Our assessment of the policy framework finds that there are considerable risks to the delivery of the Government's emissions reduction pathway. In some cases, the risks result from the inherent reliance on new technologies and new ways of doing things. In others, there may be fewer inherent risks, but the policy framework does not yet provide confidence that full delivery will ensue.»*

Further pressure on the Strategy came from a group of environmental NGOs. They challenged the legality of the Strategy with respect to the Government's obligations under the Climate Change Act, particularly the need to set out detailed climate policies that show how the UK's legally-binding carbon budgets will be met, addressing quantitative targets. Following a judgement in their favour by the High Court in July 2022, the Government needs to amend the Strategy and show how the proposed policies will bring about the required changes to meet the targets.

Turning to the climate and energy policies themselves, there are many similarities between climate legislation in the EU and the UK. However, rather surprisingly, energy efficiency improvements have enjoyed a particularly low profile in the UK Government's programme. Improved efficiency does feature in some high-level documents, such as the British Energy Security Strategy, but the rollout of specific schemes to achieve results on the ground has been on a very limited scale, not least in the domestic sector, where the necessity of action from a social as well as environmental perspective is particularly acute. This has yet to change significantly in the face of the Ukraine crisis and the alarming prospect of more widespread and severe fuel poverty. This stands in contrast to the position in the EU where energy saving is seen as a central plank of the net zero strategy.

The proposed EU Energy Efficiency Directive adopts the principle of energy efficiency first and includes a range of quantitative targets such as reducing primary energy consumption by 39 per cent and final consumption by 36 per cent across the whole economy by 2030. Although average UK household electricity prices are relatively high, currently at least 30

per cent above those in many neighbouring EU countries, because of the large share of gas in the mix of generating plant (Shepherd, D. and Smith, A. 2022), regulatory measures to improve household energy efficiency lag well behind those in the EU. The proposed EU Directive on the Energy Performance of Buildings includes the objective of at least doubling the annual rate of energy renovation of buildings by 2030. This is an example of a potentially large gap between UK and EU standards opening up in the wake of Brexit and the UK's taking less action on a major environmental issue than its neighbours as the priorities of its government change outside the EU (Baldock, D. and Nicholson, M. 2022).

Climate policy is perhaps the clearest example of the Johnson administration adopting an active international role. It was open to the setting of ambitious domestic targets, especially with the incentive provided by the role of being host to COP26 in Glasgow, but was less willing to adopt the potentially more politically sensitive and in some cases, costly, measures required to deliver on these. Progress has been rapid in some areas, such as phasing out coal, but lagged in others such as energy conservation and land use.

This is not entirely new and far from unique to the UK, but it opens up questions about how deep the Government's commitment to net zero runs and how much it may vacillate between successive administrations in ways that are less pronounced in the EU, where the law-making process is much less sensitive to the political cycle in individual countries. The replacement of Johnson by Liz Truss and then by Rishi Sunak and the accompanying economic turmoil in the UK have created considerable uncertainty, although the net zero commitment remains in place at the moment.

## BIODIVERSITY

The need to address and reverse the persistent decline in biodiversity has been the other central environmental theme since 2016, again within a global as well as domestic context. The UK has been a prominent actor in several international fora, such as the G7, in the lead-up to the next Conference of Parties for the Biodiversity Convention, (COP15), taking place in Montreal in December. It championed the "Leaders' Pledge for Nature" launched in September 2020, and all four UK nations have signed up to the commitment to protect 30 per cent of the land and marine area for biodiversity by 2030. However, there are questions about exactly how this target is to be met, most pressingly in England, and whether the necessary policies and funding will be put in place.

Since the spatial area covered by an assortment of formal landscape or environmental designations at the moment is not tremendously far from the 30 per cent target, the Government may believe that this commitment would not involve too much of a stretch to comply with this target. The British Ecological Society does not see it this way and estimates that «The coverage of effectively protected terrestrial PAs [Protected Areas] could be as low as about five per cent of UK territory.» (British Ecological Society 2022). In Eng-

land, around 40 per cent of the sea area is included within the boundaries of designated «Marine Protected Areas». However, according to Wildlife and Countryside Link, a leading network of NGOs, only four per cent of the seas around England fall within Marine Protected Areas which «could be said to be effectively managed for nature» (Wildlife and Countryside Link 2021). In their view, around eight per cent of the land falls within strictly protected sites whereas between 10 and 16 per cent needs to be both designated and in demonstrably good ecological condition by 2030 if the pledge is to be complied with (Ibid). Even if the gap is smaller than NGOs believe, it still suggests that a major programme of investment in land management and further designations are required rather rapidly within the UK.

In England at least five strands of policy bearing directly on biodiversity can be noted.

- a) The introduction of several new measures addressing biodiversity challenges in recent years, covering both international and global issues. One of these is a new mandatory due diligence system to apply to «forest risk commodities», notably those imported from illegally logged areas, introduced under Article 116 of the Environment Act. This is largely parallel to but in significant respects narrower in scope than an EU regime also being put into place.

Most novel of the new domestic measures is the introduction of Biodiversity Net Gain under the provisions of the Environment Act 2021 alongside a strengthened legal obligation on public bodies to conserve and enhance biodiversity. When this becomes mandatory, potentially in November 2023, most planning consents granted in England will have to deliver a biodiversity net gain of at least 10 per cent via commitments secured for at least 30 years. This has brought about the introduction of a new biodiversity metric to measure net gain. The Act also introduces a new system of Conservation covenants as well as Local Nature Recovery Strategies, which are mandatory spatial strategies for nature, an innovation which environmental NGOs had lobbied for very actively.

- b) The ongoing process of adopting a new set of domestic targets. Perhaps most critical of these will be the new legally binding long-term environmental biodiversity targets for England, part of a wider set of environmental targets that was due to be published by the end of October 2022 under the provisions of the Environment Act 2021. This deadline was missed by Defra and no date for publication of the high-level targets had been set by mid-November. However, once adopted the targets are likely to bear some resemblance to the proposals for both terrestrial and marine biodiversity made by Defra in a consultation exercise in March 2022 (DEFRA 2022). Of these, the most innovative is one to increase species abundance by 10 per cent by 2042. However, the ambition of this target is dented by not taking the current level of abundance as the baseline

year, but rather starting from the position arrived at in 2030. The latter is an unknown quantity at this point and indeed could be below current levels of species abundance. For this reason, in particular, the prominent new target has not been universally welcomed. Aside from the risks that biodiversity will not be enriched, the Climate Change Committee for example has argued that such a target «would compromise resilience as well as carbon storage and be a reward for failure. This target should instead be set as an improvement over a recently defined baseline (CCC 2022b).»

It is worth noting that a target setting framework for biodiversity in the EU also is being developed but on a different legal and policy track. There are strong reasons to argue that the proposals in England and also in Northern Ireland are not as ambitious as their counterparts now under discussion in the EU (however, it should be borne in mind that they are not yet agreed either (Tucker, G.M. 2022). The EU comparator in this case is the European Commission's June 2022 proposals for a Regulation on nature restoration (EU Commission 2022), commonly referred to as the Restoration Law, putting forward binding targets to restore healthy and resilient ecosystems.

- c) There has been a shift in the government's approach to the delivery of nature conservation measures on the ground through developing a rationale for a more «streamlined» process. Previously, thinking in the Johnson administration on how the English species and protected area targets might be met was set out in the Nature Recovery Green Paper of March 2022 (DEFRA 2022b). This does underline the need for progressing nature recovery as a fundamental part of the whole domestic environmental agenda, as exemplified by the Department for Environment, Food and Rural Affairs' 25 Year Environment Plan (25YEP). However, the Paper is less about concrete proposals and more about a new approach, implicitly in pursuit of reduced regulatory requirements: «We want to simplify and streamline environmental regulation, with a focus on delivering the legally binding targets now enshrined in the Environment Act.» It proposes simplifying both protected area designations and the Habitat Regulations Assessment. In addition, streamlining and reorganising delivery agencies such as the Environment Agency and giving them more discretion rather than relying on the enforcement of hard rules is a central theme of the paper and emblematic of the likely direction of travel. For example, «We'd like to move towards a system where scientific judgement has a greater role, rather than action being led solely by legal process. We want regulators to be able to make expert judgements based on the best available science and evidence about what will improve the environment and support nature's recovery in local geographies (Ibid).»

This signpost to regulatory reform and less prescriptive approaches indicates an intention to depart from the established reliance on measures based on EU legislation, notably the Birds and Habitats Directives. The Office for

Environmental Protection was invited to offer advice on this Green Paper. Now in the public domain, it is interesting to note that they did not reject the principle of replacing a mix of EU-derived and domestic laws with new national legislation in pursuit of greater clarity and coherence. However, they underlined that uncertainties and risks, including of legal challenge, could arise and the fundamental need to approach reform with caution so as not to undermine existing high levels of protection. «...Any change should, in our view, represent a considerable step up on what we already have, to justify the risks, and what is more to deliver the significant action required to protect and restore nature in line with the 25YEP mission and the pressing timeframe» (OEP 2022).

- d) A new approach to agricultural policy where the principal objective of expenditure on farming under the new Agriculture Act is to secure the provision of environmental public goods, an important component of which is the preservation and restoration of biodiversity. Within this new legal framework, quite distinct from its predecessor the Common Agricultural Policy, new schemes under the heading of Environmental Land Management (ELM) are being introduced, in principle to incentivise farmers to adopt more environmental practices. This very significant change in direction is being introduced in stages and is meeting not a little resistance from the farming community, resulting in changes to original plans. How far it will deliver biodiversity gains remains to be seen.
- e) A recent and unexpectedly strong push for deregulation, targeting the pivotal biodiversity regulations amongst others, mounted during the brief of Prime Minister Liz Truss. The Growth Plan 2022 (HM Treasury 2022), published in September 2022, had the aim of increasing investment, seeking faster economic growth and reduced constraints on development, for example by loosening planning controls, setting up new, very lightly regulated «Investment Zones» and reforming habitats and species regulations. The Plan was launched in the same week as the draft REUL Bill, discussed further in the section on «the coming phase» below. This aims at a much more comprehensive sweeping away and modification of retained EU law, a category covering most environmental legislation adopted in recent decades. Environmental NGOs reacted swiftly and strongly to this «attack on nature» and it is unlikely that the new Sunak administration will proceed with all the proposals in the Growth Plan. The Investment Zones seem to have been dropped already. Nonetheless, the REUL Bill is in Parliament in the process of being adopted and the new government is still advocating a more deregulatory approach.

In the very active field of biodiversity policy, the significant high-level commitments and conceptual advance of setting a target to increase species abundance sit uncomfortably alongside an overt proposal to streamline the habitats and species regulations and take further steps to reduce protection in the planning system. How

the roster of initiatives fit together, intersect with other measures such as environmental management incentives for farmers and foresters, and how far they will contribute to meeting the headline targets is not especially clear. The gap between more ambitious targets, several for 2030, and the policy machinery to deliver them is again apparent.

## PURPOSEFUL DIVERGENCE – THREE EXAMPLES

There are a few areas of environmental policy where the Government has made clear its determination to diverge from EU-based legislation, because it considers it to be over-restrictive and burdensome and a more flexible, less procedural approach would be better.

One concerns the environmental assessments that are required of certain categories of development projects and new infrastructure. There has been an unambiguous decision in England to move away from EU-derived regulations on Environmental Impact Assessment (EIA, mainly for individual projects) and Strategic Environmental Assessment (SEA, for larger developments). This is set out in Part 5 of the Levelling Up and Regeneration Bill currently passing through Parliament. The Secretary of State will gain the power to replace the current EIA and SEA regimes via new regulations with a more «results-based» process featuring an «Environmental Outcomes Report». The idea seems to be to continue to require an assessment for a modified list of developments which could have significant environmental impacts but to introduce a more flexible, less prescriptive approach than EIA and SEA. There is also a linkage to «simplification» of the Habitats regulations and the political interest in speeding up the authorisation of development projects, including new housing schemes.

Another case is the clear choice to diverge from the EU in the regulation of gene editing and genetically modified organisms (GMOs). This is an area where there have always been tensions between the UK and the EU. The freedom to depart from EU legislation on GMOs and potentially other areas of biotechnology was seen as an advantage of Brexit by some actors, including a segment of the scientific community, during the referendum campaign and was always an objective of the Johnson administration. It has given rise to new legislation to remove a whole category of «precision bred» plants and vertebrate animals from the current EU-derived regulatory regime covering GMOs. The Genetic Technology (Precision Breeding) Bill 2022–23 was introduced to the House of Commons in May and is partway through its Parliamentary passage. Precision breeding covers a range of techniques including gene editing, and a lighter regulatory regime is argued by the Government to be proportionate. There is the expectation that it could generate new investment in the UK and speed up the development of new foods, including farmed animals, with claimed benefits for global food production, the environment, and health as well as commercial benefits. Whilst it seems highly likely that the legislation will be adopted there are divided views on this

topic, much as there are in the EU. Mainstream farming organisations and many scientific bodies support the change but there is opposition from organic farmers, some environmental NGOs, and animal welfare groups.

There is a clear economic and administrative motivation behind this legislative change, as there is, in a less pronounced way, for the change in the environmental assessment regime. However, one difference between the two is that there is also a lobby to alter the authorisation regime for gene editing inside the EU and the Commission is actively considering a proposal. This may or may not result in the EU model following the same path as that in the UK.

The third example has an element in common with the others in that it introduces within the UK a new regulatory regime, aspects of which are lighter than that in the EU. However, rather than offering the UK an economic advantage, it is an outstanding example of self-harm inflicted on the economy out of ideological determination to be completely free of EU institutions, including the European Court of Justice. This is the decision to opt out of REACH, the comprehensive EU regime for regulating chemicals and participation in its central institution, the European Chemicals Agency, ECHA, instead setting up an essentially parallel regime within the UK based within the Health and Safety Executive. This is a smaller, less well-staffed and resourced body with less access to data and a more limited capacity to assess and control risks. In addition, it imposes costs both on the government and the industry.

Companies operating both in the EU and the UK, as many are in this sector, now have to register their chemicals in both the UK and the EU in parallel, giving rise to duplication and greater administrative burdens, with accompanying costs and delays. The costs of registering chemicals onto the new UK database has been estimated at around two billion pounds, according to a government assessed impact assessment prepared by DEFRA (DEFRA 2022c). This compares with an estimated expenditure of around 500 million pounds by UK companies complying with the EU REACH regime over the previous decade. The approach taken by the new UK body to the authorisation of substances of very high concern has been criticised as less satisfactory by environmental NGOs, which also are concerned that UK REACH is considering fewer protective controls on hazardous chemicals because of its more limited capacity (Baldock, D. and Nicholson, M. 2022). Since Brexit, only two restrictions on the use of hazardous chemicals are being taken forward in the UK, one on lead ammunition, itself the topic of EU legislation, and the other on certain substances found in tattoo ink.

## THE LURCH TO DEREGULATION: REVIEWING AND REPEALING RETAINED EU ENVIRONMENTAL LAW

Until September 2022 this patchwork approach, including elements of divergence by design and by default, with varying patterns between the four UK nations, was looking like

a new form of «business as usual». However, at that point, a dramatic lurch in policy occurred in England initiated by the Liz Truss government. This began with an explicit plan to roll back elements of environmental law, especially in relation to controls on development, as noted in the discussion of biodiversity policy above. Then came the launch of a broader, politically driven, and arbitrarily accelerated process of reviewing, amending, scrapping and replacing the broad category of Retained EU law (REUL) still on the statute books. This is proposed in legislation currently before Parliament, in the form of the Retained EU law (Revocation and Reform) Bill, with BEIS as the lead Department.

For some time and well prior to the selection of Liz Truss as Prime Minister, there have been proposals inside government for wholesale review and potentially large-scale scrapping of nearly all Retained EU law, mainly in England but extending to a wider field within the UK as well. When Jacob Rees-Mogg was leading this effort from the Cabinet Office, the timetable being advanced for this very substantial exercise was a period of five years. However, during the course of the Conservative leadership election in summer 2022, both of the two final candidates put forward much shorter timetables, with Liz Truss advocating the end of 2023 as a deadline. It is difficult to know how far this was a political flourish concocted in the heat of the campaign and how far it was underpinned by any serious thought about how it could be achieved. In either case it has major implications for environmental law alongside other spheres, including working rights and conditions.

This is because most current environmental law in the UK was put into place in the decades following the early 1970s during the period of EU membership. Thus, for historical reasons, it now falls into the category of Retained EU law. Given this and the important role of EU law in agriculture and fisheries in the period prior to Brexit, it is not surprising that a sizeable share of the whole catalogue of Retained EU law, probably more than 800 measures, falls within the Department for Environment, Food and Rural Affairs' domain. Of this, a considerable component deals directly with the environment, including several laws at the core of the system of environmental protection in the UK. These are accompanied by multiple measures concerned with the specifics of agricultural and fisheries policies, for example, some of which also are of environmental significance.

In June 2022, the Cabinet Office published a public «dashboard» representing an interim and as yet incomplete catalogue of this body of law<sup>2</sup> and encouraging the public to scrutinise it. Subsequent press reports suggest that the actual number of retained laws is not 2400 as proposed on the dashboard but probably more like 3800 following investigative work by the National Archives (Parker, G. and Foster, P. 2022). This uncertainty about the scope of the Bill and the scale of the review operation required has compounded the

uncertainty arising from proposals to overhaul it at great speed. Confidence in the process and timetable have been further dented by the Regulatory Policy Committee's «red rating» of the impact assessment of the Bill presented to them by BEIS, indicating that it is not fit for purpose (Regulatory Policy Committee 2022).

Under the REUL Bill, all EU law that was retained under the EU (Withdrawal) Act 2018 in the form of Statutory Instruments (SIs), i.e., the great majority, will lapse automatically at the end of 2023 unless «saved» by ministers under a default sunset provision. English ministers, but not their counterparts in the devolved administrations, would be able to extend this deadline to 2026 in specific cases. If the Bill becomes law, ministers in England would be able to revoke, replace, restate or update retained EU law without proper parliamentary oversight.

No rationale is provided or apparent for the extremely short timetable this imposes on the devolved authorities as well as Defra. Nor is there any credible explanation of how such an exercise could be completed with due regard to necessary process, including impact assessment, stakeholder engagement and proper Parliamentary scrutiny.

Amongst other provisions of particular concern from an environmental perspective is Subsection 5 of Clause 15 which stipulates an extremely restrictive list of conditions that any replacement legislation should meet. These include a requirement that there should be no additional administrative burdens and no impact on profitability. In effect, a ceiling on the impact of new legislation in this domain is being imposed at a time when more ambitious targets for the environment are to be put in place. Showing that effective new legislation is compatible with such criteria, particularly within a very tight timescale, will be quite unnecessarily challenging.

The Bill has brought the tension between the predetermined commitment to roll back and replace EU law with the declared ambitions to retain and raise environmental standards in England to centre stage. It has been met with strong opposition from a remarkably wide spectrum of stakeholders including environmental NGOs, trades unions, business interests, the Institute of Directors, lawyers, the National Farmers' Union, civil rights organisations, and the Scottish and Welsh governments. There is a common view that adopting the Bill will cause confusion and uncertainty, unwanted disruption and distraction at a time of economic and other pressures.

With some exceptions, business organisations are extremely wary of the regulatory uncertainty that is likely to arise from such a wave of change and most are not calling for a watering down of current standards. By contrast, there is a greater interest in making more limited adjustments in existing law, for example to reduce what they may see as disproportionate burdens arising from some obligatory processes. For many operating in EU markets, there is also a concern about having to comply with dual regimes. Consequently, it is not clear where the constituency for radical deregulation lies

<sup>2</sup> See public dashboard available at: <https://public.tableau.com/app/profile/governmentreporting/viz/UKGovernment-RetainedEULaw-Dashboard/Guidance> (last accessed 7.12.2022)

outside an influential faction within the Conservative Party. Nonetheless, it is not yet clear whether this will change the Government's mind or whether the Bill will be adopted as is, amended or will fall by the wayside.

## MOVING FORWARD IN 2025

Looking to the longer term, there is growing discussion about how to improve relationships between the UK and the EU, even if a strategic reset, such as the UK pursuing a «Swiss style» model, appear off the table for the moment. The Trade and Cooperation Agreement between the UK and the EU will be reviewed every five years, starting in 2025. In principle, this could be an opportunity both to look forward and to review the consequences for the environment and for environmental legislation of the Agreement and of Brexit more generally. The commitment of both sides not to lower their environmental standards might be reviewed and strengthened for example.

The environment is far from a trivial dimension of the relationship between the parties.

Imagining for a moment that a) there was a greater spirit of cooperation than exists at present and outstanding impediments to a closer relationship between the EU and the UK, such as the dispute over the Northern Ireland Protocol, had been resolved, b) no major structural issues such as the UK seeking re-entry to the Single Market were on the table and c) UK participation in EU programmes on research for example were addressed elsewhere: could meaningful steps towards greater cooperation on the environment be taken and what might they include?

Accepting that the EU almost certainly will continue to have a limited appetite for introducing special arrangements for the UK and would need to be convinced of clearly added value for both sides, a few possibilities might find a way on to such a list:

- A positive commitment to adopt the same metrics and data requirements in new environmental law where possible and to monitor this, aiming to avoid differences that would be unhelpful in scientific, technical, and economic terms.
  - A commitment by the UK to re-join the European Environment Agency.
  - Fresh negotiations over the UK's cooperation with and, ideally, participation in, REACH.
  - Exploration of the scope for dedicated Protocols or agreements on areas where cooperation is particularly valuable, which conceivably could include transboundary pollution, management of the North Sea, management of carbon markets and emissions trading systems, conservation of migratory species etc.
  - The creation of a new cooperative forum concerned with trade and the environment, including technical issues such as the choice of metrics and operation of credible monitoring regimes, and more political aspects, including coherence in the approaches adopted with third countries and incorporating sustainability into the WTO.
  - The creation of a new means of including the UK within the EU's strategies and initiatives for influencing Multilateral Environmental Agreements where there was a reasonable alignment of views.
- The creation of a standing dedicated forum for environmental cooperation with a rolling agenda. This could have an official strand, primarily bringing officials and agency staff together and another for civil society and independent experts.
  - Amongst several other functions, this measure providing advance warning of thinking on both sides and an opportunity to prevent avoidable conflicts and duplications and identify better means of co-operation. It could identify ways of improving transparency and participation for example by logging and explaining developments in and differences between environmental policy and law between the four UK nations and the EU.
  - Establishing effective channels for the exchange of relevant environmental information and data, including evidence utilised in the design of legislation and in evaluations, pertinent court rulings etc.

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# ENVIRONMENTAL REGULATION IN THE UK AFTER BREXIT

## Where Runs the River?



The majority of substantive environmental law in the UK came onto the statute book during the period of EU membership. This body of law is amended, updated and expanded on a continuous basis and its depth, breadth and detail underpin its influence on a global as well as European scale. While restrictions such as the Northern Ireland Protocol and elements of the Trade and Cooperation Agreement exist, the UK is yet to decide its overall post-Brexit strategy towards environmental regulation.



Some steps have already been taken, such as the UK's withdrawal from the European Environment Agency and the chemical regulator REACH, but overall little deregulatory action has been taken. The UK's energy efficiency is weak relative to Europe, raising consumer prices, and tangible progress towards the 2050 net zero target is lagging. The push for deregulation escalated dramatically with the publication of the Retained EU law (Revocation and Reform) Bill, which seeks to remove all EU law on British statute books by the end of 2023.



This plan to roll back elements of environmental law, especially in relation to controls on development and biodiversity as well as core environmental protections relating to agricultural and fisheries policies, represents a break in policy. If averted, all eyes will be on 2025 with the Trade and Cooperation Agreement's renegotiation, which could be an opportunity to review the consequences for the environment and for environmental legislation of the Agreement and of Brexit more generally.

Further information on the topic can be found here:  
<https://uk.fes.de/>