

The Rt Hon Thérèse Coffey MP
Department for Environment, Food and Rural Affairs
2 Marsham Street
London
SW1P 4DF

30 August 2023

By email only

Dear Secretary of State,

The Retained EU Law (Revocation and Reform) Act 2023

Thank you for your letter of 25 July setting out your reasoning on the two matters we raised. We have considered the issues again in the light of your letter.

Revocation of regulations 9 and 10 of the National Emission Ceilings Regulations (NECR) 2018

Regrettably, your letter does not address the wider UK perspective, yet concerns continue to be raised about the UK-wide implications of this revocation, including those highlighted recently by Scottish Government.¹

We recognise that statutory requirements in relation to emissions targets, inventories and projections will remain in place. But in our view, removing the requirement for the National Air Pollution Control Programme (NAPCP) weakens *transparency and accountability* on how these targets could be achieved across the UK.

We provide (in an annex to this letter) our detailed analysis which we hope will assist. In short, we do not consider that there are any statutory provisions that duplicate the requirements of regulations 9 and 10 of the NECR. We remain of the view that removal of these regulations without alternative statutory requirements constitutes a weakening of the legal framework supporting delivery of improved air quality. By way of example, removal of the course corrective measures of the NECR could have a real-time impact on the ability of government to stay on course to achieving targets for five of the most harmful air pollutants.

Where air quality is addressed in the Environmental Improvement Plan, it is our view that it is not covered in a comparable way to the NAPCP. The NAPCP is detailed,

¹ [Cabinet Secretary for Transport, Net Zero and Just Transition \(parliament.scot\)](https://www.parliament.scot/CMSStatic/DocumentContent/Evidence/2023/08/20230808%20-%20Cabinet%20Secretary%20for%20Transport,%20Net%20Zero%20and%20Just%20Transition%20-%20parliament.scot)

evidence-based and measurable. The EIP does not outline the pathways to emissions reductions in detail, and it does not set out to what extent the policies and measures will contribute to those reductions. The EIP is also not subject to the same statutory triggers for review.

We welcome this Government's commitment (re-iterated in your letter) to reducing emissions and achieving the reduction targets. Nevertheless, for the reasons we set out above we remain of the view that consideration should be given to how the key attributes of the regulations and the NAPCP can be maintained to support effective delivery of improved air quality.

Implications for assimilated environmental law

We previously raised concerns about the risks arising from the REUL Act's removal of directly effective rights and general principles of EU law, and changes relating to retained case law. We have yet to see any information on how these risks are being comprehensively and transparently identified and addressed.

You will be aware of recent cases that illustrate the gaps that may be left once the relevant provisions of the REUL Act have come into force at the end of this year. Two such examples include *Harris v Environment Agency*², and *Fry v Somerset Council*³.

These cases show that retained directly effective rights, principles and case law are being relied on by claimants and the courts in ways that secure environmental protection. It is, however, unclear what approach the courts will take in the future, under assimilated law, should recourse to these provisions be lost or change. As such, we remain concerned that the REUL Act may result in a weakening of environmental protection at the end of 2023.

Coupled with this, there are risks and issues arising from legal uncertainty following the loss of these rights and principles, and changes relating to case law. Where there is a lack of clarity as to how environmental law should be interpreted and applied, business may hesitate to invest – and it can lead to additional regulatory burdens and costs. If the REUL Act leads to lower levels of environmental protection and/or increased legal uncertainty, we see the potential for adverse impacts on the Government's ability to meet commitments so recently set out in the EIP and in statutory targets.

I welcome your recognition of the importance of the Environmental Principles Policy Statement (EPPS) in the context of policy making under powers in the REUL Act. Whilst there is a requirement for Ministers to have regard to the EPPS from the 1 November, we anticipate that this will fall after the date by which some statutory instruments may be brought forward under certain powers of the REUL Act. The EPPS would need to be considered ahead of 1 November, to inform this programme⁴.

² *Harris v Environment Agency* [2022] EWHC 2264 (Admin).

³ *C G Fry & Son Limited v Secretary of State for Levelling Up, Housing and Communities & Somerset Council* [2023] EWHC 1622 (Admin).

⁴ The duty to have due regard to the EPPS when making policy is expected to take effect on 1 November 2023. This relates to the date of the policy-making decision rather than the process that leads up to it. The duty will therefore apply to all relevant policy made from the date on which it comes into effect, regardless of whether any development of the policy takes place before that date. This means that ministers and officials will need to have due regard to the statement in the development of all relevant policies that are already in preparation, or initiated in the coming months, where the policy is made after the duty takes effect.

We appreciate of course that these are matters for government, and that you have already written with your initial views. We are pressing these matters all the same, as there is an opportunity here for government to strengthen the legal framework underpinning environmental commitments and ambitions and so make it more likely that those ambitions will be met.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'G Stacey', written in a cursive style.

Dame Glenys Stacey
Chair of the Office for Environmental Protection



www.theoep.org.uk

Annex A – OEP analysis of the implications of revocation of regulations 9 and 10 of the National Emission Ceilings Regulations 2018 under the Retained EU Law (Revocation and Reform) Act 2023

Why we consider regulations 9 and 10 of the NECR to be important

In our view regulations 9 and 10 of the NECR are key to keeping delivery of UK emissions reduction targets on track and supporting delivery of improved air quality.

We welcomed the revised UK NAPCP, which was published in February 2023⁵ and sets out policies, measures, and analysis for how emission reduction commitments can be met across the UK.

We consider that, given that the UK failed to meet the emission reduction commitment for PM2.5 (fine particulate matter) in 2021 and is not on track to meet 2030 emission reduction commitments for four out of five key air pollutants, the NAPCP is particularly important. These are the same pollutants that form the subject of the NAPCP, which proposes additional policies and measures to be implemented to address these shortfalls.

We recognise that only parts of the NECR are to be removed. Emission reduction inventories, projections and targets for the five pollutants listed will remain in place through provisions of the NECR that are not scheduled for revocation. However, we see the NAPCP as an important and unique tool for supporting delivery of the emission reduction commitments – bringing value where it sets out the programme of action for realising those international commitments.

We also recognise its value in relation to wider commitments and targets for air quality required by the Environment Act 2021, and as set out in the Government's Environmental Improvement Plan (EIP23)⁶. Far from duplicating these, it sets out a plan for how to achieve them by mitigating major sources of key pollutants such as PM2.5. It is the only plan for air quality that coherently sets out, in detail and in one place, the policies and measures for all five air pollutants.

In our Environmental Improvement Plan (EIP) monitoring report published on 19 January 2023⁷, we highlighted the NAPCP as an example of good practice. In setting out how policies and measures can be used to achieve national targets and clearly outlining the sectors that are most affected, and the responsibilities of delivery partners, it performs a role not replicated elsewhere. It creates an evidence-based delivery pathway, which enables the identification of barriers to delivery and synergies and trade-offs with other policy areas.

Given the transboundary nature of some air pollutants, the NAPCP also brings an important benefit in that it operates at a UK-wide level.

We see that there is further value in that the NAPCP provides an opportunity for scrutiny and improvement of government's plans through consultation. It also ensures a continuing process of review, whereby plans are proactively updated when evidence suggests targets are at risk of being missed. In our view, it is an important statutory tool that helps deliver government's air quality goals in a transparent and consultative way.

Implications of revocation

Summary

Below is a summary of our concerns regarding the revocation of regulations 9 and 10 of the NECR, which we go on to detail further.

⁵ [Air Quality: Revised UK National Air Pollution Control Programme - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/114444/Air_Quality_-_Revised_UK_National_Air_Pollution_Control_Programme_-_GOV.UK_(www.gov.uk))

⁶ [Environmental Improvement Plan \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/114444/Environmental_Improvement_Plan_(publishing.service.gov.uk))

⁷ [Progress in improving the natural environment in England, 2021/2022 | Office for Environmental Protection \(theoep.org.uk\)](https://theoep.org.uk/progress-in-improving-the-natural-environment-in-england-2021/2022/)

Duplication – we do not consider there to be any statutory duplicative requirements akin to the requirements of regulations 9 and 10 of the NECR in either England or Northern Ireland, or more broadly across the UK. Whilst there may be some policy duplication, we do not consider it directly comparable, and no legally binding equivalent requirements exist.

Northern Ireland – we have particular concerns over the legislative gap that would be left in NI.

UK-wide – we have concerns that revocation will create disparity between the countries of the UK in relation to an important transboundary environmental issue, where the NAPCP currently provides important UK-wide oversight and coordination.

Accountability – removal of regulations 9 and 10 of the NECR would result in a weakening of accountability as regards meeting emissions reduction targets in the UK.

Transparency - removal of regulations 9 and 10 of the NECR would result in a weakening of transparency regarding Government's plans to meet reduction targets in the UK, and reduced scrutiny of those plans.

Environmental protection – there is no publicly available assessment as to the potential impacts to environmental protections, including consideration of the Environmental Principles Policy Statement (EPPS).

Duplication

We can find no legislative provisions that are directly duplicative of the requirements of the regulations to be revoked. There are several policy and legal requirements regarding air quality that may overlap in some areas, but these are principally in policy, not law, and are not a like-for-like duplication.

Many of our domestic legal requirements relating to air quality are concerned with ambient air quality, as opposed to emissions. The NECR has a significant focus on addressing the totality of emissions into the atmosphere with a view to addressing long-range transboundary air pollution.

Where the topic of air quality is addressed more comprehensively, in EIP23 for example, it is not covered in a comparable way to the NAPCP - which is detailed, evidence-based and measurable. The EIP does not outline the pathways to emissions reductions in detail, nor to what extent the policies and measures will contribute to those reductions.

Part of the published rationale for revocation is that, by repealing regulations 9 and 10 of the NECR, there can be greater focus on delivering the long-term targets under the Environment Act 2021, as a means of improving air quality.

Section 1(3)(a) of the Environment Act 2021 requires the Secretary of State to set at least one long-term target for air quality. A target set under that section needs to specify the standard to be achieved (which must be capable of being objectively measured), and a date by which it is to be achieved.

In England this was accomplished through the Environmental Targets (Fine Particulate Matter) (England) Regulations 2023. The requirements of these regulations concern the target ambient levels of fine particulate matter known as PM2.5, and a population exposure reduction target. There are, however, no equivalent targets for the other four pollutants covered by the NAPCP, and the targets regarding PM2.5 in the above regulations are concerned with ambient air quality, as opposed to emissions.

Further to this, the Environment Act does not require the setting out of an evidence-based pathway to achieving any long-term targets under its provisions (as is required under the NECR in relation to the NAPCP).

The recently revised national air quality strategy (AQS), 'Air Quality Strategy: Framework for Local Authority Delivery'⁸, is a requirement of the Environment Act 1995, as amended by the Environment Act 2021. It is a statutory policy document setting out the powers, responsibilities, and further actions that Government expects local authorities, and others to take to deliver improved air quality. In respect of the requirements of the NECR, the strategy states that "*We set out our delivery plan for achieving emissions reductions in our Environmental Improvement Plan*" and that the "*Clean Air Strategy (CAS) remains the government's strategy for air quality*".

The AQS does not include the detailed pathway to delivery that is included in the NAPCP and the recent revision to the NAPCP indicates that the CAS is now outdated. As a non-statutory strategy, there is no requirement to update the CAS, which focuses on emissions of the five key air pollutants covered by NECR. In addition, while the EIP does build on CAS and must be updated every five years, there is no requirement to consult the public and it does not conform to the level of detail provided in the CAS and NAPCP. Nor does it clearly present underpinning evidence.

The current EIP for England was published in January 2023 (EIP23) as a revision to the 25 Year Environment Plan. The requirement for an EIP is set out in section 8 of the Environment Act 2021. It requires the Secretary of State to prepare an EIP for a period not shorter than 15 years, as well as annual reports on the implementation of the EIP and review of the EIP every 5 years.

The Environment Act 2021 does not prescribe the air quality targets that are required to be considered in the EIP— instead, these are stipulated in secondary legislation. Nor does it set out detailed content that the EIP should contain on air quality, such as specific actions (or their respective contributions) to meeting emissions reduction targets.

The EIP23 covers 10 goal areas, with goal 2 being 'clean air'. It sets out the legal targets and commitments in respect of air quality, including those required by the NECR. It also sets out the interim targets for each of these, which must be set under the Environment Act 2021, but which are not legally-binding. It does not set out the policies and measures that are intended to achieve the emissions reduction targets, or how they will individually contribute to reductions. Should the EIP be updated to include elements of the NAPCP that we consider good practice, it would not be legally-binding and there would be no ongoing legal obligation to maintain this level of transparency and detail. As such, it still would not provide the same certainty as the current provisions of regulations 9 and 10 of the NECR.

We therefore do not consider either the AQS or EIP23 to duplicate requirements of regulations 9 and 10 of the NECR. As policy documents, they are not legally binding and neither document contains the level of detail included in the NAPCP.

Regulation 9(6) of the NECR sets out that public authorities must have regard to the NAPCP when exercising any functions which significantly affect the level of emissions of a relevant pollutant within the United Kingdom. We do not consider that this duty is fully duplicated elsewhere in domestic law. Section 81A of the Environment Act 1995 requires public authorities to have regard to the AQS when exercising any function of a public nature that could affect air quality. However, as set out above, we do not consider the AQS to duplicate the requirements of regulation 9 of the NECR. Loss of this obligation on public authorities could have unintended consequences for public authorities, such as those acting in a regulatory capacity.

Northern Ireland

Given our remit in Northern Ireland (NI), we have particular concerns regarding the regulatory gap that may arise in this jurisdiction.

⁸ [Air quality strategy: framework for local authority delivery - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/air-quality-strategy-framework-for-local-authority-delivery)

All the risks identified above apply in NI, where emissions of ammonia and PM2.5 have increased in recent years (over the last 10 years of available data, 2010-2020⁹). However, in addition there is less scope for potential duplication with other legal or policy frameworks, meaning a greater likelihood that a gap will result, with no meaningful replacement identified.

Whilst we do not think that the long-term targets established under the Environment Act 2021 duplicate requirements of regulations 9 and 10 of the NECR, it is also worth noting that these targets apply to England only. There are currently no equivalent targets in NI.

There is currently no EIP in place for NI, and we do not know how air quality will be addressed. A Draft Environment Strategy for NI was published on 11 November 2021, and it is intended that this will form the basis of the first EIP for NI. However, this draft strategy is very limited in detail on actions or targets relating to air quality. As such we can make no realistic assessment as to the extent to which the final NI EIP may duplicate in practical terms the requirements of the regulations to be revoked. However, it remains a fact that there is no legal duplication, as there is no requirement in the Environment Act to replicate the detail covered by the NAPCP in the NI EIP.

Northern Ireland was signed up to the UK Air Quality Strategy 2007, which in England has subsequently been superseded by the AQS. A public discussion document was launched in November 2020 in advance of developing the first Clean Air Strategy for NI. However, a draft strategy is yet to be produced and therefore we cannot make any assessment as to what this might cover. Whilst we appreciate that this will be subject to public consultation, there are no comparable requirements for review as are set out in the NECR.

The Climate Change Act (Northern Ireland) 2022 (CCA(NI)) requires that a climate action plan (CAP) be published and laid before the end of the first year of a carbon budgetary period, which is the end of 2023. It is a requirement of the Act that the CAP includes annual targets on air quality (at sections 32 and 51). However, the Act does not specify what these targets should be (i.e. whether for ambient air quality or for emissions, and for what pollutants), and the CAP will not be in place until the end of 2023. We can therefore make no meaningful assessment as to the extent to which the CAP might duplicate elements required by the NECR regulations to be revoked other than that the legal requirement of the NECR themselves are not duplicated by the CCA(NI).

On this basis we consider that there is a significant risk that an important tool for supporting achievement of emissions reductions in NI, as part of the contribution to wider UK commitments, will be lost, with no statutory duplicative arrangements in place.

UK-wide

Whilst we note that the targets for national emission ceilings will remain, as will the requirements for inventories and projections, these are required at the UK-wide level. With the removal of the requirements for the NAPCP, this would leave no statutory programme or strategy in place to coordinate action across England, Wales, Scotland and Northern Ireland towards the UK-wide targets set out in the NECR. In addition, the recently updated AQS represents a framework for local authority delivery in England, while the previous iteration was a UK-wide strategy.

We are aware of the 'Air Quality Common Framework: Provisional Framework Outline Agreement and Concordat'¹⁰, which has ministerial approval from all four governments. This paper sets out how UK Government and devolved authorities propose to work together on policies that aim to reduce harmful emissions and concentrations of air pollutants. We note that in this document, which was published in February 2022, it states that the NAPCP, alongside the inventories and projections required by the NECR, are together needed to

⁹ [Air Pollutant Inventories for England, Scotland, Wales, and Northern Ireland: 2005-2020 \(defra.gov.uk\)](https://www.defra.gov.uk)

¹⁰ [Air quality: provisional common framework - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

ensure compliance with national and international air quality emissions and concentrations targets.

Given the transboundary nature of air pollution, we would consider a key benefit of the NAPCP to be the role it plays in supporting coordination of effort, and clearly illustrating the relationship between the respective policies and measures to be employed in England, Northern Ireland, Scotland and Wales.

We have already set out our specific concerns in relation to NI, but note concerns raised in respect of Scotland, where Environmental Standards Scotland have also found no duplicative statutory provisions to be in place.¹¹

Accountability

We see regulation 9 of the NECR as containing important safeguards in terms of accountability. Should emissions inventories or projections (required under part 2 of the NECR) show that emissions in the UK are, or are at risk of, exceeding national emission reduction commitments, the Secretary of State must review the NAPCP within 18 months.

The need to review the NAPCP has recently been triggered as a result of the most recent projections earlier this year, where four out of five of the reportable pollutants will fail to meet 2030 Emission Reduction Commitments based on current assessments.

These triggers create ongoing, statutory accountability as well as supporting course correction if the UK is not on track to meet its commitments. It ensures that policies and measures for achieving emissions reductions are fit for purpose and are making the anticipated contributions to improving air quality that are needed across the UK.

Whilst this requirement may be considered burdensome by some, we would consider it to be an example of good practice as regards monitoring and evaluation, with feedback on the efficacy of measures informing continuous improvement. Ultimately this type of accountability improves the likelihood of meeting targets by ensuring progress stays on track and approaches are adjusted accordingly.

The NAPCP is a framework that supports implementation of statutory air quality targets. An effective framework for monitoring the implementation of measures to achieve these maximises the potential for improving air quality. We do not agree that the NAPCP does nothing to improve our air.

We do not consider there to be a duplicative requirement for this degree of accountability in respect of the emissions covered by the NECR in domestic law. There are requirements in the Environment Act 2021 for a five yearly review of the EIP, and for annual implementation reports. However, whilst these make a broader assessment of progress against targets, and a longer-term ability to adjust approaches through revision to the EIP, there are no statutory triggers akin to those in regulation 9 of the NECR.

Transparency

We consider that the requirements set out in regulation 10 (regarding consultation on the NAPCP) strengthen transparency and this in turn aids understanding and scrutiny of Government plans for the measures to be taken to achieve emissions reduction targets and can lead to improvement.

For areas of policy or law that could be considered duplicative, there are no equivalent provisions for this level of transparency and engagement. There is no provision for public consultation on the EIP, or in relation to other reporting aspects of the NECR (i.e., inventories and projections).

¹¹ [Correspondence-Mark-Roberts-to-Claire-Adamson-MSP-CEEAC-Committee-REUL-Bill-20230605.pdf \(environmentalstandards.scot\)](#)

Whilst consultation is required for the national Air Quality Strategy, we would not consider this to be duplicative as the subject matter is different and it does not concern the pathway to achieving emissions reduction targets, which the AQS states is covered by the EIP and CAS.

Environmental protection

There is no publicly available assessment as to whether revocation of regulations 9 and 10 of the NECR would likely result in a weakening of environmental protections relating to air quality, nor any indication as to how the Environmental Principles Policy Statement (EPPS) has been considered in the decision to revoke these regulations. Given our concerns regarding the gap that will be left by revocation, we consider there to be a risk that their removal could undermine Government commitments in this regard.

At the very least this revocation will remove a requirement to develop and keep under review a substantive programme of measures to limit anthropogenic emissions in accordance with the national emission reduction commitments. The commitments themselves will remain in place, but without a programme to realise them, the likelihood of meeting them may be reduced.

The UK has seen notable reductions in the emissions of all five pollutants covered by NECR over recent decades.¹² However, some statutory air quality targets continue to be missed. For PM2.5, the UK did not meet the NECR emissions reduction commitment in 2021 and while the UK has seen a reduction in ammonia emissions over the long term, emissions since 2011 have increased. For nitrogen dioxide, the emissions of which are also covered by NECR, there are areas in England that continue to exceed concentration limit values. The NAPCP is an important tool to ensure that the progress seen over recent decades is capitalised on.

Overall, we conclude that removal of these regulations, without an alternative statutory requirement, constitutes a weakening of the legal framework supporting delivery of improved air quality.

¹² [Emissions of air pollutants in the UK - Summary - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/90422/emissions_of_air_pollutants_in_the_uk_summary.pdf)