



**Scottish Independence:
An assessment of a range of
environmental consequences that
might be anticipated to flow from
a hypothetical referendum**



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CORRESPONDING AUTHORS

David Baldock (dbaldock@ieep.eu), Lloyd Austin (lloydaustin@blueyonder.co.uk), Nicolas Woo-Canal (nwoo-canal@ieep.eu), Kaley Hart (khart@ieep.eu) and Michael Nicholson (mnicholson@ieep.eu).

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Executive Summary

The purpose of the study reported here is to assess a range of environmental consequences that might be anticipated to flow from a hypothetical referendum on Scottish independence, were this to occur. No assumptions are made about the desirability, legality, or feasibility of such a referendum or about the likely result. Rather, the study is confined to exploring the consequences of a referendum the legality and results of which were not contested.

Assessing the Scenarios

The assessment is based on the development of three ‘scenarios’, representing the two possible outcomes of any referendum (‘Yes’ and ‘No’), with ‘no’ being the maintenance of the status quo, and ‘yes’ resulting in an independent Scotland. The independence outcome is then further refined into two scenarios, in one Scotland becomes a full EU member and in the other Scotland remains outwith the EU, at least for a significant period.

Within these broad options there are different political and constitutional variations that are possible and merit some consideration. A ‘no’ result could mean the maintenance of the ‘status quo’ with minor departures, if any, from ‘business as usual’ or it could involve significant further changes to the devolution settlement within a potentially reformed UK. A ‘yes’ vote would result (after a negotiation period) in independence. The pathway of the new state is not a given however, especially in relation to Scotland’s membership of the EU, and hence the choice of three scenarios.

All three scenarios involve looking ahead into an uncertain future. In developing them it was possible to draw on evidence from a range of sources, including the historic record, the past and present positions of key actors, including political parties and other institutions and the literature on the environment and environment related policies in Scotland. In addition, a series of interviews was conducted with relevant experts and actors, mainly in Scotland, in the period from autumn 2022 to early 2023. This was an important source of different perspectives on how policies might be taken forward in Scotland under different scenarios and on what might be some of the major issues to arise and uncertainties surrounding them.

Unavoidably, a scenario-based exercise of this kind must consider questions where there is scope for a wide range of different choices to be made and political positions to adopt and so involves an element of conjecture as well as consideration of evidence. The approach to this has been to be as transparent as possible about the basis of judgements that are made.

Timescales

Assessing the likely timescales of an independence referendum is not straightforward. However, plausible estimates suggest that there would be a significant lapse of time between the referendum itself and the full establishment of an independent nation and, in Scenario 2, a further period of time before accession to the EU. This has implications for the timeframe within which any post referendum constitutional decisions and subsequent changes in political orientation, legislation, policy, governance, and the economy could be expected to have substantive impacts on the environment. The majority of impacts seem likely to arise from the 2030s onwards. Nonetheless, in the shorter term, the outcome of the vote itself could signal significant future changes in likely policy direction, including on the environment. The approach to licensing oil and gas extraction in the North Sea is an important case in point.

The seven years from now to the end of 2030 are critical for the environment, especially meeting climate and biodiversity targets. An Independence referendum in 2024-25 or later (as has been proposed by major figures in Scotland) would leave little time to respond in depth to this challenge by 2030. Thus, any critical action to address the biodiversity and climate crises and, most immediately, meet the respective targets for 2030, needs to be taken extremely soon - by the Scottish and UK Governments under the current constitutional arrangements. The possibility of constitutional change in the coming years is not a reason to delay action.

Assessing the Scenarios

Most, but not all, areas of environmental policy and law are devolved rather than resting at UK level and this would be the same in all scenarios. The same is true of agricultural and fisheries policies, both of which are environmentally significant.

One of the main differences between the scenarios is the level at which legal competence for a range of issues that have the potential to affect the environment significantly, but that are not currently devolved, would sit (i.e., in Scotland, the UK or the EU). Many of these issues are outside the realm of the environment per se, for example policies on licensing oil and gas exploitation at sea and powers over taxation. Although difficult, nonetheless, it is important to consider how such powers might be used differently in the scenarios and how much this would be influenced by relationships between future Holyrood and Westminster governments.

The assessment of the scenarios suggested that it is helpful to consider impacts at two different levels. The first of these covers a range of constitutional and cross-cutting issues, including the role of parliament and other institutions, the provisions of a written constitution, the issues of foreign policy and trade policy, questions relating to the economy, fiscal policy, and public expenditure. Outcomes in these areas would be a very

significant influence on developments taking place in a second set of policies, those most directly concerned with the environment.

The second part of the assessment covers a range of such policy issues - at a necessarily high level. Different sections are focused on policies covering agriculture, land use, land reform, aquaculture, fisheries and marine more generally, climate, energy and transport, biodiversity, nature and water, chemicals, industrial pollution, and air pollution. This was not the opportunity for an in-depth analysis. However, it did demonstrate some of the key issues and uncertainties to be considered and significant differences between the environmental issues in relation to the implications of the different scenarios. Departures from the constitutional status quo would be more significant for some areas of policy relating to the environment than others, mainly because the extent of devolution under the current settlement varies considerably.

Caution is required in drawing overall conclusions from a relatively brief and high-level analysis of this kind. However, it does point to a number of observations that could be tested and augmented in more detailed work.

Critical Policy Areas

Policy areas where the transfer of powers seems to be most likely to be significant in relation to the environment in those scenarios where Scotland is not an EU member (either in its own right or as part of the UK), include:

- Major aspects of energy policy, including offshore oil and gas exploitation;
- Other aspects of climate policy, including elements of transport policy;
- The broader envelope of marine policy and ability to coordinate the different strands of this;
- Elements of taxation policy and the potential to orient this more towards climate objectives;
- The funding of agricultural policy;
- Chemicals policy;
- Foreign policy including commitments under the IPPC, such as funding for loss and damage;
- In addition, there would be scope for including new provisions on environmental rights in a new Scottish constitution if it received sufficient political support in the independence scenarios.

A larger realm of policies could be affected significantly if Scotland were to re-join the EU, whatever the circumstances. These would include most elements of environmental and climate policy, where alignment with EU requirements would be necessary, aspects of product policy, fisheries policy, and agricultural policy. This would be a significant

change from the status quo where the Scottish government aims to keep in step with EU legislation where it considers this to be practicable but is not obliged to do so and may well proceed on a selective basis.

On re-entering the EU, Scotland would need to re-join the CAP as well as the CFP, removing national discretion in some policy areas with some environmental drawbacks but it is worth noting that the direction of travel in both the CAP and CFP is for Member States to have increasing flexibility to pursue more tailored and greener approaches than in the historic CAP. The requirement for Scotland to align with a broad range of environmental and climate policies would apply within a fairly short period. The impact would depend on the way in which environmental law had evolved in Scotland and the EU in the intervening period. If there had been little change then alignment could be expected to lead to increased environmental ambition and commitments in Scotland in several areas, for example in relation to air pollution and chemicals, as well as to the restoration of nature if current proposed EU legislation on this subject is adopted without serious watering down.

The Trajectory in the EU

Although there have been fluctuations over time, historically there has generally been a commitment to high environmental standards in the EU, not least under the current Commission which has made the Green Deal central to its agenda. However, this may not last indefinitely and there has been political push back against some key legislation in the Green Deal programme over the last six months. Nonetheless, sudden changes in the progression of EU legislation are rare, partly because of the need to reach agreement between 27 countries and policy positions are much less exposed to the consequences of the political cycle in the way that occurs in any single state, including the UK. Historically it is highly unusual for environmental standards to be weakened. Governance arrangements, including the important role of the Commission in overseeing the implementation of EU based environmental law, seem unlikely to change. On the other hand, decisions can be made more rapidly in countries acting alone outside the EU and in principle legislation could be fine-tuned to national circumstances in a beneficial way if there is the will to do it.

Reflections on different scenarios

In scenarios where Scotland remains in the UK, the question of how the currently reserved powers that affect environmental outcomes would be used by UK authorities in future is one key issue. There is a spectrum of possibilities, the best being where both administrations have high environmental ambitions and use them in a cooperative way. This is a possibility but not the pattern under recent administrations. Relationships have tended to be tense, and the UK government has not chosen an environmentally progressive path in relation to several important topics including:

- the role of retained EU law, a category including large swathes of environmental legislation.
- the licensing of oil and gas developments in the North Sea
- willingness to accommodate Scottish environmental proposals subject to the provisions of the Internal Market Act (IMA), such as the proposed Deposit Return Scheme.

Looking forward, however, future UK administrations may take a different position, as underlined by the current Labour Party's approach to Net Zero and winding down oil and gas production in the North Sea. The net environmental costs and benefits of transferring powers in currently reserved areas depend on developments beyond as well as within Scotland.

Clearly, in looking ahead the political priorities and degree of environmental ambition of the administration that is responsible for a policy area is a critical variable. In recent years, the Scottish government has adopted a more progressive approach to the environment than the UK government in many areas and this is one pointer to likely future positions.

However, there is no guarantee that either the political parties that have been in power in recent years will continue to be so in future or of the position adopted in relation to the environment by parties that could find themselves in power after a referendum. The relatively rapid changes in UK governments since 2016 and their variable positions in relation to the environment are a reminder of the dangers of making firm predictions.

In the case of EU membership, there is a degree of predictability about the future course of environmental law and policy given both established strategies, laws and the proposals expected to be published by the European Commission in the coming months. However, the uncertainties accumulate rapidly as we look further ahead and the scenario that does not involve EU or UK membership is potentially less predictable, not least because there is scope for departing from both EU and established UK law affecting the environment in a variety of different directions.

While proven EU governance arrangements and the historical stability and forward progression of environmental law is a significant potential benefit of EU membership in most environmental sectors, there is not the equivalent track record to draw on for scenarios where Scotland is a fully independent state outside both the UK and the EU. Governance arrangements since Brexit are relatively new, so less proven, but include the creation of Environmental Standards Scotland (ESS), which has significant powers, which should not be underestimated. The strong commitment to renewable energy and tackling climate change is well established in Scotland, but in this and other areas, not least

biodiversity conservation, implementation often has lagged behind aspiration. This is a potential concern in Scenario 3, where an independent Scotland does not join the EU and there are other uncertainties for example about the strength of the economy, the approach to trade and the availability of public funds. This makes the evaluation of future environmental impacts in this scenario more difficult.

Finally, this report has sought to identify and describe a range of opportunities and risks that could arise under different scenarios. Their range and diversity, however, means that there is no one outcome that is clearly most optimal for environmental policy. All involve a balance of opportunities and risks. For environmental NGOs and others in the sector, efforts in the coming period seem best directed towards monitoring developments - and challenging all parties to the debate to ensure the environmental opportunities are taken and the risks are minimised. In several areas there would be opportunities for an independent Scotland to increase environmental ambition outside the UK. However, the ability of future governments to deliver on such ambition needs to be taken into account, including the availability of the necessary public funding and other resources and the political readiness to deploy them.

1. Introduction

In Scotland, as elsewhere, there are enormous opportunities and challenges for the environment in the coming decades. The selection of policies to address this agenda will be influenced by many factors but amongst them will be choices made with respect to Scotland's constitutional future. The debate on the constitutional future is a key part of the context influencing nearly all public policy in Scotland (see Box 1 below). This report brings together the results of a study to assess the potential environmental consequences of different scenarios that might follow a referendum on independence; the study was conducted mainly in the last quarter of 2022 and early 2023.

Box 1: Scotland's constitution and the environment

The debate over Scotland's constitutional future is far from new, dating back to the Act of Union itself (see Annex 2). It was re-ignited after the 2021 Scottish elections, which led to an SNP-led Scottish Government (in partnership with the Scottish Green Party) committed to a second referendum on Scottish independence. This commitment remains government policy (notwithstanding the recent UK Supreme Court decision on the proposed Referendum Bill¹).

The outcome of a referendum, or an alternative political route to changing Scotland's constitution and relationship with the UK, would have consequences for environmental law, policy, institutions, economic forces, and other factors influencing the environment. Although extensive powers applicable to the environment have been devolved to Scotland, there remains shared responsibility for the environment, between the UK and Scottish Governments.

In the light of experience during and after the first independence referendum, in 2014, and the UK-wide Brexit referendum of 2016, it is safe to expect that:

- a) environmental issues will arise and be discussed during any new referendum campaign;
- b) whatever the outcome, the consequences are likely to impact significantly on the development and implementation of environmental policy; and

¹ <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-63727562>

- c) environmental bodies, including those sponsoring this report, will be amongst those with an interest in such impacts, and their views may be sought in the course of the campaign.

This is the background to this study. The formal remit of the study is set out in Annex 1. It should be emphasised that no assumptions are made about the desirability, legality, or feasibility of such a referendum or about the likely result. Rather, the study explored the consequences of a referendum the legality and results of which were not contested.

It was essentially a desk study informed by a literature review, interviews with range of interested and informed people and a workshop involving the commissioning organisations and a number of the interviewees. It seeks to be an independent and dispassionate assessment, undertaken in a transparent way, significantly in advance of a potential vote, with no prior assumptions. As such, this report represents the conclusions of the authors and not the commissioning bodies.

Our assessment is based on the development of three ‘scenarios’, broadly representing the two possible (binary) outcomes of any referendum (‘Yes’ and ‘No’), with ‘no’ being the maintenance of the status quo, and ‘yes’ resulting in an independent Scotland². The independence outcome is then further refined into two scenarios, in one Scotland becomes a full EU member and in the other Scotland remains outwith the EU, at least for a significant period. These scenarios are discussed more fully in Chapter 2 - followed by a discussion and assessment of the cross-cutting issues raised in Chapter 3 and, then a series of more specific sectoral and environmental issues in Chapter 4. Conclusions then follow.

Box 2: Sturgeon resigns, Humza Yousaf becomes new First Minister

During the final stages of this report’s preparation, Nicola Sturgeon announced her intention to resign as First Minister and leader of the SNP³. Subsequently, after an internal SNP election, Humza Yousaf was appointed as the new First Minister. He was widely believed to be the ‘continuity’ choice as new leader.

Clearly, this major political development may lead to significant changes in Scottish

² Since the UK Supreme Court ruling in November 2022 (<https://www.supremecourt.uk/cases/uksc-2022-0098.html>), it has seemed to many less likely that an independence referendum would take place in the near future. Given this, Scenario 1 (i.e. the status quo) effectively has many of the attributes of what could occur in the next few years in the absence of a referendum on independence.

³ <https://www.bbc.co.uk/news/uk-scotland-64647907>

Government strategy, tactics and/or policies - as well as the SNP's approach to its campaign for independence. Indeed, there was speculation that this political uncertainty will lead to a delay⁴ and/or that the current strategy will be abandoned⁵. However, in practice, little appears to have changed - the UK Supreme Court decision had already generated delays and uncertainties - and this continues to be the case.

Notwithstanding the above, the SNP remains committed to independence and to securing that aim through campaigning and democratic change; and, along with the pro-independence Green Party, they lead a majority in the Scottish Parliament. Moreover, opinion polls on the question of independence itself remain at around 50:50 (albeit with poll variation of +/-5%)⁶.

The assumption adopted for this report has been that the issue of independence would be determined by a legal, uncontested democratic event (most likely a referendum). Considering the recent Supreme Court decision and the current, and likely, positions of the UK and Scottish Governments, our estimated timeline (see chapter 2) has suggested that such an event, if it took place, would likely be in the late 2020s or beyond. While strategy to achieve this may be revised (and may be revised again in light of further developments - such as the outcome of the forthcoming UK election), it can be assumed that seeking to secure independence will remain the aim of the SNP, of the current Scottish Government, and thus remain central to the Scottish political and policy debate.

Given these circumstances, the question of the environmental consequences of constitutional change remains both topical and of significant interest. Further political shocks and upheavals may arise - but, in current circumstances, the independence debate and efforts to secure a referendum will continue, and stakeholders will wish to be informed of potential consequences for environmental and related policies.

⁴ <https://www.theguardian.com/uk-news/2023/feb/16/sturgeon-resignation-might-delay-new-scotland-independence-vote-by-five-years>

⁵ <https://www.thetimes.co.uk/article/calls-for-snp-independence-referendum-scrapped-scotland-nicola-sturgeon-bbxkcz3k3>

⁶ For instance, see <https://bylines.scot/politics/what-really-lies-behind-the-snps-slip-in-the-polls/> for recent evidence that support for independence remains stable despite fluctuations in support for political parties.

2. The scenarios

As outlined in the introduction, this study is based on the development of ‘scenarios’ that describe alternative versions of a post-referendum Scotland. These are broadly based on the two possible (binary) outcomes of any referendum (‘Yes’ and ‘No’), with ‘no’ being the maintenance of the status quo⁷, and ‘yes’ resulting in an independent Scotland. The independence outcome is then further refined into two alternative scenarios: in one Scotland becomes a full EU member as rapidly as practicable and in the other Scotland remains outwith the EU, at least for a significant period. The scenarios may, therefore, be summarised as:

1. Scotland remains in the UK following the referendum;
2. Scotland leaves the UK and joins the EU as soon as practicable; and
3. Scotland leaves the UK and is outside the EU, at least for a significant period.

Before considering these scenarios in more detail, some context and initial assumptions need to be laid out.

2.1. Initial assumptions - horizontal to all scenarios

A number of assumptions are needed to create the scenarios, and these include some which relate to the political parties that might be in power and their policy orientation.

First, as emphasised already, it is assumed that the referendum exercise is accepted as legally valid by all key stakeholders and that the results are not contested, including by the Westminster government. No assumptions are made about the question asked or the precise model of independence put forward by the Scottish Government at the time or in the official literature associated with the referendum.

Second, the state of the UK economy, energy and cost of living concerns, and the effects of the Ukraine war around the time of a future referendum are all unknowns. They are, amongst the important geopolitical, socioeconomic, and political factors that might have an influence on the scenarios and other elements of the analysis. However, they are difficult to forecast, especially without knowing the date of the referendum. Specific assumptions on these variables are thus avoided as far as possible.

⁷ The use of the terms ‘status quo’ and ‘Scenario 1’ include the rejection of independence as well as the possible absence of an independence referendum in Scotland.

Third, following the 2022 Supreme Court decision relating to a potential referendum⁸, it is assumed that the date of any referendum is likely to be after the next UK election, and therefore probably not before Spring 2025 and might well be in the period up to, say, 2026 or later. Either way, a UK election is assumed prior to then and thus a new UK government will be in place. The proposition, by some and floated by the previous First Minister, that the next UK election should be considered a *de facto* referendum is interesting politically. However, it is assumed, for the purposes of this study, that a normal referendum (agreed by all, see above) will be necessary.

Fourth, it is assumed that the date of the next UK election is most likely to be in the second half of 2024 and probably that tough economic constraints continue to apply, with a corresponding impact on public expenditure. In relation to the possible outcome of that election, the only source of evidence at present is the current opinion polls, suggesting a significant Labour lead. Consequently, **Scenario 1** (Scotland remaining in the UK) assumes that the current government may well not win the election. A Labour or Labour-led UK government may well be significantly different to the present government in relation to matters such as:

- a) its approach to Scotland and devolution/independence (including intergovernmental arrangements, such as the Common Frameworks);
- b) its approach to the EU and interest in joining more extensive cooperative initiatives and even new structures, which might develop into pursuing something closer to the “Swiss model”;
- c) its approach to the environment;
- d) its approach to the operation of (if not the principles of) the UK Internal Market Act⁹; and
- e) its approach to regulation, deregulation, and the role of Retained EU law. For example, it could be more aligned to the social democratic vision espoused by the SNP.

Conversely, whilst it is early days, it also seems not unreasonable to assume that the direction taken by the Sunak Government will continue broadly along the lines of the 2022 autumn statement and will be less implacably de-regulatory than the Truss government, while still emphasising the pursuit of Brexit opportunities. Were this government to remain in office following the UK general election, similar policies might well continue but any assumptions become increasingly speculative.

Thus, the uncertainties related to the result of the next general election, and the significantly different environmental proposals on offer from the various parties that

⁸ Devolution issues under the Scotland Act 1998, Reference by the Lord Advocate (Rev1) [2022] UKSC 31 (23 November 2022) <https://www.supremecourt.uk/cases/uksc-2022-0098.html>

⁹ For more on this topic, please see Annex 3 below.

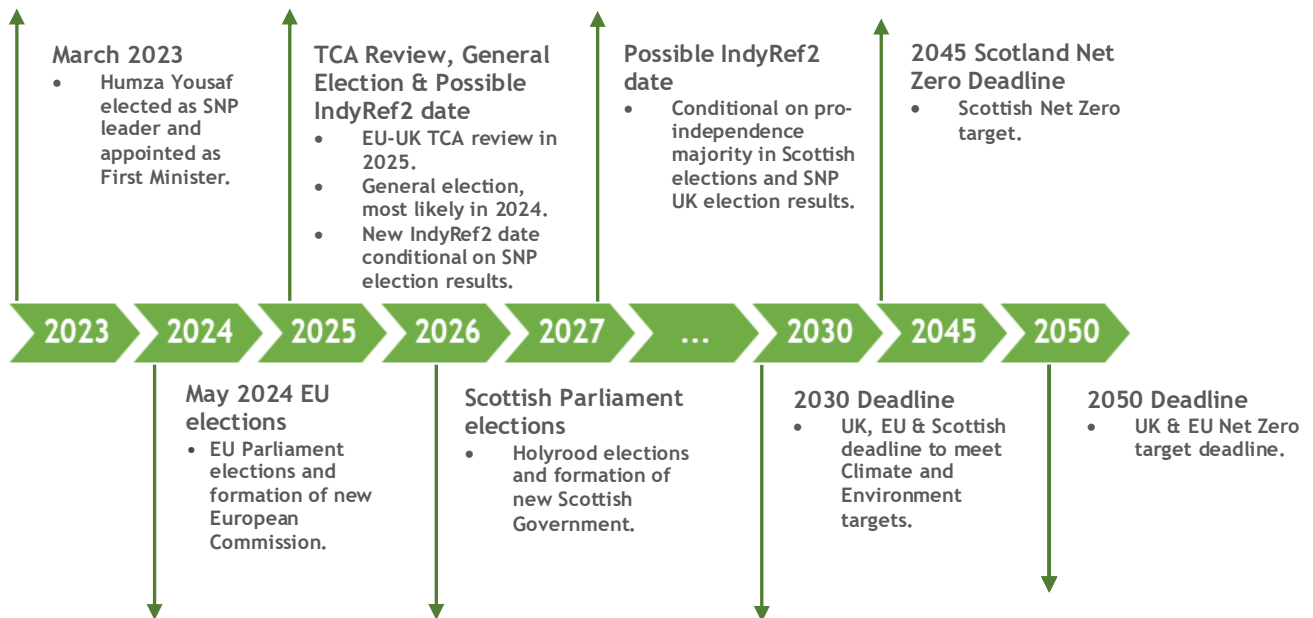
might have a role in a future government, reinforce the need to allow for more than one possible direction of travel in the UK. In **Scenario 1** a form of sub-scenario has been adopted for this reason.

Fifth, it is assumed that the Northern Ireland Protocol, as interpreted and amended by the Windsor Framework, is accepted as a workable settlement by the UK Government and is no longer a source of contention between the EU and the UK, irrespective of political developments within Northern Ireland. It sets interesting precedents about the status and management of sensitive EU land borders and what happens when crossing rights, processes and costs are changed. The workability of mixed legal competence arrangements, as in Northern Ireland, is being tested.

Sixth, the timing of the assumed referendum will, to some extent, impact on each of the scenarios, even if the precise date does not make too much difference. It now seems inevitable that it will not be possible for a referendum to take place on the previously proposed date in October 2023. Thus, for our purposes, it is assumed that, if it does take place, any fairly near-term referendum compatible with the assumptions above (including the consent of the UK Government), would be in the ‘window’ between the next UK elections and the next Scottish elections (that is, late 2024 to early 2026) or, perhaps more likely now, after the next Scottish elections, if a pro-independence majority is re-elected¹⁰. Such a possible timeline is illustrated in Figure 1 below.

¹⁰ Notwithstanding the scheduled date of the next Scottish elections, proposals have been made for an earlier (or additional) vote as part of an independence strategy; see <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-64931626>

Figure 1: A timeline of agreed and prospective events



Most notably, this timeline has implications for the dates by which the full consequences of a vote for independence would have worked their way through and in turn will have a strong bearing on environmental policy and law. Once periods required for intra-UK negotiations and/or EU accession have elapsed, it would be close to 2030 before the full constitutional, governance and legal changes associated with independence will have fully taken effect. Thus, the impact of these measures on environmental outcomes would be expected to be felt more in the 2030s and beyond than in the 2020s. Such policies would seem much more likely to be able to address the climate and biodiversity targets for 2040, 2045, etc than those for 2030. By contrast, a vote to stay within the UK would mean that all targets would need to be met under current arrangements.

Finally, events in Scotland and the UK do not take place in isolation. Both wider geopolitical developments and advances in environmental policy at the global, regional and EU levels will continue to occur. Most recently, for example, COP15 in Montreal concluded with a significant UN agreement on a global biodiversity framework¹¹. Under all our scenarios, Scotland and/or the UK would be party to, and subject to, such global policy developments. In addition, while the influence of the EU will vary between scenarios, policy development within such a large and close polity, that remains a

¹¹ <https://www.unep.org/news-and-stories/story/cop15-ends-landmark-biodiversity-agreement>

significant trading partner of Scotland and the UK, also will be a factor in every scenario¹².

2.2. Initial assumptions - horizontal to all independence scenarios

Both scenarios related to independence assume that eventually there will be a fair division of assets and liabilities between Scotland and the Rest of the UK. This may, of course, take some time, probably years, to negotiate and would be a potentially complex exercise. (It is also not entirely clear who would represent which interests in the process).

There would be political trade-offs for the negotiators on both sides, not necessarily ring-fenced within the same areas of policy. Some of the issues that would be on the table are likely to be of environmental interest, for instance in relation to the precise way that responsibilities in certain areas are divided and how future joint or co-ordinated decision making arrangements over shared resources, such as the marine environment and certain fisheries, are intended to work. Indeed, there may be opportunities for environmental interests, including NGOs to influence aspects of the exercise and propose options in certain areas and some preparation for this eventuality could be worthwhile. However, we make no assumptions about specifics, such as the division of government debt, in these scenarios. This avoids clouding the environmental issues with too many other uncertain variables¹³.

It is also assumed the SNP, or a coalition, would form the government in Scotland following a vote for independence. Thus, the policies of those negotiating and of any early independent Scotland would be 'along the lines' of the current devolved Scottish Government. However, it should also be noted that there could be an election before the process is complete and different parties may acquire a role. Following independence, the future of all political parties and especially the SNP (and therefore of the policies that affect the environment) is not wholly self-evident. Several interviewees reflected

¹² This influence is commonly referenced as the 'Brussels effect', see <https://scholarship.law.columbia.edu/books/232/>.

¹³ There is, however, an interesting question about how the current UK overseas territories (UKOTs) might be treated - and whether there would be a division between Scotland and the Rest of the UK. Might Scotland 'inherit' a portion of the current UK overseas territories? This is an important environmental question as the UKOTs are of huge importance for biodiversity conservation - being, probably, the most biodiverse parts of the current UK, as well as for marine resources, including fisheries and oil & gas. How and if this question is addressed might be an issue that environmental NGOs will wish to consider; and/or if Scotland chooses not to pursue this consideration might be given to what, if any, assets are claimed *in lieu*.

that there could be some re-alignment in Scottish politics after independence, perhaps with a more conventional left/right spectrum, emerging over time.

Whilst the proposition made by pro-independence parties is likely strongly to favour EU membership for Scotland, this cannot be taken for granted. A referendum on this issue may be needed. Negotiations with the EU could begin quite early, even while the separation with the Rest of the UK is being negotiated, and the Scottish side will have an eye on what the EU will look for when negotiating independence. However, we assume that a period of time will be required to establish Scotland as a fully independent country. During this period, new border arrangements with the Rest of the UK would be put in place, and new institutional apparatus created, including a new currency, central bank, trade agreements and more. A number of steps would be necessary before negotiations with the EU could proceed beyond a certain threshold. During this period, relationships between the Rest of the UK and the EU will almost certainly change, particularly if there were a Labour-led government. Consequently, there could well be parallel moving parts in negotiations over a period of years.

There would be a combination of factors that would influence Scotland's prosperity as an independent country that reach well beyond the limits of this project. However, several interviewees drew attention to the challenges to be faced, such as the costs that might arise from taking on a share of UK debt, ending any net transfers from the Rest of the UK, the need for and cost of phasing out fossil fuels and old infrastructure, net contributions to the EU budget etc. These could add pressures on public expenditure that could have important environmental implications. The economic importance of certain key export industries, including farmed and wild fish, whisky, renewable energy, and tourism would be greater than it is currently for the UK as a whole, giving them potential leverage in policy decisions, including those affecting the environment.

2.3. The three scenarios

As indicated above, the three scenarios that form the starting point for the assessment and analysis that follows are:

1. Scotland remains in the UK following the referendum;
2. Scotland leaves the UK and joins the EU as soon as practicable; and
3. Scotland leaves the UK and is outside the EU, at least for a period.

These are described in more detail in the following sections, along with a discussion of the possible variations that might arise in the light of events - in Scotland, in the UK or elsewhere.

2.3.1. Scenario 1: Scotland remains in the UK.

Scenario 1 is the default or “business (more or less) as usual” outcome. This is the simplest scenario as we assume continuity in most respects, although without implying that it is particularly stable or settled, especially given possible changes in government at the Scottish and UK levels. This is also, of course, the default scenario that applies should any referendum be significantly delayed or, indeed, is not agreed within the timeframes envisioned here.

Analysis of this scenario is based on an understanding of the current constitutional arrangements. This ‘status quo’, as well as its recent history and the environmental profile of previous administrations are set out in Annex 2.

Other factors and potential variations that need to be considered in any assessment of **Scenario 1** include:

A referendum and the campaigns preceding and accompanying it, are frequently a trigger for wider political debate around constitutional issues. Based on the 2014 experience¹⁴, as well as more recent events, this creates an enhanced opportunity to put forward other proposals. These could include support at UK level for steps towards further devolution or wider constitutional change. It is not unlikely that a future 'no' campaign would offer "reform of the UK" in some form as a counter to the pro-Independence arguments. The recent Labour proposals¹⁵, produced by a Commission led by Gordon Brown, are an example of such “counterproposals”. Given the significant possibility of a Labour (or Labour-led) UK Government, the likelihood of such proposals for further constitutional change needs to be factored into any consideration of **Scenario 1**.

- **Scenario 1** assumes no change to the formula for distributing UK Treasury resources between the 4 countries (the “Barnet formula”), or to the Internal Market (IMA) Act or the Common Framework Agreements, although there is consideration of potential change, for example if a different government came into power in the UK.
- The Retained EU Law (Revocation and Reform) Act, enacted in July this year is also a factor, with implications for the Scottish Government. However, it is not yet clear what, if anything, the Scottish Government will do with its newfound ‘opportunities’, or what the UK Government may do in respect to Scotland with theirs. The Scottish government’s stated opposition to the Act could lead to a

¹⁴ See, for example, the “vow”, the Smith Commission and Scotland Act 2016 that followed the 2014 referendum.

¹⁵ *A New Britain: Renewing our democracy and rebuilding our economy* (<https://labour.org.uk/wp-content/uploads/2022/12/Commission-on-the-UKs-Future.pdf>)

potential new area of conflict with the UK Government, not least on environmental policy, which comprises a large swathe of Retained EU Law.

Any consideration of **Scenario 1** must take account of the non-trivial probability of a change in the Westminster government, after the next election. As noted above, this might result in a different approach to EU relations and a more collaborative approach to Scotland. The review of the EU/UK Trade and Cooperation Agreement (TCA) due in 2025 could open new options for example. Whilst the Labour Party position is not to seek to re-join the EU, the Single Market or other core components of the EU, there could be a place for the UK in the potential European Political Community if this gets off the ground for example. Conversely, UK-EU relations could worsen given flashpoints such as immigration and refugee policy.

- The course of UK-EU relations affects issues of relevance here, such as whether the UK, including Scotland re-joins the EU's research programme, Horizon Europe and whether conditions are ripe for more EU/UK cooperation on the environment. Scotland can, and does, foster bilateral relations with the EU whilst within the UK, but most forms of concrete cooperation depend on wider UK/EU relations.

The various factors described above mean that within the political domain there are, essentially, two sub-scenarios within **Scenario 1**: one with a UK Government continuing to pursue the current approach and one with a UK Government, potentially led by Labour, pursuing a different approach. There will be many similarities (for example, both Labour and the Conservatives are currently against a referendum itself, let alone independence). However, there are likely to be significant differences in certain aspects of the main scenario being analysed. For instance:

It seems a fair assumption that, after an election, a future Conservative government will continue to favour more divergence from the EU, in certain areas of law but not others, perhaps on a rather selective and opportunistic basis. Further deregulation impinging on the environment also seems likely, especially around the planning system and perceived barriers to economic growth but probably not a substantial reduction in environmental standards more generally. The approach taken by a Labour or Labour led government might be different in several respects, for example in level of commitment to measures needed to meet Net Zero by 2050 or the priority given to the environment in agricultural policy.

On current assumptions, the differences in approach relative to Scotland in some areas seem likely to increase, assuming Scotland follows broadly its current path, including more active alignment with EU legislation on the environment. This could continue to cause tensions in some areas, such as standards related to traded products in particular

under the Internal Market Act. However, this trajectory of divergence from England is much less certain after the next UK election.

2.3.2. Scenario 2: Scotland leaves the UK and in due course joins the EU.

This scenario is based on a referendum result supporting independence, together with Scotland subsequently joining the EU. Joining the EU, following independence, is currently the aim of the SNP and Scottish Greens (the two main political parties in favour of independence). However, while this forms a core part of the debate and is widely viewed positively among independence supporters¹⁶, it is not necessarily straightforward. In addition, there are also independence supporters who do not favour EU membership - in a post-referendum Scotland, this group may coalesce with (former) Brexit-supporting unionists to challenge any accession or, at least, ensure it is subject to a further referendum.

This scenario is subject to a range of factors that will affect the outcome, and thus the scope for environmental policy development and implementation. First, there are the issues of *timing and process*. Independence followed by EU accession would, of necessity, be a multi-step process with no certainty over the duration of the individual steps or the process as a whole. Simplifying the process a little, these steps might be summarised as:

- Step one comprises negotiations within the current UK over the independence deal. Scotland will face a trade-off between seeking speed to conclusion and the best deal that can be negotiated. The duration and complexity of the Brexit process, including the inherent trade-offs that had to be addressed, provide some evidence of the likely process. A duration of 2-3 years would not be unlikely, while longer is also very possible. The complexity of these negotiations could be increased if representatives of Scotland pursue a deal that minimises barriers to re-joining the EU, for example in relation to the land border with England, as well as achieving the best settlement with the Rest of the UK. There are lessons to be learned from the protracted discussions over the form and implementation of the Northern Ireland Protocol between the EU and UK.
- Step two is the building of a fully functioning independent Scottish state with the necessary institutions, currency, central bank, constitutional arrangements, etc. The nature of these arrangements and how they are determined is currently unclear and subject to uncertainties - the Scottish Government papers to date

¹⁶ For example: <https://www.heraldscotland.com/opinion/23216459.prospects-independent-scotland-rejoining-eu-positive/>

offer some, but incomplete, guidance on their preferences. One necessity would be to establish an entity with the capacity to negotiate with the EU (and with which the EU would be willing to negotiate). This step seems likely to include a new election, under the fresh rules, to establish an independent (rather than devolved) Scottish Parliament and Government. Such an election might be used to establish a mandate for EU accession - although it might, conceivably, also be an opportunity for the anti-EU voices to coalesce. The time required for this substantive step is very difficult to estimate but seems unlikely to be shorter than one or two years.

- Step three is the political decision to join the EU with a full democratic mandate. This could require a further referendum - unless the election described above is viewed as itself establishing an appropriate mandate. This might add up to a year to the overall process.
- Step four is a formal application to join the EU and then to negotiate terms. This could be quite short on some scenarios as Scotland meets the key criteria re democracy, rule of law, etc. and applies nearly all the *acquis* (current EU legislation). There should be no major barriers in this respect but other aspects of the negotiation, concerned with currency for example, may be more demanding. The precise direction of the negotiations is difficult to forecast and may be influenced by factors outside Scotland's control, such as the state of negotiations with other nations seeking EU accession. The war and special position of Ukraine adds to uncertainty on this front. This stage would also be affected by other EU nations' perspective on the process leading to independence - if the referendum is agreed by all parties as legal and uncontested, as assumed in this study, presumably this would not be an issue. However, any disputes may lead to concerns from member states where similar 'succession movements' are active. The duration of this step may be an additional two years or so but conceivably might be faster (as happened with the integration of the former East Germany into the EU following German reunification) or longer if any of the issues mentioned become problematic to either party.

Although distinguished here as separate steps, several processes could be advanced in parallel and there are interactions between them. Thus, the total time required to negotiate independence and then join the EU will not be a simple sum of the duration of each step. However, an overall timeline of between four and, perhaps more likely, six years does not seem unreasonable as an initial assumption. This contrasts with the 18-24-month period envisaged by the "Yes" side in the 2014 campaign¹⁷. Although no new proposed timescale has been suggested by the current Scottish Government or other

¹⁷ <https://www.gov.scot/publications/scotlands-future/pages/4/>

independence campaigners, most observers now recognise (especially given the experience of the Brexit negotiations) that a longer timeframe is likely.

The second major issue for this scenario is the *terms of accession* to the EU. The key assumptions here are that:

- Scotland would be a full member in conventional terms, including membership of the entire Single Market, the Customs Union, the Freedom of Movement requirements, etc - and that the Common Agricultural Policy, Common Fisheries Policy and the EU acquis would apply, including legislation on the environment, climate, energy and capital markets. In some instances where Scotland was not in alignment with the acquis it might be possible to negotiate a grace period, but this is not easy to predict.
- Scotland would also re-join the EU's Internal Energy Market and become subject to EU climate legislation, including that on ETS, Renewable energy, LULUCF, energy conservation, the Effort Sharing Regulation etc.
- Scotland would benefit from joining EU research funding arrangements and may expect some funds from the CAP, various EU structural funds, LIFE+ and other EU budgets. However, it is almost certain to be a net contributor to the EU budget at a non-trivial scale. It is difficult to estimate the likely sums involved in advance, but some clues can be gained from the size of a country's Gross National Income (GNI), since this is one of the main determinants of the contribution that it is required to make to the EU budget. Funds received from the EU then have to be deducted from the overall payments made in order to arrive at the net contribution. Conditions have changed since 2021 and will change further in future but, at that time, the Republic of Ireland with a Gross National Income (GNI) about 15% greater than Scotland's, was a net contributor of €703m¹⁸. Net contributing Member States draw down funds from a variety of EU schemes and need to meet the conditions attached to them but their overall payments into the EU budget exceed the sums obtained from the EU schemes. In effect, a portion of public expenditure is aligned to EU priorities rather than being solely a matter of national discretion, but the overall economic benefits of EU membership may be much greater than the net contribution made, so this is not a simple equation.

¹⁸ While Scotland's population is larger than Ireland's, economically speaking, in 2021, Scotland's GNI was £170.9bn (c.€199.4bn), whereas Ireland's was €233.9bn. As such, considering Ireland's EU membership fee in 2021 was €3,071m (+€703m net contribution), it may suggest that Scotland's contribution could be lower than Ireland's, a comparable EU Member State, (based on its GN and population) and that its need for state-building funds from Europe could make it a net recipient in the early years of membership. <https://data.gov.scot/primary-income-account/>; <https://www.cso.ie/en/releasesandpublications/ep/p-ana/annualnationalaccounts2021/gniandde-globalisedresults/>; <https://www.statista.com/chart/18794/net-contributors-to-eu-budget/>; <https://www.statista.com/statistics/316691/eu-budget-contributions-by-country/>

- Scotland would have an allocation of MEPs and a voting allocation in the Council that could be expected to be broadly proportionate to other Member States with roughly similar populations.
- It also seems likely that Scotland would face a (theoretical) requirement to join the Euro. However, it must be noted that several Member States, such as Sweden, are subject to a similar requirement but have not, in practice, taken this step.
- Scotland would be free to join the European Environment Agency and would be expected to do so.
- Finally, the negotiation of possible special terms re the relationship with the rest of the UK and the regimes applying at the border with England would be a sensitive and potentially tricky point between the three parties involved. There may precedents or concepts from the NI protocol (and associated Windsor Framework) that are ‘carried over’ into these discussions.

2.3.2.1. Powers gained by Scotland following independence.

Most powers relating to the environment, agriculture, fisheries, and territorial waters are devolved to Scotland already - albeit their use is subject to constraints in certain areas deemed to have UK-wide implications and especially where there are reserved matters (see **Scenario 1** and Annex 2: Scotland’s constitutional debate). The major thematic policy areas of environmental significance that would be gained by Scotland following independence would be in relation to:

- Aspects of energy policy not already devolved, including in relation to the licensing of oil and gas extraction in the North Sea, development of interconnectors, control of energy markets and key aspects of civil nuclear power (beyond the powers over planning aspects which are devolved already).
- Aspects of marine policy, including many more responsibilities beyond the 12nm (nautical mile) territorial zone.
- Several aspects of fiscal and economic policy which in principle would allow the deployment of new measures to support environmental objectives, for example combinations of investment aid and tax policy.
- Foreign policy, including development assistance (ODA spending) and the deployment of diplomatic services.
- Freedom to join or leave international organisations and agreements, including the European Environment Agency.

2.3.2.2. Some assumptions/questions about the EU post 2025.

There may be 30 or more Member States (MS) by the time of a Scottish application, with new members on the eastern side of Europe. This and other factors, including the outcome of the 2024 European elections, may influence the EU's internal policy agenda and the extent of support for environmentally ambitious policies.

Nothing is certain but generally, it seems probable that the EU will continue with a broadly progressive environmental policy. Several ambitious measures with target dates in the 2030s and beyond have been adopted or are being negotiated during the current Commission's term, within the general framework of the Green Deal. Nonetheless, the new Commission and European Parliament after the 2024 election may have a different political complexion and set of priorities than the present one and the strong performance of right-wing parties in a range of recent national elections should be noted. A less "progressive" agenda in environmental terms after 2024 is entirely possible.

Regarding the CAP, the direction of change is assumed to continue, with more emphasis on sustainability within the framework of the current "New Delivery Model", which gives greater responsibilities to Member States but requires a more strategic planning process for the use of different payment schemes for farmers; the next CAP and other EU spending policies should be in place from 2028.

The 'Green Deal', currently central to EU environment, climate, biodiversity, and food policy, is assumed to be taken forward but may not necessarily be quite as ambitious as originally intended because of opposition from varying combinations of political parties, private interests and reluctant Member States and the relatively short time available to the current Commission to secure agreement on the outstanding issues before the end of the term in 2024.

2.3.3. Scenario 3: Scotland leaves the UK but does not join the EU, at least for a period.

As described above, the policy and ambition of the current Scottish Government and most independence campaigners is for an independent Scotland to join the EU. However, as also noted, this is not inevitable and would not be immediate if the past is any guide. Thus, a balanced analysis of post-referendum circumstances must also include the possibility that an independent Scotland (for one reason or another or for at least a substantive period) may not join the EU. Such a situation is envisaged in this scenario.

Many variants on this scenario can be imagined - but this study focuses on two:

- The first would be a purely temporary state of transition during which Scotland was establishing itself as an independent nation and going through the process of applying for EU membership. This could take some years (see above). Indeed, some version of this transitional stage seems unavoidable. On this variant, there is essentially a transitional process, with a need to have substantive interim arrangements in place. It would be a period of institution building and constitutional change but without the necessity of immediate alignment with EU requirements.
- A second would be that an independent Scotland re-considers (as a result of fresh elections, a referendum, or other democratic process) its options and decides EU membership, particularly full membership, is no longer its ambition. The basis for such a re-consideration could take many forms - it may arise from past Euro-scepticism/support for Brexit, but may also include worries about the currency and potential need to adopt the Euro, economic impacts, worries over the likely disruption and uncertainty as exhibited by the Brexit process, fears of reduced control over fisheries, worries about the difficulties that could arise with the England border, etc. In certain circumstances, the options for a closer relationship with the EU that fall short of full membership (joining the Single Market for example) may be greater and more appealing than they are now.

In this second variant, Scotland might seek to maintain sterling as the currency and retain closer relations with other parts of the British Isles than in **Scenario 2**. It would not be incompatible with building a closer relationship with the EU and joining potential EU neighbourhood initiatives, such as the proposed European Political Community. Joining the EEA or the Single Market, either completely or partially, might also be an option although the border with England would then be a substantial issue and the arrangements under the Northern Ireland Protocol would be of great relevance.

In the assessments that follow in chapters 3 and 4 the focus is almost entirely on the second of these two variants. This is because it is a distinctively different future for Scotland than **Scenario 2**. In the first variant, essentially an extended transition period, it would be expected that Scotland would be seeking to align with the EU, as in **Scenario 2**, so there are considerable similarities between the two.

2.3.3.1. Powers gained by Scotland following independence.

These would be the same as in **Scenario 2** and will not be repeated here.

3. Cross-cutting governance and policy issues

Five key cross-cutting issues that appear of particular relevance to the environment are explored in broad terms here, while more specific areas of policy are considered in the next chapter.

3.1. Constitutional matters

Clearly, there are significant differences between the scenarios in relation to the constitutional settlement and the ramifications for governance, policy and, ultimately, the environment. Of necessity, these can be considered only at a relatively high level and with recognition of the multiplicity of factors and the many uncertainties about how different options will play out over time.

A natural starting point for any analysis is the historic record and therefore the approach to the environment by successive governments and Parliaments in Scotland under the current constitutional arrangements. The brief review of devolution to date and the environmental track record in Annex 2 highlights a number of Parliamentary or ‘constitutional’ issues that, it would appear, have contributed to what can be regarded as a generally positive approach by the Scottish Parliament in adopting environmental legislation since 1999. The fact that the legislative ambitions have not always been translated into the envisaged outcomes - as implementation and delivery has often been less effective - also comes to the fore in this review.

The factors that appear to have contributed to the adoption of more progressive legislation in Scotland include:

- A preponderance of minority or coalition governments - as a result of a proportional voting system;
- A generally open and accessible Parliament - along with a relatively small policy community where “everyone knows everyone else”; and
- An active, informed environmental NGO sector that has successfully used the Parliament’s openness to influence legislation - both at that stage and in other processes, for example by encouraging political commitments in Party manifestos.

On the other hand, it is also clear that in some ways, the operation of Holyrood has been such that scrutiny of policy implementation and outcomes can at times be less rigorous than might be ideal. This might in part contribute to the “Rhetoric vs reality” critique that comes up in relation to overall environmental performance in Scotland¹⁹. With enhanced scrutiny, the Government could be expected to make greater efforts to deliver in practice on its frequently commendable ambitions, not least when scrutiny generates specific and practical recommendations to improve delivery. The early work of Environmental Standards Scotland, for example in relation to air pollution, is confirming the benefits of such scrutiny²⁰.

3.1.1. Scenario 1

Turning to future constitutional considerations, **Scenario 1**, where Scotland remains in the UK, has a number of possible variants, as outlined in Chapter 2. One is that the present settlement remains unchanged, while another is that there is a significant change in the UK government’s approach to Scotland and related constitutional issues, including devolution and, separately, some change in relations with the EU. This seems possible or even likely given the apparent likelihood of a Labour or Labour-led government after the next election. Recent Labour Party proposals for UK constitutional reform are of particular relevance in this context (see Box 3).

Box 3: Labour Party Commission proposals for UK-wide constitutional reform.

The final report and proposals from the Labour Party’s Commission on the UK’s Future, chaired by ex-Prime Minister Gordon Brown, *A New Britain: Renewing our democracy and rebuilding our economy*, was published in December 2022²¹. The principal proposals have been analysed by the Institute for Government²², and the key ones affecting Scotland include:

- “A new constitutional statute guiding how political power should be shared” which would “entrench the constitutional status of self-government across the nations of the UK” and that “Scottish devolution should be constitutionally protected by strengthening the Sewel Convention and protecting it from amendment through the new second chamber”;

¹⁹ <https://www.scotlink.org/publication/rhetoric-to-reality-report-2022/>

²⁰ <https://www.environmentalstandards.scot/wp-content/uploads/2022/09/20220929-ESS-AIR-QUALITY-INVESTIGATION-REPORT-IESS.21.013.pdf>

²¹ <https://labour.org.uk/wp-content/uploads/2022/12/Commission-on-the-UKs-Future.pdf>

²² <https://www.instituteforgovernment.org.uk/explainer/labours-constitutional-proposals>

- “The Foreign Affairs reservation should be amended to permit the Scottish Government, with the agreement of the Scottish Parliament, to enter into international agreements and join international bodies in relation to devolved matters”;
- “There should be a 'solidarity clause', a legal obligation of co-operation between the different levels of Government and institutions across the UK; and the UK needs a new and powerful institution to drive co-operation between all its governments - a Council of the Nations and Regions”; and
- “The House of Lords should be replaced with a new second chamber of Parliament: “an Assembly of the Nations and Regions”.

Other potential triggers for a change in the current constitutional arrangements for Scotland can be imagined as well, including propositions emerging from the pro-Union side in Scotland in a referendum campaign. For these reasons, it seems unwise to assume that the status quo is cast in stone, although it is the main frame for the analysis here.

A key feature of both the status quo, and of any **Scenario 1** variants, is the continuation of both the political and the more legal and operational interplay between devolved and reserved matters. On reserved matters, the Scottish Government has no formal role; yet, for political and policy reasons, it has recently not shied away from saying what it thinks and, in effect, sought to lobby the UK Government. This has been more marked in recent years during which the UK and Scottish Governments have been of different (and opposing) political persuasions. In the early years of devolution, with the same parties in power in Edinburgh and London, such discussions took place more informally²³.

The reserved or partly reserved issues that have attracted attention recently have included the licensing of oil and gas exploitation in the North Sea, immigration, human rights more generally, economic policy, and, of course, the consequences of Brexit. In addition to the environmental issues associated with Brexit (including the Internal Market Act, see below and Annex 3: Scottish reaction to the Internal Market Act 2020), the other reserved policy issue of particular environmental interest where Scottish Government views have differed from the UK Government has been in relation to consenting offshore oil and gas. Here, the current Scottish Government consultation on a new energy strategy²⁴ sets out a more decisive and rapid end to fossil fuel extraction than that espoused in Westminster. This is a clear example of where the Scottish government is

²³ And, of course, more privately and discreetly.

²⁴ <https://consult.gov.scot/energy-and-climate-change-directorate/energy-strategy-and-just-transition-plan/>

constrained by the constitutional settlement and is advocating a more environmentally progressive approach than the UK government. The Brown proposal (see Box 3 above) would not immediately appear to alter responsibilities for oil and gas but might make a difference in other policy realms. For example, if the Foreign Affairs reservation were to be amended it would offer significant opportunities for Scotland, given the range of international agreements and bodies related to the environment (see also section 3.5 on international matters below).

At present, there are a significant number of environmental topics where the Scottish government is more ambitious than the one in Westminster, with respect to legislation being adopted or proposed, for example in relation to renewable energy expansion, fossil fuel phase down, prohibitions on single use plastics, grouse moor licensing and wildlife crime issues and the contested Deposit Return Scheme. In most cases the necessary powers are devolved to Scotland already but in a number of areas, generally outside the core of environment policy, its ambitions are being constrained in practice or theory because of the overlap with reserved powers, such as those over energy, financial services, some aspects of taxation, etc.

This underlines the environmental drawbacks of the status quo while current political conditions persist, but it does not necessarily mean that a change in the distribution of powers would per se and more permanently lead to a more environmentally progressive approach (parallel arguments were made in relation to ‘repatriating’ powers over the environment to the UK in the Brexit referendum). The environmental ambition and political position of governments can change with the political cycle.

Clearly differences between jurisdictions in political ambition for the environment are important. However, there are also other dimensions to consider when assessing the benefits and costs of settling relevant powers at different levels of governance. For example, there can be a trade-off between the potential finer tuning and added legitimacy of settling powers as locally as possible within any jurisdiction versus the benefits of creating a strategic approach for the overall environmental common good at a rather higher level, which may not win the support of all local stakeholders, which have interests of their own. The Scottish government is several rungs up from the local, but it is clearly closer to the ground in Scotland than the UK government. This question of whether this brings inherent advantages is explored further in Box 4.

Box 4: Accountability, alignment, transparency and related environmental governance issues.

Given the current close alignment between environmental policies in Scotland and the rest of the UK, there is understandably some debate about the benefits and drawbacks of maintaining this broadly common approach as opposed to accepting or encouraging more freedom to diverge. In principle, the potential benefits of different, Scotland-only policy or legislation include that it can be developed locally, with local stakeholders, adjusted to local or particular circumstances, objectives, and timetables, while potentially increasing transparency and local commitment. It may be freer to utilise novel approaches which may be easier to create more rapidly if negotiations with other parties are not required. Indeed, at times, advances can be developed and implemented ahead of other countries, so that Scotland can be ahead of the UK or even “lead the world”.

The potential disbenefits include the increased risk of confusion, cost, and complication for stakeholders because of different systems, rules, reporting requirements and possibly metrics. In some cases, the costs of relying on local approaches can be greater with a loss of ‘economies of scale’ and more limited institutional capacity - these are significant issues in some areas of policy, such as chemicals regulation. Businesses may face the burden of having to master more than one regulatory regime, with subsequent costs. There can be a greater danger of regulatory capture by powerful local interests and more scope for friction with neighbouring countries adopting different approaches. Within the EU negotiating a common approach which necessitates action by all often is considered more effective environmentally than relying on diverse approaches. There can also be level playing field issues and possible barriers to trade, particularly relevant in Scotland in **Scenario 1** because of the current need to comply with the UK Internal Market Act (see below and Annex 3: Scottish reaction to the Internal Market Act 2020).

An objective assessment of how the pattern of benefits and drawbacks of locating responsibilities at a particular level of governance could affect the environment is not easy and the case of Scotland is no exception. Much depends on the political commitment, good judgement and technical capacity of the authority which has the powers required. It is a topic where stakeholders often adopt a ‘pick and mix’ approach, arguing selectively according to their preference for a particular governance model at a particular time. Stakeholders, including government representatives, often cite certain of the benefits noted above to support their proposition on one issue, while they also cite the opposing benefit or disbenefit in relation to another apparently rather similar issue. For example, those underlining the benefits for stakeholders of a more uniform and therefore easier to grasp, pattern of environmental regulation on both sides of the border would rarely consider that this should also apply to Scots law, education or other policy domains that have been different for centuries. Equally, the strongest advocates

of adopting different approaches in Scotland (and, thus, often of independence) regularly recognise the simplicity of a single statute for all jurisdictions (e.g., Part 3 of the Environment Act 2021 on waste and resource efficiency). The recent arguments about the Deposit Return Scheme demonstrate both the potential benefits and disbenefits, as well as how protagonists will ‘cherry pick’ the pros and cons of alignment or divergence²⁵.

On top of this there are broader political principles in play. For some stakeholders and citizens’ sovereignty and regulatory autonomy are important goals in their own right, irrespective of environmental (or other) outcomes. This was a key principle for UK negotiators in the negotiations with the EU leading to the TCA for example and is clearly an important factor in Scotland.

As noted already and in Annex 2, recent controversies about devolution (arising from e.g., the Gender Recognition Reform (Scotland) Bill, etc.) have led to debate about how far the inevitable diversity in law and policy, implicit in devolution, is sustainable²⁶. Further, the Scottish Government has recently argued that post-Brexit actions by the UK Government have adversely impacted on the devolution settlement²⁷. In any of the **Scenario 1** variants, with or without any further UK-wide reforms, this debate about, and tension between, the benefits and disbenefits of uniformity or divergent approaches to policy in devolved areas will inevitably continue. As discussed above, this will also be affected, in **Scenario 1**, by the approach to Scotland and devolution adopted by future UK Governments (which may differ considerably depending on their political complexion).

Within the present constitutional settlement, two mechanisms concerning the coordination and, in some circumstances, the alignment of policy, are worth particular mention. First, the UK Government and the devolved administrations have been, since Brexit, agreeing a range of Common Frameworks to “ensure a common approach is taken where powers have returned from the EU which intersect with policy areas of devolved competence²⁸”. These seem, to date, to be primarily procedural to enable officials to discuss policy and agree if and how to align and/or how to manage separate competences and any divergence. A considerable proportion of those published so far, generally on a provisional basis, concern matters related to the environment and/or land management. These common frameworks build on, and supplement, the pre-Brexit Memorandum of Understanding on working arrangements between the UK Government and devolved

²⁵ See <https://www.bbc.co.uk/news/uk-scotland-64624421>, <https://bellacaledonia.org.uk/2023/02/17/bottling-it-on-the-polluter-pays-principle/> <https://aprs.scot/news/what-happened-to-deposit-return/>

²⁶ <https://www.heraldsotland.com/opinion/23265698.can-uk-tolerate-diversity-scotland-england-seems-not/?ref=twtrece>

²⁷ <https://www.gov.scot/publications/devolution-since-the-brexit-referendum/>

²⁸ <https://www.gov.uk/government/collections/uk-common-frameworks>

administrations²⁹, as well as the ever-evolving arrangements for formal inter-government relations³⁰, which include Inter-Ministerial Groups on Net Zero, Energy and Climate Change and on Environment, Food and Rural Affairs.

The Common Frameworks seem to be a practical working model for managing a fair range of devolved issues. Less satisfactory is their lack of transparency and the difficulty for third parties, including parliamentarians and civil society, in engaging in the process. This needs to be rectified.

However, a second element of the four-country governance architecture with a significant influence on environmental policy has been a source of very visible tension between the government in Westminster and those in both Edinburgh and Cardiff. This is the Internal Market Act (IMA), which has a similar role in several respects to the Single Market rules in the EU. However, there are significant differences between the EU model and the constitutional settlement and devolution arrangements within the UK. This is underlined by the Scottish government which regards the IMA as intruding on powers that have been devolved and granting the UK government too much authority in regulating the internal market³¹. Added to this is a perception that Conservative UK governments, in power since the IMA came into being, have not exercised the powers they have in a dispassionate way and that Scottish interests have suffered as a result. There is now a clear lack of trust in the IMA mechanism on the Scottish side and a desire to adopt models closer to the more cooperative approach built into the Common Frameworks.

This impinges on environmental policy as the IMA is designed to constrain policies introduced by any of the four countries that are deemed to create impediments to the internal market. Undoubtedly, some environmental legislation can also have implications for trade between the four countries, or on the competitiveness of producers in different jurisdictions, or both. In some cases, environmental proposals from the Scottish government have been knocked back by the UK government using the IMA process, the recent example of the proposed Deposit Return Scheme for single use beverage containers being particularly notable. Some of the issues arising from this case are summarised Annex 3: Scottish reaction to the Internal Market Act 2020. By the same token, environmental proposals from other parts of the UK also can be held up or blocked because of the IMA rules, with delays over the introduction of bans on horticultural peat appearing to be a recent example, despite the wide level of support for the initiative.

²⁹

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf

³⁰ <https://www.gov.uk/government/collections/intergovernmental-relations>

³¹ <https://www.gov.scot/publications/brexit-uk-internal-market-act-devolution/>;
<https://www.gov.scot/publications/devolution-since-the-brexit-referendum/>

Accepting that reasonable constraints are needed to protect the internal market, particularly where legislation affects traded products, and that some tensions are likely when different political parties are in power in the relevant nations, the way that the IMA is being approached in Westminster has not been sympathetic to differential advances in environmental policy within the UK. There does not seem to be much willingness at the Westminster end to accept some economic trade-offs in the process.

At the moment, this is creating uncertainty and a level of tension which is not helpful to the development of autonomous environmental policy in Scotland, especially where product standards are concerned, since they are particularly affected by the Internal Market Act. Even where Scottish environmental initiatives do not have immediately obvious implications for trade within the UK, there are concerns within the Scottish government that they could be subject to constraints or serious limitations because of the terms of the IMA and the way that the current government oversees it. This in turn will inhibit a “race to the top” between the four countries in environmental terms and Scotland’s ability to keep in step with EU environmental law, some of which will have internal market consequences.

For these reasons Scotland would be freer to act in certain areas in **Scenario 3** as a fully independent nation while in **Scenario 2** it would cease to be bound by the IMA but subject to EU rules. In **Scenario 1** this is a topic of potential future negotiation between Westminster and the devolved authorities and one of environmental interest.

Indeed, conditions might change in future if there was greater political alignment between the Holyrood and Westminster governments and as the IMA process beds in, with more precedents to draw on than the early examples of Scottish regulations concerning deposit return schemes and single use plastics³².

However, the current direction of travel is quite different, with the UK government’s enthusiasm for altering retained EU law (REUL) in pursuit of a Brexit “dividend” putting into question the future of a large slice of environmental law within the UK which falls into this category (see Box 5). Determination to alter the status of REUL in UK law, to revoke a sizeable body of retained laws and to give the government wide powers to modify it via a simpler and likely speedier process, led to the introduction of draft legislation that, following significant alteration, became the Retained EU Law (Revocation and Reform) Act 2023 in July. From its first introduction, the Act attracted strong opposition from practically the whole environmental community and a much wider group of stakeholders in addition to the Scottish and Welsh governments (see Box 5).

³² <https://spice-spotlight.scot/2022/10/27/scotlands-ban-on-single-use-plastics-a-case-study-of-the-impact-of-the-uk-internal-market-act/>

Many stakeholders, including most leading environmental NGOs³³, have been concerned that, amongst other things, this Act opens the door to regression in environmental law. The assurances by ministers at the Dispatch Box that standards would be maintained were not sufficient to allay this concern, especially since the government would not accept an amendment in the Lords that would have given this commitment legal force.

The UK Government's approach to post-Brexit governance and Retained EU law, especially prioritising an Act which imposes obligations on the devolved administrations directly in opposition to their wishes, is aggravating already difficult relationships rather than building cooperation.

These tensions and uncertainties are not unfamiliar in more federal states with substantial devolved powers and in principle could diminish over time as new arrangements are finalised, become familiar and, as noted, could be lessened by more trust between the two governments. At present, however, they create frictions that are unhelpful to securing environmental progress in Scotland.

Box 5: Retained EU environmental law after Brexit and the REUL Act

As highlighted by many stakeholders and lawyers, within and beyond the environment sector³⁴, leaving the EU presented considerable challenges for environmental law across the UK. This challenge, and the responses to it, have been much discussed and analysed³⁵.

First, it should be noted that the Trade and Cooperation Agreement (TCA) included a provision committing both parties (albeit limited to matters affecting trade and investment) to non-regression in environmental protection. Second, the various legislation implementing UK withdrawal and the TCA maintained all existing EU law, including that relating to the environment, as "Retained EU law".

In addition, there were also bespoke responses to those environmental issues which, in keeping with devolution, were different for different parts of the UK. The UK Government (for England³⁶ and in relation to reserved matters) passed the Environment

³³ For example: https://greeneruk.org/sites/default/files/download/2022-11/REUL_Bill_Committee_briefing_Greener_UK_and_Link.pdf or https://twitter.com/Natures_Voice/status/1618276028908204032

³⁴ For example: https://greeneruk.org/sites/default/files/download/2018-07/Greener_UK_Governance_Gap.pdf and <https://www.clientearth.org/latest/documents/environmental-law-governance-post-brexit/>

³⁵ For example: <https://ukandeu.ac.uk/long-read/brexits-implications-for-environmental-policy/> and <https://www.brexitenvironment.co.uk/2021/03/23/environmental-regulation-post-brexit/>

³⁶ And, in some regards, Northern Ireland.

Act 2021, which builds on its earlier 25-year Plan for the environment. This also ‘enacted’ a version of the EU environmental principles and established the Office for Environmental Protection.

In Scotland, the Scottish Government adopted a clear and oft-repeated policy of seeking to “maintain and exceed EU environmental standards” and its UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (part 1) provides it with powers to “keep pace” with EU law (including with respect to the environment). The Continuity Act (Part 2) also ‘enacted’ the EU environmental principles and established Environmental Standards Scotland³⁷.

In late 2022, the UK Government moved to further complicate the legislative framework with the introduction of the REUL Bill³⁸ triggering a heated debate within and outside Parliament, concluding when the Retained EU Law (Revocation and Reform) Act 2023 received royal assent in early July 2023. The Act will result in the revocation of around 600 items of Retained EU law by the end of 2023. It gives ministers extensive powers to amend or revoke a large body of such Retained law, a significant proportion of which concerns the environment, through a process geared to passing secondary legislation, generally involving limited consultation either with external stakeholders or Parliament. There are also strict conditions limiting the scope of amendments made to retained law in relation to any additional administrative or economic burden that could be created. The Act has been forcefully opposed by the Scottish and Welsh Governments, from the outset and they have withheld legislative consent for several reasons, including lack of prior consultation, inclusion of legislation that they consider to be devolved rather than reserved, imposition of unhelpful timetables and demands on the resources of devolved authorities and concerns about regression³⁹.

The REUL Act is likely to introduce both a tilt towards deregulation and a level of uncertainty about the next steps in a large area of environmental law that is very unhelpful to the progress of environmental policy. In addition, it has imposed an unsolicited and unwelcome process on the Scottish government.

The constitutional arrangements in **Scenario 1** grant wide powers for Scotland to progress a strongly environmental agenda in a wide range of fields. In the short term, for example, the Natural Environment Bill, the Agriculture Bill, and a Bill on Grouse Moors/Muirburn present considerable scope for environmental benefit. The scale of environmental

³⁷ Both the UK and the Scottish Governments have passed legislation related to the EU environmental principles, with the associated policy statement for England now published and coming into force in November and the Scottish policy statement expected in the autumn of 2023.

³⁸ <https://bills.parliament.uk/bills/3340>

³⁹ <https://www.gov.scot/news/msps-invited-to-withhold-consent-for-retained-eu-law-bill/>

progress will depend on how the key actors work together to utilise these and future **opportunities**.

There are however **risks** for the environment in the constitutional arrangements, notably that:

- Scotland lacks powers in certain strategic areas. Probably the most important are in relation to the regulation of oil and gas exploitation and related energy markets: policies in these fields play an important role in climate policy and could be constrained unhelpfully by the UK government.
- The powers of the Scottish government to deploy fiscal measures are constrained to some degree by formal limitations and perhaps more by competitiveness concerns within the UK, limiting the choice of environmental policy tools in certain conditions. (These constraints would be different and less in **Scenarios 2 and 3** but still present in some form, given EU rules on VAT for example and the sensitivity of differential tax rates in competing economies).
- The IMA limits Scottish ambitions at present, especially because of the uncertainties and the “chilling effect” arising from the early experience with this measure.
- Scotland is exposed to the hostility of the current UK government to retained EU law, a large proportion of which is within the UK Government Department for the environment, food, and rural affairs (Defra’s) portfolio, including a substantial segment of environmental law⁴⁰. This has led to the imposition of urgent and unsought obligations on the Scottish government, absorbing time and resources that could be employed elsewhere. There is also a tension with the Scottish Government’s objective of keeping in step with evolving EU legislation.

3.1.2. Scenarios 2 and 3

By contrast, a pro-independence outcome in any referendum (**Scenarios 2 and 3**) would provide more of a ‘blank sheet’ on which a range of constitutional issues and/or governance matters could be developed. This may have an impact on the political map in Scotland as well as the constitution and machinery of government. For example, while it may be dangerous (and outwith the remit of this report) to speculate, several observers whom we interviewed thought that over time there could be a significant political realignment post-independence as the SNP’s headline goal had been achieved. Many of those interviewed felt that in due course a more traditional left/right spectrum amongst parties could emerge. Their perspectives on the environment could be distinctly different

⁴⁰ <https://public.tableau.com/app/profile/governmentreporting/viz/UKGovernment-RetainedEULawDashboard/Guidance>

to both the current Scottish Government and the current Scottish and UK-wide political parties.

Clearly, with a new country and a new constitution to be forged, there can be no certainty about the eventual governance arrangements. For instance, the current PR voting system in Scotland would not have to be retained within a new constitution - although it seems reasonable to expect that it will be. Second, the unicameral nature and size of the Scottish Parliament, as well as its working arrangements could be reviewed and altered. There may be significant innovations, such as a new second chamber⁴¹ or changes to the system of committees. With additional functions (defence, foreign policy, etc) to be taken on, it may be considered necessary to increase the size of the Parliament to ensure sufficient MSPs to address these issues (and, in effect, replace the role of Scottish MPs/Peers at Westminster).

In addition to these potential evolutions of the devolution arrangements into those appropriate for an independent state, most pro-independence campaigners have indicated an ambition for a new, written constitution (presumably with linked arrangements for amendments and enforcement via the judiciary). How this would be developed and implemented is less clear and there are few specific proposals; however, given the experience in other countries, such a process might provide an opportunity to promote environmental concerns as worthy of constitutional protection. The incorporation of new environmental rights into a distinctive new constitution for Scotland seems a real possibility.

Thus, in relation to any debate on independence, in the run-up to a referendum, or in the event of a pro-independence vote, there will in principle be new opportunities to promote environmental priorities in a context quite different to the status quo. These include opportunities for environmental organisations to put forward a stronger environmental dimension in different elements of a new structure, including:

- Any proposals for a new constitution, including issues related to the introduction of a right for nature and/or a human right to a healthy environment;
- Any proposals related to the size and operating procedures for an independent Parliament, including if and how scrutiny might be improved and its working relationships with civil society (including ideas such as a second chamber or a civic forum); and
- Possibly, proposals related to the proposed electoral system.

There are also new risks in **Scenarios 2 and 3**. In an independent state, the environment is likely to attract less political attention than it does now in Holyrood as it will be

⁴¹ Or, as was once proposed for the devolved Parliament, a linked “Civic Forum”.

competing with a wider gamut of issues, including major economic and foreign policy issues being addressed by both Parliament and government in Edinburgh. It will also be competing for its share of the budget against an enlarged set of other priorities. If the environment is featured in new constitutional arrangements, this might offset these risks, at least to some degree. So too might the development of a group of MSPs with specific interest or expertise in environmental matters. NGOs could have an important role in this regard and in other independence scenarios too.

Scenario 2 involves a significant additional layer of constitutional, legal and governance changes. The consequences are many but would include:

- Becoming part of a Union (the EU) applying a collective approach to many important areas of policy, covering most environmental issues. There would be less autonomy for Scotland but a place in a dynamic organisation at the forefront of many environmental agendas, initiatives and commitments and with a strong historical track record;
- An ability to draw on the extensive capacity of the EU and its institutions in the environmental field, including technical expertise, governance processes, cooperative arrangements, extensive pooling of data, research effort, international connections etc;
- A reduced ability to set and pursue purely national environmental priorities or to secure a high level of cooperation with England, which is clearly an important neighbour. This could involve accepting policies and perhaps related expenditure that are not optimal for Scotland;
- A new capacity to influence EU domestic and foreign policy, including strategic documents;
- A parallel reduction in ability to influence UK policy;
- The return of EU oversight of the implementation of most environmental law, with the threat of possible adverse ECJ judgements and fines being an additional motive to improve levels of compliance; and
- A requirement to report on progress under several EU directives, assuring a certain level of transparency but designed for EU requirements more than specifically Scottish accountability.

3.2. Trade issues

As was demonstrated by the UK's withdrawal from the EU, changes in the nature of relationships between members and former members of a multi-national union, including a Customs Union, lead to important questions about the governance and content of trade policy and law - both between the parties themselves and with third parties. Some of these changing trade arrangements have evident or less predictable environmental consequences. The environmental and environmental policy consequences of both the UK-EU TCA and trade agreements between the UK and third countries have rightly received considerable attention since Brexit, although mainly at the civil society rather than the governmental level.

Under the current constitutional arrangements, and thus under **Scenario 1**, trade policy is a reserved matter outside the control of the Scottish government. Unless invited to do so, it has little ability to contribute to, influence or agree the process of introducing new trade arrangements, including the new UK Free Trade Agreements that have been required since Brexit, the TCA with the EU, new UK positions in the WTO, including on the environment, and other aspects of trade policy. The UK government has not gone out of its way to establish new consultative arrangements to bring devolved authorities, or indeed, other stakeholders, into the shaping of trade policy, which has been a source of frustration and tension for the Scottish government and many others, but it is not obliged to do so. It does not mean that devolved authorities have not been consulted on issues where Westminster has chosen to do so, but the power remains with UK ministers and in particular what is now the Department for Business and Trade. The Department of International Trade, its forerunner, did not give the environment high priority in the view of most observers, including a previous Secretary of State for the Environment, George Eustice⁴².

Prior to Brexit, trade policy in the UK was governed by the EU process. The European Commission is responsible for negotiating trade agreements, taking a mandate from the European Council. Member States then have relatively little role in the process, although national and in some cases, (e.g., in Belgium) regional parliaments, can utilise a form of veto on new FTAs, as has occurred with Mercosur for example. In this realm, the power accorded to subnational legislatures stems from the constitutional character of the Member State in question rather than any stipulations within the EU process. The type of constitutional changes being floated by the Brown Commission (Box 3 above) could alter such arrangements in the UK and might be a factor in **Scenario 1** as well. There are also consultation processes involving civil society as well as governments and this may have contributed to the development of an increasingly weighty environmental dimension in

⁴² <https://news.sky.com/story/george-eustice-brands-australia-free-trade-deal-a-failure-in-brutal-swipe-at-liz-truss-12747723>

EU trade policy. Scotland had limited influence on this EU model as a sub national entity but could engage in the stakeholder processes, like others. In this framework Scotland's role in influencing the EU (directly and indirectly - see section 3.5 below) was limited but clear and understood. This is no longer the case, particularly with respect to the interplay between devolved powers to set standards and the need to meet the requirements of the UK Internal Market Act

These arrangements within the UK would continue in any of the **Scenario 1** variants unless the Labour proposals for a reformed UK (or any other proposal from the 'no' campaign) led to a new and formal role for the devolved administrations in the shaping or ratification of UK trade policy and agreements.

By contrast, in **Scenario 2**, Scotland's trade relationships would change as it became part of the EU and subject to its rules and processes, including the FTAs between the EU and third countries, including Canada and, probably by then, Mercosur. The previously prevailing UK/third country FTAs, such as the recent one with Australia, would cease to apply. This may have consequences for certain Scottish economic priorities such as whisky and fish.

There would, however, be new barriers to trade with England and a different position in relation to Northern Ireland, with its dual regime (which by then may have changed in some respects). There would be likely to be some effort to reduce the most severe barriers to trade with England and sustaining cross-border infrastructure, such as railways and high voltage transmission lines would be a priority. The full commercial consequences of these developments would be important, as demonstrated by Brexit: the sensitivity of the agri-food sector to changes in trade regimes has been particularly apparent. In turn there would be environmental ramifications, for example following adjustments to trade in livestock products and fish but these are not especially easy to forecast, even for specialists.

In **Scenario 3**, Scotland would start out where it is now in an 'internal market' with the rest of the UK and subject to the IMA and negotiations to alter this model could go in different directions. One option would be to negotiate a broadly free trade area with the Rest of the UK but outside the confines of the Internal Market Act, which would cease to apply. Scotland would be subject to the FTAs that it is party to now as part of the UK until such time as it negotiated different agreements. This might involve seeking to "roll over" these existing FTAs to include Scotland as an independent country. In pursuing trade deals the government might seek to have some of the advantages of Northern Ireland with a version of participation in both the Single Market and the UK Internal Market. In principle, frictions on the land border with England could still arise but there would be different avenues available to reduce them without the constraints of EU membership and presumably this would be a priority in this scenario. Another option

might be to join the EU Customs Union, while remaining outside the EU, as Turkey has done.

Scenario 3 offers much greater empowerment to Scotland than the other scenarios but the limitations of what can be negotiated by a small player on the global scene would be a major constraint. In **Scenarios 1 and 2** the main environmental opportunity for Scotland would be to influence the direction of trade policy in the UK and EU respectively. In formal terms it would have a larger role in **Scenario 2** but only as one member of a sizeable Union. Within the UK it is possible that Scotland could acquire a stronger role in trade policy in future but that is dependent on political developments that are not easy to forecast. Taking these factors together, there are too many contingencies to identify clear differences in potential environmental outcomes between the scenarios with a high level of confidence.

3.3. The role of environmental institutions

Scotland's environment is currently 'managed' by a range of delivery bodies and other institutions that have been established (or inherited but unaltered) by the Scottish Government. These include the Scottish Environment Protection Agency (SEPA) and Scottish Natural Heritage (known as 'NatureScot'), as well as the Scottish functions of UK-wide organisations such as the Joint Nature Conservation Committee (JNCC) and the UK Climate Change Committee (CCC). Most recently, Environmental Standards Scotland (ESS) has been established as a 'watchdog' primarily to replace some of the role of the Commission in the monitoring and enforcement of environmental law within Scotland. Although it has a focus on issues related to England and Northern Ireland, the Office of Environmental Protection (OEP) has a remit in relation to any reserved matters in Scotland.

In **Scenario 1**, it might be assumed that these institutions would continue in their current form and with their current remit, subject to any changes following the review of environmental governance required in 2023⁴³. The report of this review has now been published and the consultation is open⁴⁴. Many stakeholders have expressed disappointment at its lack of depth and absence of any clear proposals. If and what further developments occur in this area will depend, in part, on the consultation responses and the government's reaction to those responses, as well as whether any wider public/political debate is generated by the process.

⁴³ Under s.41 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021.

⁴⁴ <https://www.gov.scot/publications/report-effectiveness-environmental-governance-arrangements/>

Equally, any process of reviewing and potentially reforming the UK's constitutional arrangements and the devolution settlement (either as a consequence of a no vote, or as a UK Government initiative⁴⁵) would also present opportunities to alter environmental governance arrangements. That said, it is unlikely that this would be a priority for any such process.

In **Scenario 2**, EU institutions would resume their previous roles, including in the development of strategies, legislation and policy in most environmental areas, the oversight of implementation and associated compliance concerns, the management of reporting requirements, implementation of international agreements and allocation of certain funds, including LIFE+. The ECHA would replace the HSE in regulating chemicals. This would both reinforce and constrain the work of environmental institutions in Scotland.

The role of the ESS would be affected and likely to change (or, at least, be subject to review) as the European Commission and ECJ would resume responsibility for overseeing compliance with the large slice of environmental law based on EU legislation. Under this scenario, when the Commission and ECJ resumed their role, there would be an immediate question on the future of ESS. It might be argued that it could be abolished, potentially to save money, as its existence arose as a consequence of Brexit. However, there would be arguments for retention too - while its role might evolve, both the Scottish Government and other stakeholders may find value in a retaining a domestic 'watchdog' to identify issues of ineffectiveness and non-compliance before they are escalated to EU level. Equally, ESS might remain a valuable source of advice on the development of international law - as well as an important watchdog in relation to environmental law arising separately from EU obligations. Whether EU-related or not, ESS might be expected in the independence scenarios to inherit the reserved matters functions of the OEP.

The role of the CCC in principle would be affected much less by **Scenario 2**. Such an advisory body is required under the Climate Change (Scotland) Act 2009, and it is a form of contractor appointed to provide this service and report to the Scottish Parliament. This is a valuable role in environmental terms but, retention of this aspect of the status quo is not a foregone conclusion in an independent Scotland; an alternative based in Scotland or outside London might be preferred.

The JNCC also has a significant role in nature conservation in partnership with other bodies, including in the gathering and management of data and taking forward specific initiatives, such as offshore marine protected areas and international matters such as the Whaling Convention and issues associated with the Overseas Territories. There would be

⁴⁵ For example, should a future Labour-led UK Government seek to implement the recommendations of the Brown Commission.

several options open for its future. In principle, these might include a continuation of the current or a similar cooperative arrangement, a widening of membership to include others e.g., the Republic of Ireland. Alternatively, its ‘Scottish’ functions might be transferred to an existing body (e.g., Scottish Natural Heritage) or to a new purely Scottish body.

Scenario 3 would be similar to **Scenario 2** in terms of changes stemming from independence but without the involvement of EU institutions unless special arrangements were negotiated e.g., over the ECHA. The continued role of the ESS, including its inheritance of the OEP’s reserved matters functions, would be clear in the absence of oversight by the European Commission.

The most significant difference between these scenarios is the key role of the EU institutions in **Scenario 2**, especially in relation to the oversight of EU based environmental legislation. This would constitute an important external driver to achieve compliance with environmental law and a backstop absent in other scenarios. However, the ESS has taken up a significant element of this role and has more resources to focus on specifically Scottish issues than the European Commission. This creates real opportunities for improvement in scenarios where the ESS is in place and is able to fulfil its mission effectively.

3.4. Economic and fiscal matters

Economic considerations, including the health of the Scottish economy, the potential tax-base, the scale of public expenditure, the use of fiscal instruments, the size and nature of the current ‘block grant’ to the Scottish Government, can and will affect the development and implementation of environmental policy in Scotland.

The economic consequences of different post referendum scenarios are clearly of relevance to many of the key debates around independence and the environment is no exception. At the general level, Scotland’s overall prosperity and economic pathway will affect many variables with environmental implications. These include disposable income, consumer choices and behaviour, trade, travel patterns, capacity to invest in environmentally desirable (and damaging) activities, the potential for raising taxes and increasing public expenditure (an important consideration on a number of environmental fronts), the resources available to contribute to global priorities, including loss and damage from climate change and other factors as well. The ability to attract sufficient inward investment to Scotland probably will be an important consideration in certain environmentally significant sectors, such as the development of new green energy sources.

The trajectory of individual economic sectors also will be a significant factor in environmental terms. The future of the oil and gas industry is an obvious case in point and the need to replace declining revenue from this source is a factor in all scenarios. Other prominent economic sectors in Scotland with a large environmental footprint include fisheries and aquaculture, forestry, farming and food, manufacturing, renewable energy, tourism, and aviation. The capacity to drive research and development, develop and adopt new technologies and finance just transition pathways are amongst the considerations particularly relevant to Scotland's progression towards greater sustainability.

The three scenarios are highly likely to have different, perhaps significantly different, economic consequences, both in the shorter and the longer term. Nonetheless, achieving any consensus on what these consequences are likely to be is potentially challenging. This has been amply illustrated by the contentious post Brexit debate in the UK. The long period before the TCA was signed highlighted the potential costs of both delay and uncertainty for the UK. The imposition of new barriers to trade also has had significant economic costs, not all of which seem to have attracted much attention in advance.

Economic forecasting is beyond the scope of this report, but additional economic analysis and foresight would be helpful in painting a fuller picture of the environmental profiles of the different scenarios. For example, it can be argued that in **Scenario 1** the risks for Scotland seem to be those of being yoked to a larger UK economy that is not performing particularly well relative to its OECD peers, has less access to the EU market since Brexit and is not necessarily geared to Scottish priorities.

The **independence scenarios (2 and 3)** carry a different risk of economic uncertainty, including vulnerability to the perceptions and responses of foreign and also domestic investors, questions about the currency, the costs of servicing any negotiated share of UK debt, the costs of any new trade barriers with England, the loss of any net budgetary transfers from the UK and the unavoidable costs of creating new Scottish institutions. These are not trivial.

Re-joining the EU, as in **Scenario 2**, would address the economic drawbacks of separation from the Single Market and bring Scotland closer to the Eurozone, with the accompanying benefits and costs but almost certainly would also involve a net transfer to the EU budget. An independent Scotland outside the EU (**Scenario 3**) would appear to face greater uncertainties and whilst there would be opportunities for the government and nimble economic actors in Scotland to utilise these conditions, the management of risk and pursuit of economic stability might be a more powerful driver of policy than in the other scenarios.

In all the scenarios, the question of fiscal policy and the capacity to devote public expenditure to environmental priorities is a key issue. The economic fortunes of the country and the policies to address them have an inevitable and consequential impact on the resources available to spend on public policy ambitions, including environmental ones. Thus, when there is pressure to reduce spending, environmental measures are often seen as of lower priority and can be among the first to be ‘squeezed’.

During the recent austerity years, there was a palpable impact on budgets for environmental action in Scotland. This is well illustrated by the funding for environmental agencies and research, which suffered a staggering 40% reduction in real terms⁴⁶. While this has been (partially) reversed in more recent years, the challenges of securing adequate funding were, in 2022, identified as a crucial cross-cutting issue that contributed to the lack of effective delivery when compared to commendable environmental ambitions⁴⁷. Scenarios which potentially lead to strong constraints on environmental expenditure clearly are associated with consequent environmental risks. These could be magnified because of the relatively limited capacity of public institutions in Scotland, however competent they are. The Scottish administration is (simply as a consequence of the size of the country) considerably smaller than its Westminster/Whitehall counterpart and thus does not have the resources or capacity to replicate everything that a larger entity is able to do. To manage this, certain issues need to be prioritised at the expense of others, some processes take longer and/or Scotland chooses to ‘opt-in’ to UK-wide policy or legislation, which may or may not be optimal. Lower budgets would exacerbate these risks.

At present, and in all variants of **Scenario 1**, the Scottish Government (like local government) has its own tax-raising powers. However, due to the effect of the block grant, the resources available to it are significantly influenced by UK Government fiscal policy and spending decisions. Likewise, Scottish Local Authorities are affected by Scottish Government funding decisions. While small differences in tax rates and structures have emerged between Scotland and the rest of the UK (or between local authorities), there is a political reluctance to allow these differences to grow too great, partly because of potential effects on competitiveness.

Among these tax-raising powers are a number of specifically ‘environmental taxes’, including landfill tax, the aggregates levy and, in principle, air passenger duty. To date, albeit with minor differences, these taxes in Scotland have generally mirrored the operation of their equivalents in England or the rest of the UK. Clearly these taxes, may alter further over the years and there are several stakeholders, including environmental NGOs, encouraging the Scottish Government to make greater use of its tax raising powers

⁴⁶ <https://www.scotlink.org/funding-the-nature-and-climate-emergency-reversing-a-decade-of-austerity-for-the-environment/>

⁴⁷ <https://www.scotlink.org/publication/rhetoric-to-reality-report-2022/>

in order to better fund action for the environment⁴⁸. How far the concern not to get out of step with other parts of the UK is inhibiting Scottish ambition in this area is difficult to judge but this 'chilling effect' does appear to be one factor which weighs significantly in decisions.

Under the current devolved settlement and in **Scenario 1**, Scotland has the opportunity to both develop and pass ambitious, Scottish-specific environmental laws and to fund their implementation via both the block grant and through the use of its devolved tax-raising powers. However, the resources available for this depend partly on UK government expenditure and the consequences of remaining part of the UK (and thus subject to UK fiscal policy and exposed to issues of 'tax competition').

Going forward, the current relatively gloomy UK economic outlook suggests that the UK's debt will continue to rise in the coming period, and that 'austerity' in some form will continue to a greater or lesser extent. This will affect the choices available to a devolved Scottish Government under the various **Scenario 1** variants. Taken together, these **Scenario 1** constraints are significant but in other scenarios there might be an even greater level of economic risk associated with Scotland becoming independent, with uncertain impacts on the scope for public expenditure on the environment.

In the **independence scenarios (2 and 3)**, there would be certain economic risks and greater uncertainty, particularly at first, as noted above, but also the chance to chart a new and perhaps more successful economic pathway. The opportunities and challenges would be broadly similar, with Scotland able to develop any new tax policy it wished (constrained only by EU limitations in the case of **Scenario 2**). This would mean great flexibility to develop environmental taxes as well as complete freedom in relation to income tax rates and thresholds, excise duties, corporate and local taxation etc. In **Scenario 3** there would be even wider freedom to raise funds in different ways, including through duties on imports and VAT⁴⁹, as well as more freedom to run budget deficits than within the EU. Such freedom would not remove the need to consider policies in neighbouring and comparable countries to avoid losing competitiveness and discourage inward investment for example, but it would be less acute in relation to the rest of the UK.

The economic and fiscal policies that would be adopted by a future Scottish government are a matter of speculation but the chances of a major departure from the status quo seem greater in **Scenario 3** than **2**. Given the greater exposure to global economic forces, **Scenario 3** might be more likely to see a Scotland that seeks a 'low tax, low spend' type

⁴⁸ See, for example, https://www.stopclimatechaos.scot/wp-content/uploads/2022/09/FinancingClimateJustice_Briefing_ONLINE.pdf, <https://reformscotland.com/2022/06/taxing-times-why-scotland-needs-new-more-and-better-taxes/>

⁴⁹ One of the EU limitations that would apply in Scenario 2 relates to VAT.

of economy (and potential low regulation too) with consequent impacts on environmental policy, which would be more difficult to adopt within the EU.

Hard and fast conclusions about Scotland's economic prospects in the different scenarios would not be appropriate in this analysis but the importance of taking economic factors and levels of risk into account in an environmental assessment is clear. Uncertainties under Scenarios 2 and 3 looked greater than under **Scenario 1** to most of those whom we interviewed.

3.5. International matters

Many aspects of the environment (and thus much of environmental policy) are an inherently international matter. Birds and other animals migrate or disperse with no notion of political boundaries, while air, water, and pollution flow across borders. Similarly, many environmental and natural resources are 'shared', in particular the marine environment and its fisheries. Thus, a large and complex corpus of international law and policy (with institutions for its implementation) has been developed on the environment, including the UNFCCC, the CBD, the Bonn, Berne, and Ramsar Conventions, as well as the Aarhus Convention. The EU is also a significant international lawmaker in environmental matters.

Scotland, not currently being a sovereign state or full member of the UN or other intergovernmental bodies, has no formal role in the development of international policy and law. However, as described by Gethins (2021⁵⁰), it has and could in future play a significant role both as part of 'team UK' and as an individual 'non-state actor'. As part of the United Kingdom, Scotland (both via the devolved role of the Scottish Government and by the intra-UK Government role of the Secretary of State) can, and does, seek to influence the negotiating positions and approach of the UK in international fora. This is undertaken by interdepartmental or intergovernmental machinery. These latter intergovernmental relations are described in a recent House of Commons Library research report⁵¹, but also are subject to a review and 'modernisation' process⁵², the outcome of which has been reviewed by McEwan (2022), with the conclusion:

"The proof will be in the practice. Machinery matters. Process and organisation matter. But the culture and conduct of intergovernmental relations matters more⁵³".

⁵⁰ Gethins, S (2021) Nation to Nation; Scotland's Place in the World. Luath Press, Edinburgh.

⁵¹ <https://researchbriefings.files.parliament.uk/documents/CBP-8371/CBP-8371.pdf>

⁵² <https://www.gov.uk/government/publications/the-review-of-intergovernmental-relations>

⁵³ <https://ukandeu.ac.uk/intergovernmental-relations-review/>

Before Brexit, these intergovernmental relations operated relatively efficiently and cordially, especially at Ministerial level. This appears to still be the case in relation to most non-EU or ECHR matters, but the significant political differences between the various governments of the UK, over Brexit, over post-Brexit arrangements and over Human Rights have strained matters. In such circumstances, the UK Government has exercised its ‘sovereign authority’ to determine UK approaches that, at times, do not have the support of one or more of the devolved administrations (see section 3.1 above).

In parallel, the Scottish Government (and other non-state actors, including NGOs) seek to influence international negotiations and thus the development of law and policy by informal means. This was perhaps most apparent at the recent COP26 on climate change in Glasgow (indeed, in the (then) First Minister’s own constituency). Here, the Scottish Government sought, often in partnership with NGOs and partners from the Global South, to move the debate on climate justice⁵⁴, efforts that, despite the overall disappointing outcome, were welcomed⁵⁵.

Although COP26 might have been an exception, due to its location, Scottish Government engagement with such issues continues through, for instance, its European co-chair role of the Under2 Coalition⁵⁶, its consideration of membership of the Beyond Oil and Gas Alliance⁵⁷ (of which Wales is already a member), and its work on the Edinburgh Declaration on a post-2020 global biodiversity framework⁵⁸.

Pre-Brexit, Scotland played a similar role in EU matters and in UK-EU relations and, like other EU sub-national entities, maintained an office and ‘influencing machine’ in Brussels, which is still in place, although subject to post Brexit constraints.

In terms of implementation, Scotland is bound to apply any legal or policy commitments made and ratified by the UK. Legislation passed by the Scottish Parliament is required to comply with the ECHR (and, formerly, with EU law). Any acts or omissions by the Scottish Ministers or other public body, can be challenged in the Scottish Courts for non-compliance with any international law having direct effect or transposed into UK or Scottish legislation.

⁵⁴ <https://www.gov.scot/publications/global-assembly-cop26-first-ministers-speech-1-november-2021/>; <https://www.gov.scot/news/global-climate-justice/> and <https://www.gov.scot/news/first-minister-scotland-to-show-leadership-on-climate-justice/>

⁵⁵ <https://www.stopclimatechaos.scot/wp-content/uploads/2022/02/SCCS-Briefing-for-NZET-Debate-COP26-outcomes-24-Feb-2022-FINAL.docx-2.pdf>

⁵⁶ “The largest global network of states, regions, provinces and other subnational governments committed to achieving net zero emissions by 2050”, see <https://www.theclimategroup.org/under2-coalition>

⁵⁷ <https://beyondoilandgasalliance.com/>

⁵⁸ <https://www.gov.scot/publications/edinburgh-declaration-on-post-2020-biodiversity-framework/>

As indicated above, under the current arrangements and under **Scenario 1**, Scotland has opportunities to influence the development of (but never veto) international law and policy. In certain ways, this is a benefit because, in some cases, certain “diplomatic niceties” or *realpolitik* do not apply, and Scotland’s government can act more like an NGO or “say what it thinks”. This provides the opportunity (subject to good relations) for the UK and Scotland to adopt “good cop, bad cop” roles for example.

On the other hand, it faces the challenge that, in formal processes, its voice is minimal, unless the UK has adopted the same position. The pro-independence argument is that, by omitting the ‘middleman’ of the UK, Scotland’s voice will be heard directly and have greater influence. Conversely, of course, it might as a relatively small nation also be more easily ignored, unless it can form substantive alliances (one of which might be via EU membership).

Scenario 1 does not comprise only the opportunities and challenges of the current situation. As discussed above, further reforms of the current UK devolution arrangements are possible and have been discussed. These include a proposal that “the Foreign Affairs reservation should be amended to permit the Scottish Government, with the agreement of the Scottish Parliament, to enter into international agreements and join international bodies in relation to devolved matters” (see Box 3 above). As environmental policy falls firmly within this description of ‘devolved matters’, it would be interesting to consider what this would mean for future Scottish Government involvement in, for instance, future climate or biodiversity COPs, and/or what form of additional agreements it might seek to make.

It is also unclear whether this proposal (and/or any wider re-alignment of the UK-EU relationship under a future Labour government) would lead to any changes in the treatment of Retained EU law and/or the ambitions of Scottish Government to “keep pace⁵⁹”.

In **Scenario 2**, Scotland’s role in international matters would be very different. It would become a sovereign state, with all the relevant rights and responsibilities, but would also become a full member of the EU with those additional rights and responsibilities. Those latter responsibilities would include a duty to transpose and to comply with EU environmental law.

Once outside the UK, its influence on policy in the rest of the UK would clearly diminish. However, it would gain autonomy where it is now fettered by UK reserved powers whilst in parallel giving up autonomy in most non-local areas of environmental policy and law to

⁵⁹ <https://spice-spotlight.scot/2022/05/31/scottish-government-approach-to-alignment-with-eu-law-the-draft-policy-statement/>

the EU. It will gain influence over EU policy, with perhaps the greatest chance to influence EU environmental policy in areas where it is a relatively important player, e.g., renewable energy policy and the marine environment.

After joining the EU, Scotland would have the chance to be an activist Member State on environmental issues if it wished, and to contribute directly to the direction of EU policy, even if it is a relatively small player in terms of MEPs, Council votes and economic heft (factors that would limit its influence on outcomes in certain areas). It could align with like-minded Member States, for example, in an expanded Nordic bloc, to increase its influence within the EU.

Outside the UK, Scotland would have the opportunity to develop its own foreign policy once it has established the diplomatic machinery to operate it. Membership of the EU does not restrict this although common EU positions are of importance in certain areas. The choice of a more activist green foreign policy will be opened up if the government were to choose it, together with an ability to make independent choices on development assistance.

In **Scenario 3**, the options would be similar to **Scenario 2** in terms of freedom to act, adopt new priorities, create fresh alliances etc and there would be new points of leverage on the rest of the UK relative to the present. However, being outside the EU and a relatively small neighbour, Scotland would have very little influence on the EU itself. Amongst other options it could seek to be an interlocutor between the rest of the UK and EU in certain areas.

Finally, in all scenarios, Scotland would remain party to international agreements including, for instance, the UNFCCC, CBD, CITES, the Bern, Bonn, Ramsar and Aarhus Conventions, with an obligation to ensure compliance. These and any future international agreements will continue to evolve and potentially grow in influence in the future. The significance of these agreements should not be overshadowed by the issues associated with Scotland's own constitutional future. Both will play an important role in shaping environmental policy and outcomes in Scotland.

Long-term, of course, Scotland would be in a position to try to influence such agreements in the independence scenarios, to the extent that any small country can influence such processes. In **Scenarios 1 and 2**, such influence might be greater since it would be exercised through collective action as a member of the UK or EU, respectively, allowing for the uncertainties of Scotland's potential position and capacity to influence these two unions. While the pathways to exerting potential influence vary between the scenarios and would be significantly different in **Scenario 2**, the impact on environmental outcomes of course depends heavily on whether Scotland remains generally progressive in its approach to the international environmental agenda.

3.6. Risks and opportunities for the environment

Taking these different but often intersecting issues together, there are many different pathways that Scotland could take in the coming decade, with the full implications of an independence vote for the environment likely to be apparent much more in the late 2020s and beyond rather than in the immediate future.

In all three scenarios the political preferences and environmental ambitions of the key actors, especially the future Scottish government, the future UK government, and the EU, will be a crucial consideration in determining policies and, in due course, outcomes. At present, there are significant distinctions between these three actors, with the EU being generally progressive in a suite of proposals to support a Green Deal, (at least until resistance to this increased in the first part of 2023) and regulate chemicals through the improvement of REACH, to take two examples, Scotland having high ambitions for net zero emissions and England introducing an agricultural policy with a stronger focus on environmental public goods than elsewhere in Europe.

While there are many facets to this, in the last few years Scotland has had a more ambitious approach to many, not all, environmental issues than the UK as a whole, judged by new legislation and proposals on the table. In this context Scotland has a good claim to be an environmentally progressive force and in principle could move faster on several fronts if it were outside the UK and the constraints particularly apparent in the IMA and REUL Acts. There are such opportunities internationally as well as domestically.

Hence, there are **environmental opportunities** in both **Scenarios 2 and 3** relative to **Scenario 1**. These are explored in more detail in Chapter 4 where the focus is on more specific issues. These opportunities are not the same in **Scenarios 2 and 3**, but in both cases, they stem from greater Scottish autonomy to progress a more ambitious environmental agenda if it chooses to do so.

However, there is an important caveat to this analysis. There is no certainty that the environmental ambitions and capacity of the three key authorities will remain as they are now from the mid-2020s onwards. Indeed, elections in the next three years in all three jurisdictions (see Figure 1 above) could have an impact on the positions being taken on the environment relatively soon. The stance of the current Scottish government may alter in future and so there is an unavoidable element of speculation (and perhaps political faith) in forecasting what it will be nearer to 2030. Scotland's autonomy is greatest in **Scenario 3** but the forces aligning to maintain environmental ambition look greater in **Scenario 2** because of EU membership and the relatively consistent position of the EU on the environment in recent decades. Within the EU as a whole, shorter term

political cycles have less influence than in individual nations, leading to more predictable advances in environmental law and there is the added momentum provided by a collective decision-making process in which most individual Member States have been reluctant to appear too often as laggards. At the same time, it is not clear that the commitment to the Green Deal agenda will endure after the 2024 elections, and it is possible that the EU will become an environmentally less progressive actor. In addition, of course, there is uncertainty built in as to when and whether Scotland would join the EU.

A further environmental opportunity in **Scenarios 2 and 3** is that the creation of a new Scottish constitution opens the possibility of embedding environmental rights into primary law. There is a campaign for this already and it looks potentially in reach. The **environmental risks** also are subject to uncertainties and caveats. They include:

- The possibility that the gap between ambition and delivery, noted already and considered further in Chapter 4, could widen, and inhibit real progress on the ground. This risk could be greatest if pressures on public expenditure were even sharper than now. This could occur in any scenario, but the uncertainties of independence suggest potentially greater risks in **Scenarios 2 and 3**, at least in the years soon after independence.
- The risk of not having sufficient institutional capacity to secure both effective delivery of environmental objectives and the development of robust, well designed, and targeted new policies on the environment. This capacity is needed in all three scenarios, but the risks of a shortfall seem greatest in **Scenario 3** where there are the biggest barriers to Scotland utilising the greater capacity and resources in either the UK or the EU. These capacity challenges may be exacerbated in the ‘early years’ after independence as resources and political bandwidth will inevitably be focused on the constitutional issues, including negotiations with the rest of the UK, the EU and establishment of new institutions, etc.
- Another risk is the possible lack of sufficient public and private investment to attain the environmental goals being put in place. This is linked to perceptions of how attractive Scotland is to potential investors and broader perceptions of the Scottish economy, the currency, and other factors well beyond the environmental sphere. Again, the risks look greatest in **Scenario 3** where Scotland is more exposed to global economic forces than in the other scenarios.

In **Scenario 1** there is the risk of Scotland continuing to be frustrated in its environmental ambitions by restrictions that would not apply in the other scenarios, as illustrated graphically by the REUL Act. However, the other scenarios carry certain different risks

that do not apply in the same way in **Scenario 1**. One is that implementing independence would prove demanding and possibly protracted, as has occurred in the UK post Brexit, leading to a diversion of attention and resources away from environmental priorities. The other is that the environment could secure less political attention and priority in Holyrood post-independence once the full gamut of economic, international, and other new responsibilities had to be addressed as well.

In the next section some important thematic issues are considered more closely, keeping these cross-cutting opportunities and risks in mind.

4. The sectoral and environmental issues

4.1. Agriculture, other land use issues and land reform

4.1.1. Context

Rural land is key to Scotland's history, culture, and identity. Almost three-quarters of Scotland's land area is under **agricultural use** (5.64 million hectares)⁶⁰. Of this, most is under grass, with the majority of this classified as rough grazing and 85% of the agricultural area (4.78 million ha) is classified as areas with limited growing potential and more suited to extensively managed livestock (also known as Less Favoured Areas). The remaining more fertile, lowland areas are characterised by cereal cropping and more intensive livestock and dairy production.

The large areas of upland and extensive farming systems in Scotland are home to a rich diversity of biodiverse habitats and agricultural land also covers a significant proportion of carbon rich soils, although many of these are degraded. Agricultural management contributes about 20% of total greenhouse gas emissions, it is a leading source of pollution of watercourses and is associated with soil degradation in some areas. There has also been a long-standing decline in the viability of some of the most environmentally valuable farming systems, mostly extensive grazing (see also section 4.4).

The Scottish Government is currently developing a new system of support for agriculture outside the Common Agricultural Policy. It published a Vision for Agriculture⁶¹ in March 2022 and a summary⁶² of consultation responses to proposals for a new Agriculture Bill to deliver this vision through a new payment system was published in June 2023. The Bill itself is due to be introduced to Parliament either later in 2023 or early 2024.

Forest and woodland cover accounts for a further 18.5% of Scotland's land area (approximately 1.4 million ha), one third of which is part of the National Forest Estate, with the remainder either privately, community or NGO owned. Forestry makes a significant contribution economically, with about three-quarters of the area managed as commercial forestry plantation. The other quarter is made up of native species, areas of

⁶⁰ Scotland's 2021 Agricultural census - <https://www.gov.scot/publications/results-scottish-agricultural-census-june-2021/documents/>

⁶¹ <https://www.gov.scot/publications/next-step-delivering-vision-scotland-leader-sustainable-regenerative-farming/>

⁶² <https://www.gov.scot/publications/agriculture-bill-analysis-consultation-responses/>

which are extremely important environmentally. The forest area is also an important carbon sink. Scotland has ambitious forest targets, set out in its 2019-2029 Forest Strategy. These include to increase forest and woodland cover to 21% of the total land area of Scotland by 2032, with 15,000 ha/year of new forest and woodland planting from 2024/25 onwards, of which 3,000 - 5,000 ha should be native woodland⁶³.

The longstanding and very live **land reform** debate in Scotland centres around concerns about the highly concentrated pattern of land ownership in rural areas, the relatively few constraints on who can own land and on what scale as well as the related question of increasing community engagement in land management choices⁶⁴. Various reforms have taken place since 2000 (Land Reform Acts of 2003 and 2016) and in July 2022 the Scottish Government launched a consultation on further land reform legislation, due to be introduced by the end of 2023. This is intended to take forward the legislative proposals from the Land Commission⁶⁵.

4.1.2. Situation under Scenario 1: Scotland remains in the UK

Scotland already has a large amount of flexibility to make its own decisions and forge its own direction with respect to land use, land management and land reform, as these are all devolved matters. Indeed, the distinctiveness of the Scottish situation has been incorporated into policies affecting rural land for many decades, highlighted in Annex 2.

Given that policies addressing agricultural support and land reform are currently under review, with potentially significant changes expected, the implications for the environment and climate are difficult to predict. The key UK constraints on what is possible in Scotland in this sphere are budgetary (given the set formula for distributing Treasury resources between the four UK countries) but also political.

Agricultural policy: In developing its new framework for agricultural support, the Scottish Government has expressed its intention to deliver ‘broad alignment to EU CAP objectives⁶⁶’. Proposals for a new Agriculture Bill to provide the legal underpinning for the new framework from 2025 are due to come before the Scottish Parliament in 2023. A new agricultural support package is already under development and an outline structure of this has been provided in the consultation document on the Agriculture Bill. This “*will*

⁶³ [Scotland’s 2019-2029 Forest Strategy](#)

⁶⁴ Hunter J, Peacock P, Wightman A, Foxley M, 2013 [Briefing paper for the House of Commons Scottish Affairs Committee](#); Scottish Land Commission, 2019

⁶⁵ Scottish Land Commission, 2021, [Legislative proposals to address the impact of Scotland’s concentration of land ownership](#), A discussion paper from the Scottish Land Commission.

⁶⁶ Scottish Government, 2022, [Delivering our Vision for Scottish Agriculture](#). Proposals for a new Agriculture Bill, Consultation document (29 August - 5 December 2022)

shift to a new Scottish approach that aligns with the new EU CAP but doesn't necessarily follow the rigidity of how payments are distributed".

The Vision for Agriculture commits to "...transforming how we support farming and food production in Scotland to become a global leader in sustainable and regenerative agriculture⁶⁷". The proposed outcomes for support are identified in the consultation paper as: climate change adaptation and mitigation; nature protection and restoration; high quality food production; and wider rural development. To deliver this, a four-tier framework is proposed (see Box 6).

Box 6: The proposed framework for agricultural support in Scotland⁶⁸

The proposed framework for agricultural support from 2025 retains direct payments under Tiers 1 and 2:

- a 'base' payment (Tier 1), underpinned by 'essential standards to ensure climate, biodiversity and business efficiency outcomes'; and
- an 'enhanced' payment (Tier 2), focused on 'businesses that are highly effective in farming and crofting for a better climate and nature restoration'.

Tiers 3 and 4 are similar to the CAP's rural development support:

- Tier 3 is proposed as 'Elective' payments, providing targeted actions to support nature restoration, innovation and supply chains;
- Tier 4 is to provide 'Complementary' support and covers support for 'new skills, knowledge, training and continuous professional development; advisory services and business support; and measurement tools'.

It is not possible at this stage to elicit what the implications for the environment and climate of this new system of support are likely to be, as this will depend on the final content of each of the Tiers, the budget, the practices that can be funded and how these are implemented.

The level of budget available and how this is allocated to the different Tiers of the new framework is critical. Although there is a commitment by the UK Treasury to maintain the current budget to 2024, it is unclear what will happen after that, given the significant budgetary pressures facing the public purse. Scotland already considers that its devolved settlement is poor, including the deal for agricultural spending, despite the uplift it

⁶⁷ <https://www.gov.scot/publications/next-step-delivering-vision-scotland-leader-sustainable-regenerative-farming/>

⁶⁸ Agricultural Reform Route Map, Scottish Government website, 22 June 2023
<https://www.ruralpayments.org/topics/agricultural-reform-programme/arp-route-map/>

received as a result of the Bew Review⁶⁹. Historically, under the CAP, Scotland has had a fairly low budget allocation for rural development and has chosen to dedicate a fairly high proportion of this as compensatory support to farmers in LFA areas, leaving a rather low budget for the much more targeted agri-environment type payments. From 2025, Scotland is free to decide how to divide the budget between each of the Tiers and in principle could dedicate more to environmental and climate objectives than in the past, but no decisions have yet been made.

The composition of the ‘sustainable farming standards’ that will underpin the Tier 1 basic direct payments is another key question to be settled. In practice Scotland is unlikely to lower its environmental standards below those in England, given the importance of England for Scottish agricultural exports.

Forestry: As highlighted above, Scotland has set out targets for a significant expansion of forest and woodland cover to 2032. The 2022-2025 Implementation Plan for Scotland’s Forestry Strategy⁷⁰ highlights a number of areas of focus, including:

- improving the resilience of Scotland’s forests to climate change in order to mitigate the forest related risks identified by the Climate Change Committee for biodiversity, carbon stores and timber supplies;
- reversing biodiversity loss, including supporting the restoration of Scotland’s rainforest;
- delivering carbon emission reductions through helping to decarbonise the forestry section, increasing the use of sustainably sourced wood fibre in construction and funding research to increase the range of species that can be machine-graded;
- supporting a just transition, for example by supporting the ‘Integrating Trees Network’, a farmer and crofter-led initiative to demonstrate how tree planting benefits their businesses.

A large proportion of funding for afforestation and the sustainable management of existing woodland (through the Forestry Grant Scheme) historically has come from the CAP and the Scottish Government has said that it will ring-fence funding within the post-CAP system for future forestry grants⁷¹. As no details are available as yet about what the arrangements or requirements for tree planting and woodland management will be, the

⁶⁹ Under the 2014-2020 CAP the redistribution of direct payments (via the convergence mechanism) meant that the UK received a slightly better financial outcome than previously, mainly due to Scotland having a lot of poorer land (LFA). The UK government decided it would split the additional funds evenly between the 4 countries, but Scotland felt that this was unfair, and an independent review was held (the Bew Review) which led to an agreement that Scotland would receive an uplift in its budget allocation for agricultural support. Bew Review: <https://www.gov.uk/government/publications/domestic-farm-support-funding-reviewing-distribution-across-the-uk-from-2020-to-the-end-of-the-parliament>

⁷⁰ [Scotland's Forestry Strategy Implementation Plan 2022-2025](#)

⁷¹ Statement in the 2021-22 Programme for Government

environmental implications under this scenario also are unclear. Overall, the budget for forestry has been increasing in order to fund grants required to meet the woodland expansion targets (from £83.7million in 2021/22 to £102 million identified in the draft budget for 2023/24⁷². In addition, forest expansion (as well as peatland restoration), is being funded increasingly by private investors, for example from pension funds, but also private companies seeking to offset their carbon emissions. This, in turn is driving up land prices. This is one of the issues that is driving those that support land reform to call for more controls and community rights over the management of land.

Land Reform: The proposed new land reform legislation, due to be introduced by the end of 2023 intends to address the long-standing concerns about the unusually concentrated pattern of land ownership in rural areas of Scotland. The Land Commission’s work on this issue found the core issue to be “the concentration of social, economic and decision-making power that often goes hand in hand with concentrated land ownership⁷³”. The environmental impacts of these patterns of ownership vary and depend on the management decisions taken in each case⁷⁴. The core aims of the Scottish Government’s land reform policy are: to increase diversity of landownership, to bring about changes in land use, and to create more opportunities for communities to engage in decision making about the land around them and share in the benefits it brings⁷⁵. The measures being proposed for inclusion within the new legislation are set out in Box 7. A public consultation in 2022 on ‘Land Reform in a Net Zero Nation⁷⁶’ sought views on several proposals for inclusion in the Land Reform Bill, an analysis⁷⁷ of which was published in June 2023.

Box 7: Measures proposed for inclusion in the forthcoming land reform legislation

The measures proposed for inclusion in the forthcoming land reform legislation, as set out in the consultation document⁷⁸, include:

- The introduction of a public interest test for transfers of large-scale landholdings;
- A requirement on owners of large-scale holdings to give prior notice to community bodies of their intention to sell;

⁷² Scottish Budget: 2023-24: <https://www.gov.scot/publications/scottish-budget-2023-24/documents/>

⁷³ Scottish Land Commission, 2021, [Legislative proposals to address the impact of Scotland’s concentration of land ownership](#), A discussion paper from the Scottish Land Commission

⁷⁴ Glass J, McMorran R, 2019 Investigation into the Issues Associated with Large scale and Concentrated Landownership in Scotland, Technical Report.

⁷⁵ [Scottish Land Rights and Responsibilities Statement 2022](#)

⁷⁶ <https://consult.gov.scot/agriculture-and-rural-economy/land-reform-net-zero-scotland/>

⁷⁷ <https://www.gov.scot/publications/land-reform-net-zero-nation-analysis-responses-consultation-exercise/>

⁷⁸ <https://www.gov.scot/publications/land-reform-net-zero-nation-consultation-paper/>

- A requirement on those seeking land-based subsidies to have the land registered in the Land Register, to ensure transparency around who benefits from public funding; and
- Ways to ensure communities benefit from future investment in Scotland’s natural capital, and that there is greater transparency around land and asset ownership.

Although Scotland has the powers to make its own decisions around land reform, there are a number of areas that impinge on what is feasible. In its advice to Ministers on the role of taxation in supporting current land reform objectives⁷⁹, the Scottish Land Commission noted that “the current mix of reserved and devolved powers in taxation means that the Scottish Government is limited in its ability to use tax in support of land policy”. In particular, the most significant tax levers that relate to land are reserved powers, namely capital gains tax and inheritance tax.

4.1.3. Implications for agriculture and land use under Scenarios 2 and 3

In re-joining the EU (**Scenario 2**), Scotland would become subject to the CAP again, in whatever form it takes after 2027. As such, it would be required to contribute to its costs via Scotland’s contribution to the EU budget and work within the envelope of funding that it would receive in return. It is anticipated that Scotland would be a net contributor to the EU budget overall, although it would receive a significant proportion of its contribution back in the form of support under the CAP. It is unclear whether this would be higher or lower than it currently receives as part of the UK. This would affect both support for farming as well as tree planting and management activities. Being a net contributor to the EU budget may also influence Scotland’s negotiating position on its size, including whether or not the overall budget for the CAP should be increased or constrained, with perhaps a more conservative position taken than by UK governments in the past.

Since Scotland is already seeking alignment with the CAP’s broad objectives, the framework for agricultural support in the period to 2027, when the current version of the CAP ends, would be unlikely to change from the approach that would be adopted under **Scenario 1**. After 2027 it may well change in structure and content and after that point, the Scottish framework for support would have to be amended to align with these changes, depending on the timing of accession.

⁷⁹ Scottish Land Commission, 2022, [Land Reform and Taxation: Advice to Scottish Ministers](#)

Although the CAP has become more flexible for Member States to operate since the UK left the EU, there remain some substantive common rules which place commitments on Member States, for example around strategic planning, budgetary ring-fencing, inspections and monitoring and reporting. Some of the different approaches that Scotland can introduce currently, therefore would need to be revised to be in line with the CAP rules. In some areas, this could be beneficial for the environment. For example, the CAP requires a programming approach whereby all measures to be used have to be justified against an assessment of needs, with a clear intervention logic and a clear monitoring and evaluation framework. This is lacking from the current Scottish approach, which to date only comprise a Vision and an outline structure, although greater clarity on the intervention logic and monitoring framework may be developed prior to 2025. In addition, the current ring-fencing requirements for environmental spend under the CAP could be beneficial, given the historically low proportions of funding being allocated to environmental measures in Scotland, compared to direct payments and compensation payments to farmers in LFAs. Re-joining the CAP could also lead to more EU driven and stringent inspection regimes (which may be beneficial for the environment).

Separately, there is a trend within the CAP to moderate the support available to large farms. Since Scotland has a greater proportion of larger farms compared to the EU average, this could disproportionately affect Scotland but might increase the income flow to smaller holdings. This may be positive for the environment since many crofts and smallholdings practice high nature value farming.

Under **Scenario 2**, Scotland would also have to adhere to all EU regulations and directives. Beyond those that it already implements through retained EU legislation, there are a number under negotiation that, if they were to be agreed, would have implications for the land use sector as they are likely to bring in more stringent requirements than are currently in place. These include: the Nature Restoration Law (setting national targets for habitat restoration, including on agricultural land); the Sustainable Use of Pesticides Regulation (setting legally binding reduction targets for pesticides and promoting the use of alternatives); the Soil Monitoring Law which sets out requirements for the monitoring and reporting on soil health; the new and more ambitious targets for reductions in emissions specified under the Land Use, Land Use Change and Forestry regulation; and the agricultural contribution to GHG emission reduction targets under the Effort Sharing Regulation. Looking further ahead, there is the proposed EU framework legislation on sustainable food systems that the Commission is due to publish in Autumn 2023. This is intended to bring in new rules for food labelling, public procurement, and overall sustainability standards for the whole food chain in steps over time. Taken together, these Green Deal measures would be likely to drive a significant change in agriculture and food systems that seems less likely to be adopted in other scenarios.

Under **Scenario 3** (leaving the UK, but outside the EU), the provisions of any future Scottish constitution could have implications for agriculture and land use. However, the main question for agriculture and forest policy under this scenario would be the availability of funding to support environmental and climate aspects affecting agriculture and land use if Scotland were an independent country.

There would be no ring-fenced budget for agriculture (as there are under Scenarios 1 and 2). Scotland would be free to make its own decisions about the scale and allocation of public funding. Given that public spending may be more squeezed than at present, this could lead to a significant decrease in support for the sector as a whole and spending on agri-environmental issues in particular. Much will depend on where political priorities lie. For example, there may be a risk that some of the more vulnerable parts of the agricultural sector could decline, leading to land abandonment, particularly in the remote and upland parts of Scotland, unless support were prioritised to sustain these systems for cultural and/or environmental reasons or to support alternative employment opportunities where agriculture is no longer viable. There may also be increased environmental risks associated with more profitable sectors, such as red meat and whisky producers, if they sought to increase production to take advantage of export markets beyond the UK. With greater pressure on public finances, it is possible that more private investment would be encouraged, taking advantage of opportunities for carbon offsetting, for example, leading to significant land use change, particularly increased tree planting and more peatland restoration, leaving less land for agricultural production, particularly livestock.

There are already capacity issues within the Scottish Government, particularly in relation to addressing the environmental issues relating to agriculture and land use. Under both **Scenarios 2 and 3**, these are likely to be exacerbated, at least in the beginning, given the additional challenges that would need to be addressed. In the past, negotiations on the CAP were led from Whitehall on behalf of the devolved administrations, so this is an area on which there is limited experience. Outside both the UK and the EU (**Scenario 3**), the anticipated budgetary pressures and complex issues that would arise in terms of what to prioritise and the economic, social, and environmental implications of these decisions would require significant strategic planning.

In terms of the implications for land reform, under both **Scenarios 2 and 3**, the main difference from **Scenario 1** is that Scotland would have powers over all taxation policy. It could therefore design taxes like Capital Gains Tax or Inheritance tax (including rules linked to potential exemptions), in ways to influence the sale and management of land and this would allow a more adventurous land reform policy if that was the political choice.

In conclusion, there are significant differences between the scenarios, with environmental implications. These are especially between **Scenario 2**, where there is more certainty about funding levels, the need to re-join the CAP and a likely raft of new legislation affecting agriculture, climate, and the environment than in the other two scenarios where the Scottish authorities would be responsible for most of these choices, other than key aspects of funding in **Scenario 1**. However, in principle a new CAP will be in place by 2028 and the current CAP is not necessarily the right benchmark when looking ahead. Addressing environmental challenges more vigorously and effectively than in the past would be possible in all scenarios and looks necessary if future environmental targets are to be met, as pointed out recently by the Climate Change Committee amongst others.

4.2. Marine, fisheries and aquaculture

4.2.1. Context

Scotland's marine area accounts for over 60% of the UK's seas. Scotland's seas cover a surface area that is over six times the terrestrial land mass and host a wide variety of marine species and habitats. Despite such a vast array of life in Scotland's seas, a closer look demonstrates that these ecosystems are fragile and under increasing stress from human activities, as emerges from the 2020 Scottish Marine Assessment⁸⁰.

The largest and most environmentally significant economic activities at sea are fisheries and aquaculture (the oil and gas sector is larger in economic terms but is addressed in the energy and climate part of this report, section 4.3 below). Seafood - finfish and shellfish, both wild-caught and from aquaculture - is Scotland's second largest export and was worth approximately worth £6 billion in 2017⁸¹.

Fisheries is a devolved matter, as is appropriate given the significant differences in fisheries across the UK and the need for management arrangements to be tailored to Scottish circumstances. The Scottish Government has noted that, "there are areas where a common approach across the UK is desirable and mutually beneficial, but any such approach must be achieved through agreement and where legislative consent from the Scottish Parliament has been given⁸²". The overall UK approach to fisheries (implemented by the UK Government for England and the devolved administrations for the other countries) is driven by a mutually developed and agreed Joint Fisheries Statement⁸³, required under the Fisheries Act 2020.

⁸⁰ <https://marine.gov.scot/sma/>)

⁸¹ <https://www.gov.scot/policies/sea-fisheries/>

⁸² <https://www.gov.scot/policies/sea-fisheries/>

⁸³ <https://www.gov.uk/government/publications/joint-fisheries-statement-jfs>

The Scottish Government's Future Fisheries Management Strategy for 2020-2030 suggests that it will:

“Form one of the cornerstones of the Blue Economy Action Plan. It will seek to deliver the benefits of a Blue Economy approach to the fishing industry by encouraging learning and collaboration with other marine sectors in areas of shared interest, such as skills, science, innovation, infrastructure, regulation and the climate emergency⁸⁴”. (emphasis added)

In launching a consultation on the Future Catching Policy (FCP), the Cabinet Secretary said:

“Now, more than ever, the spotlight is on the twin crises of climate change and biodiversity loss, which require urgent action in order to deliver change on a significant and long-lasting scale. The signing of the Bute House Agreement last year underlined our commitment to deliver the best outcomes for Scotland's marine environment, our seafood sector and coastal communities⁸⁵”.

Yet, despite this context and the commitments and aspirations of Scottish Government policy documents and Ministerial statements, environmentalists have expressed concern that the FCP consultation paper “does not appear to address, to consider, or propose any measure to either ensure that fisheries contribute to climate mitigation or adapt to climate change. Indeed, a wordsearch of the consultation indicates that the words “climate” and “carbon” do not occur - even in a context-setting section or objectives, let alone in proposed measures⁸⁶.

In relation to the marine environment as a whole, the Marine (Scotland) Act 2010 has been described, by the Scottish Government, as “a major turning point in safeguarding the future of Scotland's seas and laying the foundations for a more simplified marine planning and licensing system⁸⁷”. The measures in the 2010 Act were:

- **Marine planning:** a new statutory marine planning system to sustainably manage the increasing, and often conflicting, demands on our seas;
- **Marine licensing:** a simpler licensing system, minimising the number of licences required for development in the marine environment to cut bureaucracy and encourage economic investment;

⁸⁴ <https://www.gov.scot/publications/scotlands-future-fisheries-management-strategy-2020-2030/pages/2/>

⁸⁵ <https://www.gov.scot/news/world-leading-fisheries-proposals/>

⁸⁶ <https://www.stopclimatechaos.scot/wp-content/uploads/2022/06/SCCS-response-to-consultation-on-Future-Catching-Policy-1-1.pdf>

⁸⁷ <https://www.gov.scot/publications/marine-scotland-act/>

- **Marine conservation:** improved marine nature and historic conservation with new powers to protect and manage areas of importance for marine wildlife, habitats, and historic monuments; and a statutory requirement to establish an ecologically coherent network of marine protected areas;
- **Seal conservation:** much improved protection for seals and a new comprehensive licence system to ensure appropriate management when necessary; and
- **Enforcement:** a range of enhanced powers of marine conservation and licensing.

However, a decade later a 2022 review by environmental NGOs of progress towards these objectives concluded that:

“The implementation of Scotland’s legislation in relation to the marine environment is, as yet, ineffective at achieving its objectives. Issues that might contribute to this ineffectiveness include:

- *a failure to apply (or apply sufficiently robustly), the general duty to recover the marine environment;*
- *a National Marine Plan that is too generic, seeking to be all things to all sectors, and does not seek to address the challenging decisions necessary in managing conflicting pressures and addressing the interlinked climate and nature emergencies, a de facto ocean emergency; and a lack of progress in the development of regional marine plans;*
- *a lack of urgency to establish marine protected areas, and to apply management plans and measures to such areas when established; and*
- *a lack of urgency to reduce the impacts of human activities on the marine environment, such as fisheries, fish farming, plastic litter, and the impact of invasive species⁸⁸”.*

To some extent, these challenges are recognised, and the Scottish Government’s Programme for Government (driven by its agreement with the Scottish Green Party) includes a number of initiatives to improve the protection and management of the marine environment, including:

- Fisheries management measures for existing Marine Protected Areas (MPAs);
- designating a ‘world-leading’ suite of Highly Protected Marine Areas (HPMAs) covering at least 10% of Scotland’s seas; and
- adopting specific, evidence-based measures to protect the inshore seabed in areas outwith MPAs and HPMAs⁸⁹.

⁸⁸ <https://www.scotlink.org/publication/rhetoric-to-reality-report-2022/>

⁸⁹ <https://www.gov.scot/publications/scottish-government-scottish-green-party-shared-policy-programme/>

These measures are due to be announced and implemented in the coming months and years - as will the finalised Future Catching Policy. The first stage of this process is the current consultation on HPMA⁹⁰. It will be a significant step forward if the issues raised during the review and consultation processes are addressed effectively but this remains to be seen. Indeed, following controversies and political concerns, the Scottish Government has now announced that HPMA⁹¹ will now not be taken forward in the form originally proposed⁹¹. While a commitment “to developing a new pathway and timetable for enhancing marine protection, in line with our draft Biodiversity Strategy ambition for Scotland to be nature-positive by 2030”⁹² remains, it is unclear what form this will take, and how it will ‘keep pace’ with the EU’s Nature Restoration law’s commitment to 10% of the land and seas being “strictly protected⁹²”. This is, therefore, another illustration of the challenges faced by the Scottish Government in turning commendable environmental ambition into delivery of real outcomes.

In the marine environment, since most policy issues are devolved, the Scottish authorities are able - when they choose - to adopt a different approach to elsewhere in the UK. For instance, the Marine (Scotland) Act 2010 represents a distinctively Scottish approach - it contrasts in some areas with the parallel UK legislation. The Scottish Act included a greater emphasis on the use of regional plans to implement marine planning, as well as a National (Scotland-wide) plan; its provisions for protected areas were also more flexible.

However, when appropriate, Scotland can also choose to work co-operatively and in step with other parts of the UK - as is the case with Joint Fisheries Statement.

Nevertheless, the marine area is also a field of policy where several important issues are currently reserved and remain the responsibility of the UK Government. These include oil and gas licencing, shipping, and the many international negotiations/agreements on marine issues, including the sharing of fishing opportunities. All of these can and do have an impact, directly or indirectly, on the marine environment and on Scotland’s efforts to reduce emissions. In addition, and adding to the jurisdictional complexities, there are a number of issues, such as nature conservation beyond 12nm and renewable energy consents, that are “executively devolved”; that is, implementation is a matter for Scottish Ministers, but the legislative framework (including any amendments) remains a matter for Westminster.

⁹⁰ <https://consult.gov.scot/marine-scotland/scottish-highly-protected-marine-areas/>

⁹¹ <https://www.gov.scot/policies/marine-environment/highly-protected-marine-areas/>

⁹² <https://jncc.gov.uk/our-work/scottish-highly-protected-marine-areas/>

4.2.2. Post-referendum scenarios

In **Scenario 1**, marine legislation and policy can be expected to remain mostly devolved (or, at least, executively devolved) and, in this respect, business as usual applies. That is, they would remain a matter for the Scottish Parliament and Government, albeit subject to the wider constraints of UK membership as discussed above. The current suite of reserved matters would continue as they are unless there were any changes in the devolution settlement.

Depending on the development and implementation of UK post-Brexit-policy and the stance of future UK Governments, these constraints might grow and significantly affect the flexibility available to the Scottish Parliament and Government. In the marine environment, the fisheries agreements with the EU, under the TCA, will continue to be a significant issue.

In addition, as noted in chapter 3, the implementation of the REUL Act could be a considerable threat to Scotland's preferred actions in this area, by requiring resource diversion within government to maintain the regulatory environment and also potentially creating political pressure to mirror the decisions of the UK Government and 'compete' with any deregulation adopted in England. Further, the Act enables the UK Government to amend or drop reserved legislation in ways that might be inconsistent with Scotland's approach elsewhere.

Looking further ahead, future UK Governments may adopt different political and policy approaches, altering the nature of these constraints on devolved decision making. Equally, a process of reviewing/reforming the UK's constitutional arrangements and the devolution settlement (either as a consequence of a no vote, or as a UK Government initiative⁹³) also could present opportunities and challenges relating to changes in the allocation of currently reserved powers.

In **Scenario 2**, by contrast, constraints on devolved policy making would not arise at all from the UK side. Scottish legislation and policy in these areas would, however, be required to be consistent with the EU law and policy. In the marine environment, the two overarching EU policies of relevance would be the Marine Strategy Framework Directive (MSFD) and the Common Fisheries Policy (CFP).

Ensuring the consistency of Scottish law with the requirements of the MSFD would not be difficult unless there are significant changes in EU law prior to Scottish accession. The

⁹³ For example, should a future Labour-led UK Government seek to implement the recommendations of the Brown Commission.

legal framework was consistent⁹⁴ before Brexit and little has changed since, either in Scotland or at the EU level. Thus, the framework and objectives would align. However, the record of practical implementation in Scotland has not been impressive and a potential environmental gain in this scenario would be Scotland's exposure to enforcement action by the Commission, which might motivate Scottish governments to apply the Directive's requirements more vigorously.

The most significant issue, in this scenario, is that Scotland would be required to re-join the CFP. However, it should be noted that the CFP has evolved since the UK's departure and will have developed further by the time Scotland may re-join, with the next review likely before the end of the 2020s. The impact of re-joining may be either positive or negative on the fisheries sector and the marine environment - depending on how both Scottish and EU policies in these areas develop in the interim. Departures from EU policy, for example in relation to discarding, would not normally be permitted and some adjustments to Scottish policy are likely to be required.

However, one aspect is certain: re-entering the CFP is unlikely to be an easy negotiation. This is illustrated by the Brexit experience and Scotland may have to concede some fishing rights overall as well as some reduction in autonomy. There will be a potential role for environmental stakeholders here. For example, environmental NGOs will wish to monitor the process and seek to influence the outcome - including seeking to play a role in the implementation of the CFP in Scotland's seas through, for instance, re-joining the relevant Regional Advisory Councils. The growing emphasis on sustainability (at least in theory) in the CFP may be a benefit to the marine environment - although this is also (again in theory) an element of 'independent' UK and Scottish policy under the Fisheries Act 2020.

In this scenario, while the catching opportunities for Scotland's fisheries sector would be constrained by the requirements of CFP membership, there may be economic benefits for the fisheries sector accruing from the re-joining of the single market and customs union. The consequences of Brexit have demonstrated clearly that the ease of exporting of Scotland's catch (and importing other fish) is almost as important economically as the catching opportunities. This arises because most of Scotland's catch is exported - while most of the fish consumed in Scotland is imported⁹⁵. Of course, this potential trading benefit of EU membership would need to be balanced against whatever, if any,

⁹⁴ Albeit that eNGOs have expressed concern over the effectiveness of implementation - for example, missed targets, etc.

⁹⁵ Comments from interviewees backed up Scottish Parliamentary evidence from the industry on this topic which states that "around 80% [of the catch] is consumed outside the UK", see <https://www.parliament.scot/-/media/files/committees/constitution-europe-external-affairs-and-culture-committee/6-seafood-scotland.pdf>.

challenges were to arise from the parallel changes to the intra-UK trading arrangements (see section 3.1.2 above). The environmental consequences of such trade adjustments are more difficult to forecast.

In **Scenario 3**, where an independent Scotland has determined to remain a non-EU member, the result, in principle, would be the greatest flexibility (and uncertainty) in relation to law and policy in relation to fisheries and the marine environment. However, in practice, not all constraints would melt away; it is likely that policy would need to recognise the shared nature of the marine environment and of fish stocks - the North Sea, the NW Atlantic and the Irish Sea are all ecosystems that are shared between different jurisdictions - in this scenario, they would be Scotland, the rest of the UK and Norway (and the other 'third countries' in current EU language). Thus, it is inevitable that Scotland, as part of the process of international recognition following independence and/or the separation agreement with the rest of the UK, would need to agree terms for the 'sharing' of this resource and aspects of the environment. Such an arrangement would be analogous to the fisheries chapters of the EU-UK TCA, following Brexit.

In this independence scenario, the Scottish Government would, as described, have greater influence and capacity, in principle, to pursue policies that benefit Scotland's marine environment and/or the fisheries sector. However, in practice, whether such Scottish governments would adopt a more or less environmental approach to fisheries policies than that at present or would be the case under the CFP is a matter of conjecture. There would be an opportunity for the industry to try to drive policies determined largely in Edinburgh and a similar opportunity for NGOs to apply pressure too.

In **Scenario 3**, Scotland has control of trade policy and the fisheries strands within it, but it may not find it easy to obtain concessions from Third countries that go beyond those obtained by the UK already.

Finally, it should be noted that, in all scenarios, Scotland would remain party to international agreements including, for instance, the UN CBD, CITES, the Bern, Bonn and Ramsar Conventions, etc with the environmental ambitions/requirements that affect the marine environment. In addition, there are a number of international agreements with specific marine purposes that apply - such as UNCLOS, OSPAR, agreements related to fisheries on the high seas and a developing UN agreement on marine biodiversity.

Long-term, of course, Scotland would in principle be in a position to influence such agreements in the independent scenarios - although this would be subject to the limitations applying to any small country, as discussed in 3.2 and 3.5 above.

In summary, there are significant differences between the scenarios, especially with respect to fisheries but also other aspects of marine management including oil, gas, and

wind exploitation. Re-joining the CFP in **Scenario 2** would be a substantial change, involving some re-negotiation of fishing rights as well as the application of EU rules, which are putting greater emphasis on sustainability as time passes. Scotland could move faster in this direction as well, if it wished to, under all scenarios but the willingness to do so is a key question, with the new ambition of recent policies needing to be weighed against a lack of delivery in the past. The significant influence of the fishing industry on policy decisions will remain a factor in all scenarios.

There could be environmental benefits from a more concerted and environmentally driven international approach to offshore development, such as the large windfarms planned by many countries in the North Sea, which will require effective compensatory measures for birds. Whether this could be attained more readily if all the powers in question were transferred from Westminster to Scotland would depend on the environmental ambition of the administrations concerned but if the Scottish government adopted an ambitious approach it would benefit from having comprehensive powers to deploy in the marine environment.

4.3. Climate, energy and transport

4.3.1. Context and energy/climate plans

Scotland enjoys a rich diversity of energy resources, from the oil and gas fields in the North Sea to onshore and offshore wind and is potentially well placed to exploit wave power if the technology becomes viable at scale in the future⁹⁶. Renewable energy has also now become central to the Scottish Government's plans for a "renewables revolution"⁹⁷, exploiting the potential benefits of green energy for climate change mitigation and adaptation, as well as for economic development. The Government's vision aims to establish Scotland as a net zero leader and renewable energy exporter in the North Sea region⁹⁸.

Scotland has enacted a statutory Net Zero target date of 2045, including interim targets for 2020, 2030 and 2040, contained in the Climate Change (Emissions Reduction Targets) (Scotland) Act 2019⁹⁹. These targets set a percentage reduction on 1990 emissions and a 'fair and safe' emissions budget of 1,240 MtCO_{2e} for total emissions in the years 2010-

⁹⁶ <https://www.gov.scot/publications/draft-energy-strategy-transition-plan/documents/>

⁹⁷ <https://www.gov.scot/news/delivering-a-fair-and-secure-zero-carbon-energy-system/>

⁹⁸ <https://www.gov.scot/news/delivering-a-fair-and-secure-zero-carbon-energy-system/>

⁹⁹ <https://www.parliament.scot/-/media/files/legislation/bills/previous-bills/climate-change-emissions-reduction-targets-bill/amendments/climate-change-emissions-reduction-targets-scotland-bill-with-stage-2-changes.pdf>

2050¹⁰⁰. These targets place Scotland amongst the ‘leading pack’ of countries with demanding climate ambitions. However, the targets could still be improved in areas such as aviation and transport, and, when accounting for the “fair share” of efforts between the Global North and South in tackling climate change, they could also be deemed as somewhat insufficient¹⁰¹.

Moreover, in common with many countries, Scotland is far from on track to meet these targets¹⁰². In its most recent five-year review of progress in reducing emissions in Scotland, the CCC highlighted that the 2030 target of 75% emissions reduction would be extremely difficult to attain in its current trajectory¹⁰³.

In consequence, managing an effective phase out of oil and gas production is set to be one of the key challenges in the years ahead, both in environmental and economic terms, and the Scottish Government has identified the transformation of fossil fuel energy sector jobs towards high-quality green, especially renewables-based, employment as a major priority of its ‘Just Transition¹⁰⁴’. However, exploration licensing is a matter reserved for the UK Government, thus requiring a collaborative approach to the transition process.

The Conservative Government has remained in favour of large-scale extraction of North Sea oil and gas reserves, committing to “hundreds of new oil and gas licenses” for exploration and potential extraction of new reserves at the end of July 2023¹⁰⁵. It is also likely to approve drilling at Rosebank, West of Shetland, in what is the largest undeveloped oilfield in the North Sea, despite concerns raised by a number of parliamentarians and green groups¹⁰⁶. Environmental groups have suggested that downstream emissions from new extraction at this site could lead to the UK missing out on its Net Zero emissions commitments for 2050¹⁰⁷.

¹⁰⁰ <https://www.gov.scot/publications/draft-energy-strategy-transition-plan/documents/>
<https://www.theccc.org.uk/wp-content/uploads/2022/12/Progress-in-reducing-emissions-in-Scotland-2022-Report-to-Parliament.pdf> and <https://www.gov.scot/publications/climate-change-scotland-act-2009-interim-target-amendments/pages/the-target-setting-criteria/>

¹⁰¹ <https://www.scotlink.org/wp-content/uploads/2022/04/Rhetoric-to-reality-2-full-report-FINAL.pdf>

¹⁰² UK Climate Change Committee, “Scotland’s climate targets are in danger of becoming meaningless”, (2022) <https://www.theccc.org.uk/2022/12/07/scotlands-climate-targets-are-in-danger-of-becoming-meaningless/>

¹⁰³ <https://www.gov.scot/publications/draft-energy-strategy-transition-plan/documents/> *Scotland met its stated emissions target for 2020, largely because of the effects pandemic and subsequent lockdown* - UK Climate Change Committee, “Progress in reducing emissions in Scotland: 2022 Progress Report to Parliament”, (2022) , p. 32 <https://www.theccc.org.uk/wp-content/uploads/2022/12/Progress-in-reducing-emissions-in-Scotland-2022-Report-to-Parliament.pdf>.

¹⁰⁴ <https://www.gov.scot/publications/draft-energy-strategy-transition-plan/>

¹⁰⁵ <https://www.gov.uk/government/news/hundreds-of-new-north-sea-oil-and-gas-licences-to-boost-british-energy-independence-and-grow-the-economy-31-july-2023>

¹⁰⁶ <https://www.theguardian.com/environment/2023/apr/01/new-oilfield-in-the-north-sea-would-blow-the-uks-carbon-budget>

¹⁰⁷ <https://www.theguardian.com/environment/2023/jul/24/new-north-sea-oil-and-gas-licences-emissions-greenpeace-government-uk>

On the other hand, while the UK Labour Party would honour and not revoke any licences issued by the Government before the election, it pledged in June 2023 as part of its Green Energy Strategy to stop issuing new licenses in the North Sea in the future, and to invest more in renewable energy sources, such as wind and nuclear¹⁰⁸. It also promised to set up GB Energy, which would be a new state-owned energy company, to be headquartered in Scotland, and to support the green transition of fossil fuel employment to quality green jobs, in sectors such as hydrogen or Carbon Capture and Storage¹⁰⁹. However, this has been met with some scepticism in Scotland, given the background of an approaching General Election and backtracking on the proposed scale of spending pledges for climate and other green policies by the Party rather recently¹¹⁰. Changes in position cannot be ruled out.

By contrast, the Scottish Government (and the SNP more specifically), has been somewhat non-committal about their precise plans for divestment from North Sea oil and gas. They have pledged a Just Transition away from fossil fuels, but without proposing a clear roadmap for winding down production in its January 2023 draft Energy Strategy¹¹¹. Furthermore, the strategy only goes as far as a “presumption against new exploration for oil and gas”, which has led many to worry about potential ‘backsliding’ in the future¹¹². Currently a consultation exercise is underway but more generally some ambiguity on this issue can be seen helpful for the SNP, as it serves the dual purpose of allowing it to publicly accuse the UK Government of overriding Scottish interests for more renewable energy, while less conspicuously delaying any meaningful decision-making that may antagonise Scotland’s fossil fuel industry and trade unions. However, decisions on fossil fuel extraction cannot be postponed too long without putting at risk Scotland’s achievement of 2030 climate targets, especially if other interim targets are not met.

The Scottish Government’s recent draft Energy Strategy and Just Transition Plan¹¹³, offers a medium- to long-term vision for the energy transition, including energy production targets for renewable energy and hydrogen production capacities rising from 13.4 GW today to around 34 GW by 2030¹¹⁴, with a large increase in pumped hydroelectricity by 2045¹¹⁵. This increased energy output would allow Scotland to export surplus electricity to European neighbours and become a clean energy leader in the North Sea region¹¹⁶.

¹⁰⁸ <https://labour.org.uk/wp-content/uploads/2023/06/Mission-Climate.pdf>

¹⁰⁹ <https://labour.org.uk/wp-content/uploads/2023/06/Mission-Climate.pdf>

¹¹⁰ <https://www.bbc.com/news/uk-politics-65857109>

¹¹¹ <https://www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2023/01/draft-energy-strategy-transition-plan/documents/draft-energy-strategy-transition-plan/draft-energy-strategy-transition-plan/govscot%3Adocument/draft-energy-strategy-transition-plan.pdf>

¹¹² <https://www.heraldscotland.com/politics/23562291.warning-snp-ministers-back-sliding-oil-gas-position/>

¹¹³ <https://www.gov.scot/publications/draft-energy-strategy-transition-plan/documents/>

¹¹⁴ <https://www.gov.scot/publications/draft-energy-strategy-transition-plan/documents/>

¹¹⁵ <https://www.gov.scot/publications/draft-energy-strategy-transition-plan/documents/>

¹¹⁶ <https://www.gov.scot/publications/draft-energy-strategy-transition-plan/documents/>

Nuclear energy makes a significant contribution to electricity production at present, but the Government is opposed to further such power plants under current technologies¹¹⁷.

The Just Transition Plan focuses on creating new jobs for the skilled workforce in the energy sector and is guided by the independent Just Transition Commission¹¹⁸. It aims to create 77,000 new renewable energy sector jobs by 2050¹¹⁹, helping to reskill and upskill current workers in the fossil fuel industry towards employment in green and renewable energy. However, a report commissioned by the Scottish Government, forecast that the North Sea basin's current rate of decline could reduce the Scottish oil and gas workforce from 57,000 currently to 32,000 by 2030¹²⁰. Creating new jobs fast enough remains an important challenge for the Just Transition Plan and there is a good case for a more detailed government roadmap to ensure that employment targets are specific, achievable, realistic, and not simply ambitious.

The Government's accompanying Hydrogen Action Plan¹²¹ lays out a mission for Scotland to become a regional leader in hydrogen production, aiming to produce 5 GW of hydrogen by 2030, and 25 GW by 2045. However, there are mixed views on whether this is feasible or the most efficient and reliable way to reduce GHG emissions. Hydrogen technology is still developing, and the Plan lacks sufficient distinctions between the different types of hydrogen, with their very different environmental benefits¹²². While it has potential, hydrogen may make a smaller impact than the Government anticipates¹²³.

On the demand side, heating, industry, and transport remain Scotland's most energy-intensive sectors. Transport in particular has proven to be one of most challenging sectors to decarbonise, with Scottish plans to reduce emissions by 53% by 2030 relative to 2019 levels recently being declared undeliverable without a clear pathway for decarbonisation, especially for shipping and aviation¹²⁴.

¹¹⁷ <https://www.gov.scot/publications/draft-energy-strategy-transition-plan/documents/>

¹¹⁸ <https://www.gov.scot/groups/just-transition-commission/>

¹¹⁹ For more, please see <https://www.gov.scot/publications/energy-system-transition-independent-analysis/documents/>

¹²⁰ <https://www.gov.scot/publications/energy-system-transition-independent-analysis/documents/>

¹²¹ <https://www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2022/12/hydrogen-action-plan/documents/hydrogen-action-plan/hydrogen-action-plan/govscot%3Adocument/hydrogen-action-plan.pdf>

¹²² Hydrogen production is often split into different colours, primarily grey, blue, or green. *Grey hydrogen* refers to hydrogen made from fossil fuels, and without carbon capture processes. *Blue hydrogen* refers to hydrogen made in the same way as grey hydrogen, but where CO₂ emissions are captured, transported, and stored. *Green hydrogen* refers to hydrogen made from splitting water particles through renewably sourced electricity (electrolysis). For more see Friends of the Earth, "Hydrogen's role in Scotland's climate journey" (2022), p.8 <https://foe.scot/wp-content/uploads/2022/06/Hydrogen-Report-Digital-2.pdf>

¹²³ <https://foe.scot/wp-content/uploads/2022/06/Hydrogen-Report-Digital-2.pdf>

¹²⁴ <https://www.theccc.org.uk/wp-content/uploads/2022/12/Progress-in-reducing-emissions-in-Scotland-2022-Report-to-Parliament.pdf>

The need for a more energy efficient built infrastructure in Scotland, both residential and non-domestic, to reduce heat demand is also clear. Targets to reduce emissions 70% compared to 2020 levels and to achieve this through low-carbon heat installations in 1.2 million homes by 2030¹²⁵, as well as by scaling up current installation rates by more than 200,000 per year by the late 2020s¹²⁶. However, a lack of effective metrics for monitoring progress could jeopardise and delay the delivery of these targets¹²⁷.

On the international stage, Scotland has been a prominent subnational climate actor in several international environmental fora, playing an active part in hosting the UN Climate discussions in Glasgow for COP26¹²⁸, and leading initiatives such as the Edinburgh Declaration on biodiversity¹²⁹, co-chairing the Under2 coalition¹³⁰, and considering joining the Beyond Oil and Gas Alliance¹³¹.

4.3.2. Division of responsibilities

Although Scotland has extensive powers to decide its own policies in relation to climate and energy, there remains a range of areas where powers are reserved at UK level or other constraints apply. There are several policy realms where there is a mix of Scottish and reserved powers, while international commitments and mechanisms handled at a UK level are a further factor in some domains, such as aviation.

According to the Scottish Government's recent Energy Strategy and draft Transition Plan, "Critical areas where the UK Government must take action to secure the full benefits of the energy transition for Scotland's people and businesses" include:

- electricity market reform;
- support for carbon capture and storage;
- action on energy affordability;
- reforms to consenting of offshore wind and regulation of the offshore marine environment; and
- the development of new market mechanisms to support clean energy technology deployment¹³²".

¹²⁵ <https://www.theccc.org.uk/wp-content/uploads/2022/12/Progress-in-reducing-emissions-in-Scotland-2022-Report-to-Parliament.pdf>

¹²⁶ <https://www.gov.scot/publications/heat-buildings-strategy-achieving-net-zero-emissions-scotlands-buildings/documents/>

¹²⁷ <https://www.theccc.org.uk/wp-content/uploads/2022/12/Progress-in-reducing-emissions-in-Scotland-2022-Report-to-Parliament.pdf>

¹²⁸ <https://www.un.org/en/climatechange/cop26>

¹²⁹ <https://www.gov.scot/publications/edinburgh-declaration-on-post-2020-biodiversity-framework/>

¹³⁰ <https://www.theclimategroup.org/under2-coalition>

¹³¹ <https://www.gov.scot/publications/scottish-government-cop26-achieved/pages/15/>

¹³² See ref 86.

Given that Scotland has only partial autonomy in the energy and climate policy sphere it must rely on the UK Government to facilitate a considerable portion of its plans. While both governments share ambitious Net Zero objectives in principle, this is not the only driver of policy. Neither the UK (and within it, England) nor Scotland is on track to meet their Net Zero targets.

The recent review of progress in reducing emissions in Scotland by the CCC contains a rather detailed analysis of the large number of policy areas where it considers significant additional action to be necessary, concluding that Scotland is behind in the pathway needed to meet the 2045 Net Zero target¹³³. In this analysis it distinguishes between topics where the onus is on the Scottish Government to make progress and where it is the reserved powers that need to be exercised more effectively. There is an extensive list of specific actions needed in both categories and it is not a one-sided picture that emerges from this analysis.

In terms of increasing the share of renewables in energy supply, Scotland has a good record in making use of the devolved powers available. However, the record is less impressive in certain areas where there are also extensive devolved powers, such as aspects of demand management, notably transport and heating. Whilst a detailed examination of all the many individual policy areas in question would shed light on the extent to which a transfer of specific powers to Scotland might facilitate faster (or slower) progress in reducing emissions such depth is beyond the scope of this report and a more selective look at some key issues is adopted here.

Depending on the scenario in question, competences, and approaches for different aspects of climate and energy policy might change after a referendum. Some of the realms of policy most likely to be affected by different post referendum scenarios are considered briefly below.

4.3.3. Energy supply and infrastructure

4.3.3.1. Oil and gas

At present, Scotland has no formal powers over the issuing of oil and gas licenses, a realm wholly reserved to Westminster. However, it should be noted that environmental policy areas such as water pollution or the creation of marine protected areas, are devolved and relevant to the environmental management of the North Sea, which adds a layer of complexity in the development and operation of North Sea infrastructure. This mix of

¹³³ <https://www.theccc.org.uk/wp-content/uploads/2022/12/Progress-in-reducing-emissions-in-Scotland-2022-Report-to-Parliament.pdf>

different competences is in itself a limitation on the Scottish Government's options in devising an optimal policy mix.

The current regime relating to oil and gas exploitation allows the Scottish Government to publicly oppose new oil and gas exploration licenses, as it does, while not being able to prevent any exploration or extraction activities approved by the UK Government. Executives on both sides of the border have had a history of consulting and collaborating on licensing. However, recent political tensions and the current energy crisis have led to deteriorating relations between Holyrood and Westminster and opinions on the North Sea's immediate future have diverged. At present the Scottish government is consulting on whether there should be a presumption against new exploration for oil and gas, contrasting with the UK government's position, as noted above. The Scottish government's position will be important but in terms of timescale most of the key decisions will have been taken, for good or ill, before any plausible dates for the establishment of an independent Scottish government.

Under **Scenario 1**, it seems unlikely that Westminster would relinquish its jurisdiction in full over North Sea resources, not least as they remain a key source of revenue for the UK Government¹³⁴. Furthermore, the North Sea is still considered pivotal to the UK's energy security and national economy. Devolving more powers, such as taxation or licensing fees, to Scotland could result in a reduced source of funding for the UK Government. However, change cannot be ruled out, particularly if a different UK government wanted to reopen the devolution settlement, during or prior to an independence vote, as discussed in section 3.1. A new government in London also might exercise its powers in a more collaborative way, with a stronger emphasis on meeting climate goals but this is all a matter of conjecture.

Scenarios 2 and 3 would see Scotland's gaining sovereignty over North Sea oil and gas fields and other marine resources in a few years' time when production will have declined further, at a rate depending partly on how far new licenses are granted. Dismantling and clean-up costs and the question of who pays for them will be looming larger, and there may be disagreements over the division of assets and liabilities in the North Sea. In both scenarios Scotland would be able to implement its own policy and phase out oil and gas exploitation, including new exploration, more rapidly than favoured by the current Westminster government. If a future Scottish administration upheld this position and was willing to forego the revenue that might be available this would be a clear environmental benefit and would spur further action to invest in low carbon alternatives. However, an independent administration with full economic responsibilities

¹³⁴ The UK Government raised £1.4 bn in revenue from Oil and Gas production in the tax year 2021 to 2022, for more, see HM Revenue and Customs, National Statistics, "Statistics of government revenues from UK oil and gas production July 2022" (2022) <https://www.gov.uk/government/statistics/government-revenues-from-uk-oil-and-gas-production--2/statistics-of-government-revenues-from-uk-oil-and-gas-production-july-2022>

would face pressures to raise funds from multiple sources, so this outcome cannot be guaranteed.

Under both scenarios, licensing and extraction receipts in principle could help to provide the resources for a new Norway-styled Scottish sovereign wealth fund, that could, in turn, accelerate the transition towards renewable energy systems and help to fund just transition. This has been proposed by the Government in a recent paper¹³⁵. However, some critics have suggested that revenues from offshore renewables could be greater than currently expected. Following a recent auction run by ScotWind, it was accused of undervaluing Scotland's offshore wind potential and thus of diminishing opportunities to raise significant funds for a sovereign wealth fund outside the realm of fossil fuels¹³⁶. Under these circumstances, there would perhaps need to be an alternative source of significant funds, perhaps a form of taxation, corporate or otherwise, to take the place of revenues from licenses if oil and gas exploitation was phased out rapidly. Trade-offs in this domain are hard to avoid.

Under **Scenario 2**, Scotland would have the powers over its energy resources and energy market rules but be subject to EU legislation relating to climate and energy, including the EU Internal Energy Market. This would not prevent Scotland from adopting its preferred approach to the exploitation of oil and gas resources, but it would entail aligning with a substantial body of EU law and shouldering the costs involved at the same time as marshalling the resources required for nation-building processes, including preparation for EU accession. This might bear on decisions relating to the flow of North Sea revenues as well the adjustments to be made to Scottish energy and climate law.

Under **Scenario 3**, there would likely to be somewhat different economic and energy market dynamics but similar underlying choices for Scotland, albeit with potentially greater risks to security of supply outside the EU, which might lead to a closer energy supply relationship with the Rest of the UK.

For more analysis on marine resources and issues more broadly, see section 4.2 above.

4.3.3.2. Renewable energy, nuclear power and hydrogen

Scotland enjoys vast renewable energy resources, a well-established onshore wind sector, significant offshore wind potential, substantial tidal energy potential and some excellent sites for pumped storage. In 2020, 97% of gross electricity consumption was derived from

¹³⁵ <https://www.gov.scot/publications/building-new-scotland-stronger-economy-independence/pages/9/>

¹³⁶ <https://www.scotsman.com/news/politics/scotwind-auction-accused-of-selling-scotlands-offshore-wind-on-the-cheap-3663314>

renewable power, indicating Scotland's potential as a green energy net-contributor both to the UK and to the EU under **Scenario 2**.

Of the approximately 70 GW of potential renewable electricity capacity, less than a third is operational today with more than half still being developed or discussed¹³⁷. While the potential is clear, mobilising the investment and delivery still remains an issue. A certain pace of progress is also important for meeting other goals, such as winding down oil and gas, creating new jobs and developing green hydrogen technology.

Most of the policy areas concerned are already devolved but there are several where reserved powers are important. These include powers affecting the build-up of large-scale wind power in the North Sea and management of the electricity market, which can be an important factor in incentivising the necessary scale and pattern of investment. Gaining powers over taxation also could help to build a more multi-dimensional energy and climate policy in Scotland. Corporation tax and the various forms of relief available, particularly for eligible investment, is a valuable policy tool in steering investment as well as generating revenue. Many large fossil fuel companies take advantage of investment relief schemes to maintain their oil and gas production capacity¹³⁸. In this context, Scotland may need support from the UK government to adjust its fiscal regime in order to build up the renewables sector faster.

Nuclear is another energy supply option addressed in the Scottish Government's draft energy strategy. It lays out their formal opposition to new nuclear power sites under current technologies due to their high cost to build and operate, which, according to the strategy, would do little to solve the current energy crisis and reduce the sector's emissions¹³⁹. This position seems unlikely to be changed in any of the scenarios considered here.

On hydrogen, the Scottish Government proposed a Hydrogen Action Plan¹⁴⁰ in December 2022 stating its aim to generate 5 GW of capacity by 2030, and 25 GW of capacity by 2045. While strong on ambition, the strategy lacks concrete steps for delivery, so it is rather difficult to assess how far such targets will be reached. Some of the key elements needed to build up the hydrogen industry are the development of offshore wind parks, the repurposing of natural gas infrastructure in the Northeast region, and the availability of a skilled workforce. The strategy also relies on the large-scale development of carbon capture, utilisation, and storage technologies (CCUS¹⁴¹). This technology is not currently scalable commercially, at least in the UK, and is one reason for some scepticism around

¹³⁷ <https://www.gov.scot/publications/draft-energy-strategy-transition-plan/documents/>

¹³⁸ <https://www.ft.com/content/d70ea52c-5dc6-4bf5-8305-fffc82fdb67e>

¹³⁹ <https://www.gov.scot/publications/draft-energy-strategy-transition-plan/documents/>

¹⁴⁰ <https://www.gov.scot/publications/hydrogen-action-plan/documents/>

¹⁴¹ <https://www.gov.scot/publications/draft-energy-strategy-transition-plan/documents/>

the efficacy of the envisaged deployment of hydrogen in reducing emissions¹⁴². How far this will change as investment aided by the UK government builds up, including in a new Scottish project, is difficult to say.

Scotland's interests under **Scenario 1** would be constrained by the UK government's position on the North Sea, energy policy and other factors. It remains to be seen how aligned the governments will be on the pace of development of North Sea wind parks, and downstream infrastructure for hydrogen. There are also many areas where Scotland can progress using devolved powers, as the CCC has pointed out.

Scenario 2 would see Scotland adjusting to EU legislation which might influence the priorities adopted in some areas, for example having to align with developing EU policy on LULUCF. Scotland would need to present a National Energy and Climate Plan - i.e., a ten-year integrated national plan for climate and energy. Nevertheless, Scotland's accession to the EU would add valuable resources of clean energy to the EU, with environmental benefits at the expense of the UK. Under RePowerEU¹⁴³, the Union would likely be interested in greater integration of Scottish energy resources to increase its energy security, which could see accelerated investment in energy interconnectors between Scotland and the EU. There would be new options for obtaining EU funding for eligible projects, but these would be offset by the presumed loss of UK funding (e.g., for CCS¹⁴⁴). The net effects would merit further analysis.

Scenario 3 is the most difficult to predict in this realm, not least because many of the policy objectives laid out in the Scottish Government's draft energy strategy and hydrogen action plan are still to be put into practice. To implement these will require inward investment on a substantial scale and increased human capital that could be difficult to come by in a scenario where government revenue would likely be reduced, and the challenges of institutional development would absorb considerable resources. Given freedom from UK and EU constraints, under **Scenario 3**, Scotland would likely have the most freedom to decide the path it wished to follow, but at the same time there appears to be a risk of severe economic constraints, at least initially, which could limit the government's ability to deliver on its current policy objectives for renewable energy and hydrogen.

¹⁴² <https://foe.scot/wp-content/uploads/2022/06/Hydrogen-Report-Digital-2.pdf>

¹⁴³ https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/repowereu-affordable-secure-and-sustainable-energy-europe_en

¹⁴⁴ https://energy.ec.europa.eu/topics/renewable-energy/financing/eu-funding-offshore-renewables_en

4.3.4. Energy demand and Net Zero

4.3.4.1. Transport

Transport is one of the main contributors to emissions in Scotland and the Scottish Government has proposed to reduce emissions from the sector by around 53% by 2030, relative to 2019 levels, a more ambitious target than the UK Government's reduction goal of 25-36% over the same period¹⁴⁵. However, there are some concerns over the deliverability of the Scottish target. Scotland's stated ambition exceeds the 40% reduction recommendation made by the UKCCC in their updated transport pathway for Scotland, which includes road transport and aviation, so further clarity on how it will be implemented is required¹⁴⁶. The working relationship between the Scottish and UK governments at present is an impediment to faster progress, for example in the aviation field policies in these areas and/or measures for decarbonising the sector considerably more difficult.

There have been several important developments in UK-wide policy that have had a positive impact in Scotland, including the Zero-Emission Vehicle Mandate, that requires manufacturers to sell a rising share of electric vehicles (EVs) and applies an end date to the sale for new non-zero emission heavy goods vehicles (HGVs)¹⁴⁷. This has led to an increased uptake in zero-emission vehicles (ZEVs) in Scotland, which in turn is helping Scotland achieve its objective of transition towards to 100% battery-electric sales by 2030. This has been boosted by a new vision to provide more charging points and EV infrastructure, the decarbonisation of zero-emission HGVs in public transport, as well as more use of public transport among the public¹⁴⁸.

Aviation has seen minimal progress in the last year¹⁴⁹. Although reserved powers are strong in this sector, the Scottish Government is yet to publish a strategy to decarbonise the aviation industry and use its powers to reduce the growth in demand for air travel. Policy measures that could be deployed include the UK Air Passenger Duty (APD), frequent flyer levies or caps, and regulation of air-mile bonus incentives. There is a mixed picture here with some powers devolved or reserved or not entirely reserved and others that will become devolved, as in the case of the APD. Generally, reserved powers have not been used significantly to drive down emissions. In contrast to the approach to

¹⁴⁵ <https://www.theccc.org.uk/wp-content/uploads/2022/12/Progress-in-reducing-emissions-in-Scotland-2022-Report-to-Parliament.pdf>

¹⁴⁶ <https://www.theccc.org.uk/wp-content/uploads/2022/12/Progress-in-reducing-emissions-in-Scotland-2022-Report-to-Parliament.pdf>

¹⁴⁷ <https://www.gov.uk/government/publications/net-zero-strategy>

¹⁴⁸ <https://www.theccc.org.uk/wp-content/uploads/2022/12/Progress-in-reducing-emissions-in-Scotland-2022-Report-to-Parliament.pdf>

¹⁴⁹ <https://www.theccc.org.uk/wp-content/uploads/2022/12/Progress-in-reducing-emissions-in-Scotland-2022-Report-to-Parliament.pdf>

nuclear power, no proposals have been made to use the planning system to constrain airport expansion. The Scottish Government has committed to decarbonising scheduled flights within Scotland by 2040, creating a zero-emission aviation zone in the Highlands and Islands region, and including aviation as part of its wider Just Transition considerations¹⁵⁰. Other issues such as zero-emission aviation and sustainable aviation fuels require research collaboration and cooperation with the UK Government and UK Research and Innovation beyond political promises.

The Scottish Government holds joint responsibility for shipping, which makes up around 15% of all transport emissions alongside aviation¹⁵¹. Wider maritime decarbonisation is, however, dependent on UK-wide policy and international obligations. Nonetheless, the Scottish Government has direct influence over the ferry contracts it controls. Therefore, it has laid out targets to ensure 30% of public-owned ferries will be low-emission by 2032¹⁵². Progress in the development of low-carbon shipping is taking place but a lack of a clear and detailed strategy for delivery could derail efforts to achieve Net Zero. Recent and ongoing controversies related to ferry procurement¹⁵³ will also have been a significant distraction from efforts to address emissions reductions.

Scenario 1 involves a continuation of the existing division of competences, perhaps with marginal changes, as transport policy would remain a largely devolved policy area, with exceptions such as aviation. Nevertheless, it remains crucial, given the short timescales to 2030, to begin implementing schemes to embed changes required to keep transport emission targets on track¹⁵⁴. Developing a roadmap for decarbonising the aviation industry in Scotland under current powers should be a priority for example¹⁵⁵. The role of the UK Emissions Trading Scheme could be significant in achieving meaningful reductions in carbon emissions in aviation and shipping¹⁵⁶.

Accession to the EU under **Scenario 2** would see Scottish legislation fall under the scope of EU laws again, particularly for vehicle emission standards, air quality standards and

¹⁵⁰ <https://www.theccc.org.uk/wp-content/uploads/2022/12/Progress-in-reducing-emissions-in-Scotland-2022-Report-to-Parliament.pdf>

¹⁵¹ <https://www.transport.gov.scot/media/47052/national-transport-strategy.pdf>

¹⁵² <https://www.theccc.org.uk/wp-content/uploads/2022/12/Progress-in-reducing-emissions-in-Scotland-2022-Report-to-Parliament.pdf>

¹⁵³ <https://www.bbc.co.uk/news/uk-scotland-65863138>

¹⁵⁴ <https://www.theccc.org.uk/wp-content/uploads/2022/12/Progress-in-reducing-emissions-in-Scotland-2022-Report-to-Parliament.pdf>

¹⁵⁵ <https://www.theccc.org.uk/wp-content/uploads/2022/12/Progress-in-reducing-emissions-in-Scotland-2022-Report-to-Parliament.pdf>

¹⁵⁶ “By 2030, the current sectors covered by the UK ETS will only cover 18 % of UK territorial emissions, sectors such as agriculture and international aviation and shipping will continue to increase their share of the UK’s emissions towards 2050 as other sectors decarbonise” <https://www.gov.uk/government/news/net-zero-review-uk-could-do-more-to-reap-economic-benefits-of-green-growth>

the EU Emissions Trading Scheme¹⁵⁷. The Scottish Government would likely be subject to the objectives of the Zero Pollution Action Plan, recently proposed by the Commission, which incorporates holistic targets for transport related pollution¹⁵⁸. This will likely require Scottish lawmakers to increase standards to rising EU levels over time. Some projects may be easier to fund because of the availability of dedicated EU budget lines and schemes that are open to Member States but have substantive climate conditions attached.

Scenario 3 remains the most difficult to predict, combining regulatory autonomy and freedom to move faster on emissions from aviation for example with a lack of external political or technical support in a politically sensitive area of policy where cooperation with neighbouring countries has particular value.

4.3.4.2. Buildings

This is a key sector given the importance of appropriate energy conservation and efficiency levels throughout the country and a rapid decarbonisation of buildings, both residential and non-domestic.

The Scottish Government recently enacted highly ambitious targets for low-carbon heat in homes, aiming to reduce building emissions by 70% compared to 2020 levels¹⁵⁹. It has also laid out plans to install low-carbon heat in 1.2 million homes and 50,000 non-domestic buildings by 2030, as well as achieving installation rates of over 200,000 a year by the late 2020s¹⁶⁰. This implies double the required level of deployment per year that the CCC considers realistic, even in its most ambitious scenario. However, despite substantial funding commitments and progress on enabling measures, there is a lack of adequate policies to put in place low-carbon heat and energy efficiency improvements at the required rate. The Scottish Government's Green Heat Finance Taskforce¹⁶¹, tasked with identifying financial solutions to building decarbonisation is expected to now publish its Interim report addressing these concerns to October 2023¹⁶².

¹⁵⁷ https://environment.ec.europa.eu/topics/air/air-quality_en#objectiveshttps://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets_en

¹⁵⁸ https://environment.ec.europa.eu/strategy/zero-pollution-action-plan_en

¹⁵⁹ <https://www.theccc.org.uk/wp-content/uploads/2022/12/Progress-in-reducing-emissions-in-Scotland-2022-Report-to-Parliament.pdf>

¹⁶⁰ <https://www.gov.scot/publications/heat-buildings-strategy-achieving-net-zero-emissions-scotlands-buildings/documents/>

¹⁶¹ <https://www.gov.scot/groups/heat-in-buildings-green-heat-finance-taskforce/>

¹⁶² <https://www.gov.scot/publications/green-heat-finance-taskforce-minutes-may-2023/>

In addition, the Scottish Government has passed legislation¹⁶³, as well as agreed funding of £1.8 billion to increase energy efficiency in buildings, particularly focusing on social housing and fuel poor homes. It has allocated £200 million for the former and £465 million for the latter. However, this falls short of the CCC's recommended £3.3 billion required for green heating and energy efficiency projects by 2026.

Similar to transport, **Scenario 1** would not appear likely to cause a major shift in policy direction or governance. Relations between the two governments and the extent of shared objectives would be important under this scenario.

EU accession under **Scenario 2** would subject Scotland to the more stringent standards for building efficiency, found in the EU Energy Performance of Buildings directive and the Energy Efficiency Directive, and for green heating, under the Renewable Energy Directive¹⁶⁴. These would lead to a raising of standards if implemented fully but implementation would impose costs on the Scottish Government, particularly in areas where it was lagging behind at the time of accession. EU funding schemes may be available to make a contribution to these costs but have to be seen alongside Scotland's expected position as a net contributor to the EU budget.

Scenario 3 would see a similar outcome to that explained under transport above with the onus on Scotland to raise the necessary funds.

4.3.4.3. Agriculture and land use

Agriculture and land use are an important part of the climate equation but are addressed primarily in section 4.1 above. It is worth noting that in Scenario 2 EU legislation in the coming years is likely to impose more climate related targets on the agriculture and land use sector, which is a sensitive issue in Scotland given the size of the livestock sector.

4.3.5. Conclusion

In conclusion, Scotland would be able to put in place a more rounded set of energy and climate policies if it had extended powers to do so and this would be advantageous environmentally if future Scottish governments had high ambitions both for climate and

¹⁶³ See the Heat Networks (Scotland) Act 2021, the Heat Networks Delivery Plan, and Scotland's First National Assessment of Potential Heat Network Zones

¹⁶⁴ https://eur-lex.europa.eu/legal-content/EN/ALL/;ELX_SESSIONID=FZMjThLLzfxmmMCQGp2Y1s2d3Tjwtd8QS3pqdkhXZbwqGwlgY9KN!2064651424?uri=CELEX:32010L0031; https://eur-lex.europa.eu/legal-content/EN/ALL/;ELX_SESSIONID=FZMjThLLzfxmmMCQGp2Y1s2d3Tjwtd8QS3pqdkhXZbwqGwlgY9KN!2064651424?uri=CELEX:32010L0031; <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1399375464230&uri=CELEX:32012L0027>; https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.328.01.0082.01.ENG&toc=OJ:L:2018:328:TOC

for biodiversity, with a readiness to include nature-based solutions on a substantial scale. This equation is not entirely straightforward however as there are also advantages to being part of a larger economy with greater resources to deploy at a time of major transition when very large investments might be required and a cooperative approach with UK and/or EU neighbours, for example in relation to aviation and to planning offshore wind, would be helpful.

The benefits of **Scenarios 2 and 3** would be greater if Scottish governments are committed to raising the country's climate performance at a faster pace than that of the UK governments and are more ready to phase out North Sea oil and gas production more rapidly. This may be the case at the moment but not necessarily so in future. However, a more detailed technical analysis would be required to assess the merits of an array of more specific policy changes that could occur under different scenarios, taking account of the impact on the UK as well as Scotland and the climate as a whole.

While the Scottish government's ambitions for decarbonisation and emission reduction are commendable, they also have important weaknesses, especially in relation to delivery, as seen in the recent analysis by the CCC. In many instances the ability as well as willingness to deploy sufficient public and private finance is a critical factor and here there are questions about how this constraint can be overcome in any of the scenarios.

EU accession under **Scenario 2** may require the Scottish government to refashion its Net Zero strategy into a National Energy and Climate Plan (NECP), a mechanism now established in the EU and meet the EU's standards in a number of fields. Whereas the EU currently is active in introducing initiatives designed to allow the agreed 2030 climate targets to be met, it would be the 2040 targets that would be of greater relevance for an independent Scotland. A Commission proposal for such a target is due in 2024.

Under **Scenario 3**, deliverability would be an area of particular concern, whilst some of the potential synergies with the rest of the UK in responding to the net zero challenge could be a significant advantage in **Scenario 1**, especially if there was a close working relationship between governments in Edinburgh and London. This and uncertainties about the future position of UK governments on these issues leads to questions about whether further devolution of powers would inherently bring about a faster and more robust route to Net Zero in Scotland.

Climate, energy and transport policy in Scotland is a complex and dynamic sphere, with varying levels of devolution in place and significant variations between the perspectives of different political parties, adding to uncertainty about how policy might progress under different scenarios. The Scottish government's record in adopting ambitious targets and progress in some key areas, such as renewables, is a good foundation to build on in all scenarios but the challenges of delivery are not trivial, either in areas where powers

are devolved or retained. Some areas of opportunity and risk for an independent Scotland have been suggested here and in certain cases more freedom to act independently would have advantages if exercised well while in others UK wide action and greater support from Westminster would be advantageous in meeting goals. Generally, greater collaboration would be welcome to achieve more effective policymaking, especially important in connection to Net Zero objectives, and closer alignment between the two governments could accelerate Scotland's progress. However, under current circumstances, closer collaboration seems rather unlikely, and it is not clear whether this is likely to change.

4.4. Biodiversity, nature and water

4.4.1. Context

Scotland's biodiversity, or wildlife, is rich and diverse. This richness is often lauded - it is used to promote the tourism industry, food and drink products and Scotland's national identity. However, despite these positives, wildlife has suffered and declined considerably over the years and remains in danger.

“The challenges facing biodiversity are as important as the challenge of climate change, and I want Scotland to be leading the way in our response”.

Rt. Hon. Nicola Sturgeon MSP, July 2019¹⁶⁵

The Scottish Government has been responsible for Scotland's biodiversity since devolution (see annex 2), starting with the publication of its first Scottish Biodiversity Strategy (SBS) in 2004¹⁶⁶. Since then, there have been successor documents and processes, such as incorporating the international UN biodiversity targets, known as the Aichi targets¹⁶⁷. Prospective policies to achieve these were set out in the '2020 Challenge' document¹⁶⁸. However, success at achieving these targets has been mixed.

The most recent, most comprehensive, and widely accepted description of Scotland's current wildlife resources is the *State of Nature 2019* report¹⁶⁹. This showed that since recording began 49% of Scottish species have decreased, 28% have increased and that nature is changing rapidly, with 62% of species showing strong changes. Of the 6,413

¹⁶⁵ Letter to Scottish Environment LINK: <https://www.scotlink.org/wp-content/uploads/2019/07/FM-response-to-cross-sector-letter.pdf>

¹⁶⁶ <https://www.gov.scot/publications/scotlands-biodiversity---its-in-your-hands/>

¹⁶⁷ <https://www.cbd.int/sp/targets/>

¹⁶⁸ <https://www.gov.scot/publications/2020-challenge-scotlands-biodiversity-strategy-conservation-enhancement-biodiversity-scotland/>

¹⁶⁹ https://scotlink.org/files/state-of-nature-Report-Scotland_.pdf

species found in Scotland that have been assessed, 11% have been classified as threatened with extinction from Scotland. The *State of Nature* data show that the abundance and distribution of Scotland's species has on average declined over recent decades and most measures indicate this decline has continued in the most recent decade.

There has been no let-up in the net loss of nature in Scotland. In 2019, the IPBES (the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services) identified five *direct* drivers of global biodiversity loss, and two *indirect* drivers¹⁷⁰. The direct drivers are changing use of land and sea, direct exploitation of organisms, climate change, pollution, and invasive non-native species. NatureScot recognise that “these global drivers are also affecting Scotland's nature and its most special natural features¹⁷¹”. This underlines the importance of agriculture, fisheries, climate issues, etc covered in other sections of this chapter.

The record of recent decades must also be viewed in the context of longer-term historical declines. The *State of Nature* reports take 1970 as the earliest baseline year, as this is as far back as statistically comparable and systematic data are available. However, people have been shaping landscapes and wildlife for millennia, and some key habitats, in particular native woodlands, underwent massive reductions long before that date. This historic context is important in framing the more recent changes that can be accurately measured and is reflected in the Biodiversity Intactness Index which places Scotland 28th from the bottom in a ranking of 240 countries and territories¹⁷².

¹⁷⁰ <https://ipbes.net/global-assessment>

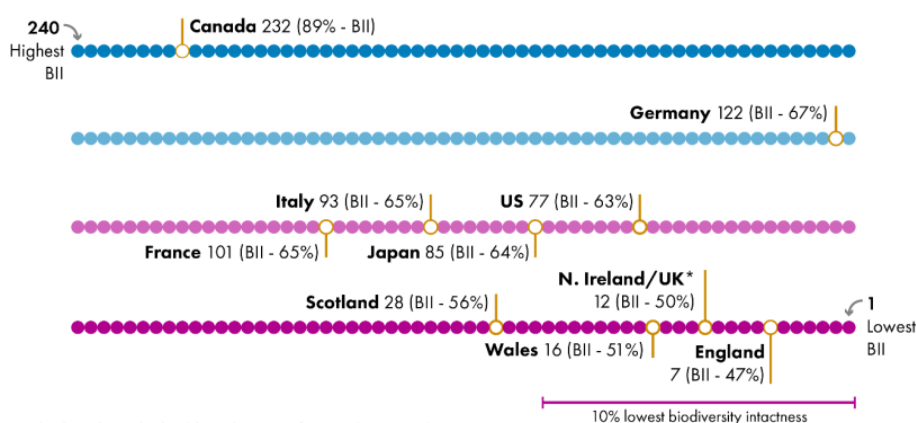
¹⁷¹ <https://www.nature.scot/scotlands-biodiversity/key-pressures-biodiversity>

¹⁷² <https://spice-spotlight.scot/2021/06/04/how-does-scotlands-biodiversity-measure-up/>

Figure 2: Biodiversity intactness in different countries within and beyond the UK

The four nations of the UK are in the bottom 25% of nations and territories for biodiversity intactness, ranking the lowest of the G7 countries

1 (lowest Biodiversity Intactness Index, BII) to 240 (highest BII)



Source: [Scottish Parliament, SPICe Spotlight, 2021](#)

The 2019 State of Nature report¹⁷³, the Biodiversity Intactness Index (BII)¹⁷⁴ and the 2020 Scottish Marine Assessment¹⁷⁵ are now treated by NGOs, Government and NatureScot as a “shared evidence-base” of biodiversity outcomes (that is, the abundance and health of species and habitats), and for use in devising strategy and policy.

In relation to the results of recent policy, SNH’s final report on progress to 2020 and the Aichi targets¹⁷⁶, was published in 2021 - this shows that targets are being met in just 9 out of 20 areas, with “insufficient” progress in 11¹⁷⁷. It is notable that those targets that were met related to issues of communications while progress has been generally insufficient where financial drivers or ecological outcomes are concerned.

Given this evidence, it is clear that there has been a historic decline in biodiversity, and little recovery, indeed some further deterioration, in the past 20-30 years. The statutory

¹⁷³ <https://www.rspb.org.uk/our-work/state-of-nature-report/>

¹⁷⁴ <https://www.rspb.org.uk/globalassets/downloads/about-us/48398rspb-biodiversity-intactness-index-summary-report-v4.pdf>

¹⁷⁵ <http://marine.gov.scot/sma/>

¹⁷⁶ Targets for biodiversity conservation, agreed under the Convention on Biodiversity Conservation; see <https://www.cbd.int/sp/targets/>

¹⁷⁷ <https://www.nature.scot/doc/scotlands-biodiversity-progress-2020-aichi-targets-final-report#AICHI+TARGET+11+%E2%80%93+PROTECTED+AREAS+INCREASED+AND+IMPROVED>

duty “to further the conservation of biodiversity¹⁷⁸” formalised in 2004 and its associated strategies have, so far, failed to halt loss or generate any recovery, and the targets for 2010 and 2020 were, especially with regard to ecological outcomes, both missed. Unfortunately, this is not an uncommon occurrence, especially across Europe and the global north.

The most recent meeting of the UN Biodiversity Convention parties was in Montreal at the end of 2022. Recognising the challenges described above, this meeting agreed a new global biodiversity framework - the Kunming-Montreal Global Biodiversity Framework (GBF)¹⁷⁹. Anticipating this global development (as well as contributing to its development through the Edinburgh Declaration¹⁸⁰), the Scottish Government began work on a refreshed strategy. The latest policy document, entitled *Biodiversity strategy to 2045: tackling the nature emergency*, was published during the Montreal part of COP15¹⁸¹. As well as proposing policy measures, the strategy also commits the Scottish Government to introduce a Natural Environment Bill to put in place statutory targets for nature restoration - this is expected in 2024-25.

The state of Scotland’s biodiversity, as well as its landscape and economic/cultural life, is linked to the use of land and seas, to the impacts of climate change, and to the management of the freshwater environment. Land use and agriculture, fisheries and marine activities and issues related to climate are covered in other sections of this chapter, but the freshwater environment is considered more closely here.

Scotland has more than 125,000 km of rivers and streams varying from small highland burns to deep, wide lowland rivers such as the Tay. There is also a 220 km canal network and over 25,500 lochs in Scotland, with the Western Isles and Sutherland having the highest concentration of lochs. The eight largest lochs cover an area of 301 km² - almost five times the area of the 17,637 smallest lochs combined. Loch Lomond has the largest surface area (71 km²), while Loch Morar is the deepest at 310m. Loch Ness holds the most water with 7.4 million m³, which is more than all the English and Welsh lakes combined¹⁸².

The Scottish Government is responsible for developing the policy and regulatory framework for the protection and improvement of Scotland's water environment. This area of law and policy is, Brexit notwithstanding, driven by the requirements of the EU Water Framework Directive and wholly devolved. It is mostly implemented according to the Water Environment and Water Services (Scotland) Act 2003 - with responsibility lying

¹⁷⁸ Section 1 of the Nature Conservation (Scotland) Act 2004 <https://www.legislation.gov.uk/asp/2004/6/contents>

¹⁷⁹ <https://www.unep.org/news-and-stories/story/cop15-ends-landmark-biodiversity-agreement>

¹⁸⁰ <https://www.gov.scot/publications/edinburgh-declaration-on-post-2020-biodiversity-framework/>

¹⁸¹ <https://www.gov.scot/publications/scottish-biodiversity-strategy-2045-tackling-nature-emergency-scotland/>

¹⁸² <https://www.environment.gov.scot/our-environment/water/scotland-s-freshwater/>

with Scottish Ministers but with most of the implementation carried out by the Scottish Environment Protection Agency (SEPA)¹⁸³.

The condition of Scottish rivers has improved significantly over the last 25 years but over half of rivers still fall short of the “good condition or better” ambition. However, almost two thirds of lochs surveyed are in good or high condition, while nearly 80% of ground water bodies in Scotland are in good condition¹⁸⁴. Much of the past improvement may be ascribed to the decline in pollution from heavy industry. Current pressures, causing a lowering of condition, include man-made barriers to fish migration, rural diffuse pollution and agricultural irrigation¹⁸⁵. Little recent progress has been made in addressing these issues, and thus the indicators of good condition have been fairly stable over recent years¹⁸⁶.

4.4.2. Post-referendum scenarios

This section seeks to address the implications of the different scenarios on the laws and policies relating to biodiversity, nature conservation (including species and site protection), freshwater pollution and water resources, and environmental assessment. It focuses on the terrestrial and coastal environment (see section 4.2 above for issues related to marine conservation).

Since powers in this area are primarily devolved, the Scottish authorities are free to take their own approach, which does not have to be the same as legislation and policy relating to biodiversity and water elsewhere in the UK. This is the case in, for instance, Scottish National Park legislation and the proposed licensing of grouse moors. Likewise, in contrast to England, Scotland chose to implement the Water Framework Directive through primary legislation¹⁸⁷ which offered the opportunity for more fundamental reform and a distinct approach (although provision for joint working across the Tweed-Solway catchments was included). When appropriate, Scotland can also choose to work co-operatively and in step with other parts of the UK - as is the case with Invasive Non-Native Species (INNS) management, where biogeography requires action on a Great Britain and/or all-Ireland basis.

¹⁸³ <https://www.gov.scot/policies/water/water-environment/>

¹⁸⁴ <https://www.climatechange.org.uk/research/indicators-and-trends/indicators/nb24-proportion-of-water-bodies-not-meeting-good-overall-status/>

¹⁸⁵ <https://www.environment.gov.scot/our-environment/water/scotland-s-freshwater/>

¹⁸⁶ <https://www.climatechange.org.uk/research/indicators-and-trends/indicators/nb24-proportion-of-water-bodies-not-meeting-good-overall-status/>

¹⁸⁷ Water Environment and Water Services (Scotland) Act 2003
<https://www.legislation.gov.uk/asp/2003/3/contents>

Thus, in **Scenario 1**, legislation and policy in these areas will remain devolved and departures from business as usual will not be required by constitutional change. The wider constraints of being part of the UK and being subject to the IMA and UK trade agreements for example will continue to apply, as outlined in chapter 2. As noted in section 3.2 above, the REUL Act will have an impact on Scotland in the more immediate future, absorbing resources, potentially creating pressures to deregulate if this occurs in England, and exposing Scotland to increased uncertainty about the future of reserved and specifically English legislation, given the extensive powers being given to ministers. The combination of these factors may make implementation of a distinctive and a more ambitious approach harder.

As noted previously, it is the position of future UK Governments, rather than the present one, that it is particularly relevant to post-referendum scenarios, and this is more a matter of conjecture. However, although this will impact possible policies and outcomes for biodiversity, since the relevant powers are mostly devolved (and most likely to remain so), the positions and approaches adopted by future Scottish Governments will be more important. In principle, these are also a matter of conjecture - although, it can be noted that the parties forming the current Scottish Government and others represented in the Scottish Parliament all support, in principle, the high-level ambitions represented by, for instance, the Kunming-Montreal Global Biodiversity Framework. Nevertheless, the extent to which any of these parties would be willing or able to implement policies to reverse the trends of the past 20-30 years (a period that has seen all parties in office for at least part of it) is another matter.

In **Scenario 2**, by contrast, constraints on devolved policy making do not arise from being part of the UK. Scottish legislation and policy would, however, be required to be consistent with the EU acquis - in particular, with the Nature Directives¹⁸⁸ and the Water Framework Directive (with the latter incorporating the Nitrates and Urban Wastewater Directives).

Such consistency would not be a significant challenge at present because Scotland's legal framework was broadly consistent with EU law before Brexit¹⁸⁹ and little has changed since (either in Scotland or at the EU level). However, as time passes, Scotland may well become out of step with the EU, especially as elements of the European Green Deal are enacted.

These include the proposed EU Nature Restoration Law, published by the Commission in June 2022 and aiming to restore the damage to Europe's nature by 2050 through a range of different provisions, adding substantially to EU law in this area. This can be expected

¹⁸⁸ The Birds and Habitats Directives taken together.

¹⁸⁹ Albeit that cases of poor or failed implementation were, and are, alleged by environmental NGOs.

to be in place in the 2020s, although possibly subject to significant amendments during the political process running up to adoption. An accompanying Commission proposal for a new Regulation on the sustainable use of pesticides aims to reduce by 50% the use of pesticides and the accompanying risks and the use of the most hazardous pesticides by 2030, although this is also the focus of considerable opposition in the European Parliament and elsewhere. It is, of course, Scottish Government policy to seek to “keep pace¹⁹⁰” with such developments. However, should this not happen, this would be an area for urgent action ahead of EU accession.

As in other areas of policy, (re-)accession to the EU would also mean that the legal framework and its implementation would be subject to monitoring and enforcement by the Commission and ECJ. The potential threat of penalties for non-compliance may motivate government bodies to more active steps and greater expenditure than they might otherwise choose. While ESS is a partial replacement for the role of EU bodies here it does not (and cannot) entirely replace it.

In **Scenario 3**, where an independent Scotland has decided to remain a non-EU member, there would, in principle, be the greatest flexibility for future Scottish governments in relation to law and policy in these areas. There would not be direct UK or EU requirements to meet although the influence of these larger neighbours would not evaporate. It is not clear that this would open up significant opportunities for greater ambition that are being inhibited by either the UK or the EU. On the other hand, the risks might be greater given the lack of such direct peer pressure, the absence of EU oversight of compliance and the potential temptation to limit expenditure on nature and water issues in the face of what might be greater economic insecurity.

Nevertheless, it should be noted that, in all scenarios, Scotland would remain party to international agreements including, for instance, the UN CBD, CITES and the Bern, Bonn and Ramsar Conventions, with the requirements for conservation action that they include (albeit that these agreements do not have the enforcement provisions that form an important part of EU arrangements). Long-term, of course, Scotland would be able to influence such agreements in the independent scenarios - although this would be subject to the extent that any small country can influence such processes. In **Scenarios 1 and 2**, such influence might be greater through participation in collective action as a member of the UK or EU, respectively, subject to caveats about the weight of Scotland’s voice on this topic in these entities.

In summary, this is an area of policy where the great majority of powers are devolved already and independence from the UK would not alter the scope for adopting more

¹⁹⁰ <https://spice-spotlight.scot/2022/05/31/scottish-government-approach-to-alignment-with-eu-law-the-draft-policy-statement/>

ambitious, or indeed less ambitious policies, very much. The constraints of the IMA would cease to apply but these bear more heavily on traded products than on the management of water, land and nature. More significant would be a decision to re-join the EU and then align with a growing corpus of EU law concerned with nature, land management and decarbonisation. One test of the Scottish government's commitment to keep in step with EU law will be whether it puts forward measures that do match or exceed the ambition of EU proposals in the Farm to Fork framework, including the nature restoration law. It is quite possible to keep in step with the EU without joining it. EU accession would result in the Commission's oversight role being restored and this could be a critical element in improving the historically poor record of implementation in Scotland, but many other parts of Europe within the EU also have poor records in this area and the role of the ESS should not be overlooked.

4.5. Chemicals, industry and air pollution

Three separate but related areas of policy are covered briefly in this section.

4.5.1. Air pollution

Air pollution in Scotland, as in the rest of the UK, is the major environmental source of ill health, with the most serious pollutants being particulate matter and nitrogen dioxide (NO₂). Over recent decades the levels of the most damaging pollutants (such as particulate matter and nitrogen oxides) have been steadily reducing in Scotland and across the rest of the UK although there are some exceptions; ammonia emissions have remained stubbornly high. Nonetheless, there are significant levels of failure to comply with binding air quality standards in some locations: annual mean limit values for nitrogen dioxide are above EU defined standards in some urban city locations, including Glasgow. Progress is required, as confirmed in the Environmental Standards Scotland (ESS) air quality Improvement Report¹⁹¹ against the Scottish Government relating in part to the lack of progress in tackling NO₂. This has been approved by the Scottish Parliament. However, it must be underlined that the challenges of reducing NO₂ and NH₃ emissions are not exclusive to Scotland but rather play out across much of western Europe including other parts of the UK.

This is a realm of policy where powers are devolved: Scotland is responsible for its own policy and legislation for air quality and has recently published a new strategy.

The 2021 *Cleaner Air for Scotland 2 Strategy* (CAFS2) states that:

¹⁹¹ <https://www.environmentalstandards.scot/wp-content/uploads/2022/09/20220929-ESS-AIR-QUALITY-INVESTIGATION-REPORT-IESS.21.013.pdf>

“...the rate of decline in most regulated pollutant sources is now reducing. This suggests that the easier actions or at least those deemed priority, urgent and important have been taken and we are now dealing with the harder issues, where interventions may be more complex and more focused on behaviour change as well as technological improvement. An associated question is what our target levels for the key pollutants should be and how quickly we wish to reach these¹⁹²”.

Up to now, progress in Scotland (and the rest of the UK) in tackling air pollutants has been driven largely by a set of EU legislation and other international obligations¹⁹³. Two key planks of EU law are:

- The National Emission Ceilings Directive (NECD) (2016/2284/EU) which sets national level emissions ceilings for certain pollutants (nitrogen oxides (NO_x), non-methane volatile organic compounds (NMVOCs), sulphur dioxide (SO₂), ammonia (NH₃) and fine particulate matter (PM_{2.5})), and
- The Directive on Ambient Air Quality (AAQD) (2008/50/EC) which defines and fixes air quality limits for several pollutants such as particulate matter (PM₁₀ and PM_{2.5}) and nitrogen dioxide (NO₂), target values for ozone, attempts to standardise air quality assessment methodologies across the EU member states and sets out requirements for making information about air quality publicly available.

Transposition of the AAQD¹⁹⁴ and the NECD¹⁹⁵ has not prevented the Scottish Government from setting itself high ambition levels in certain areas, for example in 2016, Scotland became the first country in Europe to adopt World Health Organisation guideline values for PM_{2.5} fine particulate matter into legislation¹⁹⁶.

A 2007 UK level *Air Quality Strategy*¹⁹⁷ established an overall framework for standards and objectives within which devolved responsibilities have been taken forward. The Scottish Government’s CAFS2 strategy¹⁹⁸ covering the period 2021-26 places a heavy emphasis on the interconnectedness of air pollution with climate change, the quality of

¹⁹² <https://www.gov.scot/publications/cleaner-air-scotland-2-towards-better-place-everyone/>

¹⁹³ The EU directives implement international obligations agreed under the UNECE Convention on Long-Range Transboundary Air Pollution and the Gothenburg Protocol, which later amended in 2012, required targets on emissions reductions to be set for 2020 and 2030.

¹⁹⁴ <https://www.legislation.gov.uk/ssi/2010/204/contents/made>

¹⁹⁵ <https://www.legislation.gov.uk/uksi/2018/129/contents/made>

¹⁹⁶ At that time the WHO guideline figure was 10 micrograms per cubic metre or less though it has subsequently been reduced to 5 micrograms per cubic metre or less in 2021.

¹⁹⁷

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/69336/pb1_2654-air-quality-strategy-vol1-070712.pdf

¹⁹⁸ <https://www.scottishairquality.scot/lez>

the urban environment and mobility, and strong coordination between different levels of government and delivery bodies (e.g., Transport for Scotland, Public Health Scotland and local authorities).

Policies addressing the major drivers of air pollution would remain within the gift of the Scottish Government regardless of the outcome of a referendum. So, for example, urban planning initiatives (e.g., the creation of low emissions zones like the ones established around Glasgow, Aberdeen, Dundee and Edinburgh, access restrictions in city centres and speed limits), transport and mobility (e.g., investment in low emission buses, the use of public transport, encouraging the move over to electric, hybrid and hydrogen vehicles), the promotion of health (e.g., encouraging fitness and recreation and walking and cycling as modes of transport¹⁹⁹), the control of woodstoves, as well as awareness raising and targeted interventions to change public behaviour, are matters for Scottish authorities.

In **Scenario 1**, legislation and policy in this area would remain largely devolved and continue within a ‘business as usual’ framework. The Government’s approach to many of the issues highlighted above would remain subject to certain UK constraints, such as the IMA, which could be significant if the control of specific traded products became contentious on different sides of the border. However, the most obvious limiting factors for the Government appear to be the ability and willingness to commit funding to this priority and, as the CAFS2 report itself states, the speed at which the Government wants to set targets to tackle key pollutants.

The Scottish Government and its competent authorities would continue to be an active participant in the UK Common Frameworks process²⁰⁰ to tackle transboundary air pollution. They would continue to submit data on emissions of certain pollutants to the UK Secretary of State who would integrate this into relevant UK wide submissions to fulfil international obligations, for example under UN conventions.

In **Scenario 2**, there would be a requirement for Scotland to achieve compliance with EU law. The NECD and AAQD are the two main EU legislative instruments concerned at present. Legal consistency with these two directives would not be a significant challenge for the Scottish Government given that this was achieved in principle at least before Brexit.

However, there are moves to strengthen the air quality framework within the EU. An announcement of a ‘Zero Pollution Action Plan’ in 2021 as part of the wider European Green Deal package introduces a proposal to tighten the AAQD and, if passed as expected, would mean that Scotland would need to tighten up its own laws to match.

¹⁹⁹ <https://www.transport.gov.scot/active-travel/active-travel-framework/>

²⁰⁰ <https://www.gov.uk/government/publications/air-quality-provisional-common-framework>

This could be challenging given that ESS has already issued a report (see footnote 171) stating that progress on tackling NO₂ levels has been slow over the last decade and that ‘governance and oversight arrangements are overly complex’. The question of tackling ammonia emissions, particularly from large livestock farms, also would arise since higher standards are being proposed by the Commission as part of a wider proposal to revise the Industrial Emissions Directive (see Box 8 and section on the EU Industrial Emissions Directive below). Within the EU, Scotland would also be subject to the oversight of the European Commission and ECJ, which could provide a significant additional source of pressure to achieve compliance with mandatory standards.

Re-joining the EU would also require Scotland to (re-)join the European Environment Agency and regularly submit data and information as part of wider EU assessment and methodological processes. Clearly, due to the proximity of other transboundary sources of air pollution from the rest of the UK, it would be desirable to negotiate some form of trilateral agreement (EU, Scotland, and Rest of the UK) on common objectives and standards, reporting and/or alert procedures.

In **Scenario 3** if there was an extended period of non-EU membership while accession was being negotiated, it is likely that the situation described above for **Scenario 2** would hold - as the Scottish Government would wish to ‘shadow’ EU Directives and regulations with a view to accession. However, should an independent Scotland wish to remain a non-EU member, this would, in principle, result in the greatest amount of flexibility (and uncertainty) in relation to law and policy.

The Scottish Government would gain several [economic] levers to control air pollution such as taxation, tariffs, and other economic measures, including emissions trading. It would also gain more control over other non-economic levers such as the specification of performance standards for plant, equipment and vehicles or tightening further the requirements around best available technology.

An independent Scotland looking to monitor transboundary sources of air pollution could negotiate data and information agreements with the EU and other non-EU states (e.g., Norway). At present, the Scottish Government is not able to work directly with EU level bodies like the European Environment Agency or Eionet because the UK Government has chosen not to be a member. Consequently, being outside the UK would provide the opportunity to reengage with the scientific community independently of the rest of the UK. Assuming that an independent Scotland would wish to be a signatory of international conventions, some (albeit, a small) administrative effort would be required to align and then process Scottish data and information ready for submission to those conventions.

However, an independent Scotland may find the significant levels of investment required to tackle some of the more intractable air quality challenges, like ammonia emissions, to

be financially burdensome, which could inhibit ambition considerably. The control of ammonia emissions, outlined in Box 8, illustrates some of the relationships between Scottish and EU environmental policy.

Box 8: Ammonia emissions

Tackling ammonia emissions, particularly from agriculture which account for around 90% of the total, will continue to be a challenge for Scotland regardless of any referendum outcome.

Agriculture policy, regulation and management options are all devolved competences. Preventing and/or mitigating ammonia at source yields the greatest results in reducing emissions. So, for example, reducing livestock numbers²⁰¹ or applying fertilisers more efficiently would help, as would creating woody shelterbelts. Other options include investing in low emission slurry spreading equipment and slurry storage and covers. All come at a cost, to the farmer, or the government as provider of aid, or both.

The Scottish Government has initiated a Sustainable Agriculture Capital Grant Scheme²⁰² but further [significant] investment could be required to make meaningful reductions in ammonia emissions. Other government initiatives include the introduction of the National Nitrogen Balance Sheet²⁰³ to help quantify nitrogen flows at a national scale and provide policymakers with data and information to make evidence-based decisions.

At present, the provisions of the EU **Industrial Emissions Directive** (IED) (see section 4.5.2 below) apply to around 20,000 large pig and poultry 'installations' which are a significant source of ammonia. Scotland implemented these provisions of the IED in 2012 to control the ammonia emissions from its own large pig and poultry farms but there are many smaller farms that are a significant source of emissions but are not controlled by regulation. A revision to the IED has been proposed by the European Commission in an effort to fill this gap²⁰⁴. The Commission's proposal was to expand the scope of the directive to include large scale cattle farms and other pig and poultry units not captured previously; in fact, to any farm with over 150 livestock units. However, the requirements have been weakened by the European Parliament and Council, amounting to a major reduction in the scope of the initiative. Regardless of the final text, Scotland will need to choose whether to align with these new regulations if the EU adopts them, irrespective of whether other parts of the UK do so.

²⁰¹ <https://www.ft.com/content/90e38fb5-e942-4afd-994d-048dc40579a2>

²⁰² <https://www.ruralpayments.org/topics/all-schemes/sustainable-agriculture-capital-grant-scheme--sacgs-/>

²⁰³ <https://www.gov.scot/policies/climate-change/nitrogen-balance-sheet/>

²⁰⁴ <https://ec.europa.eu/environment/industry/stationary/ied/evaluation.htm>

4.5.2. Industrial emissions

The control of pollution from large industrial plants is also a devolved responsibility in Scotland, with domestic regulations derived from EU law. Emissions to air, water and land and requirements to avoid the generation of waste from such plants are controlled by the Pollution Prevention and Control (Scotland) Regulations²⁰⁵. This implements a pivotal item of EU legislation, the Industrial Emissions Directive (IED)²⁰⁶.

The Scottish Environmental Protection Agency (SEPA) is responsible for implementation on the ground and issues permits and carries out compliance and enforcement activities. Scottish Ministers have a duty to report emissions from industrial installations to the UK Government. The *Scottish Pollutant Release Inventory* (SPRI) has been collating emissions data from a range of sources since 2002 and has been a source of data for the UK²⁰⁷ and European wide PRTR²⁰⁸ databases and information about pollutant releases from Scottish industry must be reported to the UK Secretary of State on an annual basis.

As with air quality, a degree of coordination and cooperation within the UK has been achieved post Brexit, by working through the Common Frameworks process and several common frameworks relating to pollution control have been established so far²⁰⁹.

In **Scenario 1**, legislation and policy in this area remains largely devolved and, like air pollution control, would continue within a ‘business as usual’ framework.

When the UK was a member of the EU, the Scottish Government, working in concert with and through the UK government, would contribute to EU discussions and decision making on the formulation of what constitutes best available techniques (BAT) for preventing or minimising emissions to air, land and water. These need to be adopted under the provisions of the directive. Post Brexit, the Common Frameworks process has replaced this process within the UK and so the Scottish Government would have a continued interest in helping to steer the development and operation of the BAT deliberation process as well as the categories of industries that BAT apply to throughout the UK (whether or not they continue to follow the standards agreed within the UK). Other, non-

²⁰⁵ See: <https://www.legislation.gov.uk/ssi/2012/360/contents/made> and later amendment, <https://www.legislation.gov.uk/ssi/2017/446/contents/made>

²⁰⁶ <https://ec.europa.eu/environment/industry/stationary/ied/legislation.htm>

²⁰⁷ <https://www.gov.uk/guidance/uk-pollutant-release-and-transfer-register-prtr-data-sets>

²⁰⁸ <https://industry.eea.europa.eu/>

²⁰⁹ Integrated pollution prevention and control:

<https://www.gov.uk/government/publications/integrated-pollution-prevention-and-control-developing-and-setting-of-best-available-techniques-bat-provisional-common-framework>; Ozone and depleting substances:

<https://www.gov.uk/government/publications/ozone-depleting-substances-ods-and-fluorinated-greenhouse-gases-f-gases-provisional-common-framework>; Resources and Waste:

<https://www.gov.uk/government/publications/resources-and-waste-provisional-common-framework>.

BAT, emissions control requirements for smaller industrial plants also are devolved but there is likely to be a continuing interest in coordinating such regimes at a UK level.

In **Scenario 2**, there would be a requirement for consistency with EU law as with air pollution control. The IED and the Medium Combustion Plants Directive (2015/2193)²¹⁰ are the two main legislative requirements of relevance.

As with air quality, consistency with these two directives would not be a significant challenge for the Scottish Government. However, since Brexit, in 2022, a proposal has been laid by the Commission to revise the Industrial Emissions Directive. If this is adopted, legislation in Scotland would have to be updated to reflect any revisions made at the EU level, such as bringing more cattle farms within scope (see also Box 8 above).

Following independence, the Scottish Government would exit the Common Frameworks process and (re-)join EU forums such as the IPPC Bureau hosted in Seville where BAT standards for the EU are discussed and agreed. Indeed, some additional work may be required to ensure that BAT standards agreed post Brexit were implemented in full in Scotland.

In **Scenario 3** if there was an extended period of non-EU membership prior to accession it is likely that the situation described above would hold to a large degree - as the Scottish Government would wish to 'shadow' EU Directives and regulations with a view to accession.

If an independent Scotland were to remain outside the EU, this would result in the greatest flexibility in relation to pollution control. It would enable the Government to tighten or loosen its regulatory controls although the degree to which this would be likely in practice is debateable. By loosening regulatory controls for example, Scotland could ostensibly make itself more economically attractive and competitive to relocating industries. However, setting up a separate regulatory regime has several drawbacks, including cost, adding complications for multi-national companies, risking retaliatory action from trading partners etc. It is likely to be more attractive to follow either EU or UK regimes.

²¹⁰ Directive (EU) 2015/2193 of the European Parliament and of the Council of 25 November 2015 on the limitation of emissions of certain pollutants into the air from medium combustion plants <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015L2193>

4.5.3. Chemicals policy

There is mixed legal competence for chemicals policy in the UK. On the one hand, restrictions on the marketing and use of chemicals are regulated at the UK level, so is a *reserved* power, and is implemented by the Health and Safety Executive (HSE), a UK wide body. On the other hand, the controls on discharges to environmental media (soil, air, water etc) is a devolved power and is the responsibility of bodies such as local authorities and the SEPA.

Prior to the UK's exit from the European Union, restrictions on the marketing and use of chemicals were regulated by the EU REACH Regulation²¹¹, named after the key processes involved in the registration, evaluation, authorisation and restriction of chemicals. Following Brexit, REACH was retained in UK law with some minor adjustments and became known as UK REACH²¹². In practice it is *GB* REACH because Northern Ireland remains subject to EU REACH according to Annex 2 of the Northern Ireland Protocol.

In **Scenario 1**, the status quo would continue, with the HSE regulating the marketing and import of chemicals into GB upstream and local authorities and SEPA regulating emissions to the environment downstream. Scottish Government representatives would want to continue to play an active role in the Common Frameworks process²¹³.

In **Scenario 2** however Scotland would be obliged to re-join EU REACH and also of course transfer from the UK internal market to the EU single market. It would mean that the European Chemicals Agency (ECHA) in Helsinki would once again become the competent authority in restricting the marketing and use of chemicals in Scotland. This would have significant environmental benefits, given the much greater capacity to address hazards related to chemicals in the ECHA relative to HSE and the faster pace at which it is able to conduct reviews and address issues. Up to now the HSE also has adopted a more cautious approach to regulatory issues than the HSE and the NGO Chem Trust has described the emerging regulatory gap between GB and UK REACH as threatening to become a 'chasm'²¹⁴. It is possible that this 'gap' will close at some point in the future but the major differences in capacity between HSE and ECHA is a significant barrier, and the present Westminster government is apparently supportive of more of a "risk based" approach. As with other differences in environmental standards affecting traded products, significant challenges would arise in relation to trade with the rest of Great

²¹¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32006R1907>

²¹² <https://www.legislation.gov.uk/ukxi/2019/758/contents/made>

²¹³ Chemicals and pesticides: provisional framework, 03 February 2022, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1052055/chemicals-pesticides-provisional-common-framework.pdf

²¹⁴ <https://chemtrust.org/regulatory-gap-uk-and-eu/>

Britain, particularly England and how to operate the land border, which would separate two different regulatory regimes.

Scenario 3 would raise interesting challenges for Scotland regarding chemicals regulation. As a non-member of the EU, it would not be able to re-join EU REACH. It is possible that if there were strong signalling of Scotland being en-route to membership that a limited form of access to EU REACH could be negotiated, similar to that of Switzerland which is party to several working groups but does not vote in key decision-making fora. Short of this, the Scottish Government is likely to find the cost of setting up an independent regulatory regime outside both EU and UK REACH, prohibitive²¹⁵. One straightforward option would be to continue involvement in UK REACH which may or may not require agreement on an access or membership fee. Another might be simply to follow EU REACH decisions without participating. Both options have implications for the management of trade.

Looking beyond REACH there are opportunities to re-design policy and go beyond the UK's current ambitions. Embedding a whole life cycle approach to chemicals regulation by combining coverage of *upstream* activities (e.g., the restrictions to marketing and use) and *downstream* activities (e.g., controls to water, air and land) into a single, coherent chemicals agency, one empowered with an investigatory function to carry out bio-monitoring campaigns (e.g., to establish the impacts of chemicals on nature and humans), would go a long way towards joining up the roles of several disparate monitoring bodies. Such an approach could be adopted at either a UK or a purely Scottish scale, but the former seems more realistic given the scale of change and costs involved.

In summary, a separate chemicals agency for Scotland is very unlikely to be practical or cost effective and re-joining EU REACH would offer the best environmental outcome unless over time the regime in the UK grows in capacity and ambition.

²¹⁵ The UK Government's experience of the cost of establishing an independent regime is alluded to in this National Audit Office report: <https://www.nao.org.uk/reports/regulating-after-eu-exit/?slide=1>

5. Conclusions

The Timeframe

Assessing the likely timescales of an independence referendum and its aftermath is far from straightforward, but the estimates considered here suggest that there would be a significant lapse of time between the referendum itself and the full establishment of an independent nation. If **Scenario 2** were to come about, a further period of time before accession to the EU could be achieved is expected to be necessary and also needs to be factored in.

Consequently, in considering the potential environmental outcomes of the referendum it is necessary to look several years ahead, with the majority of impacts likely to arise from the 2030s onwards. This is the main frame within which environmental consequences need to be considered. At the same time, the importance of the vote itself and the outcome should not be discounted. The result could signal significant longer-term changes in Scotland's likely policy direction, including on the environment. The approach expected to be taken to the future licensing of oil and gas extraction in the North Sea is a case in point.

The seven years from now to the end of 2030 are critical for the environment, especially for meeting climate and biodiversity targets. An Independence referendum in 2024-25 or later (as has been proposed by important figures in Scotland) would leave little time to respond in depth to this challenge by 2030. Thus, any critical action to address the biodiversity and climate crises and, most immediately, meet the respective targets for 2030, needs to be taken extremely soon - by both the Scottish and UK Governments under the current constitutional arrangements. The possibility of constitutional change in the coming years is not a reason to delay action.

The Assessment

The assessment made was against three scenarios, which were:

1. Scotland remains in the UK following the referendum.
2. Scotland leaves the UK and joins the EU as soon as practicable; and
3. Scotland leaves the UK and is outside the EU, at least for a significant period.

Whatever the outcome of any referendum, developments in external environmental policy, globally, in the EU and in the UK, will be important for Scotland. In Scenario 2, Scotland will have a voice in the formation of EU law and policy and will be required to implement it. In the other scenarios however, the EU will still be influential as it will

remain a significant geo-political and economic bloc on Scotland's doorstep. So too will be developments in both the UK and in international environmental agreements, with the latter being an important but easily overlooked constant in all the scenarios.

In the international sphere, depending on its government's stance, an independent Scotland could be a useful additional voice for environmental ambition, building on its existing role as an active sub-national player and perhaps engaging most closely with other likeminded smaller countries in Europe, strengthening an interesting bloc.

However, there will be limitations on Scotland's influence on the world scene and the most significant environmental impacts of an independence referendum seem likely to occur on the domestic front, within Scotland itself and in other parts of the UK.

Taking this narrower frame, one of the main differences between the scenarios is the level at which legal competence on a spectrum of laws and policies affecting the environment sits (i.e., in Scotland, the UK or the EU). In **Scenario 2**, EU membership would affect a large share of such legislation, excluding some areas that would remain under purely national control, such as land use planning. EU policy also would have a strong influence on agricultural and fisheries policies in Scotland although there are trends towards greater national and regional flexibility in both policies and less of a "one size fits all" approach.

Since much of the competence for environmental legislation is devolved already, many of the differences between **Scenarios 1 and 3** are concerned with other policies which have a strong bearing on the environment, many of which are in the economic sphere, such as aspects of energy, marine and taxation policy.

In assessing the possible environmental consequences of the three scenarios, one key factor is the pervasive unknown about the likely levels of environmental ambition and capacity to deliver that will be found in future in the three main governmental actors concerned (i.e. the Scottish and UK governments and the EU). Although this is critical to the environmental outcome, and the evidence of past and relatively more recent action by these players is reviewed under a wide range of headings in the study, there can be no certainty about how positions may shift over time. Historically, the EU has a strong track record of gradually progressing environmental policy and almost never weakening legislation once established but this will not necessarily continue indefinitely.

In recent years the Scottish government has adopted a more progressive approach to the environment than the UK government in many areas and this is one pointer to likely future positions. At the same time, it must be noted that, for both governments, delivery of outcomes has not always matched ambition.

However, there is no guarantee that either the political parties that have been in power in recent years will continue to be so in future or of the position adopted in relation to the environment by parties that could find themselves in power after a referendum. The relatively rapid changes in UK governments since 2016 and their variable positions in relation to the environment are a reminder of the dangers of making firm predictions.

Then, moving beyond the stance of key political actors and authorities and focusing more on structural and policy issues, the main differences of potential environmental significance between the scenarios arise in three broad areas of policy and law:

- A set of horizontal cross-cutting issues, including the Scottish constitution, parliamentary processes, the role of different institutions governing the environment, economic policy and performance, trade policy etc. For most of these, Scenario 1 is distinctly different to the other two.
- A set of specific policy areas and powers that are not currently devolved to Scotland but would be under Scenarios 2 and 3. Most are outside the realm of the environment per se, for example policies on licensing oil and gas exploitation at sea, on aspects of marine management, the energy market and Internal Market Act and powers over taxation as well as trade in Scenario 3. There are significant differences between the three scenarios examined further in the report.
- A set of laws, policies and procedures where EU legal competence would play an important role in shaping what would need to occur in Scotland in Scenario 2 but not the other scenarios. Within this category are most areas of environmental policy, large components of agricultural and fisheries policy, aspects of energy policy, all trade policy etc.

The web of possibilities is large, and this relatively high-level assessment was not the occasion for an in-depth analysis, (which would be a valuable exercise). However, it did bring out some of the key issues and uncertainties to be considered. It also highlighted significant differences between environmental issues with regard to the extent of potential variations between scenarios, partly because of the differing levels of devolution under the current settlement.

Caution is required in drawing overall conclusions from a relatively brief and high-level analysis of this kind. However, it does point to a number of observations that could be tested and augmented in more detailed work.

Critical Policy Areas

Policy areas where the transfer of powers seems to be most likely to be significant in relation to the environment in those scenarios where Scotland is not an EU member (either in its own right or as part of the UK) include:

- Major aspects of energy policy, including offshore oil and gas exploitation and energy markets;
- Other aspects of climate policy, including some elements of transport policy;
- The broader envelope of marine policy and ability to coordinate the different strands of this;
- Elements of taxation policy and the potential to orient this more towards climate objectives;
- The funding of agricultural policy;
- Chemicals policy;
- Foreign policy, including commitments under the IPPC, such as funding for loss and damage;
- In addition, there would be scope for including new provisions on environmental rights in a new Scottish constitution if it received sufficient political support in the independence scenarios.

In Scenario 2 the EU's position on the environment and the specifics of a large range of EU legislation in force or being put in place in the early 2030s in comparison with those applying in Scotland would be of central importance. It would be a significant change from the status quo where the Scottish government aims to keep in step with EU legislation where it considers this to be practicable but is not obliged to do so and may well proceed on a selective basis.

Scotland would need to re-join the CAP as well as the CFP, removing significant but not complete national discretion in a range of policy areas with some environmental drawbacks but probably benefits as well. The requirement for Scotland to align with a broad range of EU environmental and climate policies would apply within a fairly short period. The impact would depend on the way in which environmental law had evolved in the intervening period, both in Scotland and the EU. If Scotland had not remained in step then alignment could be expected to lead to increased environmental ambition and commitments in Scotland in several areas, for example in relation to air pollution and chemicals and also to the restoration of nature if current proposed EU legislation on this is adopted without serious watering down.

Reflections on the different scenarios

On scenarios where Scotland remains in the UK, the question of how the currently reserved powers that affect environmental outcomes would be used by UK authorities in

future is one key issue. There is a spectrum of possibilities, the best environmentally being where both administrations have high environmental ambitions and use them in a cooperative way. This is a possibility but not the pattern under recent administrations. Relationships have tended to be tense, and the UK government has not chosen an environmentally progressive path in relation to several important topics including:

- the role of retained EU law, a category including large swathes of environmental law.
- the licensing of oil and gas developments in the North Sea.
- willingness to accommodate Scottish environmental proposals subject to the provisions of the Internal Market Act, such as the proposed Deposit Return Scheme.

Looking forward, however, future UK administrations may take a different position, as underlined by the current Labour Party's approach to Net Zero and winding down oil and gas production in the North Sea. The net environmental costs and benefits of transferring powers in currently reserved areas depend on developments beyond as well as within Scotland.

In the case of EU membership there is a degree of predictability about the future course of environmental law and policy given both established strategies, laws and the proposals expected to be published by the European Commission in the coming months. However, the uncertainties accumulate rapidly as we look further ahead.

Scenario 3, which does not involve EU or UK membership, is potentially less predictable, not least because there is scope for departing from both EU and established UK law affecting the environment in a variety of different directions.

While proven EU governance arrangements and the historical stability and forward progression of environmental law is a significant potential benefit of EU membership in most environmental sectors, there is not the equivalent track record to draw on for scenarios where Scotland is a fully independent state outside both the UK and the EU. Governance arrangements since Brexit are relatively new, so less proven, but they do include the creation of Environmental Standards Scotland (ESS), which has significant powers, and this should not be underestimated. The strong commitment to renewable energy and tackling climate change is well established in Scotland, but in this and other areas, not least biodiversity conservation, implementation often has lagged behind aspiration. This is a potential concern in Scenario 3, where an independent Scotland does not join the EU and there are other uncertainties for example about the strength of the economy, the approach to trade and the availability of public funds. This makes the evaluation of future environmental impacts in this scenario more difficult.

Finally...

This report has sought to identify and describe a range of opportunities and risks that could arise under different scenarios. Their range and diversity, however, means that there is no one outcome that is clearly most optimal for environmental policy. All involve a balance of opportunities and risks. For environmental NGOs and others in the sector, efforts in the coming period seem best directed towards monitoring developments - and challenging all parties to the debate to ensure the opportunities are taken and the risks are minimised. In several areas there would be opportunities for an independent Scotland to increase environmental ambition outside the UK. However, the ability of future governments to deliver on such ambition needs to be taken into account, including the availability of the necessary public funding and other resources and the political readiness to deploy them.

Annex 1: Study Remit

The formal remit of this study, as agreed with commissioning bodies and used to inform interviews and the workshop, is as set out below.

This is a relatively short study being undertaken on behalf of the RSPB, Scottish Environment Link and WWF Scotland to assess a range of environmental consequences that might be anticipated to flow from a hypothetical referendum on Scottish independence were this to occur. No assumptions are made about the desirability, legality, or feasibility of such a referendum or about the likely result. Rather, the study will explore the consequences of a referendum, the legality, and results of which were not contested. It is an independent exercise, and the sponsors will not be bound in any sense by the conclusions.

The study will involve considering the potential consequences of a small number of scenarios, including an independence scenario leading in due course to Scotland re-joining the EU and a scenario in which Scotland remains part of the UK. The aim is a dispassionate assessment of the factors and potential dynamics within these scenarios that might have significant environmental consequences, particularly in Scotland but also elsewhere. A medium-term timescale is being adopted, looking several years but not decades beyond the date of the referendum. The environment is understood in broad terms to include climate change, biodiversity, land, and marine management.

The assessment will be based on the evidence available, including but not confined to, work being undertaken by academics, the Scottish Government, the UK Government, civil society, and others as well as the past actions and statements of the various institutions and other actors expected to play a part in shaping environmental outcomes. We welcome any evidence that stakeholders may like to send us. Since various future possibilities need to be considered, informed judgements of how things may play out will need to be made. For this and other reasons we are anxious to hear the views of a range of experts and actors, particularly within Scotland, and we are seeking interviews to this end. We very much appreciate any time that can be made available to us for these conversations.

Annex 2: Scotland's constitutional debate

Historical context

The run-up to and the passing of the Act of Union was highly contested and generated considerable debate, both within Parliament and beyond²¹⁶. Such debate and occasional unrest continued after the creation of the (then) United Kingdom of Great Britain - especially during the 18th century, often being conflated with either disputes over Monarchical succession or religion, or both.

During 19th and early 20th century, especially in association with British empire and/or the world wars, the debate appeared settled. However, behind the scenes such 'Britishness' was always flavoured with a distinct form of "nationalist unionism" - which sought to promote Scottish national identity and distinctiveness (especially in areas such as law, education, religion and sport) but within the union²¹⁷. Conversely, in the early part of the 20th century, many nationalists stressed a 'British link' through seeking dominion status within the empire. Following WWII, Scottish nationalism also tended to appear as a conservative (small c) force in opposing the GB or UK-wide socialist reforms of the Attlee government (NHS, nationalisation, etc.) as creating uniformity against Scottish distinctiveness.

The recent debates, about devolution and/or independence, came to the fore in the late 1960s and 1970s, following Winnie Ewing's 'breakthrough' victory for the Hamilton bye-election of 1967²¹⁸. This was followed by the SNP returning a group of 11 MPs in 1974. These events led to debates among the three main unionist parties about Scotland and led to various proposals for devolution - including the Conservatives' "Declaration of Perth²¹⁹" and the Labour Government's proposals for a devolved assembly under the Scotland Act 1978²²⁰. Those proposals were subject to a referendum (with a contested threshold element) in 1979²²¹ and, the loss of this referendum led, directly and indirectly, to the fall of the Labour Government, the election of the Thatcher Government and the repeal of the 1978 Act.

²¹⁶ See, for example, <https://www.parliament.uk/about/living-heritage/evolutionofparliament/legislativescrutiny/act-of-union-1707/overview/mob-unrest-and-disorder-for-scotland/>

²¹⁷ <https://edinburghuniversitypress.com/book-standing-up-for-scotland.html>

²¹⁸ https://en.wikipedia.org/wiki/1967_Hamilton_by-election

²¹⁹ https://en.wikipedia.org/wiki/Declaration_of_Perth

²²⁰ <https://www.legislation.gov.uk/ukpga/1978/51/contents/enacted>

²²¹ https://en.wikipedia.org/wiki/1979_Scottish_devolution_referendum

The foundations of the current devolution settlement (see below) were laid during the Conservative governments of 1979-97 (who then opposed devolution). However, the cross-party and civil society-led Constitutional Convention developed detailed proposals, supported by various campaign groups. These were later mostly adopted into the 1997 proposals and the Scotland Act 1998.

At first, the SNP and independence supporters did not participate in the Constitutional Convention or support devolution. However, in 1997, under Alex Salmond, the SNP supported the then Labour Government's proposals and campaigned for a 'yes' vote in the 1997 referendum²²². This was, to independence supporters, a "gradualist" approach, seeking to move towards independence via the ongoing accumulation of powers for a devolved Scotland²²³. While there are still "fundamentalist" voices in the SNP and beyond, this gradualist approach appears to have worked (to date) with the significant increase in SNP representation at Holyrood, the 2014 referendum and the rise in support for independence to its current level (~50% - albeit with poll variation of +/- 5%²²⁴).

Thus, the current debate (and political arguments) about a further independence referendum are the latest developments in a long history of Scotland's constitutional debate. Recent iterations of this debate have included the UKSC decision on the proposed Referendum Bill²²⁵ and the inter-governmental dispute on the Gender Recognition Reform Bill²²⁶. These follow on from disputes about Brexit (including several cases of overriding the 'Sewel Convention' - see also below) and have been described as "muscular unionism²²⁷" and led to questions about whether the inevitable diversity in law and policy, implicit in devolution, is sustainable²²⁸. Thus, the debate is both longstanding and looks set to continue and intensify.

²²² https://en.wikipedia.org/wiki/1997_Scottish_devolution_referendum

²²³ <https://www.research.ed.ac.uk/en/publications/recent-developments-in-the-scottish-national-party>

²²⁴ <https://twitter.com/BallotBoxScot/status/1616490172828516352>

²²⁵ <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-63727562>

²²⁶ <https://www.bbc.co.uk/news/uk-politics-64288757>

²²⁷ https://twitter.com/aileenmcharg/status/1549788229854969856?s=58&t=t_Hvx86jp4ZCe9PF56PGWA

²²⁸ <https://www.heraldscotland.com/opinion/23265698.can-uk-tolerate-diversity-scotland-england-seems-not/?ref=twtrrec>

The current devolution arrangements: origins and operation

Following that historical context, it is appropriate to consider, next, the nature of devolution, as it exists and operates today, and how it came to be so.

The current Scottish Parliament was (re)established the Scotland Act 1998, as amended²²⁹. This introduced a scheme of devolution set out in the 1997 White Paper, *Scotland's Parliament*²³⁰, launched by the then Secretary of State, Donald Dewar. This was based, to a great extent, on the work of the Scottish Constitutional Convention, in the run-up to the 1997 election²³¹. The path to devolution, as well as the pre-devolution arrangements, are reviewed on the Scottish Parliament website²³² and in a briefing from 1997 by the House of Commons library²³³.

Two key issues should be noted from the 1997-98 debates and the devolution scheme that subsequently emerged:

First, many issues were already *administratively devolved to the then Scottish Office*, led by the Secretary of State for Scotland. The 'modern evolution' of the Scottish Office is described in the 1997 House of Commons briefing. Among the issues administratively devolved were agriculture and fisheries, planning, local government, and environment policy. Junior Ministers often led on these issues.

One key environmental policy decision taken during this period of administrative devolution was the creation, in 1991-2, of Scottish Natural Heritage²³⁴ (following a UK Government decision to create three 'country-based' conservation agencies instead of the former GB-wide²³⁵ Nature Conservancy Council and Countryside Commission²³⁶). This, in effect, transferred further environmental responsibilities to the Scottish Office - from the then Department of Environment.

Although the Scottish Office was an integral part of the UK government and 'policy coherence' (across GB or UK, as appropriate) was always one objective, many Secretaries of State also viewed 'distinctiveness' and 'relevance to Scottish circumstances' as

²²⁹ <https://www.legislation.gov.uk/ukpga/1998/46/contents>

²³⁰ <https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/3.pdf>

²³¹ <https://www.parliament.scot/-/media/files/history/scotlands-parliament-scotlands-right.pdf>

²³² <https://www.parliament.scot/about/history-of-the-scottish-parliament/the-path-to-devolution>

²³³ <https://researchbriefings.files.parliament.uk/documents/RP97-92/RP97-92.pdf>

²³⁴ <https://www.legislation.gov.uk/ukpga/1991/28/contents>

²³⁵ Northern Ireland arrangements were always separate.

²³⁶ <https://www.legislation.gov.uk/ukpga/1990/43/contents> (Part VII)

important²³⁷. Post-war examples of such policy issues, with importance to the Scottish environment, include:

- The creation of HIDB (later HIE) and the development of hydro-electric power in the Highlands.
- The establishment, maintenance, and regular reform of Crofting as a legal form of agriculture tenure - as well as, both within and beyond the Crofting Counties, the establishment and operation of a Scottish Land Court.
- The importance of forestry as a land management sector, with the GB-wide Forestry Commission headquartered in Edinburgh, and a Scottish Office minister considered as the 'lead UK minister' for forestry.
- Distinctive water industry structures - originally as joint local government boards, but now as Scottish Water, but never privatised.
- Despite the concentration of population in the urban, central belt, the political importance attached (by all parties) to rural areas and rural industries, especially agriculture, forestry, and fisheries, as well as islands' issues (e.g., maintaining population and transport links, such as ferries and 'lifeline' air services).
- The absence (until the creation of the Scottish Parliament) of National Parks in Scotland and the existence of distinctive access rights (later codified or enhanced by the Scottish Parliament).
- The importance of large (and/or aristocratic) landowners and field sports, especially grouse shooting, deer stalking and salmon fishing, with distinctive, Scotland-only legislation for those pursuits - and, in contradistinction, the political importance of the land reform debates, from the 19th century to the current day.

In addition to those matters with a direct impact on environmental policy, the distinctive legal, education and church systems (all three protected by the Act of Union) also remained pre-devolution and have been protected and enhanced subsequently. Of these, the separate Scots legal system has had an indirect effect on the development and implementation of environmental policy. For instance, the (formerly) more restrictive interpretation of 'standing' in the civil courts meant that planning or environmental decisions were harder, for citizens or NGOs, to challenge; while the absence of private prosecutions means that any criminal environmental cases were (and are) dependent on

²³⁷ See, for example, Torrance, D. (2006) "*The Scottish Secretaries*", Birlinn, Edinburgh.

the Procurator Fiscal (this has, over the years, impacted both wildlife crime prosecutions²³⁸ and those sought by SEPA and/or SNH).

The (re)established Scottish Parliament was, therefore, in part a means of providing Scotland-focused democratic oversight to the operation of the Scottish Ministers (who became, first, the Scottish Executive, and now the Scottish Government). The residual roles of the Secretary of State for Scotland (operating their parts of the 1998 Act and ‘representing Scottish interests in the UK cabinet’) remain - and is supported by a renamed UK department now called the Scotland Office.

Secondly, the structure and philosophy of the 1998 Act is that “**all matters are devolved unless they are reserved**”. This means that rather than stating what the Scottish Parliament/Government can do, the 1998 lists those matters that are either protected (Schedule 4) or reserved (Schedule 5); these are therefore matters outwith the competence of the Scottish Parliament. Schedules 4 and 5 have been significantly amended since 1998, both to devolve more powers and to update/add to the areas protected/reserved. These amendments have been made by both the Scotland Acts of 2012 and 2016, as well as by regular s.30 Orders.

The Scotland Act 2016, and its amendments to the 1998 Act, claimed to implement the recommendations of the Smith Commission²³⁹, established following the 2014 referendum. Most of these changes were financial or related to tax-raising powers, but of note in respect to the environment is that this included devolution of the Aggregates Levy and of Air Passenger Duty²⁴⁰. These ‘environmental taxes’ thus joined with Landfill Tax that had been devolved by the 2012 Act.

Constitutionally, the 2016 Act also ‘enshrined in law’ (subject to many lawyers’ derision at such a term) both the “permanence of the Scottish Parliament” and the Sewel Convention. The recent Brexit process has, of course, seen the Sewel Convention overridden on a regular basis.

The Smith Commission and the 2016 Act also provides an illustration of the (possible) impacts on the status quo of an independence referendum, even if result is - technically - against change. The process of ‘improving devolution’ that culminated in the 2016 Act was a result of pledges made by the ‘no’ campaign during the 2014 referendum.

²³⁸ <https://www.scotlink.org/publication/natural-injustice-paper-1/> and <https://www.scotlink.org/publication/natural-injustice-paper-2/>

²³⁹ <https://webarchive.nationalarchives.gov.uk/ukgwa/20151202171017/https://www.smith-commission.scot//>

²⁴⁰ While devolution of APD has been agreed, in principle, and it is included in the 2016 Act, this has yet to be actually implemented (see also discussion in transport section of climate chapter).

In general, it can be assumed that most environmental issues are devolved matters; however, there are some policy areas that are either directly environmental or significant affect environmental outcome that are reserved. These include foreign affairs (see below for discussion related to international law and policy on the environment), noting that - being a ‘cross-border’ issue - a considerable amount of environmental law and policy is driven by international (and formerly EU) agreements. In the area of climate change, a significant reserved matter is energy policy (although this is somewhat overridden by the devolution of planning and other consent process) and the licencing of offshore oil and gas exploration/development.

While technically reserved, the consenting of offshore renewables and marine conservation measures beyond 12nm are “executively devolved”. This is a ‘halfway house’ between devolved and reserved, where Scottish Ministers are responsible for implementation (the consenting process or designating protected areas at sea) but do so under UK-wide legislation passed by the UK Parliament that the Scottish Parliament cannot amend.

Devolved government (1999-curent) and its environmental milestones

The first election to the re-convened Scottish Parliament was held on 6th May 1999. Subsequent elections were held in early May in 2003, 2007, 2011, 2016 and 2021 - which also illustrates the adjustment from a four-yearly cycle to a five-year cycle, that originally took place to avoid an election ‘clash’ with Westminster in 2015²⁴¹.

The results²⁴² of these elections led to the formation of Scottish administrations (originally the Scottish Executive, now the Scottish Government) as set out in table below.

Table 1: Timeline of Scottish Executives and Governments

Parliamentary Session	Executive/Government
1: 1999-2003	Scottish Labour/Liberal Democrat coalition

²⁴¹ The shift guaranteed no future clashes for a long as the Fixed-term Parliament Act was in effect at UK level; however, this has now been repealed and Westminster election cycles are purely a matter for the UK Prime Minister (and/or any confidence votes in the Commons).

²⁴² <https://www.parliament.scot/msps/elections> or https://en.wikipedia.org/wiki/Elections_in_Scotland

2: 2003-2007	Scottish Labour/Liberal Democrat coalition
3: 2007-2011	Minority SNP-led government
4: 2011-2016	Majority SNP government
5: 2016-2021	Minority SNP-led government
6: 2021 to date	Minority SNP-led government with 'co-operation agreement' with Scottish Green Party ²⁴³

The previous section highlighted a range of environmental policy issues, including areas where Scotland differed from the rest of GB or UK, that were the result of governance under the pre-devolution Secretary of State for Scotland. A similar list of major milestones in legislation, post-devolution, of interest to environmental NGOs might include:

- National Parks (Scotland) Act 2000
- Water Environment and Water Services (Scotland) Act 2003
- Protection of Wild Mammals (Scotland) Act 2002 (now replaced with subsequent Hunting with Dogs (Scotland) Act 2023)
- Freedom of Information (Scotland) Act 2002 (amended/extended 2013)
- Land Reform (Scotland) Act 2003 (amended, by Community Empowerment (Scotland) Act 2015, and amended/extended by further Land Reform Act 2016)
- Nature Conservation (Scotland) Act 2004
- Charities and Trustee Investment (Scotland) Act 2005
- Environmental Assessment (Scotland) Act 2005
- Planning etc. (Scotland) Act 2006 (amended/extended 2019)
- Climate Change (Scotland) Act 2009 (updated/extended 2019)
- Marine (Scotland) Act 2010
- Wildlife and Natural Environment (Scotland) Act 2011
- Lobbying (Scotland) Act 2016
- Forestry and Land Management (Scotland) Act 2018
- Islands (Scotland) Act 2018
- Scottish Crown Estate Act 2019
- UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021
- Good Food Nation (Scotland) Act 2022.

²⁴³ Agreement, known as The Bute House Agreement: <https://www.gov.scot/publications/cooperation-agreement-between-scottish-government-scottish-green-party-parliamentary-group/>

Legislation expected in the remainder of the current session include Bills on agriculture; natural environment (including nature recovery targets); grouse moor management and muirburn; and the circular economy. At the time of writing, the latter two Bills are in the process of Parliamentary consideration, while the former two are expected in 2023-24.

This range of legislation covers a number of environmental issues (and/or matters that affect the operation of eNGOs) and have all been welcomed and supported by eNGOs (albeit at times further improvements were sought). The reason for such support is due to a number of drivers, including:

- Issues that Westminster had not addressed (either for lack of time for Scotland-specific legislation or opposition, especially by peers). These matters were common in the early years of the Scottish parliament and included National Parks, Land reform and Charity regulation.
- Implementation of EU Directives - two major Directives were implemented in the pre-Brexit period in a manner notably different from at Westminster. These were the Water Framework Directive (by the WEWES Act) and the SEA Directive (by the EAS Act) - in both cases, primary legislation was utilised (rather than regulations under the 1972 Act, as at Westminster) and in both cases, the resulting legislation was more comprehensive than required by the Directive. In addition, the WEWS Act also filled a 'gap' in pre-devolution legislation inherited from Westminster (abstraction licences).
- It is notable that there is a lack of significant environmental legislation in the 2011-16 Parliament²⁴⁴. This may have been due to the (then) political priorities - it was the Parliament that negotiated, agreed, ran and was in almost constant 'campaign mode' for the 2014 Independence referendum. However, it might also have been due to the absence of any need for cross-party support or pressure from a junior coalition partner, experienced by the coalition/minority governments.
- Certainly, experience suggests that the major environmental gains, made by NGOs, within the legislation listed above were achieved by either pressure by the junior coalition partner or by cross-party pressure on a minority government. For instance, although the SNP/Scottish Government were quick to embrace the (then) "world-leading" climate change targets set in the 2009 Act, their original bill mirrored the UK's then 80% target for 2050²⁴⁵ with an interim target of 50% by 2030. This latter target was amended by the Parliament to 42% by 2020 - the "world-leading" figure, but primarily because sufficient MSPs from across the Party

²⁴⁴ Note: the WANE Act was passed in the final months of the 2007-2011 parliament.

²⁴⁵ Now 'net zero' by 2050 at UK level, but by 2045 for Scotland.

spectrum were persuaded - Government Ministers and their officials were originally resistant.

- Similar examples of cross-party pressure leading to better outcomes, for environment policy, under minority or coalition government can be identified in the Water Environment and Water Services (Scotland) Act 2003; Marine (Scotland) Act 2010; Wildlife and Natural Environment (Scotland) Act 2011; UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021; and Good Food Nation (Scotland) Act 2022.
- As well as the prevalence of minority/coalition government, another factor that has influenced the nature of legislation has been the Scottish Parliament's structure and working practices. These are notably more open and accessible than those at Westminster and more engagement is undertaken with civil society (including eNGOs) with arguably greater note taken of their views. This is, in part, due to the pre-devolution history and work of the constitutional convention, discussed above. The eNGO experience and success (and the reasons for it) with the early sessions of the Parliament is described in Scott (2007)²⁴⁶.

Of course, the above highlights the positives - and there are also, at times, negatives. The Parliament's Committee system (combining scrutiny and legislative roles) means that Bills are usually considered by Committees with experience and some knowledge of the issue. However, because of this role, they are also 'whipped' and seem to operate, in their scrutiny role, with less 'independence' than Westminster Select Committees.

Secondly, although legislation on environmental issues has arguably been very positive over this period, this has not translated into environmental outcomes. Numerous scientific and eNGO reports have highlighted the declines in biodiversity and the insufficiently rapid reduction in emissions; and it is widely acknowledged, including by Government, that we are currently in a climate and nature emergency. The contrast between admirable environmental ambition in both legislation and policy intent ("rhetoric") and poor outcomes ("reality") has been explored, in depth, by Scottish Environment LINK in their 2011 and 2021 reports on "Rhetoric to reality"²⁴⁷.

²⁴⁶ Scott, M. (2007) "A strong coherent voice: Reflections on the first twenty years of Scottish Environment", LINK. <https://www.scotlink.org/wp-content/uploads/2007/07/A-Strong-Coherent-Voice.pdf>

²⁴⁷ <https://www.scotlink.org/publication/scotlands-environmental-laws-from-rhetoric-to-reality/> and <https://www.scotlink.org/publication/rhetoric-to-reality-report-2022/>

Annex 3: Scottish reaction to the Internal Market Act 2020

Introduction

The United Kingdom Internal Market Act 2020 (IMA) was approved in the UK Parliament in the wake of Brexit; it sought to establish a UK ‘Internal Market’ to harmonise trade relations across the Union. There are clear reasons to establish internal market rules within the UK, however, certain aspects of the Act and the powers it conveyed to Westminster caused concerns in devolved Parliaments, which preferred the Common Frameworks programme, separately in place to coordinate potential intra-UK divergences more generally. The Scottish Government argued that the Bill was “fundamentally incompatible” with the “principles and practice” of the devolution settlement²⁴⁸, which was supported by both the Scottish and Welsh Parliaments, which withheld their legislative consent to the Bill during its passing through Parliament²⁴⁹.

Constitutional and Environmental Perspective

From a constitutional perspective, Scotland voiced its deep concern about the UK Government’s “increasing” tendency to add enactments to Schedule 4 of the Scotland Act 1998, which contains a list of Acts the Scottish Parliament is not permitted to modify²⁵⁰. The Scottish Government argued that the IMA represents a “unilaterally designed and imposed [trading] regime²⁵¹” which in turn, could prevent future divergence of environmental protections across the UK, for example.

As noted in Section 3 of the text, internal market rules generally do have the potential to limit the ability of constituent jurisdictions to adopt measures, including environmental measures, that significantly impact on the market, for example by creating barriers to trade, increasing the competitiveness of domestic producers in their home markets etc, even if that was not the purpose of the environmental law. For example, if one country introduces product standards that are higher than those in the internal market as a whole and these have to be met by all producers entering the market in the country concerned this may well be regarded as a barrier to trade within the internal market.

²⁴⁸ <https://commonslibrary.parliament.uk/internal-market-bill-reactions-from-scottish-and-welsh-governments/>

²⁴⁹ <https://commonslibrary.parliament.uk/internal-market-bill-reactions-from-scottish-and-welsh-governments/>

²⁵⁰ <https://commonslibrary.parliament.uk/internal-market-bill-reactions-from-scottish-and-welsh-governments/>

²⁵¹ <https://www.gov.scot/publications/brexit-uk-internal-market-act-devolution/pages/5/>

This has occurred on several occasions within the EU Single Market, with the Commission opening court cases against Member States where they consider necessary. However, there is a question of proportionality and how far to prioritise common rules over other objectives, including environmental progress. There is some recognition of this in the Act since both environment and public health policy objectives are specifically identified as areas where “exclusions” from the IMA may be permitted if justifiable. The question is what is required to make an exclusion acceptable and by whom is this decision made.

This highlights a further question concerning the authority of different actors within the internal market and the powers conferred on the UK government, which is not accepted by other governments as a relatively neutral ‘referee’ in the way that the European Commission generally is.

Some tensions between environmental and internal market considerations are unavoidable but the lack of consensus on both the rules and the neutrality of the overarching authority is aggravating these. From the Scottish side, which seeks to remain aligned with EU environmental standards wherever practicable, this is especially problematic.

In effect the IMA diminishes the role of the Common Frameworks programme from a Scottish perspective and this has been worsened by the REUL Act (see main text). Since the Common Frameworks programme is a non-statutory, mutually agreed process among the four nations of the UK to discuss and manage regulatory consistency “where returning EU powers are within devolved competence” after Brexit²⁵², it relies on good working relationships between the UK and devolved governments. Generally, these relationships seem to have been working reasonably well but the REUL Act has been a further demonstration of a tendency for centralisation of control, with a significant impact on environmental law, and a tendency to include legislation considered to be reserved in Westminster but at least partially devolved by Edinburgh and Cardiff.

Case Study - Scotland’s Deposit Return Scheme

Recently, in mid-2023, the Scottish Government delayed the implementation of its flagship Deposit Return Scheme (DRS) which was designed to emulate EU models to encourage the recycling of drinks containers such as bottles and cans- from August 2023 to October 2025 at the earliest²⁵³, after it was denied a full exclusion under the IMA, which made it impractical to implement.

²⁵² <https://committees.parliament.uk/work/6591/defra-common-frameworks/>

²⁵³ <https://aprs.scot/news/what-happened-to-deposit-return/>

Amongst the conditions imposed by the UK Government were the removal of glass containers from the scheme, very considerably reducing its scope, and a requirement to align some important aspects of the scheme with counterpart measures in other parts of the UK, none of which have yet been put into law or become operational so cannot be considered to be finalised. Without a full exclusion, from the IMA and in the face of opposition from certain parts of industry, the Scottish government did not consider it practical to implement the scheme in Scotland alone.

An English scheme which will exclude glass containers is proposed to come into effect in 2025 and in effect this date is now being imposed on Scotland. Impacts on the Internal Market arose in relation to producers outside Scotland and the difficulty of excluding them from the Scottish market.

This unforeseen delay threw the public company created to manage the scheme into administration²⁵⁴. This illustrates how the IMA, and the unpredictability of the exclusion process, could continue to have downstream effects on Scottish environmental legislation and policies and the power vested in the UK Government to adjudicate in this and potentially many future cases where there is deemed to be an interference with the internal market. However, it should also be acknowledged that the Scottish DRS was also considered by a number of actors to have had specific design flaws, getting a mixed reception from industry and also encountering a surprising degree of opposition from Scottish politicians from more than one party, generating some internal confusions about its effective implementation. Its delay cannot be solely linked to the UK Government's position, and the operation of the IMA.

This then is an example of many forces in play, including lobbying by business interests on both sides of the border, technical, economic, and environmental issues being blended in the context of an IMA framework with a strong market orientation and a general sense of encroachment on Scottish autonomy by Westminster, further reinforced by the REUL Act²⁵⁵.

²⁵⁴ <https://www.bbc.com/news/uk-scotland-65965368.amp>

²⁵⁵ <https://www.gov.scot/publications/devolution-since-the-brexit-referendum/>



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