

## **Submission from ClientEarth and response from Defra**

### Draft Persistent Organic Pollutants (Amendment) (EU Exit) Regulations 2020

*Q1: Regulation 9 inserts a new Article 2C into Regulation (EU) 2019/1021 on persistent organic pollutants. Article 2C amends Article 5 of Directive 2008/98 and omits paragraph (2) of Article 5 so that there is no longer a requirement that detailed criteria on the uniform application of conditions on by-products “shall ensure a high level of protection of the environment and human health and facilitate the prudent and rational utilisation of natural resources”. We are concerned that there may be a weakening of environmental protections on by-products as a result of this change.*

**A1:** The Waste Framework Directive will not be retained EU law, and the modifications to certain Articles of the Directive which these draft Regulations insert into Regulation 2019/2021 are only for the purpose of interpreting provisions of Regulation 2019/2021 which cross-refer to those Articles. Specifically, Article 5 of the Directive is to be read with the modifications set out in the inserted Article 2C for the purpose of interpreting references to “waste” in Regulation 2019/2021. Article 2(8) of Regulation 2019/2021, as amended by regulation 8(2) of these draft Regulations, provides that “waste” has the meaning given Article 3(1) of the Waste Framework Directive as read with Articles 5 and 6 of that Directive. Article 5 makes provision about when substances or objects are to be considered by-products rather than waste.

Article 5(2) of the Waste Framework Directive gives the Commission power to adopt implementing acts establishing criteria as to when specific substances or objects meet the conditions for being considered as by-products rather than waste. The modifications made to Article 5 include the omission of this paragraph because it has no relevance to determining whether something is waste or a by-product, since no implementing acts have been made under it, and any future implementing acts that are made after the end of the transition period will not be retained EU law.

In place of paragraph 2, the modifications include the insertion of paragraph 1A, subparagraph (a) of which says that any decision as to whether a substance or object is a by-product must be made in accordance with any regulations setting out detailed criteria on the application of the conditions in paragraph 1 to specific substances or objects.

No such regulations, or power to make such regulations, currently exist. Paragraph 1A(a) has been included because it is intended to make separate Regulations under section 8 of the EU (Withdrawal) Act 2018 next year, conferring on the Secretary of State and devolved administrations a power corresponding to the Commission’s power under Article 5(2).

Those further Regulations will be the appropriate place to set out any conditions on the exercise of that power, and Defra will consider when it drafts those Regulations whether to make the exercise of the power subject to the condition identified by Client Earth.

*Q2: Regulation 20 omits Article 14 of Regulation (EU) 2019/1021 on the application of the polluter pays principle. It is unclear why this has been removed.*

**A2:** Article 14 of regulation (EU) 2019/1021 requires member states to “lay down rules on penalties applicable to infringements of this Regulation and shall take all measures necessary to ensure that they are implemented “. This is unchanged from the previous version of the

EU POPs regulation (850/2004) and has already been implemented in the UK through the [Persistent Organic Pollutants Regulations 2007](#).

*Q3: Regulation 28 makes a number of changes to Annex 5 of Regulation (EU) 2019/1021 on the toxic equivalence factor and emission limits for certain substances. It is unclear why these changes have been made.*

**A3:** The EU regulation refers to “..... provided the facilities meet as minimum requirements the emission limit values for PCDDs and PCDFs laid down in accordance with Directive 2010/75/EU of the European Parliament and of the Council.....” These values are set out in Annex VI of that Directive and have been replicated in the regulation so that we can remove reference to the EU Directive.

*Q4: Finally, in a number of instances references to the European Chemicals Agency (ECA) are replaced with references to relevant authorities. It is unclear whether these authorities would have the equivalent level of expertise as the ECA.*

**A4:** ECA has only recently taken on responsibility for providing POPs expertise. The recast of the EU POPs regulation in July 2019 tasked ECA with providing technical, scientific and administrative support to the management of POPs. In accordance with Article 8 of the UK SI, the Environment Agency (EA) will have responsibility for technical and scientific support to the POPs regime on behalf of the UK, with the support of Scottish Environment protection Agency (SEPA), Natural Resources Wales (NRW) and the Department of Agriculture, Environment and Rural Affairs (DAERA) in Northern Ireland.

The EA has considerable experience in this field, having led or supported the EU nomination of POPs in the past and is respected for their participation in the Stockholm Convention POPs technical review committee, where they will represent the views of the UK.

**19 October 2020**