

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

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## EXPLANATORY NOTES

### OVERVIEW AND BACKGROUND

#### **Part 2 – Environment**

#### *Chapter 2 – Environmental governance*

#### **Judicial review and other civil proceedings**

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

147. Section 38 sets out the circumstances in which Environmental Standards Scotland may apply for judicial review of a public authority’s conduct or intervene in an existing case. These powers are expected to be used only rarely. The conditions for this are set out in subsections (1) for an application for judicial review and subsection (4) for intervening in an existing case: essentially where the conduct of the public authority constitutes a serious failure to comply with environmental law and where it is necessary for Environmental Standards Scotland to act to prevent, or mitigate, serious environmental harm. In relation to applications for judicial review, the usual rules and procedure for such court actions will apply, including for example the potential to seek interim orders at the outset if there were considered a need to prevent imminent and serious environmental harm pending the outcome of the judicial review and the requirement to obtain permission from the Court of Session for the judicial review to proceed to be fully considered by it.
148. Subsection (1) allows Environmental Standards Scotland to make an application for judicial review in relation to the conduct of a public authority if Environmental Standards Scotland considers that the conduct constitutes a serious failure to comply with environmental law, and that it is necessary to make an application to prevent or mitigate serious environmental harm. This application may be made regardless of a compliance notice or improvement notice being issued to the public authority regarding the same matter.
149. Subsections (2) to (4) provide for Environmental Standards Scotland to intervene, with the court’s permission or at its invitation, in existing civil proceedings relating to an alleged failure by a public authority to comply with environmental law. Subsection (4) places similar limits on this power, based on the serious nature of the failure and the serious effect on the environment, as apply in relation to the power under subsection (1). Subsection (5) permits the court to give permission to, or invite, Environmental Standards Scotland to intervene under subsection (3) only if it is satisfied that the intervention is likely to assist the court.
150. Subsection (6) provides for Environmental Standards Scotland to be treated as having sufficient interest in the subject matter of any application which it may make or of any legal proceedings in which it may intervene.

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

151. Subsection (7) defines “court” and “legal proceedings” for the purposes of this section.