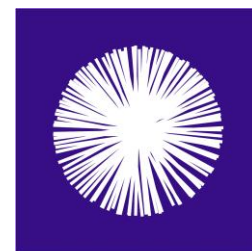


# **Regulatory Reform (Scotland) Bill - Stage 1 Written Evidence to Rural Affairs, Climate Change and Environment Committee**

**by the Scottish Environment LINK**

**Date: 21 MAY 2013**



Scottish  
Environment

**LINK**

## **Summary**

- We support the need for effective, targeted and transparent regulation for the benefit of Scotland.
- We strongly oppose the introduction of a duty on regulators to contribute to achieving 'sustainable economic growth' - the duty should refer instead to 'sustainable development'.

## **Introduction**

Scottish Environment LINK is the forum for Scotland's voluntary environment community, with over 30 member bodies representing a broad spectrum of environmental interests with the common goal of contributing to a more environmentally sustainable society.

Its member bodies represent a wide community of environmental interest, sharing the common goal of contributing to a more sustainable society. LINK provides a forum for these organizations, enabling informed debate, assisting co-operation within the voluntary sector, and acting as a strong voice for this community in communications with decision-makers in Government and its agencies, Parliaments, the civic sector, the media and with the public.

Acting at local, national and international levels, LINK aims to ensure that the environmental community participates in the development of policy and legislation affecting Scotland.

LINK works mainly through Taskforces – groups of members working together on topics of mutual interest, exploring the issues and developing advocacy to promote sustainable development, respecting environmental limits.

We welcome the opportunity to offer views on those parts of the Regulatory Reform (Scotland) Bill relevant to the remit of the RACCE Committee.

## **General Comments**

Scottish Environment LINK supports the need for effective, targeted and transparent regulation and is broadly supportive of any steps that can be taken to streamline regulation provided that this does not happen at the expense of environmental protection. The 2011 UK National Ecosystems Assessment<sup>1</sup> clearly highlighted the wide variety of benefits provided by the natural environment in terms of economic prosperity, human health and well-being; the risks posed to the delivery of these benefits through inadequate protection and management of the natural environment; and in particular, the importance of regulation in safeguarding and enhancing the delivery of these key services.

<sup>1</sup> <http://uknea.unep-wcmc.org/Resources/tabid/82/Default.aspx>

While we acknowledge that regulators should, and already do, account for the social and economic impact of their actions, the pursuit of economic growth must not override environmental protection or well-being. We support the Carnegie UK Trust's Report of the Round Table on Measuring Economic Performance and Social Progress in Scotland 2, which recommended that focusing on delivering economic growth as the end rather than the means is inadequate, concluding that *'we need to break our focus on economic growth and instead focus our effort on delivering well-being, now and into the future.'*

We are therefore greatly concerned by the inclusion of a duty on regulators, including environmental regulators, to contribute to achieving *'sustainable economic growth'*. Indeed we question the need for a duty to include reference to sustainable economic growth at all, given that the environmental regulators already have legislative requirements to consider social and economic factors while fulfilling their primary functions. They also have extensive statutory duties for *'sustainable development'* and it is very far from clear that these duties are compatible with a duty for *'sustainable economic growth'*.

No evidence has been presented that regulation in Scotland is a significant barrier to economic growth. Environmental regulation can in fact improve well-being, drive innovation, reduce risks, create jobs, create new business opportunities and boost Scotland's international reputation and competitiveness.

We know of no legal definition of sustainable economic growth and, therefore, have no assurance that it aligns with the sustainable development definition and principles, which already have a sound basis in international, EU, UK and Scottish law. Its inclusion in environmental regulators statutory purposes could undermine, confuse and compromise the regulators' work and their achievement of environmental protection and improvement. Any statutory purpose for SEPA and other environmental regulators should refer to sustainable development as this has a clear legal framework and a set of principles which the Scottish Government has signed up to.

Should the duty remain as drafted, guidance on the meaning of sustainable economic growth, and how regulators will meet the requirements of the duty must be introduced urgently, in consultation with all affected bodies. We would expect any guidance to clarify how a growth duty would relate to current duties, and how to overcome implementation issues. There exists a grave risk here that it will prove impossible to reconcile duties for sustainable development, which **balance** economic, social and environmental development concerns, with a growth duty which clearly gives **added weight** to economic concerns alone. Parliament should take great care to ensure that any law they pass achieves a high standard of justiciability.

## **Part 1 Regulatory functions**

### **Section 4 - Regulator's duty in respect of sustainable economic growth.**

We strongly oppose the introduction of a duty on each regulator, and in particular, SEPA and SNH, to contribute to achieving sustainable economic growth because it threatens to damage environmental protection by conflicting with regulators' existing primary purposes. Sustainable economic growth is not defined in the Bill or anywhere else in Scottish, international, EU or UK law. If a duty is considered necessary this should be to contribute to achieving sustainable development.

Sustainable development is well defined, globally recognised, underpinned by clear principles, and the Scottish Government is a signatory to the UK's shared framework for sustainable development<sup>3</sup>. There is also a strong precedent for a duty to contribute to achieving sustainable development in Scottish law. In exercising functions under the Planning (Scotland) Act 1996, the Water Environment and Water Services (Scotland) Act 2003, the Climate Change (Scotland) Act

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<sup>2</sup> <http://www.carnegieuktrust.org.uk/publications/2011/more-than-gdp--measuring-what-matters>

2009 and the Marine (Scotland) Act 2010, Scottish Ministers and others must do so with the objective of contributing to or furthering the achievement of sustainable development.

There is danger that placing a sustainable economic growth duty on regulators introduces a bias towards economic aspects over the other two pillars of sustainable development: the environmental and social. As effective, independent and respected authorities, SEPA's priority should remain the protection and improvement of the environment, and SNH's to secure the conservation and enhancement of natural heritage. We note however, that those regulatory bodies already have various duties to consider economic and social issues or duties to achieve sustainable development. Under the Natural Heritage (Scotland) Act 1991, SNH has a clearly defined duty to take into account *'the need for social and economic development in Scotland or any part of Scotland' in exercising its functions.*<sup>4</sup> Similarly, under Section 32 of the Environment Act 1995 (that outlines general environmental and recreational duties and is proposed for repeal in this Bill), in performing its functions, SEPA must *'have regard to the social and economic needs of any area or description of area of Scotland'*<sup>5</sup>. Statutory guidance on sustainable development issued under Section 31 of the 1995 Act (not to be repealed) requires that SEPA work *'to ensure that its actions do not unnecessarily constrain economic development and do not impose a greater than necessary burden on those it regulates.'*<sup>6</sup> Furthermore, the Water Environment and Water Services (Scotland) Act 2003 states that SEPA must *'act in the way best calculated to contribute to the achievement of sustainable development'*.<sup>7</sup>

On the reporting of economic considerations by regulators, the Public Services Reform (Scotland) Act 2010 imposes a range of duties on the Scottish Government and listed public bodies (including SNH and SEPA) to provide information, including an annual statement on the steps taken to *'to promote and increase sustainable growth through the exercise of its functions'* and *'to improve efficiency, effectiveness and economy in the exercise of its functions.'*<sup>8</sup>

The introduction of an additional reporting requirement could result in increased costs and decreased efficiency and therefore increase burdens on businesses. In its consultation on the proposals, the Government stated that it was keen to avoid new reporting requirements which may divert time and energy away from front-line environmental duties. A number of local authorities responded to the consultation with concerns that the introduction of a new generic duty, and the additional burden of reporting associated with it, would do just that and undoubtedly stretch limited resources.

Additionally, there is also a risk of increased incidences of legal challenge where a business believes the regulator has failed to comply with the statutory growth duty, or concerned citizens believe the regulator has failed to comply with sustainable development duties. Indeed, in its response to the Government consultation, SNH noted the potential risk that by applying the new duty when making decisions or providing advice, public bodies would be open to legal challenge that the duty has been wrongly applied. This would inevitably deflect resources and undermine the aim of more effective regulation.

We note the inclusion of the qualification that the duty would apply *'except to the extent that it would be inconsistent with the exercise of those [regulatory] functions to do so'*, but would query how this would be applied and tested in practice. Where a regulator faces conflict between compliance with primary functions and achieving sustainable economic growth we would like there to be a clear guidance for resolution and priority given to fulfilling the primary functions.

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<sup>3</sup> [One future – different paths: The UK's shared framework for sustainable development](#)

<sup>4</sup> Natural Heritage (Scotland) Act 1991, section 3(1)(c)

<sup>5</sup> Environment Act 1995, section 32(1)(d)

<sup>6</sup> [Statutory Guidance to SEPA on sustainable development made under section 31 of the Environment Act 1995](#)

<sup>7</sup> Water Environment and Water Services (Scotland) Act 2003, section 2

<sup>8</sup> Public Services Reform (Scotland) Act 2010, section 32(1)(a) & section 32(1)(b)

## Part 2 Environmental Regulation

### Chapter 1 - Regulations for protecting and improving the environment

**Section 8** - We are generally supportive of the proposals for revised regulatory powers for Scottish Ministers with the general purpose of protecting and improving the environment. We would however seek the inclusion of national obligations relating to the protection and improvement of the environment in addition to those listed in subsection (1)(b).

**Section 9** - While we accept that the term '*environmental activities*' is defined in subsection (1), we are concerned that the term is potentially misleading as alone it implies an activity undertaken for the benefit of the environment. For example, the Organisation for Economic Co-operation and Development (OECD) defines environmental activities as '*activities which reduce or eliminate pressures on the environment and which aim at making more efficient use of natural resources.*'<sup>9</sup> A more appropriate term should be substituted – such as '*activities potentially harmful to the environment*'.

**Section 11** - the list of representative interests that must be consulted by Scottish Ministers before making regulations includes local government, industry and business. Environmental non-government organisations might be explicitly listed in this section to make clear that this sector will also be consulted.

### Chapter 2 - SEPA's powers of enforcement

While we support the inclusion of an additional range of powers to introduce fixed and variable monetary penalties (sections 12-17) we believe they could be strengthened.

**Section 12** – subsection (4) states that the maximum amount of a fixed monetary penalty is an amount equivalent to level 4 on the standard scale. We believe that level 5, the highest level on the standard scale, should be applied instead. SEPA need not use a fine of that level but it gives them the flexibility to do so if circumstances require it.

**Section 15** - We do not believe the proposed cap of £40,000 on variable monetary penalties is adequate to deter or penalise those who have caused significant environmental harm. Clearly, for large businesses, £40,000 might not have the necessary impact. Other legislation does not cap at such a level; for example, the Greenhouse Gas Emissions Trading Scheme Regulations<sup>10</sup> enable penalties of 100 Euros per tonne of CO<sub>2</sub> emitted to be applied. This has resulted in operators receiving penalties well in excess of £40,000. There are clear benefits of such a system where the magnitude of fine is not capped and is proportionate to the environmental harm caused or takes into consideration the financial benefit accrued by the perpetrator of the offence. Additionally, we reiterate our support for the establishment of a scheme to feed any monies raised into a publically administered environmental restoration fund and would welcome such a scheme being progressed as soon as possible.

**Section 19** - Enforcement undertakings would allow an operator to make reparation through restoration or environmental improvement when non-compliance has occurred. It was originally proposed in the public consultation that SEPA would use such undertakings '*to enable legitimate operators to make amends where an offence has not led to significant environmental harm and has involved little or no blameworthy contact*'.<sup>11</sup> We support enforcement undertakings being used on this basis. However, we feel strongly that this must not become an alternative or default option to either SEPA pursuing financial penalties or pursuing through the courts where this is a more appropriate response.

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<sup>9</sup> <http://stats.oecd.org/glossary/detail.asp?ID=6420>

<sup>10</sup> <http://www.legislation.gov.uk/ukxi/2005/925/made/data.pdf>

<sup>11</sup> <http://www.scotland.gov.uk/Publications/2012/05/6822/3>

### **Chapter 3 - Court powers**

**Section 26** - The provisions on compensation orders will allow costs of up to £50,000 to be paid to SEPA or others for costs incurred in preventing or remediating harm to the environment. We welcome these orders but do not believe that they should be capped because as in the case of variable penalties we believe there must be scope for compensation to be proportionate to the environmental harm caused.

**Section 27** – We support the proposed power for the court to consider the financial benefit obtained by an illegal activity, but we note that there might be difficulties for the courts if they assess the benefit as greater than the currently capped compensation order.

**Section 28** - We welcome the introduction of publicity orders on the basis that adverse publicity can prove a greater deterrent than a financial penalty due to fears over reputational damage.

### **Chapter 4 Miscellaneous**

As with Section 26 we note that the fine here is capped at £40,000, and we do not believe that they should be capped because as in the case of variable penalties we believe there must be scope for compensation to be proportionate to the environmental harm caused.

### **Chapter 5 General purpose of SEPA**

We support the introduction of a general purpose for SEPA with regard to protecting and improving the environment, the sustainable management of natural resources and improving the health and wellbeing of the people of Scotland. This reflects the modern role of SEPA, which has over the years since its creation extended beyond the control of pollution and further allows SEPA to take opportunities to improve Scotland's environment where appropriate.

However, as in our comments on section 4 above, we strongly oppose the inclusion of contributing to achieving sustainable economic growth within SEPA's general purpose.

### **Conclusion**

The comments in this submission cover our principal concerns with the Bill as introduced. There may be other matters of substance, amendment and drafting which give rise to further contributions to the passage of the Bill.

#### **For more information contact:**

the LINK Parliamentary Officer, Andy Myles  
on 0131 225 4345 or via email on [andy@scotlink.org](mailto:andy@scotlink.org)  
[www.scotlink.org](http://www.scotlink.org)