Written submission from Dr Sarah Hendry, Centre for Water Law, Policy and Science, University of Dundee

We are pleased to have the opportunity to give evidence on this Bill and we are in general supportive of moves to rationalise and streamline regulation, especially environmental regulation, in Scotland.

We have a number of concerns, especially around the new duty for regulators with respect to “sustainable economic growth” (sections 4 and 38). We consider this an unclear concept, which will be difficult to define and enforce, and is not an appropriate focus for all regulators, especially SEPA and SNH. Their focus should be on protecting the environment, framed by sustainable development.

We have some concerns around the structure of the Bill, especially within Part 2.

In Part 2, we think there could be greater clarity about the relationship between the Bill, subsequent regulations and subsequent guidance. Partly because the regulations and guidance are not yet available, it is difficult to fully understand some provisions. Especially, we are concerned about:

- The different tiers of offences: the “significant harm” offence, the relevant offences and any other offences that may remain on the statute books but not within the penalty scheme;
- The appeals process and its relationship to the penalty scheme.

Part 1

We appreciate that RACCE is primarily concerned with Part 2 of the Bill. However we would note the extensive powers in Part 1, especially s.2, to rewrite existing legislation. Whilst we agree that it is often appropriate to use secondary legislation, for all the reasons given in the Delegated Powers memorandum, and whilst we agree that the negative resolution procedure may be appropriate, nonetheless many legislative acts that were once in primary law are now in secondary rules, and enabling powers to Ministers are often extensive. Along with the unicameral structure of the Scottish Parliament we would be concerned about the possible lack of scrutiny, for example, in deciding if regulations would have “equivalent effect” to a previous mandatory enactment.

We would agree that regulations made under ss. 1 and 2 should be made under the affirmative procedure.

We suggest that the regulatory principles in s.6(3)(a) should be stated more generally as applying to regulators, in Part 1 and Part 2, and not only as underpinning to the Code of Practice.

Especially as that is not the case, we would not agree that “sustainable economic growth” should be repeated here as a regulatory principle (s.6(3)(b)).

We would like to see (as in all cases where consultation is required by statute) a general requirement to consult the public.
Part 2

We are generally supportive of ss.8 and 9. We would agree with the suggestions made by RSPB and by Prof Colin Reid to include “biodiversity”, or “habitats and species”, after “ecosystems” in s.9(2)(b)(iii).

Section 10 and schedule 2 contain very broad enabling powers to secure the repeal and re-enactment of the four main consenting regimes in Scotland. Each of these is technically and legally complex and their restructuring is likely to require extensive work by the Government and SEPA, involvement of key stakeholders and public consultation. We would strongly suggest that these are appropriate subjects for affirmative procedure, to ensure proper scrutiny.

We would suggest that s.10 could be clearer as to the extensive reforms of the regulatory system that we understand are intended under this provision.

There are four tiers of control in schedule 2. Whilst permits and general binding rules are well-understood, it is not wholly clear what the difference is between notification and registration. We think a three-tiered system would be simpler and could still provide for all necessary forms of control.

We note s.11(2) and we are unclear as to its purpose. We recognise that Government obtains significant data and input from consultations at different times and on different subjects, but where the legislation imposes a specific duty to consult specific parties, we consider that should always merit a specific consultation at that time. Otherwise there is a risk that earlier responses, made to a different question, will be taken out of context in ways that the respondents did not fully intend, or overlooked. Given the importance of these reforms, it will be most important that Government allows time for full consultation as the detail emerges.

We would suggest that s.38, chapter 5 (general purpose of SEPA) would be better placed near the start of Part 2. We would also suggest that the “significant harm” offence in s.31 should be placed higher up in Part 2, before the penalty scheme. This might make it easier to understand the context of the scheme.

Chapter 2 – we are generally supportive of these new powers for SEPA, and we think they will significantly improve effective enforcement. We would like to see more focused reporting by SEPA on outputs and outcomes.

We are unclear about the desirability of the provisions in s.13(3). We note that the explanatory notes state that such an early payment is common in penalty schemes. However, we would be concerned to be sure that this is not a mechanism for liable parties to avoid not just criminal proceedings but any record of their non-compliance. Otherwise they could incur a series of such early payments without recognition of a pattern of behaviour.

We would agree with Prof Reid’s comments about how the scheme will apply to ongoing breaches.
The whole question of the balance between higher penalties and lower levels of regulation is crucial to the potential success or otherwise of a ‘light touch’ regulatory regime.

We would support the maximum fixed penalty being set at £5000, level 5 on the standard scale, rather than £2500, level 4. The maximum will not always be used.

More generally, whilst we fully support that submission to the penalty scheme should mean that no criminal proceedings could be brought, it is not clear whether “relevant offences” will also be subject to criminal proceedings as an alternative, or whether criminal proceedings will only apply to these offences where the operator has not complied with an element of the penalty scheme. See also our comments below on relevant offences in relation to s.31.

We would support Prof Colin Reid’s concerns around the need for clarity on appeals, and especially, the relationship between appeals and further proceedings; and that this should be addressed in the Bill.

Under s.15, we are concerned that the penalties may not be high enough. Whilst we appreciate that the £40,000 maximum has precedent behind it, we would like to see the possibility of penalties high enough to deter even large organisations. We appreciate that this money should not be directed to SEPA, and that it the penalty is not for remediation, compensation or cost recovery, but we would also prefer that these sums be hypothecated to environmental protection or improvement in some way.

We support the non-compliance penalties under s.18, the general provision for enforcement undertakings under s.19, and cost recovery provisions in s.22.

Section 24(2) is unclear. If the purpose is to allow SEPA to publicise information about the wrongful activity as well as the level of penalty, which we would support, this could be more clearly expressed. Visibility of the penalties will be a major factor in effective deterrence.

Chapter 3 – Clause 26 – as the purpose is to remedy environmental harm, we do not agree that there should be a limitation on the sums payable. They should be limited by the nature of the harm in combination with the culpability of the offender; ability to pay may be relevant, but where there is ability to pay then full recovery of the costs of reparation should be possible.

We strongly support clause 27, and also clause 28.

Chapter 4 – Section 31 – we support this provision and that it should have strict liability. As noted, we think it should be located higher up in this Part, before the penalty scheme.

We have two concerns:

The definition of “significant” environmental harm: it will be important to have clarity about the meaning of “serious adverse effects”. Similar language is used in other
related legal regimes, and is often restricted. In particular this must not imply that the offence is only applied where there is damage to a EU designated conservation site can be proven, whilst damage to national sites (such as SSSIs) and non-designated sites is treated less seriously.

The relationship between this offence and the definition of “relevant offences” (section 39): as so much is left to future regulation and guidance, it is not wholly clear in the Bill what will be the status of, for example, the “procedural” offences; or, the permitting or causing of environmental harm that is not “significant”. Will these only be subject to penalties and undertakings; or will they also be subject to potential prosecution, and if so, will that only be where a penalty has not been paid or an enforcement undertaking not complied with, or will they also be “stand alone” offences?

Linked to that, will there be a “middle tier” of offences which are not “significant harm”, but not open to the penalty scheme either?

We would prefer to have some clarity around this in the Bill. We would also suggest that all orders relating to the offences be made under the affirmative procedure, and consulted on widely.

Section 32 – we would like to see the provision for compensation, and for publicity, extended to this offence. It is not clear to us that this will be the case; we read this provision separately to that on “relevant offences” in chapter 3.

Section 35 – we would agree with Prof Reid that the decision to remove special sites should be made by (or with) SEPA.

Chapter 5: General purpose of SEPA:

We agree that it is helpful for SEPA to have a statutory purpose. We would suggest that this be placed higher up in this Part.

We do not support the inclusion of the duty to contribute to sustainable economic growth for SEPA under s.38, or for Scottish Natural Heritage in particular under s.4.

We consider that “sustainable economic growth” as a concept is not well defined or understood and contains inherent and fundamental contradictions. The economy is wholly dependent on the environment, not the other way round.

We would also support the arguments made by Prof Reid and by the RSPB in regard to this provision.

We consider that the appropriate focus for environmental regulators is the environment, and sustainable development is the appropriate over-arching concept. Sustainable development takes a tri-partite approach and SEPA does therefore consider economic and social dimensions in aspects of its decision-making. “Sustainable economic growth” shifts the emphasis away from the environment and

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1 The Habitats Directive, 92/43/EEC, considers “significant effects”. The Environmental Liability Directive, 2004/35/EC, and the Water Environment (Controlled Activities) (Scotland) Regulations 2011/209 use “significant adverse effects”. These provisions are all restricted.
towards the economy and this is not appropriate for SEPA or SNH. Sustainable development is a well-established concept and we would support its further emphasis and refinement. Especially, we would support strong procedural duties to show progress towards sustainable development, including the use of indicators.

**Schedule 3 Part 3: Environment Act 1995.**

We support the amendments to s.33 and the repeal of s.36. We do not see the reasoning behind the repeal of s.32 (heritage and access) or s.34 (protection and conservation of water) though we accept the latter may be covered by s.2 of the Water Environment and Water Services (Scotland) Act 2003.

We are unclear as to the import of the amendment to s.34. If this means that the general cost benefit provisions will no longer apply to SEPA, we would not support that. We would consider that a general analysis of the costs and benefits of any regulatory action is an essential part of ensuring that such actions are proportionate, consistent and targeted, as in s.6 of the Bill.