Written submission from RSPB Scotland

Stage 1 Written Evidence

RSPB Scotland welcomes the opportunity to respond to the Rural Affairs, Climate Change and Environment Committee’s call for views on the Regulatory Reform (Scotland) Bill. We outline the aspects of the Bill that we think are positive and those that give us cause for concern.

In summary:

- We fully support effective and transparent regulation.
- We oppose the introduction of a duty for regulators to contribute to the achievement of sustainable economic growth; any duty should be to achieve sustainable development.
- We believe that the sanctions in the Bill should be refined to give regulators the necessary scope and flexibility to deal with non-compliance.
- We think the regulatory powers provisions need to be clarified and strengthened.

General comments

The Bill will take forward elements of the Scottish Government’s Better Regulation agenda. As stated in a previous RSPB Scotland consultation response\(^1\), we fully support the integration and streamlining of regulation but only when this maintains a sufficient level of environmental protection. Regulations play a central role in protecting the environment and the natural capital upon which our long-term prosperity and wellbeing ultimately depend. The 2011 UK National Ecosystems Assessment clearly highlighted the wide variety of significant benefits provided by the natural environment in terms of economic prosperity, human health and wellbeing; 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 key services.\(^2\)

We view regulation as an essential policy tool for achieving protection of the natural environment and as a means of the UK meeting its legal obligations under EU Directives such as the Water Framework Directive and the Birds and Habitats Directives. Furthermore, given the debate about regulatory burden and the need to cut red tape in these financially straitened times, it is notable that a UK study found that costs of environmental regulation do not have a statistically significant effect on

\(^1\) RSPB Scotland response to ‘Proposals for an Integrated Framework of Environmental Regulation’ consultation

\(^2\) http://uknea.unep-wcmc.org/
employment and there was no evidence of a trade-off between jobs and the environment.³

RSPB Scotland is extremely concerned that the proposed duty on regulators to contribute to the achievement of sustainable economic growth will introduce a bias towards economic gain over environmental protection. As we discuss further below, we believe it is far more appropriate for regulators to have a duty to contribute to sustainable development.

We would like to draw RACCE’s attention to section 2 of the Bill, which is being examined by the lead Committee. The provisions in this section would allow any regulations made under section 1 to create, amend or revoke existing regulatory requirements. Although the Bill proposes that such changes would only be permitted when equivalent regulatory requirement exists, we question how this judgement would be made. Robust and sufficient safeguards would be needed to ensure that the provisions do not result in deregulation and weakening of environmental protection.

Part 1 Regulatory Functions

Section 4 - Duty for sustainable economic growth

RSPB Scotland strongly disagrees with the proposed duty for regulators to contribute to sustainable economic growth. We are particularly worried about the consequences for those regulators, SEPA and SNH, who have duties to protect Scotland’s environment and natural heritage.

We question the use of ‘sustainable economic growth’ over ‘sustainable development’ and argue that a duty for the latter is far more appropriate. Sustainable economic growth is not defined in legislation, either in this Bill or in existing legislation, nor is there any clarity about what sustainable economic growth actually is; it means different things to different people. On the other hand, sustainable development is well defined in international, European, UK and Scottish law and is underpinned by clear principles. The Scottish Government is already signed up to the UK’s shared framework for sustainable development⁴ and there is strong precedent for sustainable development duties in Scottish legislation, for example the Planning etc. (Scotland) Act 2006, Climate Change (Scotland) Act 2009 and Marine (Scotland) Act 2010.

We are concerned that a sustainable economic growth duty on regulators would introduce a bias towards economic aspects over the other two pillars of sustainable development: environmental and social. If it is not the Government’s intention to propose a duty that puts economic issues ahead of environmental or social considerations then a new duty is not technically necessary for regulators that already have a sustainable development duty e.g. SEPA⁵ and SNH⁶. Furthermore,


⁴ One future – different paths: The UK’s shared framework for sustainable development

⁵ Sustainable development duty in Section 2 of the WESS Act 2003
SEPA and SNH already have legal obligations to have regard to social and economic factors\(^7\) when exercising their functions. This means that economic growth can already be taken into account. It would be far more sensible to extend a sustainable development duty to all of the regulators listed in Schedule 1.

RSPB Scotland believes a more sustainable economy would be aided by the development of new measures of social and economic wellbeing to complement the traditional, but limited measure, of GDP. We agree with the recommendation from the Carnegie report\(^8\) that there should be a shift in emphasis from measuring economic production to measuring people’s wellbeing. There must be due recognition of the fact that the natural environment generates and sustains economic activity and brings wider benefits to society\(^9\).

**Part 2 Environmental Regulation**

**Regulatory powers (Sections 8-11)**

- We support the intention in Chapter 1 regarding the need for regulations to protect and improve the environment. However, we think that some of the provisions require further clarification:

  - The general purpose in section 8 includes “implementing EU obligations, and international obligations, relating to protecting and improving the environment”. This should be expanded to include national obligations in order to encompass Scottish legislation such as the Nature Conservation (Scotland) Act 2004 and the Wildlife and Natural Environment (Scotland) Act 2011 and all subsidiary obligations including statutory guidance, strategies, plans and policies.

  - Section 9 defines ‘environmental activities’ as “activities that are capable of causing, or liable to cause, environmental harm, and activities connected with such activities”. The phrase ‘environmental activities’ implies the activity is environmentally beneficial. Therefore, when used without its supporting definition, this term could be misleading and cause confusion. We suggest that an alternative term is used, for example ‘activities potentially harmful to the environment’.

  - The term ‘substances’ within the definition of ‘activities’ (section 9(2)) and in Schedule 3 needs to be defined. It is critical that ‘substances’ will encompass invasive non-native species, the introduction of which can cause devastating environmental effects.

  - The meaning of ‘protecting and improving the environment’ should be clarified by explicitly stating ‘habitats and species’ alongside ecosystems.

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\(^6\) Section 1 of the Natural Heritage (Scotland) Act 1991

\(^7\) SEPA: s.32 of the Environment Act 1995 and s.2 of the WEMS Act 2003; SNH: s.3 of the Natural Heritage (Scotland) Act 1991

\(^8\) http://www.carnegieuktrust.org.uk/getattachment/edc70373-49a0-48bb-84a3-5b0a253a5a6f/More-Than-GDP--Measuring-What-Matters.aspx

\(^9\) Wellbeing through wildlife (RSPB publication)
Section 11 introduces provisions that require Scottish Ministers to consult before making regulations for protecting and improving the environment. The consultee list includes local government, industry and business. Environmental interests should be explicitly listed to make clear that our sector will be consulted too.

SEPA’s enforcement powers

We welcome the provisions to give SEPA powers through fixed and variable monetary penalties but these could be made more effective in a number of ways. Our suggestions below are based on the recommendations in the Macrory review\(^\text{10}\) which states that sanctions should be based on six principles: (i) aim to change the behaviour of the offender; (ii) aim to eliminate any financial gain or benefit from non-compliance; (iii) be responsive and consider what is appropriate for the particular offender and regulatory issue; (iv) be proportionate to the nature of the offence and the harm caused; (v) aim to restore the harm caused by regulatory non-compliance; and (vi) aim to deter future non-compliance.

- Section 12(4) states that the maximum amount of a fixed monetary penalty is to be an amount equivalent to level 4 (£2500) on the standard scale, as per the Criminal Procedure (Scotland) Act 1995. We think that level 5 (£5000), 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.

- The variable monetary penalty should not be capped at £40,000 because there must be scope to have fines that act as sufficient deterrent and adequately penalise those who have caused significant environmental harm. For businesses with large turnover, £40,000 might not have the necessary impact. Other legislation does not cap, for example, the Greenhouse Gas Emissions Trading Scheme Regulations\(^\text{11}\) enable penalties of 100 Euros per tonne of CO\(_2\) 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 can be linked to the potential environmental harm of an activity.

- When setting fines, there must be consideration of whether any financial benefits have accrued or are likely to accrue as a result of the offence. We note the provision in section 16: “secure that no financial benefit arising from the commission of the offence accrues to the person”. We suggest that the provision should be consistent with that of section 46(1) of the Nature Conservation (Scotland) Act 2004 i.e. “The court must, in determining the amount of any fine to be imposed on a person convicted of an offence under this Part, have regard in particular to any financial benefit which has accrued or is likely to accrue to the person in consequence of the offence”.

- We support the principle of enforcement undertakings but they must not be used instead of financial penalties or court action when these are a more

appropriate response. In situations where significant and irreparable environmental harm has occurred, it may be more appropriate to pursue a prosecution and restoration order.

Scottish Coal – the need for strong and effective regulation

Coal mining in Scotland is facing one of its most challenging periods for many years, with two of the largest opencast coal operators (ATH Resources and Scottish Coal) recently entering administration. Both operators have significant liabilities in relation to the restoration of their sites, with restoration costs rising into many millions of pounds at some sites. Failure to manage and restore these sites could cause immediate and serious pollution threats from contaminated mine water and put Scotland in breach of European legal requirements under the Birds and Habitats Directives. It is not yet clear how this story will unfold but it is a stark reminder of the need to regulate industry closely and effectively. A shift towards deregulation does not pay, either economically or environmentally. Scotland’s regulatory framework must be sufficiently effective and robust to avoid such situations in future.

Powers of the Courts

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 think that they should be capped because there must be scope for compensation to be commensurate with the damage incurred.

We are disappointed by the ad hoc nature of the marine licensing provisions in the Bill. There is a real need for a joined-up approach to judicial reform and, in this regard, we wholeheartedly agree with the points made by Professor Colin Reid in his evidence submission. It remains very difficult for parties to challenge Government in the courts. We note that, prior to forming the current Government, the SNP made a manifesto commitment to explore the option of an environmental tribunal or court. This would provide an opportunity to introduce a fairer, more efficient and more cost effective initial procedure for interested parties to challenge Scottish Ministers’ decisions and remove the need for immediate recourse to the courts. In its report Governance Matters, Scottish Environment LINK suggests that there is a strong case to be made for an environmental and land court.

12 http://www.scottish.parliament.uk/S4_RuralAffairsClimateChangeandEnvironmentCommittee/General%20Documents/Prof._Colin_T._Reid(1).pdf