Written submission from the Scotch Whisky Association (SWA)

Introduction

The Scotch Whisky Association (SWA) represents 90% of the Scotch Whisky industry. Scotch Whisky is Scotland’s leading single product export. Annual shipments in excess of £4.3bn in Customs value represent over 80% of Scotland’s and 25% of the UK’s food and drink exports.

The vast majority of our members, including distillers, bottlers and those engaged in the wholesale and export trade of Scotch Whisky, have some type of interaction with SEPA. Licences range from simple registrations through to Integrated Pollution Prevention and Control (IPPC) permits.

Scotch Whisky is a natural product closely tied to its environment and rural communities across Scotland. Environmental sustainability is one of the industry’s and Association’s top priorities. Building on a range of existing company initiatives, the industry launched an ambitious and wide-reaching Environmental Strategy in June 2009. It has been recognised and welcomed by several environmental organisations including SEPA, RSPB and WWF.

The Association and Scotch Whisky industry have developed a strong professional working relationship with SEPA. For example, the industry has, through the SWA, delivered training events for SEPA staff, improving understanding of the workings and challenges of the distilling sector and business in general. We hope that the strong partnership between SEPA and Scotch Whisky industry can be translated across other business sectors.

There has been extensive discussion within the industry about the SEPA regulatory proposals throughout their development. The Association facilitated a series of meetings between our members and SEPA to explore the impact of the proposals for the sector. The industry also provided resources and expertise to assist SEPA in developing the concept of integrated permitting, along with some real-life examples on which to test the developing model.

This Bill represents a wish to modernise and simplify the way businesses in Scotland are regulated with a greater emphasis on outcomes rather than just action. If implemented effectively, the new form of regulation should support the improvement of the environment whilst using resources more efficiently, yet ensuring Scottish businesses can grow. Subject to much detail that remains to be developed under subordinate legislation, we give a cautious welcome to this Bill.

The Bill is so wide in scope that there exists opportunity for secondary legislation to capture activities not yet subject to regulation and potentially capture activities not intended to be covered by the scope of this Bill. To ensure proper scrutiny of subordinate legislation arising from this primary legislation, we would wish to see all subordinate legislation arising from the final Act subject to the affirmative procedure and thus open to proper scrutiny.

Looking ahead to the implementation of subordinate legislation, we would wish to see the Scottish Parliament setting some indicators for the various regulators to
‘measure success’. We believe that the successful implementation of the Act should be measured by the environmental outcomes it delivers rather than the number, or degree, of processes the regulators manage.

The Association is pleased to have the opportunity to respond to the Rural Affairs Climate Change and Environment Committee’s invitation to comment on the Regulatory Reform (Scotland) Bill. We would be happy to provide additional information to this Committee and/or any other supporting committees. This submission focusses only on Part 2 of the Bill - Environmental Regulation.

**Part 2: Environmental Regulation**

**Chapter 1: Regulations for Protecting and improving the environment**

Scotch Whisky is closely tied to its environment and rural communities across Scotland. We broadly support the intention of the Bill that SEPA would have a general purpose ‘to protect and improve the environment (including managing natural resources in a sustainable way)’. The Bill also states that SEPA must also contribute to improving the health and well-being of the people of Scotland and contribute to achieving sustainable economic growth. We seek clarification around the definition and possible weightings given to each of these objectives and would expect full consultation on the definitions of these matters.

We support the Bill’s new duty for SEPA to contribute to achieving sustainable economic growth. This adds weight to existing legislation where SEPA must consider economic factors (such as affordability and cost-effectiveness of environmental improvement measures) alongside environmental considerations. It also allows scope for SEPA to target better its interventions where the highest risks to the environment exist. Where cost-benefit analysis demonstrates that environmental improvement/pollution mitigation action is necessary, the environmental licensing framework must allow regulated businesses to focus their resources where action will deliver the greatest environmental return/improvement. We believe the Bill should be strengthened with a specific reference to a risk-base for environmental regulation.

Part 2, Chapter 1, Section 10 of the Bill gives Scottish Ministers the power to make a wide range of regulation as detailed in Part 1 of Schedule 2. It is understood that a key driver for Section 10 is to allow the setting up of a ‘single regulatory framework’ in regulations. In principle we see value in this proposal and we have highlighted in previous consultations the benefits of a single Controlled Activities Regulation (CAR) licence for distillery sites. We are pleased to see that this new power goes beyond ‘stapling together’ individual licences and offers scope for a wholesale review of existing permissions covering all relevant environmental permissions.

The aim of the single regulatory framework regulations is for a reduction in the number of licences held by businesses, significant simplification of those licences, greater ability for businesses to effectively manage their own environmental performance (which in turn should lead to a better understanding of process and impacts), reduced inspection frequency and reduced costs. One significant benefit for regulated companies is the potential to reduce the current duplication of effort required by businesses and the regulator; for example providing the same company...
details and data to SEPA for a variety of different reasons or the hosting of numerous site visits and inspections from officers with different interests and from different environmental disciplines. This would, theoretically, allow for a greater consistency of approach to be taken across the various environmental media and across companies.

The Bill includes a new ‘integrated’ approach when it comes to environmental management. The SWA would not wish the complexity of the IPPC (Industrial Pollution Prevention and Control) style of licence to be replicated at lower risk installations. Currently IPPC variations can be lengthy and cumbersome and we would not wish to see the same process transposed onto all new licences. This would represent significant gold-plating of regulation.

There remains a real risk that this new power could be used to drive a prescriptive and detailed regulatory framework. It will be extremely important that the development and implementation of subordinate regulation be tightly managed and that a full dialogue between the Scottish Government, SEPA and regulated businesses is allowed to take place. We believe such regulations should be subject to a positive parliamentary procedure and open to full Scottish Parliament Committee scrutiny. We understand that over time, SEPA would wish to migrate existing company multiple licences to single permits. We would welcome clarification on the timetable proposed for this migration.

Part 2 Chapter 1 Section 11: Regulations relating to protecting and improving the environment, provides a commitment to consult with representatives of industry prior to making regulations relating to protecting and improving the environment. The Association would welcome the opportunity to be involved in these consultations.

Chapter 2 – SEPA's power of enforcement

Section 10 of the Bill allows for the development of enforcement notices, revocation and suspension notices and these proposed notices might be served on operators who are carrying out an activity whether or not they have an authorisation. We believe this is one of the real strengths of this proposed Bill – providing SEPA with the tools to deal with environmental harm and pollution from unregulated businesses. Similar sanctions already exist for regulated businesses and this proposal levels the playing field.

The Bill includes new powers under Sections 12 and 15 to make provision for SEPA to issue fixed and variable monetary penalties and furthermore that SEPA is able to recover associated costs e.g. investigation, legal etc. from those persons issued with a monetary penalty. SEPA should be required to demonstrate the amount of any fees or costs levied in a transparent manner and this should be defined in guidance.

Section 19 provides SEPA with the power to accept a voluntary enforcement undertaking. This should achieve the environmental outcome SEPA desires without having to resort to costly litigation and it is welcomed that where enforcement undertakings are accepted by SEPA, no criminal proceedings will be commenced.
We would like to underline that these additional enforcement measures should not undermine the current mature relationship which SEPA has with compliant and responsible businesses. There is a risk that if fixed penalties are used frequently by SEPA in response to minor transgressions (such as administrative errors or minor misses to reporting deadlines), this is likely to lead to a deterioration in the regulator’s relationship with operators. To counter this, we believe the proposed guidance from the Lord Advocate should set out where these measures should be used alongside other enforcement tools available to SEPA. Monetary penalties should not circumvent early engagement and open dialogue with compliant companies to rectify environmental concerns. Penalty notices should not be a vehicle to generate income from minor breaches by well-performing licence holders. The guidance should also ensure consistency in the application of monetary penalties. The emphasis should be on SEPA’s role of producing guidance and advice rather than resorting to penalties or threat of penalties.

Chapter 3 - Court powers

Criminal activity that results in environmental damage, would attract strong enforcement action and penalties. The Bill enables more robust penalties (including fines that better reflect the costs avoided by poor practice, that cover the cost of the environmental damage, and that cover the regulator’s costs in investigating the permit breach or crime). The aim would be to drive improved behaviours from non-compliant operators.

The Association has concerns regarding the use of publicity orders and believes their use must be proportionate and only following careful consideration from the courts. Advertising the outcome of a court case proactively may have a disproportionate impact on businesses reputation.

A publicity order would be very powerful for those who trade on their environmental performance, but not for those who wilfully damage the environment. We are therefore not convinced it will drive the correct behaviours amongst the community the Bill is trying to target. Use of a publicity order on distillers might have a disproportionate impact as mis-information could be published in our international markets and international Governments could use the publicity as an excuse to introduce new trade barriers. We are unaware of any competitor spirits (tequila, Cognac etc.) whose manufacture is open to similar publicity orders. The introduction of these might put Scotch Whisky at a competitive disadvantage. Even responsible and compliant businesses will have accidents from time to time and the approach by the courts to this type of pollution incident should be different to wilful pollution. We would not wish to see this enforcement tool becoming the norm and should only be used for serious breaches that have resulted in significant harm to the environment.

Chapter 4 – Miscellaneous

Section 31 of the Bill creates the new offence of causing or permitting, or acting in a way likely to cause, significant environmental harm. We are concerned that this new power is so broad it offers SEPA the opportunity to intervene in company business matters inappropriate for regulatory intervention. For example it must not allow the environmental regulator to have any influence over a regulated company’s choice of
raw materials, production schedule or product type – these are matters for the business to decide and not the regulator.

Ministers must ensure the policy intent is reflected in the regulations as there is a risk that this new power has the scope to drive disproportionate regulation on compliant businesses. The normal approach to escalation of enforcement levels should be applied.

**Chapter 5 – General purpose of SEPA**

See earlier points under Chapter 1.

**Additional points**

We are disappointed that ‘beyond compliance’ environmental performance is not acknowledged within the Bill and we hope this will be covered by subordinate legislation. We believe that rewarding achievements as part of the licencing regime should be part of the regulator’s framework; by recognising ‘champions’, SEPA should have the powers to incentivise companies to innovate. Building a regulatory framework which allows SEPA to capture activities that currently are not covered by traditional regulation will ensure SEPA gain a more rounded and informed view of environmental performance by operators e.g. low carbon initiatives and on-site renewable power plants. We wish to see SEPA striving to become an ‘enabler’ for companies who are investing in innovative and new technologies.

We would also wish to re-iterate the importance of an effective and proportionate harmonised Risk Assessment to the success of this Bill. This would result in more assessment being associated with big risk activities with comparably less assessment associated to lower risk activities allowing SEPA to focus their resources on the high risk activities. This is one of the core principles of the regulatory change programme and should not be lost in the detail.

We would also wish Scottish Ministers to recognise that where these proposals are likely to reduce the administration burden between the regulator and operator, the internal systems and processes to manage the risks by environmental compliant operators are likely to remain unchanged.

**Conclusion**

The SWA welcomes the new duty for SEPA to contribute to achieving sustainable economic growth which we believe is compatible with the proper protection of the environment. Targeting those who wish to operate outside of regulations must be the main driver rather than focussing resources on compliant operators.

The SWA gives a cautious welcome to this Bill, but as it is mainly an enabling Bill, we are unable to endorse fully all the powers and duties until the detail is developed within the subordinate legislation on which there should be consultation and sufficient parliamentary scrutiny.