Written submission from Scottish Power

Thank you for the opportunity to submit comments in regard to the Regulatory Reform (Scotland) Bill. This response is made on behalf of Scottish Power. It considers the Bill against the interests of our generation, renewables, transmission and distribution business activities relating to environmental regulation in Scotland.

We are strongly supportive of the Bill, particularly in relation to the creation of a single regulatory framework, elements of the new penalty regime and the proposal to introduce mitigation and restoration options to avoid penalties or prosecution.

Our comments are set out below and relate specifically to Parts 1 and 2 of the Bill.

**Part 1 - Regulatory Functions**

*Section 4 - Regulatory Duty in Relation to Sustainable Economic Growth*

We are cautiously supportive of the proposal in the Bill to amend the duties of Regulators in relation to sustainable economic growth. This duty must, however, remain secondary to the primary purpose of environmental regulator to protect and enhance the environment. It is important that SEPA can provide certainty, predictability and good regulatory practice.

The creation of these powers and guidance, if not properly designed, can confuse regulatory purpose and could paradoxically undermine sustainable economic growth.

**Part 2 - Environmental Regulation**

*Section 9 - Meaning of Environmental Activities*

The Bill requires to set out further detail in defining what is meant by both “environmental activities” and “environmental harm”.

The definition and use of the term “environmental activities” in the Bill could conceivably relate to any economic, human or natural activity that could occur (or be likely to occur) at any time. This definition appears to be far too wide. For the purposes of the Bill, our view is that the scope of environmental activities should relate to the direct impacts upon the environment arising from a specific licensed economic activity that is governed against the purpose of a particular regulation.

Similarly, the definition of “environmental harm” is also very wide and we are not sure how elements of the definition could be reasonably used in practice (eg, “offence to the senses of human beings” being a rather wide and subjective definition of harm). In other regulations, environmental harm is defined in a specific context of quality threshold or baseline condition. Harm is often also defined against specific environmental media or habitat.

*Section 13 - Fixed Monetary Penalties: Procedure*

In principle, the fixed monetary penalty procedure is reasonable and we look forward to reviewing the code of practice at a later date.
However, we would like to see more detail in this section of the Bill in relation to the appeals mechanism. It is not clear whether one appeals to SEPA (against decisions already made by SEPA) or to another body. If the appeal is to SEPA itself, there needs to be a mechanism within the regulatory body that ensures the appeals are considered separately to the internal enforcement function.

Section 16 - Variable Monetary Penalties Procedure

As per Section 13, above

Section 22 – Cost Recovery

The requirement to publish guidance on how SEPA will exercise its powers on cost recovery is welcome. It is important that the costs recovered from operators reflect as accurately as possible the marginal costs incurred upon the Regulator.

It would be helpful if the Bill was more explicit in definition of eligible costs within 22 (3) – ie that any costs must be directly attributable to the environmental incident and relate only to marginal costs borne by the Regulator for sole the purposes of investigation. Legal review costs that could apply to more than one company or incident may not be applicable.

Section 26 – Compensation Orders Against Persons Convicted of Relevant Offences

We note the extension of existing powers to allow the courts to fine offenders up to £50,000 to address environmental harm or damage. Subject to our comment on Section 9, we agree that this can be an important tool for regulators to protect the environment. It is not clear, however, why £50,000 was chosen as the limit value.

Section 27 – Fines for Relevant Offences: Courts to Consider Financial Benefits

The assessment of financial benefit is not always straightforward. In applying any fine that includes such benefits, a provision for a procedure for independent assessment of this should be included in the Bill. Furthermore, the Bill should give reference to powers for courts to consider financial benefit where operators “knowingly” caused the offence.

Section 28 - Powers to Order Conviction, etc for Offences to be Published

In principle, there should be no objection to naming and shaming those guilty of an environmental offence and it can often be an effective tool for environmental compliance.

However, the use of publicity orders proposed in the Bill is not straightforward. It is not clear in the Bill what is actually meant by a publicity order in practice and what content such an order should include. For example, could it relate beyond the simple facts about the judgement (and penalty) in question to include the impact on the wider environment, reference to some arguments used in the case, the required activities for remediation – issues that stakeholders will want to understand to appreciate the context of the ruling. Does such a publicity order disallow further comment on an offence or in relation to the environment affected for a period of time? Who will vet the communication from the offending party or resolve disputes about the precise nature of a possible series of communication?
In our view, for reasons of practicality and efficiency, the publicity order should not be placed upon the person(s) convicted of the offence but should remain with the Regulator.

Section 29 - Vicarious Liability for Certain Offences by Employers or Agents

The Bill proposal to limit the vicarious liability for companies is welcome. However, it would be helpful if the Bill were to request that the Government and Regulator provide guidance in this matter. Obviously, all circumstances in which this will be tested will be different, but it is important for operators to understand conditions upon which liability will be reduced or eliminated.

Section 31 - Significant Environmental Harm

We have some concerns in relation to this part of the Bill as the fine for an offence is to relate to the ‘potential severity of environmental harm’ rather than, as an operator, the nature of the ‘breach of compliance’.

The protection from environmental harm arising from operator activities is typically protected through the structure of regulation and the balance of environmental risk that allow the regulator to provide permission for an activity. This environmental risk, in turn, directs the nature of permit authorisations. In our view, fine levels should be set out in relation to the nature of compliance breach instead.

The Bill also creates a potential overlap with other provisions in law that already provide for instances that cause significant environmental harm. Legal provisions arising from the transposition of the Environmental Liability Directive currently provide for compensatory remediation for activities that can cause environmental harm.

Section 38 - General Purpose of SEPA

We support the primary purpose of SEPA being re-affirmed in relation to its principal duties in relation to the protection of the environment. Reference to sustainable economic growth is important, but should be a secondary consideration enabled through guidance by the Scottish Government.