Scottish Environment LINK

Regulatory Reform (Scotland) Bill
Briefing for Stage 1 Debate

Summary

- The sustainable economic growth duty should be removed from the Bill.
- The Bill should ensure sufficient financial security is available for restoration and prevent companies under liquidation disclaiming regulatory requirements.
- All new regulations and changes to existing regulations must be subject to sufficient scrutiny, and all consultation procedures must be open and inclusive.
- Several definitions on protecting and improving the environment require clarification.
- The maximum level of fixed penalties should be increased to give regulators greater flexibility.

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.

LINK provided written and oral evidence at Stage 1 of the Regulatory Reform (Scotland) Bill, and previously responded to consultations on the better regulation agenda. We support regulatory reform that integrates and streamlines regulation while affording environmental protection. A healthy, functioning and well-protected natural environment is an essential prerequisite for a sustainable economy and for the wellbeing of society.

1. An economic growth duty for environmental regulators?

LINK is concerned by an economic growth duty for regulators because there is no legal definition of "sustainable economic growth" and, therefore, no assurance that it aligns with the principles of sustainable development. The three pillars of sustainable development are the environment, the economy and society and giving primacy to economic growth would risk undermining the other two pillars. The inclusion of this duty in environmental regulators' statutory purposes could confuse and compromise the regulators' work and their achievement of environmental protection and improvement. Indeed, the duty has been questioned by a number of individuals and organisations including the Law Society of Scotland, legal academics at the University of Dundee, and the Association of Salmon Fishery Boards.

The RACCE Committee's Stage 1 report (paragraph 4) expressed concern about the proposed duty on the basis that there is no statutory definition of sustainable economic growth. Furthermore, the Committee (paragraph 5) is unclear why the term sustainable economic growth has been used rather than sustainable development, since sustainable development has international recognition and is understood legally across a number of regimes and jurisdictions. The importance of sustainable development was recognised in the passage of the Water Resources (Scotland) Act 2013 when the Bill was amended at Stage 2 in response to the Infrastructure and Capital Investment Committee's recommendation to give "equality of emphasis to all three pillars of sustainability rather than just the economic aspects".

LINK welcomes the announcement that planning functions will be exempt from the growth duty, but questions why the maintenance of the duty in primary legislation is considered

necessary for regulatory functions. There must be consistency and it would be entirely sensible to use a non-statutory approach (such as that proposed in the recently published 'Sustainability and Planning' consultation for Scottish Planning Policy) to direct bodies in respect of their regulatory functions. This would avoid putting a poorly understood concept into legislation which could ultimately cause confusion and increase the likelihood of legal challenge in the Courts. For this reason, **LINK advocates a removal of the economic growth duty for regulators from the Bill.**

2. Financial guarantees for environmental restoration and protection

The current situation with opencast coal mining in Scotland has highlighted failures in the regulatory system to ensure funding for restoration of damaging development, and also a lack of legal clarity on whether companies can abandon polluted land and disclaim environmental licenses in the case of liquidation. The implications of this extend beyond coal to a range of industries including landfill sites, wind farms and other fossil fuel and minerals extraction. A key lesson that must be learned is that a system of light touch regulation, where it is taken largely on trust that developers will fulfill or sufficiently fund restoration obligations, is not fit for purpose. If industrial sites are not properly restored, serious environmental damage could occur and in the case of open cast coal, Scotland may be in breach of a number of legal obligations including the European Water Framework Directive and Birds and Habitats Directives. Action is needed to prevent similar situations arising in future, and this Bill is an opportunity to provide some safeguards. **The Bill could be amended to require regulators to check operators have sufficient financial security to fulfill their obligations before they grant an authorisation for any potentially harmful activity**. This financial security could be achieved by requiring operators to pay into a central, independently audited fund to underwrite the costs of remediating and restoring environmental damage. **The Bill could also be amended to prevent companies under liquidation from disclaiming environmental licences.** This would be consistent with the 'polluter pays' principle which is well established in national and European environmental law.

3. Scrutiny and transparency of regulatory changes

Affirmative procedure
Section 10 of the Bill enables Ministers to make regulations for the purpose of protecting and improving the environment. It is absolutely critical that there is adequate consultation and scrutiny of the detail of those regulations to ensure they are effective and fit for purpose. At Stage 1, Environment Minister Paul Wheelhouse MSP committed to requiring the first set of regulations made under section 10 to be subject to the affirmative procedure[1]. LINK notes that the DPLR committee[2] is not content that only the first set of regulations would be made under the affirmative procedure. Furthermore, DPLR recommended that a 'super-affirmative' procedure might be more appropriate for the exercise of some powers in the Bill, such as the removal of primary legislation. **We believe that the Bill should be amended to ensure all new regulations and changes to existing regulations are subject to sufficient Parliamentary scrutiny.**

Consultation and the code of practice
During Stage 1, stakeholders including LINK and the Law Society of Scotland, highlighted that the Bill should be strengthened to ensure open and transparent consultation procedures. The RACCE Stage 1 report (paragraph 12) stated "Whilst the Minister confirmed that any consultation would be open to the public, the drafting of the Bill does not readily lend itself to that view". The Bill has several provisions that require clarification in this regard, including

[1] http://www.scottish.parliament.uk/S4_RuralAffairsClimateChangeandEnvironmentCommittee/General%20Documents/2013.06.04_Letter_from_Minister.pdf
[2] http://www.scottish.parliament.uk/S4_SubordinateLegislationCommittee/Reports/sur-13-40w.pdf

section 1(3c) which relates to consultation when making regulations; section 6(4b) on the draft code of practice and section 11 regarding who should be consulted prior to making new regulations. **The Bill should be amended to ensure open and transparent consultation.**

Exemption criteria and the 'six month' rule
Section 2(7) gives Scottish Ministers power to stipulate that a particular regulation need not apply to a regulator, for a period of up to six months. We welcome recognition by both the EET and DPLR Committees that the inclusion of the six month period is unusual. **Ministers should clarify why this power is required and the circumstances for which it might be used.**

4. Protecting and improving the environment: definitions

The definitions in the chapter on regulations for protecting and improving the environment (section 9) would benefit from clarification. 'Environmental activities' is used in the Bill to mean activities that are potentially harmful, yet the term implies an activity that is being undertaken for the benefit of the environment. For example, the Organisation for Economic Co-operation and Development defines the term as '*activities which reduce or eliminate pressures on the environment and which aim at making more efficient use of natural resources*'[3]. **To avoid confusion, a more appropriate term should be used, such as '*potentially harmful activities*'.**

The definition of 'protecting and improving the environment' in section 9 should **include specific reference to biodiversity**. This view is shared by LINK and the Law Society of Scotland[4] who noted that inclusion of biodiversity would ensure compliance with the Nature Conservation (Scotland) Act 2004.

The term 'substances' within the definition of 'activities' in section 9(2) and in Schedule 3 needs to be defined. **The Bill must make clear that 'substances' include invasive non-native species, the introduction of which can cause devastating impacts on the natural environment**.

5. Fines and penalties

Section 12(4) of the Bill stipulates that the maximum amount of fixed monetary penalty will be equivalent to level 4 (£2,500) on the standard scale[5]. Scottish Environment LINK and the Centre of Water Law, Policy and Science[6] believe that the maximum fixed penalty should be set at level 5 on the standard scale (£5,000) rather than level 4. This would avoid leaving a regulator with inadequate powers. **The Bill should be amended so that higher fixed penalties can be applied if circumstances require it.**

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[3] http://stats.oecd.org/glossary/detail.asp?ID=6420
[4] http://www.scottish.parliament.uk/S4_RuralAffairsClimateChangeandEnvironmentCommittee/General%20Documents/Law_Society_of_Scotland(2).pdf
[5] as per the Criminal Procedure (Scotland) Act 1995
[6] http://www.scottish.parliament.uk/S4_RuralAffairsClimateChangeandEnvironmentCommittee/General%20Documents/Dr_Sarah_Hendry.pdf