This document relates to the Regulatory Reform (Scotland) Bill as amended at Stage 2 (SP Bill 26A)

REGULATORY REFORM (SCOTLAND) BILL 
[AS AMENDED AT STAGE 2]

——————

REVISED EXPLANATORY NOTES

CONTENTS

1. As required under Rule 9.7.8A of the Parliament’s Standing Orders, these revised Explanatory Notes are published to accompany the Regulatory Reform (Scotland) Bill (introduced in the Scottish Parliament on 27 March 2013) as amended at Stage 2. Text has been added or deleted as necessary to reflect the amendments made to the Bill at Stage 2 and these changes are indicated by sidelining in the right margin.

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL – OVERVIEW

4. The Bill is in five Parts:

   • Part 1 – Regulatory functions
   • Part 1A – Primary authorities
   • Part 2 – Environmental regulation
   • Part 3 – Miscellaneous, including marine licensing; planning authorities’ functions: charges and fees; and street traders’ licences
   • Part 4 – General provisions

Part 1 – Regulatory functions

5. This Part makes provision to further improve regulatory consistency, to require regulatory functions to be exercised in a way that contributes to sustainable economic growth and to encourage regulators to adopt practices that are consistent with regulatory principles.
Part 1A – Primary authorities

6. This Part makes provision for the Scottish Ministers to nominate a local authority as a primary authority in respect of an activity carried on by a person (a “regulated person), where the regulated person carries on the activity in the area of two or more local authorities, and each of those authorities has the same regulatory function in respect of the regulated person.

Part 2 – Environmental regulation

7. This Part is divided into 6 Chapters.

8. Chapter 1 provides that the Scottish Ministers may make provision for or in connection with protecting and improving the environment, including provision regulating environmental activities and provision implementing EU obligations relating to protecting and improving the environment. It introduces schedule 2.

9. Chapter 2 provides that the Scottish Ministers may by order make provision:
   • for or about the imposition by SEPA of fixed monetary penalties and variable monetary penalties,
   • to enable SEPA to accept an enforcement undertaking from a person who SEPA reasonably suspects has committed a ‘relevant offence’ (as defined in section 39), and make provision for penalties where such undertakings are not complied with.

10. It also provides that the Lord Advocate may issue guidance to SEPA on the exercise of its functions relating to such penalties and undertakings.

11. Chapter 3 provides that the courts may make compensation orders in relation to persons convicted of a relevant offence; that they have to consider the financial benefit that has accrued to an offender when determining the amount of the fine to impose in respect of a relevant offence; and that they may require offenders convicted of a relevant offence to publicise information about the offence (a ‘publicity order’).

12. It also provides that if an organisation fails to comply with a publicity order, and the commission of the offence is attributable to the connivance, consent or negligence of a responsible official of the organisation, the official also commits the offence.

13. Chapter 4 makes miscellaneous provision. In particular, it provides:
   • for the vicarious criminal liability of employers or principals for environmental offences committed by their employees or agents,
   • for an offence of acting, or failing to act in a way that causes or is likely to cause significant environmental harm (or permitting another to act or not to act in a way that causes or is likely to cause such harm),
   • for the courts to have power to order persons convicted of an offence to remedy or mitigate the harm (a ‘remediation order’),
• for an enforcement authority to issue a fixed penalty notice for offences in regulations made under section 88 of the Climate Change (Scotland) Act 2009 (offences relating to the supply of carrier bags),
• for the prosecutor to have a right of appeal against a decision of the court not to make a publicity order or a remediation order,
• for a local authority to be able—
  o to issue a notice that land identified as contaminated under the provisions of Part 2A of the Environmental Protection Act 1990 is no longer contaminated, and
  o to remove an entry for a special site from the contaminated land register maintained under that Part, and for the effect of the removal of such an entry,
• for the amendment of powers of enforcing authorities and persons authorised by them under section 108 of the Environment Act 1995,
• that waste carrier regulations may authorise a registration authority to refuse an application for registration as a waste carrier, or authorise revocation of a registration, where—
  o the applicant or carrier is a member of a partnership convicted of an offence, or
  o the applicant or carrier is a partnership, and a member of the partnership has been convicted of an offence;
• that where the holder of a waste management licence must be a ‘fit and proper’ person to hold the licence, and for that purpose that neither the holder nor a relevant person must have been convicted of an offence, that a relevant person is—
  o a partnership of which the holder is a member, or
  o where the holder is a partnership, a member of the partnership, and
• for the Scottish Ministers to be able to authorise the use of certain fuels and fireplaces in a smoke control area declared by a local authority under Part III of the Clean Air Act 1993, by publishing a list of such fuels and fireplaces.

14. Chapter 5 provides that SEPA must carry out the functions conferred on it by or under the Bill or any other enactment for the purpose of protecting and improving the environment, and in doing so must, so far as it is consistent with that purpose, contribute to—
• improving the health and well-being of the people in Scotland, and
• achieving sustainable economic growth.

15. Chapter 6 defines terms for the purposes of Part 2.
Part 3 – Miscellaneous

16. This Part makes provision for a statutory right of appeal in relation to marine licensing decisions; about charges and fees payable to planning authorities; and in relation to applications for street traders’ licences for mobile food businesses.

Part 4 – General

17. This Part contains general provisions, including the delegation of a power to the Scottish Ministers to make by order such consequential provision as they consider necessary or expedient.

Schedule 1

18. This schedule lists regulators for the purposes of Part 1.

Schedule 2

19. This schedule sets out the purposes for which regulations under section 10 may be made.

Schedule 3

20. This schedule makes minor and consequential modifications of other enactments.

THE BILL – SECTION BY SECTION

PART 1 – REGULATORY FUNCTIONS

21. This Part makes provision to further improve regulatory consistency, to require regulatory functions to be exercised in a way that contributes to sustainable economic growth and to encourage regulators to adopt practices that are consistent with regulatory principles.

Regulations to encourage or improve regulatory consistency

Section 1: Power as respects consistency in regulatory functions

22. This section enables the Scottish Ministers to make regulations containing provision that they consider will (when taken together and when read with other powers under this Part) encourage or improve consistency in the exercise of regulatory functions by one or more regulators in schedule 1 (a “listed regulator”). The regulations may, for example, set out the procedures to be followed by a listed regulator in carrying out a function. They may also require listed regulators to co-operate or co-ordinate activity with each other. In terms of section 44(4), any such regulations are subject to the affirmative procedure.

Section 2: Regulations under section 1: further provision

23. This section makes clear that the regulations may require a listed regulator to impose, set, secure compliance with or enforce a requirement, restriction, condition, standard or outcome (a
“regulatory requirement”), including imposing or setting a new regulatory requirement(to the extent that a regulator has the power to impose or set it).

24. The regulations can also amend or remove a regulatory requirement that was imposed or set at the discretion of a listed regulator. However, if an enactment requires a regulatory requirement to be imposed or set by the regulator, that requirement can only be modified or removed if the regulations otherwise make provision having an equivalent effect.

25. The Scottish Ministers may direct that any provision of the regulations is, for a temporary period of up to 6 months, not to apply to a particular regulator or is to apply with modifications. This enables adjustments to be made quickly to take account of unforeseen circumstances. If any such adjustment needs to remain in place for a longer period, the regulations can be amended. Any direction given must be published.

Compliance and enforcement

Section 3: Regulations under section 1: compliance and enforcement

26. This section provides that a listed regulator must comply with regulations under section 1 to the extent that it is able to do so. If a regulator fails to comply, it may be directed to take steps to remedy the breach, failing which the Scottish Ministers may do so or may arrange for another person to do so (and recover the costs as a civil debt).

Exercise of regulatory functions: economic duty and code of practice

Section 4: Regulators’ duty in respect of sustainable economic growth

27. This section places a duty on a listed regulator to exercise its regulatory functions in a way that contributes to sustainable economic growth. In carrying out the duty, listed regulators must have regard to relevant guidance given to them by the Scottish Ministers. This guidance must be published.

Section 5: Code of practice on regulatory functions

28. This section makes provision for the Scottish Ministers to issue a code of practice in relation to the exercise of regulatory functions by specified regulators in schedule 1. Each regulator must have regard to the code, which must be published, in exercising its regulatory functions and also in determining any general policy or principles adopted in relation to the exercise of those functions.

Section 6: Code of practice: procedure

29. This section sets out the procedure to be followed in relation to issuing the code (or a revised code). In preparing a draft, the Scottish Ministers must seek to ensure that it is consistent with the principles of better regulation and also the principle that regulatory functions should, where possible, be carried out in a way that contributes to achieving sustainable economic growth. Ministers cannot issue the code unless a draft has been laid before and approved by the Parliament.
Power to modify list of regulators

Section 7: Power to modify schedule 1

30. This section enables the Scottish Ministers, by order, to amend the list of regulators in schedule 1 and to specify a function (or the extent to which a function) of any such regulator is (or is not) a regulatory function for the purposes of section 1, 4 or, as the case may be, 5. In terms of section 44, an order under this section is subject to the negative procedure, unless it adds a regulator to the list or adds (or extends) a regulatory function of a regulator on the list (for the purposes of sections 1, 4 or 5), in which case it is subject to the affirmative procedure.

PART 1A – PRIMARY AUTHORITIES

31. This Part makes provisions whereby businesses operating in several local authority areas can form a statutory partnership with one local authority, which then provides advice relating to the regulatory functions of local authorities.

Sections 7A-H

32. These sections make provision for primary authorities relating to regulatory functions of local authorities. They enable the Scottish Ministers to nominate a local authority to be the primary authority for a person where an activity is carried out in two or more local authorities.

33. The provisions in section 7D set out that suitable nominations may be the local authority for the area where the regulated person principally carries out the activity or where the activity is administered, and that a register of nominations must be maintained. A primary authority has the function of giving advice and guidance, and section 7E confers powers on the Scottish Ministers to make further provisions in respect of enforcement and inspection. Section 7G provides that the primary authority may charge fees representing the costs reasonably incurred in exercising primary authority functions. Section 7H sets out that the Scottish Ministers may issue guidance to local authorities about the operation of primary authorities and this must be published.

PART 2 – ENVIRONMENTAL REGULATION

CHAPTER 1 - REGULATIONS FOR PROTECTING AND IMPROVING THE ENVIRONMENT

34. This Chapter confers powers on the Scottish Ministers to make, by regulations, provision for the purpose of protecting and improving the environment (the “general purpose”).

Section 8: General purpose: protecting and improving the environment

35. This section sets out the general purpose, and specifies that the purpose extends to provision regulating environmental activities, and provision implementing EU obligations (such as the Industrial Emissions Directive (Directive 2010/75/EU) or other international obligations (such as the Convention on Wetlands of International Importance).
Section 9: Meaning of “environmental activities” and “protecting and improving the environment”

36. This section defines terms used in Chapter 1. In particular, it defines—
   - “environmental activities” (see section 8) to cover activities which are capable of causing or liable to cause environmental harm, and
   - “environmental harm” to cover a wide range of matters, including harm to the quality of the environment such as might be caused by (for example) polluting activities.

37. In this context, “activities” is also defined, so that it covers a broad range of matters including the production, treatment, keeping, depositing or disposal of substances. The effect is that the Bill enables the regulation under section 10 of a wide range of matters relating to environmental activities, and the prevention of environmental harm. Regulations under section 10 may make further provision in respect of environmental activities, including specifying other activities as environmental activities (see paragraph 1 of Part 1 of schedule 2).

Section 10: Regulations relating to protecting and improving the environment

38. Section 10 of the Bill enables the Scottish Ministers to make provision by regulations for any of the purposes specified in Part 1 of schedule 2 (as described below). Subsection (3) sets out that the provision that may be made is provision for and in connection with the matters specified in section 9.

39. Regulations under section 10 are subject to negative procedure, unless they add to, replace or omit of the text of an Act (see section 44).

40. The power is in broadly similar terms to the powers in section 2 of, and Schedule 1 to, the Pollution Prevention and Control Act 1999 (which are not repealed), and the powers in respect of controlled activities in section 20 of and schedule 2 to the Water Environment and Water Services Act 2003 (which are repealed: see schedule 3). The 1999 Act has, and will continue to have, UK extent so that provision may be made under that Act in respect of both reserved and devolved matters where a single UK wide measure is considered appropriate.

41. The power in section 10 might, for example, be used to consolidate in one instrument environmental protection measures made under different enactments including those currently in the Water Environment (Controlled Activities) (Scotland) Regulations 2011 (SSI 2011/209) and the Pollution Prevention and Control (Scotland) Regulations 2012 (SSI 2012/36).

Section 11: Regulations relating to protecting and improving the environment: consultation

42. Subsection (1) requires the Scottish Ministers, before making regulations relating to protecting and improving the environment, to consult certain regulators and such other persons as they think fit. Subsection (2) has the effect that such consultation can be undertaken prior to the coming into force of this section.
CHAPTER 2 - SEPA'S POWERS OF ENFORCEMENT

43. This Chapter enables provision to be made that will confer additional enforcement powers on SEPA.

44. The additional enforcement powers are similar to those in Part 3 of the Regulatory Enforcement and Sanctions Act 2008, sections 46 to 50 of the Marine (Scotland) Act 2010 and sections 78 to 90 of the Reservoirs (Scotland) Act 2011. The effect of any conferral of powers under this Chapter will be to help ensure that SEPA will be able to operate in a consistent manner when discharging a full range of regulatory functions.

45. The additional powers, if conferred, would complement the similar powers under the Marine (Scotland) Act 2010 exercisable in respect of the marine environment. The similar powers in the Reservoirs (Scotland) Act 2011 in respect of ‘civil sanctions’ are repealed (see Schedule 3 to the Bill). That repeal can be commenced in a co-ordinated manner should the powers in this Chapter be conferred on SEPA.

Fixed monetary penalties

Section 12: Fixed monetary penalties

46. This section enables the Scottish Ministers to make provision by order for SEPA to impose fixed monetary penalties on persons who SEPA is satisfied, on the balance of probabilities, have committed a relevant offence. In terms of Section 44(3), any such order is subject to the affirmative procedure.

47. A fixed monetary penalty may not be imposed more than once in relation to the same offence constituted by the same act or omission. A penalty may however be imposed in relation to a different offence constituted by the same act or omission.

48. Relevant offences are those prescribed by order under section 39. For the purposes of imposing fixed penalty notices, these might include offences involving breach of a requirement for dry cleaners to report to SEPA quantities of solvent used and the total emission value per kilogram of fabric cleaned – information which SEPA requires to report to the European Commission. The amount of the fixed monetary penalty may be specified in the order, but may not in any event exceed level 4 on the standard scale of fines for offences triable summarily as provided by section 225 of the Criminal Procedure (Scotland) Act 1995 (currently £2,500 – see section 225(2)).

Section 13: Fixed monetary penalties: procedure

49. This section provides that any order about fixed monetary penalties that may be made under section 12 must secure the mandatory results specified in subsection (2) as read with subsection (6), and may secure the optional result specified in subsection (3). It has the effect that a notice of intent to impose a monetary penalty and a final notice must contain the information specified in subsections (4) and (5) respectively.
The mandatory results include that SEPA must issue a notice of intent prior to issuing a fixed monetary penalty, must provide an opportunity for a person served with such a notice to make written representations to SEPA, that SEPA is required to take any such representations into account before imposing a final notice, and that a person on whom a penalty is imposed may appeal against such imposition (see subsection (6)).

The optional result is that the notice of intent may offer the person an opportunity to discharge their liability to the monetary penalty by paying a sum that is less than or equal to the penalty that would otherwise apply. This would allow early payment of the amount of a fine to be made by a person at their discretion (possibly at a discount) without the delay and expense of proceeding to a final penalty notice, and is a common feature applied to systems with fixed and variable penalties.

**Section 14: Fixed monetary penalties: criminal proceedings and conviction**

This section has the effect that an order by the Scottish Ministers made under section 12 about fixed monetary penalties must secure the results specified in subsections (1) and (3).

Subsection (1) provides that where a notice of intent is served in respect of an offence constituted by an act or omission (see section 12(2)(a)) no criminal proceedings may be commenced for the offence in the period during which liability to the penalty may be discharged, or if the liability is discharged.

Subsection (1) as read with subsection (2) also has the effect that an order under section 12 must provide that the period between the date a notice of intent is served and the final day on which written representations may be made to SEPA in respect of that notice is not to be counted in calculating any period in which criminal proceedings may be brought for the offence to which the notice relates.

Subsection (3) provides that where a fixed monetary penalty is imposed in respect of such an offence no criminal proceedings may be commenced against the person on whom the penalty is imposed in respect of the offence constituted by that act or omission.

Subsection (4) provides for references in this section to “criminal proceedings” to be read as including the alternative disposals specified in that subsection.

**Variable monetary penalties**

**Section 15: Variable monetary penalties**

This section enables the Scottish Ministers to make provision by order for the imposition by SEPA of variable monetary penalties on persons who SEPA is satisfied, on the balance of probabilities, have committed a relevant offence. In terms of Section 44(3), any order made under this section is subject to the affirmative procedure.
58. A variable monetary penalty may not be imposed more than once in relation to the same offence constituted by the same act or omission. A penalty may however be imposed in relation to a different offence constituted by the same act or omission.

59. Relevant offences are those prescribed by order under section 39. For the purposes of imposing variable penalty notices these might include offences involving failure to comply with a general binding rule provided for in regulations made under section 10 and schedule 2, carrying waste without a registration, or carrying out minor engineering activities in water without appropriate authorisation.

60. The Scottish Ministers may specify the amount of the variable monetary penalty that can be imposed by SEPA, subject to a cap equivalent to the amount of the fine that could be imposed on summary conviction in the case specified in subsections (5)(a) and (6), or to the amount of £40,000 in any other case (except where the figure of £40,000 has been increased by an order made by the Scottish Ministers under subsection (7)).

Section 16: Variable monetary penalties: procedure

61. This section has the effect that any order made by the Scottish Ministers under section 15 about variable monetary penalties must secure the mandatory results specified in subsection (2) as read with subsections (5) and (6), and that a notice of intent and final notice must contain the information specified in subsections (3) and (4) respectively.

62. The mandatory results include the service of a notice of intent on any person on whom SEPA proposes to impose a variable monetary penalty, providing for a period within which a person served with such a notice may make representations to SEPA.

63. Subsection 2(c) as read with subsection (5) has the effect that the order must also permit an opportunity for the person to offer an undertaking as to action the person will take to restore the position as far as possible to what it would have been had the offence not been committed, to benefit the environment to the extent that commission of the offence has harmed the environment, and/or secure no financial benefit accrues to the person. SEPA must be able to accept or reject such an undertaking, and must take any undertaking that it decides to accept into account when deciding whether to impose a variable monetary penalty.

64. The order must provide a right of appeal against the imposition of the variable monetary penalty, including on the grounds set out in subsection (6).

Section 17: Variable monetary penalties: criminal proceedings and conviction

65. This section requires the Scottish Ministers, if they make an order under section 15 about variable monetary penalties, to include provision about the interaction between variable monetary penalties, undertakings accepted under section 16(5) and criminal proceedings, so as to avoid a person being sanctioned twice in relation to the same offence constituted by the same act or omission, and to extend the time available to commence criminal proceedings if a variable monetary penalty is not served and an undertaking is not accepted.
66. Subsection (5) provides for references in this section to “criminal proceedings” to be read as including the alternative disposals specified in that subsection.

Non-compliance penalties

**Section 18: Undertakings under section 16: non-compliance penalties**

67. This section enables the Scottish Ministers, if making an order under section 15 about variable monetary penalties, to include provision for a non-compliance penalty to be issued where an undertaking has been accepted by SEPA in response to a notice of intent to issue a variable monetary penalty (see section 16(2)(c) and (5)), but the undertaking has not been complied with.

68. Such provision may specify the amount of the non-compliance penalty, set criteria by which it should be calculated, empower SEPA to determine the amount (subject to any maximum amount set out in such provision) or provide for the amount to be determined in some other way. Subsection (2A) has the effect that the maximum amount of the non-compliance penalty may not exceed the maximum amount of the variable monetary penalty in the particular case.

69. If provision for non-compliance penalties is included in an order under section 15, the order must provide a right of appeal against the imposition of such a penalty on the grounds specified in subsection (4).

Enforcement undertakings

**Section 19: Enforcement undertakings**

70. This section enables the Scottish Ministers to make provision by order for enforcement undertakings. In terms of section 44(5), any such order is subject to the negative procedure.

71. An enforcement undertaking is a voluntary undertaking offered to SEPA by a person in a case where SEPA has reasonable grounds to suspect that the person has committed a relevant offence. The person may offer, and SEPA may accept, an undertaking to take certain actions, or to refrain from doing so (see subsection (7)). Relevant offences are those prescribed by order under section 39.

72. The action offered would be action to secure that the offence does not continue or recur, to secure that the position is, as far possible, restored to what it would have been if the offence had not been committed, or any other action that may be specified by the Scottish Ministers in the order.

73. An order providing for enforcement undertakings must provide that, once SEPA accepts an undertaking, criminal proceedings may not be commenced against that person for the offence constituted by the act or omission in respect of which the undertaking is accepted (nor may a fixed or variable monetary penalty be imposed on them in respect of the act or omission). If a person fails to comply (even in part) with an enforcement undertaking, then the person may be
prosecuted for the original offence or SEPA may impose a fixed or variable monetary penalty, and time limits for commencing criminal offences may be extended in those circumstances.

74. The order may include provision for SEPA to certify that an undertaking has not been complied with, and may stipulate the circumstances in which a person is to be regarded as having complied with such an undertaking. It may also provide that where a person has given inaccurate, misleading or incomplete information in relation to an undertaking then that person may be regarded as not having complied with it. The order is not required to set out a right of appeal against the terms of the enforcement undertaking since it is offered voluntarily, but the order may provide that there is a right of appeal against certification from SEPA that the undertaking has not been complied with. In addition, the Scottish Ministers may also provide in the order for the procedure for entering into an enforcement undertaking, the terms of such undertaking, publication of or monitoring of compliance with such an undertaking by SEPA, and variation of such an undertaking.

75. Subsection (6A) provides for references in this section to “criminal proceedings” to be read as including the alternative disposals specified in that subsection.

Operation of penalties and cost recovery

Section 20: Combination of sanctions

76. This section requires the Scottish Ministers, where they confer upon SEPA a power to issue a fixed or variable monetary penalty, to ensure that it is not possible to serve both a fixed and a variable monetary penalty in relation to the same offence constituted by the same act or omission.

77. The Scottish Ministers must also provide that a fixed or variable monetary penalty may not be issued where there has already been a prosecution or where a person has been given a warning, been sent a conditional offer, or accepted a compensation offer or a combined offer by the procurator fiscal, or a work order has been made against them.

Section 21: Monetary penalties

78. This section provides that orders made by the Scottish Ministers in relation to fixed monetary penalties, variable monetary penalties and non-compliance penalties may include provision for early payment discounts, interest or other penalties for late payments, enforcement of the penalty and recovery of the monetary penalty as if it were a civil debt. It also allows the order to facilitate recovery of such penalties by treating them as if they were payable under a civil court decree.

Section 22: Costs recovery

79. This section allows the Scottish Ministers to include in an order made under section 15 (variable monetary penalties) provision enabling SEPA to recover its investigation costs, administration costs and costs of obtaining expert advice (including legal advice) from a person who has been issued with a variable monetary penalty. Such provision, if made, must provide for SEPA to serve notice of the amount it is seeking to recover. It must also provide that the
person required to pay SEPA’s costs may appeal against the decision to impose the cost recovery notice, and against the amount of the costs sought. Provision must also require SEPA to publish guidance about how it will exercise its power to recover such costs. The provisions of section 21 relating to interest, late payment penalties and recovery as a civil debt are applied to costs recoverable under this section.

Guidance

Section 23: Guidance as to use of enforcement measures

80. This section provides that the Lord Advocate may issue and revise guidance to SEPA in relation to the exercise of its functions relating to enforcement measures as defined in subsection (3) (fixed monetary penalties, variable monetary penalties or enforcement undertakings), and that SEPA must comply with such guidance.

81. It also provides that, where this Chapter of the Bill or any provision made under it confers powers upon SEPA to use any enforcement measures, any such provision must also require SEPA to publish guidance on specified matters relating to those measures. Any such provision must ensure that guidance published by SEPA includes specified information in relation to fixed and variable monetary penalties.

82. SEPA may revise guidance published by it from time to time and publish that revised guidance, and must consult the Lord Advocate and other appropriate persons before publishing any guidance or revised guidance.

Publication of enforcement action

Section 24: Publication of enforcement action

83. This section provides that an order made by the Scottish Ministers for the imposition of a fixed or variable monetary penalty by SEPA and the acceptance of an enforcement undertaking may also provide for SEPA to publish specified information on the cases where the procedures in those orders are applied.

Interpretation of Chapter 2

Section 25: Interpretation of Chapter 2

84. This section provides definitions for expressions used in Chapter 2.

CHAPTER 3 - COURT POWERS

Compensation orders

Section 26: Compensation orders against persons convicted of relevant offences

85. This section sets out provision for compensation orders. It provides that section 249 of the Criminal Procedure (Scotland) Act 1995, which makes general provision for compensation orders to be made by the courts, in addition allows the court to make a compensation order requiring compensation to be paid by a person convicted of a relevant offence. Compensation of
up to £50,000 in respect of costs incurred in preventing, reducing or remediating, or mitigating the effects of, any harm to the environment or any other harm, loss, damage or adverse impact resulting from that offence may be paid to SEPA, a local authority or an owner or occupier of land to which harm or adverse impact occurred.

86. The Scottish Ministers may by order change the maximum amount of compensation that may be the subject of such a compensation order. In terms of section 44(5), any such order is subject to the negative procedure.

**Fines**

**Section 27: Fines for relevant offences: court to consider financial benefits**

87. This section requires the criminal courts to have regard to any financial benefit which has accrued or is likely to accrue to a person convicted of a relevant offence in consequence of that offence in determining the amount of any fine.

**Publicity orders**

**Section 28: Power to order conviction etc. for offence to be publicised**

88. This section makes provision for the court to make a publicity order where a person is convicted of a relevant offence. Section 39 defines “relevant offence” for that purpose.

89. This is an additional sentencing option for the criminal courts to use where appropriate after having regard to any representations from the prosecutor or the convicted person. A publicity order may be made alongside or in place of other sentences that may be imposed for a relevant offence. The publicity order would require a person convicted of a relevant offence to publicise, in a manner specified in the order, the fact that the person has been convicted of the offence, the details of the offence and any other sentence passed by the court, including a fine or compensation order. A publicity order must set out the period within which the publicity requirements must be complied with, and may require the convicted person to supply SEPA with evidence that those requirements have been met.

90. This section also makes it an offence, punishable on summary conviction to a fine not exceeding £40,000 and on conviction on indictment to an unlimited fine, to fail to comply with a publicity order.

**Section 28A: Corporate offending**

91. Section 28A has the effect that where a relevant organisation as specified in subsection (3) commits the offence of failing to comply with a publicity order, and the commission of the offence is attributable to the connivance, consent or negligence of a responsible official of the organisation (see subsection (3)), the official also commits the offence.
CHAPTER 4 - MISCELLANEOUS

Vicarious liability

Section 29: Vicarious liability for certain offences by employees or agents

92. This section provides that, where a relevant office is committed by an employee or agent of a person (which will include bodies corporate, limited liability partnerships, Scottish partnerships and trusts) the person is also guilty of the offence. A relevant offence is one prescribed under section 39 of the Bill.

93. It is a defence for the person to show that the person did not know the relevant offence was being committed, that no reasonable person could have suspected that the offence was being committed, and that the person took all reasonable precautions and exercised all due diligence to prevent the offence from being committed.

94. Proceedings may be taken against the employer or principal even if they are not taken against the employee or agent.

Section 30: Liability where activity carried out by arrangement with another

95. This section provides that where a person is carrying on a regulated activity, for another person (which will include bodies corporate, limited liability partnerships, Scottish partnerships and trusts) and they commit a relevant offence in the course of that activity, that person for whom the activity is carried out is also guilty of the offence. A relevant offence is one prescribed under section 39 of the Bill.

96. A person carries on a regulated activity for another person whether the person is doing so by arrangement between the persons, or by arrangement through a third party.

97. It is a defence for the person to show that the person did not know the relevant offence was being committed, that no reasonable person could have suspected that the offence was being committed, and that the person took all reasonable precautions and exercised all due diligence to prevent the offence from being committed.

98. Proceedings may be taken against the person even if they are not taken against the other person.

99. In this section “regulated activity” has the same meaning as in section 9(3), and includes activities specified in an order made under subsection (6)(b). Subsection (7) has the effect that only “environmental activities” within the meaning of section 9 may be specified for that purpose. In terms of section 44(5), any such order is subject to the negative procedure.

Offence relating to significant environmental harm

Section 31: Significant environmental harm: offence

100. This section provides for it to be an offence for any person to-
act, or permit another person to act, in a way that causes or is likely to cause significant environmental harm, or

fail to act, or permit another person not to act, in a way such that the failure causes or is likely to cause such harm.

101. Environmental harm has the same meaning as in section 9(2), and subsection (9) of this section has the effect that the harm is ‘significant’ if it has serious adverse effects whether locally, nationally or on a wider scale, or it is caused to an area designated by an order made by the Scottish Ministers. Different areas may be designated for different purposes and different types of harm. In terms of section 44(5), any such order is subject to the negative procedure.

102. No offence is committed where permission is or was given by or under an enactment conferring power to authorise the act or failure (for example where the action is covered by a permit issued by SEPA).

103. A defence is available where the acts or failures constituting the offence were necessary to avoid, prevent or reduce an imminent risk of serious adverse effects on human health, provided that the person took such steps as were reasonably practicable to minimise harm to the environment and adverse effects on human health and particulars were given to SEPA as soon as practicable after the incident.

104. A defence is also available where the acts or failures constituting the offence were authorised by, or carried out in accordance with, regulations under section 10, an authorisation given under those regulations, or an authorisation specified under an order made by the Scottish Ministers for this purpose.

105. The penalties applicable to the offence are

- on summary conviction a fine not exceeding £40,000, or imprisonment for up to 12 months, or both, and
- on conviction on indictment, an unlimited fine, or imprisonment, or both.

Section 32: Power of court to order offence to be remedied

106. This section creates a new power for the criminal courts to order a person convicted of the significant environmental harm offence in section 31 to remediate or mitigate the harm to which the conviction relates, where that person has the power to do so, in addition to or instead of any other sentence. This is referred to as a ‘remediation order’.

107. Failure to comply with a remediation order will be an offence punishable on summary conviction with a fine not exceeding £40,000, imprisonment for a term not exceeding 12 months, or both and, on conviction on indictment, with an unlimited fine, imprisonment for a term not exceeding five years, or both.
Section 32A: Corporate offending

108. Section 32A has the effect that where a relevant organisation as specified in subsection (3) commits the significant environmental harm offence or the offence of failing to comply with a remediation order, and the commission of the offence is attributable to the connivance, consent or negligence of a responsible official of the organisation (see subsection (3)), the official also commits the offence.

Offences relating to supply of carrier bags: fixed penalty notices

Section 32B: Offences relating to supply of carrier bags: fixed penalty notices

109. Section 32B amends the Climate Change (Scotland) Act 2009 (the “2009 Act”) by inserting a new section 88A and schedule 1A into the 2009 Act.

Inserted section 88A – Offences relating to supply of carrier bags: fixed penalty notices

110. Section 88A of the 2009 Act has the effect that a person authorised by an enforcement authority for the purposes of that section may give a person a fixed penalty notice for a relevant offence, if the person so authorised has reason to believe that the person given the notice has committed the offence.

111. Section 88A(2) provides that a relevant offence is an offence provided for in regulations made under section 88 of the 2009 Act (charges for supply of carrier bags). Section 89 of the 2009 Act has the effect that an enforcement authority for the purpose of regulations made under section 88 of that Act may be any of SEPA, a local authority, or such other person or body as the Scottish Ministers consider appropriate.

112. Section 88A(3) and (4) enable the Scottish Ministers by regulations to make further provision about fixed penalties. Section 96 of the 2009 Act has the effect that any such regulations are subject to the affirmative procedure.

Inserted schedule 1A – Fixed penalties

113. Schedule 1A of the 2009 Act makes further provision about fixed penalties. It has the effect that regulations made under section 88A(3) may provide that a fixed penalty notice may not be given after such time relating to the offence as may be prescribed, provide that the amount of the fixed penalty and of a discounted amount for early payment are such amounts as may be prescribed (limited to level 2 on the standard scale (currently £500)), and provide for the forms of notices and other procedural matters.

114. Payment of a fixed penalty is not a conviction and any liability to conviction for the alleged offence is discharged by payment.
This document relates to the Regulatory Reform (Scotland) Bill as amended at Stage 2 (SP Bill 26A)

Publicity and remediation orders: appeals by prosecutor

Section 33: Orders under section 28 and 32: prosecutor’s right of appeal

115. This section amends the Criminal Procedure (Scotland) Act 1995 to allow the Lord Advocate, or the prosecutor in summary proceedings, to appeal against any decision of a court not to make a publicity order or remediation order.

Contaminated land and special sites

Section 34: Contaminated land and special sites

116. Section 34 amends Part 2A (contaminated land) of the Environmental Protection Act 1990 (the “1990 Act”).

117. Subsection (1A) inserts a new subsection (5A) into section 78F of the 1990 Act, with the effect that, where the Crown owns or occupies contaminated land by virtue of the land vesting in the Crown as bona vacantia or falling to the Crown as ultimus haeres, then the Crown will not be an “appropriate person” for the purposes of determining the person to bear responsibility for remediation of that land under Part 2A.

118. Subsection (2) inserts new sections 78QA, 78TA and 78TB into the 1990 Act.

Inserted section 78QA – Land no longer considered to be contaminated

119. Inserted section 78QA enables a local authority, if satisfied that land which is not designated as a special site is no longer contaminated land, to issue a non-contamination notice to SEPA, the owner, and occupier and any “appropriate person” (as defined by section 78A(9) of the 1990 Act) to mean any person who is determined to bear responsibility for anything which is to be done by way of remediation in any particular case).

120. A non-contamination notice has the effect that the land is no longer subject to the contaminated land regime in the 1990 Act and, in particular, that any remediation notice requiring action in respect of the site (for which see section 78E (duty of enforcing authority to require remediation etc.) of the 1990 Act) ceases to have effect unless the non-contamination notice provides otherwise. Land that is the subject of a non-contamination notice may subsequently be identified as contaminated land, and, if so, a remediation notice may then be served in respect of the land.

Inserted section 78TA – Registers: removal of information about land designated as special site

121. Section 78R (registers) of the 1990 Act requires an enforcing authority for the purposes of Part 2A of that Act (the local authority or, in the case of a special site, SEPA) to maintain a register of matters relating to contaminated land (“the register”), including notices under sections 78C (identification and designation of special sites) and 78D (referral of special site decisions to the Scottish Ministers) of that Act relating to the designation of special sites.

122. Land is required to be designated under section 78C of the 1990 Act if it is land of a description prescribed for the purposes of that section, and for those purposes the Scottish
Ministers may have regard to the matters specified in section 78C(10) of that Act. Those matters include whether it appears that the land is likely to be in such a condition, by reason of substances in, under or on the land that serious harm might be caused, or serious pollution of the water environment might be caused.

123. Inserted section 78TA provides for an enforcing authority to be able to remove a notice relating to a special site from the register if it considers that the land no longer requires to be designated as such a site but only where SEPA has given notice to the authority that the special site designation is no longer required. If the enforcing authority removes a notice from the register then it must give notice to affected persons in the same manner as in inserted section 78QA.

*Inserted section 78TB – Effect of removal of information from register*

124. Inserted section 78TB provides for the effect of removal from the register, in particular that the designation of the land as a special site is terminated.

125. Subsection (3A) inserts a new paragraph (g) into subsection (4) of section 78X (supplementary provisions) of the 1990 Act. It provides for the Queen’s and Lord Treasurer’s Remembrancer (“QLTR”) to be the person acting in a relevant capacity for the purposes of that section in respect of property and rights that have vested in the Crown as *bona vacantia* or fallen to the Crown as *ultimus haeres*. This effect is that the QLTR shall not be personally liable under Part 2A of the 1990 Act to bear the whole or any part of the cost of remediating land so vested, or that so falls, that is contaminated land.

126. Subsection (4) makes consequential amendments to section 78YA (supplementary provisions with respect to guidance by the Scottish Ministers) of the 1990 Act.

*Amendment of powers under section 108 of Environment Act 1995*

**Section 34A: Amendment of powers under section 108 of Environment Act 1995**


*Subsection (2)*

128. Paragraph (a) of subsection (2) modifies subsection (1) of section 108 of the 1995 Act, which provides for persons authorised by an enforcing authority (as defined in subsection (15) of that section) to exercise the powers in subsection (4) of that section for pollution control purposes. Paragraph (b) of subsection (1) inserts a new subsection (1A) into that section.

129. The effect of paragraphs (a) and (b) is that the scope of subsection (1) of section 108 is extended to include determining whether offences have been committed under section 110 (offences) of the 1995 Act, section 31 of this Bill (significant environmental harm), and section 293(2) (art and part and aiding and abetting offences) of the Criminal Procedure (Scotland) Act 1995. The scope is also extended - where SEPA is the enforcing authority - so that the powers in subsection (4) of section 108 may be exercised for the purpose of determining whether financial
benefit has accrued to a person in connection with a relevant offence, for the purposes of provision made under section 16 of this Bill in connection with variable monetary penalties, or for the purpose of the determination of the amount of a fine by a court in accordance with section 27 of this Bill. Relevant offence has the same meaning for that purpose as it does in section 39 of this Bill.

130. Paragraph (c) of subsection (2) modifies subsection (4) of section 108 of the 1995 Act. The effect is that-

- The power in paragraph (h) of that subsection to take possession of and detain an article or any substance which appears to have caused, or be likely to cause, pollution of the environment or harm to human health is available where it is necessary to ensure that the article or substance is available as evidence in proceedings for an offence under section 31 of this Act (significant environmental harm),

- The power in paragraph (j) of that subsection to require a person, where there is reasonable cause to believe the person is able to give relevant information, to answer such questions as the person authorised by the enforcing authority thinks fit to ask and sign a declaration in that respect, includes requiring the person to attend at such place and at such reasonable time as the authorised person may specify to answer those questions and sign the declaration,

- A new paragraph (ja) is inserted into that subsection which, in the case of a person authorised by SEPA, enables the authorised person to require a person who appears able to give information relevant to an investigation to provide the authorised person with their name, address and date of birth, and

- A new paragraph (ka) is inserted into that subsection which, in the case of a person authorised by SEPA, enables the authorised person to search premises and seize and remove documents which the person reasonably believes may be required for the purpose of proceedings under a pollution control enactment or under section 31 (significant environmental harm) of this Bill (paragraph (h) of subsection (2) inserts a definition of “document” into subsection (15) of that section, with the effect that it includes electronic media).

131. Paragraph (d) of subsection (2) modifies subsection (5) of section 108 of the 1995 Act, with the effect that the powers in subsection (5) in respect of experimental borings and monitoring may be exercised for the purpose of determining whether an offence has been committed under section 31 (significant environmental harm) of this Bill.

132. Paragraph (e) of subsection (2) modifies subsection (6) of section 108 of the 1995 Act, with the effect that the powers under subsection (6) to enter premises are exercisable without seven days’ notice of the proposed entry being given to the occupier of the premises.

133. Paragraph (f) of subsection (2) inserts new subsections (7A) to (7E) into section 108 of the 1995 Act. They have the effect that the powers to seize documents in new section 108(4)(ka) of that Act may not be exercised except under the authority of a warrant granted under Schedule 18 to that Act. They also make provision in respect of documents in respect of which a claim to confidentiality of communications could be maintained in legal proceedings, with the effect that information in the documents may not be used against persons with such a claim, and that the
document must be returned to the premises or such persons (subject to a right to retain or copy any other information in the document).

134. Paragraph (g) of subsection (2) amends subsection (12) of section 108 of the 1995 Act, with the effect that answers given in response to a requirement under section 108(4)(j) of that Act may be used in proceedings relating to false statements or declarations or where an inconsistent statement is given in connection with another offence.

Subsection (3) – Inserted section 108A – Procedure where documents removed


136. Section 108A of the 1995 Act provides for authorised persons who remove any document in exercise of the new power in section 108(4)(ka) of that Act to provide a record of what was removed to specified persons on a request by such a person.

137. The specified persons, as set out in subsection (2) of section 108A, are the occupier of the premises from which the document was removed, and any person who had possession or control of the document before it was removed.

138. Subsections (4) and (5) of section 108A provide for SEPA to allow a person who had possession or control of a document to apply for, and be given, supervised access to the document and to copy it. Subsection (6) of that section specifies that SEPA does not require to give such access or to allow such copies if doing so might prejudice an investigation or any criminal proceedings.

139. A person who believes that SEPA has failed to comply with a requirement under section 108A may apply to the sheriff for an order under subsection (10) of that section, which provides for the sheriff to order SEPA to so comply.

Subsection (4)

140. Subsection (4) makes consequential amendments to Schedule 18 to the 1995 Act.

141. Subsection (4) also has the effect that a warrant granted by a sheriff under that Schedule may be made in relation to premises in an area outside the territorial jurisdiction of the sheriff, and may be exercised throughout Scotland in the same way as it may be exercised within the sheriffdom of the sheriff who granted it.

Authorisations relating to waste management: offences by partnerships

Section 35: Carriers of controlled waste: offences by partnerships affecting registration

142. It is an offence under the Control of Pollution (Amendment) Act 1989 to transport controlled waste without being registered for that purpose. An application may be refused or a registration revoked where the applicant, the holder or a “relevant person” has been convicted of an offence. Section 35 amends the 1989 Act so that the relevant person includes a partnership
where the applicant or holder is a member of the partnership, and includes a member of a partnership where the applicant or holder is the partnership.

Section 36: Waste management licences: offences by partnerships

143. A waste regulation authority for the purpose of Part 2 (waste on land) of the Environmental Protection Act 1990 may, when granting, revoking, suspending or transferring a waste management licence, be required to determine whether an applicant or holder is a “fit and proper” person to hold a licence (section 35(1) of that Act sets out that a waste management licence is a licence authorising the treatment, keeping or disposal of waste on land, or the treatment or disposal of waste by means of mobile plant).

144. The authority may for that purpose require to have regard to whether the applicant, the holder or another “relevant person” has been convicted of an offence. Section 36 amends the 1990 Act so that “relevant person” includes a partnership where the applicant or holder is a member of the partnership, and includes a member of a partnership where the applicant or holder is the partnership.

Air quality assessments

Section 37: Duty of local authorities in relation to air quality assessments, etc.

145. Section 82 of the Environment Act 1995 requires a local authority to conduct an air quality review of the air within the area of the authority. The authority must designate as an air quality management area any part of the area of the authority where it appears, as a result of such a review, that an air quality standard or objective is not being achieved (or is not likely to be achieved). Section 84 of that Act requires an authority to undertake and report on a further assessment of air quality in an air quality management area.

146. This section repeals section 84 of the Environment Act 1995, with the effect that an authority no longer requires to undertake such a further air quality assessment.

Smoke control areas: fuels and fireplaces

Section 37A: Smoke control areas: authorised fuels and exempt fireplaces

147. Section 37A amends sections 20, 21 and 29 of the Clean Air Act 1993 (the “1993 Act”).

Subsection (2)

148. Subsection (2) amends section 20 of the 1993 Act, which provides that the occupier of a building or a person possessing a boiler or plant commits an offence where smoke is emitted from a chimney in a smoke control area declared by a local authority under Part III of that Act. It is a defence in proceedings for the offence to show that the emission of smoke was not caused by the use of a fuel other than an authorised fuel.

149. Section 20(6) of the 1993 Act enables the Scottish Ministers by regulations to declare that a fuel is an authorised fuel.
150. The amendments made to section 20 of the 1993 Act have the effect that the Scottish Ministers may, in addition, authorise a fuel for the purposes of that section by including the fuel in a list of fuels kept by them for that purpose. The Scottish Ministers must publish the list (and any revised list) as soon as is reasonably practicable, in such manner as they consider appropriate.

Subsection (3)

151. Subsection (3) amends section 21 of the 1993 Act, which provides for the Scottish Ministers to exempt by order any class of fireplace from the provisions of section 20 of that Act, if they are satisfied that such fireplaces can be used for burning fuels other than authorised fuels without producing any smoke or any substantial quantity of smoke.

152. The amendments made to section 21 of the 1993 Act have the effect that the Scottish Ministers may exempt any class or description of fireplace for that purpose by including the fireplace in a list of fireplaces kept and published in the same manner as the list produced for the purposes of section 20 of the 1993 Act as that section is amended by subsection (2).

Subsection (5)


CHAPTER 5 - GENERAL PURPOSE OF SEPA

Section 38: General purpose of SEPA

154. This section inserts a section 20A into the Environment Act 1995. Inserted section 20A provides, for the first time, a general purpose for SEPA.

155. SEPA must carry out any functions conferred on it by an enactment (as defined in inserted section 20A(3)) for the purpose of protecting and improving the environment, contributing, so far as is consistent with such functions, to improving the health and well-being of people in Scotland and achieving sustainable economic growth (see also section 4 which provides for a duty relating to sustainable economic growth for other regulators).

156. This section should be read together with the modifications in paragraph 14 of Part 3 of schedule 3 to the Bill. In particular, that paragraph inserts a new subsection (2A) into section 31 of the 1995 Act. Section 31 of that Act as amended will enable the Scottish Ministers to give guidance to SEPA with respect to the carrying out of its duties under inserted section 20A.

CHAPTER 6 – INTERPRETATION OF PART

Section 39: Meaning of “relevant offence” and “SEPA” in this Part

157. Section 39 defines terms for the purposes of Part 1 and, in particular, defines “relevant offence” so that it means an offence specified in an order made by the Scottish Ministers.
158. The term “relevant offence” applies, in particular, for the purposes of sections 12, 15, 19, 26 to 29 and 30 of the Bill.

159. The power in this section may be combined with the power in section 44 to enable different offences to be specified for the purposes of any of those sections (if desired).

PART 3 – MISCELLANEOUS

Marine licensing decisions

Section 40: Marine licence applications, etc.: proceedings to question validity of decisions

160. Section 40 concerns challenges to certain marine licensing decisions made by the Scottish Ministers under section 29 of the Marine (Scotland) Act 2010 (“the 2010 Act”) and a decision to hold or not hold an inquiry in connection with their determination of applications for such licences under section 28. An applicant is currently able to challenge a decision regarding an application for a marine licence on the legality or on the merits in the sheriff court under the Marine Licensing Appeals (Scotland) Regulations 2011, which were made under section 38 of the 2010 Act. At present, all other persons or bodies who have standing may challenge the legality of a decision by the Scottish Ministers by means of an application for judicial review made to the Outer House of the Court of Session.

161. This section amends the 2010 Act by inserting new sections 63A and 63B. These provide for a statutory appeal to be made to the Court of Session by any person or body who is aggrieved by the decision of the Scottish Ministers. The statutory appeal will only apply to Ministers’ decisions taken under sections 28 and 29 of the 2010 Act regarding marine licence applications which relate to activities where ministerial consent under section 36 of the Electricity Act 1989 is also required, i.e., for offshore electricity generating systems with a capacity of no less than 1 megawatt. Section 40 also consequentially amends section 38 of the 2010 Act to exclude from its scope appeals against decisions to which section 63A applies.

162. Any such application under section 63A of the 2010 Act must be made within six weeks of the date on which the decision to which the appeal relates is taken.

163. Section 63A(5) provides that the Court of Session may suspend a decision of the Scottish Ministers on an application for a marine licence until the final determination of the appeal proceedings. If satisfied that the Scottish Ministers have either acted outwith their powers under the 2010 Act, or have failed to comply with those legislative requirements as defined in section 63A(6), the Court may nullify the decision (or part of it). Under section 63B, the permission of the Court is needed before proceeding, which can only be given if the applicant can demonstrate sufficient interest and real prospect of success.

Planning authorities’ functions: charges and fees

Section 41: Planning authorities’ functions: charges and fees

164. Section 41 inserts new provision into section 252 of the Town and Country Planning (Scotland) Act 1997. The new provision in subsection (1A) enables Scottish Ministers to make
regulations for the charge or fee payable to different planning authorities to be of different amounts. This can only be done under the new provision where Scottish Ministers have determined that the functions of an authority are not being performed satisfactorily. The new subsection (1AB) ensures that the flexibility to set different fees for different authorities for reasons unconnected with performance is preserved.

165. Section 41 also removes subsections (5) and (6) so that all regulations made under section 252 are subject to negative parliamentary procedure.

Street traders’ licenses

Section 42: Application for street trader’s licence: food business

166. This section amends section 39(4) of the Civic Government (Scotland) Act 1982 to make it clear that the certificate to be produced for the purposes of a street trader’s licence application for a mobile food business is to be from a food authority that has registered that establishment (rather than the food authority for the area in which the application for the licence is made). This means that if a mobile food business wishes to trade in more than one local authority area in Scotland it can, for each street trader’s licence application, produce a certificate from the same registering food authority. Where a business based outwith Scotland is not registered with a food authority in Scotland, the certificate should be produced by the food authority to which the application is being made, or another food authority in Scotland to which a previous application has been made.

PART 4 - GENERAL

Sections 43 to 48

167. Section 43 introduces schedule 3, which provides for minor modifications of enactments, repeal of spent provisions, and consequential modifications.

168. Section 44 makes provision in respect of subordinate legislation that may be made under the Bill, including Parliamentary scrutiny of that legislation. It provides that any power to make an order or regulations under the Bill includes a power to make different provision for different purposes, and to make incidental, supplemental, consequential, transitional, transitory or savings provision. It also provides that a power to make regulations under section 1 includes a power to modify any enactment (including the Bill itself, except for sections 1 to 3 and 7).

169. Section 45 provides for the Scottish Ministers to make by order incidental, supplemental, consequential, transitional, transitory or savings provision. Such an order may modify any enactment, instrument or document. Section 44 provides that an order under this section is subject to negative procedure, unless it adds to, replaces or omits any part of the text of an Act in which case it is subject to affirmative procedure.

170. Sections 46 to 48 provide for Crown application, commencement, and the short title. A commencement order under section 47 is not subject to any parliamentary procedure.
SCHEDULE 1: REGULATORS FOR THE PURPOSES OF PART 1

171. This schedule lists regulators for the purposes of Part 1. The Scottish Ministers may by order modify this list (see section 7).

SCHEDULE 2: PARTICULAR PURPOSES FOR WHICH PROVISION MAY BE MADE UNDER SECTION 10

172. In this schedule, an environmental activity which is prohibited or authorised under regulations is described as a “regulated activity” (see section 9).

173. Schedule 2 is in two Parts. Part 1 provides for particular purposes for which provision may be made by regulations under section 10 (see paragraphs 1 to 22 of the schedule). Part 2 supplements Part 1 and provides, amongst other things, for charging schemes and for the maximum penalties that may be imposed in respect of offences created by the regulations.

174. Paragraph 1 enables the regulations to further define, expand on, or amend the definition of environmental activities, or to specify additional environmental activities.

175. Paragraph 2 enables the regulations to establish emission standards and requirements, to authorise making of plans for emission limits and quotas, and to authorise the making of emissions quota trading or transfer schemes (see also paragraph 24 of the schedule).

176. Paragraph 3 enables the regulations to specify the authorities on whom regulatory functions are conferred (defined as “regulators”), and enables the Scottish Ministers to give guidance and directions to regulators.

177. Paragraph 4 enables the regulations—
   - to prohibit the carrying out of a regulated activity,
   - to prohibit the carrying out of a regulated activity unless authorised by or under regulations, or
   - to authorise the carrying out of a regulated activity in accordance with a permit, or subject to requirement to register or to notify the activity, or subject to compliance with “general binding rules” (see also paragraph 25 in that respect).

178. General binding rules may be made in regulations, or by a regulator under regulations (see also paragraph 25 of the schedule).

179. Paragraphs 5, 6, 7, 8, 10, 11 and 12 enable the regulations to specify the procedures relating to authorisation of regulated activities by permits, registration, and notifications. The effect of these paragraphs is to allow for detailed procedural provisions to be included in the regulations governing how an application for the permit or registration may be made and how to notify the carrying on of a regulated activity, how that application will be assessed and how a permit or registration may be granted. They also provide a framework for the extent to which the regulations may allow requirements to be imposed in permits and registrations, as well as
This document relates to the Regulatory Reform (Scotland) Bill as amended at Stage 2 (SP Bill 26A)

allowing regulations to provide mechanisms for transfer, variation, and consolidation, and for suspension and revocation of permits (together with a requirement to take associated preventative or remedial action). These provisions also enable the regulations to specify when registration may be refused and when a registration or notification may lapse.

180. There are supplementary provisions at paragraphs 23, 26 and 27. Paragraph 23 allows for regulations to provide that specified provisions of the regulations have effect in relation only to specified regulated activities, circumstances or specified persons. Paragraph 26 allows regulations to make provision for anything in paragraphs 5 to 12 which could be provided for determination by the regulators to be provided for in regulations. Paragraph 27 allows regulations to provide for regulators to have regard to specified principles and to any directions or guidance in determining rules and imposing conditions.

181. Paragraph 11 also allows provision to be made in connection with permits or registrations for multiple activities or for activities across multiple sites or for multiple persons to be granted a permit or registration. It allows ‘standard rules’ provision to be made, and provides the basis for the fit and proper person test to be applied before an authorisation is given to a person or before an authorisation is transferred, and to allow an authorisation to be varied, suspended or revoked if the operator has ceased to be a fit and proper person. Paragraph 11 also provides a basis for certain persons or descriptions of person to be treated as carrying on regulated activities or as authorised to carry them on.

182. Paragraphs 9 and 13 enable the regulations to provide for charging (see also paragraph 28 of the schedule). Paragraph 9 enables the regulations to authorise, or authorise the Scottish Ministers to make, specific provision in respect of charging for testing and analysis of substances, and assessing the effect on the environment of release of such substances prior to grant of a permit. Paragraph 13 enables charges to be authorised under the regulations, and the making etc. of charging schemes by regulators.

183. Paragraphs 14 to 16 enable the regulations to secure that publicity is given to specified matters, and that public registers are maintained by regulators in respect of such matters. They enable persons to be required to provide information and/or compile information on emissions, energy consumption and energy efficiency, and waste. They also enable the regulations to require or authorise regulators to carry out consultation in connection with the exercise of any of their functions.

184. Paragraph 17 enables the regulations to confer functions on regulators with respect to compliance with, and enforcement of, the regulations. This includes conferring a power to arrange for preventative or remedial action to be taken at the expense of the persons carrying on a regulated activity. It also provides for the conferring of powers on regulators to appoint persons to exercise functions and powers of that type, and to confer further powers on persons so appointed (such as a power similar to the power of entry in section 108(4) of the Environment Act 1995).

185. Paragraph 18 enables the regulations to authorise regulators to serve notices on persons carrying on regulated activities, including notices requiring a person—
• to notify the carrying on by the person of a regulated activity requiring notification by a person of the carrying on of regulated activities,
• to take preventative or remedial action in respect of regulatory contraventions,
• to provide financial security pending the taking of preventative or remedial action,
• to take steps to remove imminent risks of serious adverse impacts on the environment, and
• to stop the carrying on of regulated activities.

186. It also enables the regulations to provide that regulators may require any person served with such notice to pay the costs incurred up to the date of service of the notice, and enables regulators to impose monetary penalties for failure to comply with any such notice. It enables the regulations to provide for enforcement of notices by civil proceedings. Paragraph 31 enables the regulations to make provision for or in connection with the service of any notice or other document.

187. Paragraph 19 enables the regulations to create offences and provide for defences and evidentiary matters. Paragraph 30 provides more detail and allows offences to be triable summarily only or on indictment. It also provides the punishments for the offences that may be set out in the regulations.

188. Paragraph 20 enables regulations to provide for a court to be able to order remedial action where a person has been convicted of an offence.

189. Paragraph 21 enables the regulations to provide for rights of appeal for various matters, and for the determination of such appeals.

190. Paragraph 22 enables the regulations to make provision that corresponds, or is similar, to provision that is made (or is capable of being made) under Part 2 of the Environmental Protection Act 1990 or under the European Communities Act 1972. This will enable regulations made under section 10 to include provision that might otherwise require to be made under the 1990 or 1972 Acts, such as the designation of a Scottish public body such as SEPA as the competent authority for the purpose of functions in or under an EU instrument. Paragraph 29 allows the Scottish Ministers by order to specify an EU instrument as one that is or contains an EU obligation relating to protecting and improving the environment.

191. Paragraph 28A allows the regulations to provide that it may be an ongoing condition of an authorisation that an operator remains a fit and proper person within the meaning of the regulations.

SCHEDULE 3: MINOR AND CONSEQUENTIAL MODIFICATIONS

192. Schedule 3 has six Parts.
This document relates to the Regulatory Reform (Scotland) Bill as amended at
Stage 2 (SP Bill 26A)

193. Part 1 makes minor and consequential modifications related to the measures authorised by or under regulations made under section 10 - in particular, where other enactments require to be modified to refer to environmental activities. For example, reference is made to section 108 of the Environment Act 1995 which requires to refer to the regulator’s functions under regulations made under section 10 in order that authorised persons may exercise statutory powers in relation to compliance and enforcement functions for regulated activities.

194. Part 2 contains amendments consequential on the new enforcement measures in Chapter 2 of Part 2 of the Bill. In particular, existing provision in the Reservoirs (Scotland) Act 2011 allowing for civil enforcement measures is modified.

195. Part 3 contains minor and consequential amendments consequential on the measures in Part 2 of the Bill. In particular, it repeals sections 32 (general environmental and recreational duties) and 34 (general duties with respect to water) of the Environment Act 1995.

196. Part 4 repeals a number of provisions that are either spent or not needed. These include provisions in the Control of Pollution Act 1974 (since superseded by the Water Environment and Water Services (Scotland) Act 2003 and the Environmental Protection Act 1990), and provisions on the establishment of noise abatement zones and nitrate sensitive areas that have never been used in Scotland.

197. Part 5 contains a number of miscellaneous minor amendments. These include repeals of spent provisions, generally connected with amendments in the preceding Parts of the schedule. It also includes repeals of provisions in the Litter Act 1983 that have never been brought into force. These provisions also modify the offences set out in section 110 of the Environment Act 1995 and extend the provisions of the Criminal Procedure (Scotland) Act 1995 as regards transcripts of interviews and scientific etc. reports to SEPA.

198. Part 6 modifies certain pre-devolution environmental enactments to provide for references to an “enactment” to include as appropriate a reference to an enactment comprised in, or made under, an Act of the Scottish Parliament. The effect is that references in the modified enactments no longer apply only to enactments comprised in, or made under, an Act of Parliament.
This document relates to the Regulatory Reform (Scotland) Bill as amended at Stage 2 (SP Bill 26A)

REGULATORY REFORM (SCOTLAND) BILL

REVISED EXPLANATORY NOTES