REGULATORY REFORM (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Regulatory Reform (Scotland) Bill introduced in the Scottish Parliament on 27 March 2013:

- Explanatory Notes;
- a Financial Memorandum;
- a Scottish Government Statement on legislative competence; and
- the Presiding Officer’s Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 26–PM.
EXPLANATORY NOTES

INTRODUCTION

1. 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.

2. 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

3. The Bill is in 4 Parts:
   - Part 1 – Regulatory functions
   - 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

4. 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 2 – Environmental regulation

5. This Part is divided into 6 Chapters.

6. 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.

7. 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.
8. It also provides that the Lord Advocate may issue guidance to SEPA on the exercise of its functions relating to such penalties and undertakings.

9. 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’).

10. 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 causing or permitting significant environmental harm,
   - for the courts to have power to order persons convicted of an offence to remedy or mitigate the harm (a ‘remediation order’),
   - 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—
     - 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
     - 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,
   - 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—
     - the applicant or carrier is a member of a partnership convicted of an offence, or
     - the applicant or carrier is a partnership, and a member of the partnership has been convicted of an offence; and
   - 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—
     - a partnership of which the holder is a member, or
     - where the holder is a partnership, a member of the partnership.

11. 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
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- achieving sustainable economic growth.

12. Chapter 6 defines terms for the purposes of Part 2.

Part 3 – Miscellaneous

13. 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

14. 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

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

Schedule 2

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

Schedule 3

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

THE BILL – SECTION BY SECTION

PART 1 – REGULATORY FUNCTIONS

18. 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

19. 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

20. 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).

21. 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.

22. 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.

Compliance and enforcement

Section 3: Regulations under section 1: compliance and enforcement

23. 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

24. 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.

Section 5: Code of practice on regulatory functions

25. 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 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

26. 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**

27. 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 2 – ENVIRONMENTAL REGULATION**

**CHAPTER 1 - REGULATIONS FOR PROTECTING AND IMPROVING THE ENVIRONMENT**

28. 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**

29. 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”**

30. 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.

31. 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

32. 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.

33. 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).

34. 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.

35. 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

36. 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

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

38. 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.

39. 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

40. 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. 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

41. This section requires any order about fixed monetary penalties that may be made under section 12 to include certain mandatory provisions as to the procedure for the imposition of a fixed monetary penalty. An order must require SEPA to issue a notice of intent prior to issuing a fixed monetary penalty, and must provide an opportunity for a person served with such a notice to make written representations to SEPA. The order must also ensure that SEPA is required to take any such representations into account before imposing a final notice, and prescribes certain information that must be included in a notice of intent and final notice. The order must also provide a right of appeal against the imposition of the fixed monetary penalty, including on the grounds set out in subsection (6). In addition to these mandatory elements, an order under section 12 may provide persons served with a notice of intent an opportunity to discharge liability by payment of a specified amount (which can be less than the penalty) without proceeding to a final notice. 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

42. This section requires the Scottish Ministers, if they make an order under section 12 about fixed monetary penalties, to include provision about the interaction between fixed monetary penalties and criminal proceedings so as to avoid a person being sanctioned twice in relation to the same offence. It also requires the Scottish Ministers to include provision about extending the time available to commence criminal proceedings if a fixed monetary penalty is not served.

Variable monetary penalties

Section 15: Variable monetary penalties

43. 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 such order is subject to the affirmative procedure. 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 (see schedule 2), carrying waste without a registration or carrying out minor engineering activities in water without appropriate authorisation. The Scottish Ministers may prescribe the maximum amount of the variable monetary penalty that can be imposed by SEPA which, in relation to most offences, could be up to £40,000, although SEPA would determine the amount of the penalty, up to the prescribed maximum, in each case.

Section 16: Variable monetary penalties: procedure

44. This section requires any order about variable monetary penalties that may be made under section 15 to include certain mandatory provisions as to the procedure for the imposition of a variable monetary penalty. The Scottish Ministers must make provision in any such order for certain minimum procedural requirements. These include the service of a notice of intent and a period within which a person served with such a notice may make representations to SEPA. 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, benefit the environment and/or secure no financial benefit accrues to the person. The order must also provide that SEPA can accept or reject such an undertaking, and take any undertaking that it decides to accept into account in its decision to issue a variable penalty notice. The order must also set out the minimum requirements for inclusion in a notice of intent and a final notice. The order must also 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

45. 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 and criminal proceedings so as to avoid a person being sanctioned twice in relation to the same offence, and to extend the time available to commence criminal proceedings if a variable monetary penalty is not served and an undertaking is not accepted.

Non-compliance penalties

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

46. 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(5)), but the undertaking has not been complied with. 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. 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.
Enforcement undertakings

Section 19: Enforcement undertakings

47. This section enables the Scottish Ministers to make provision by order for enforcement undertakings. An enforcement undertaking is a voluntary undertaking offered to SEPA by a person to take certain action or refrain from taking certain action, where SEPA has reasonable grounds to suspect that the person has committed a relevant offence. Relevant offences are those prescribed by order under section 39. 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.

48. The order establishing enforcement undertakings must provide that, once SEPA accepts an undertaking, the person giving it may not be prosecuted for the offence in respect of which the undertaking is given (or have a fixed or variable monetary penalty 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.

49. 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.

Operation of penalties and cost recovery

Section 20: Combination of sanctions

50. This section requires the Scottish Ministers, if conferring upon SEPA through sections 12 and 15 the power to issue fixed and variable monetary penalties, to ensure that it is not possible to serve both a fixed and a variable monetary penalty in relation to the same act or omission. The Scottish Ministers may 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 by the procurator fiscal, or a work order has been made against them.

Section 21: Monetary penalties

51. 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
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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

52. 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

53. 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 (fixed monetary penalties, variable monetary penalties or enforcement undertakings), and that SEPA must comply with such guidance.

54. 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 (as defined in subsection (3)), 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.

55. 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

56. 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

57. 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

58. 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. The Scottish Ministers may by order change the maximum amount of compensation that may be the subject of such a compensation order.

Fines

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

59. 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

60. This section makes provision for publicity orders. This is an additional sentencing option for the criminal courts to use where appropriate. 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 specified manner, 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. 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.
CHAPTER 4 - MISCELLANEOUS

Vicarious liability

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

61. This section provides that, where an employee or agent of a non-natural person commits a relevant offence while acting as the employee or agent of that non-natural person, the non-natural person is also guilty of the offence and may be punished accordingly. A relevant offence is one prescribed under section 39 of the Bill. Non-natural persons include bodies corporate, Scottish partnerships and limited liability partnerships. The section provides a defence for the non-natural person if it can show it did not know the relevant offence was being committed by the employee or agent; that no reasonable person could have suspected that the offence was being committed by the agent or employee; and that it took all reasonable precautions and exercised all due diligence to prevent the offence from being committed. However, where a relevant offence is committed by an employee or agent while acting as an employee or agent, and the employer or principal either knew about the offence or ought to have known about it, or did not take reasonable precautions and exercise due diligence to prevent it occurring, then that person shall be guilty of that offence. 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

62. This section provides that, where a person is carrying on a regulated activity for a non-natural person, and they commit a relevant offence in the course of that activity, the non-natural person is also guilty of the offence and may be punished accordingly. A relevant offence is one prescribed under section 39 of the Bill. Non-natural persons include bodies corporate, Scottish partnerships and limited liability partnerships. The section clarifies that a person is carrying on a regulated activity for another person whether doing so by arrangement between those persons or by arrangement through a third party. The section provides a defence for the non-natural person if it can show it did not know the relevant offence was being committed by the other person, that no reasonable person could have suspected that the offence was being committed by them and that it took all reasonable precautions and exercised all due diligence to prevent the offence from being committed. Proceedings may be taken against the non-natural person even if they are not taken against the other person.

Offence relating to significant environmental harm

Section 31: Significant environmental harm: offence

63. This section creates a new criminal offence of causing or permitting significant environmental harm. In addition to causing or permitting significant environmental harm, acting in a way that is likely to cause such harm, failing to act in a way that such failure is likely to cause such harm, or permitting another person to act (or fail to act) in a way that is likely to cause such harm, also constitutes the offence. Environmental harm (as defined in section 9) 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.
64. No offence is committed where permission is or was given by or under an enactment conferring power to authorise the actor failure (for example where the action is covered by a permit issued by SEPA). 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. 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. Provision is made on summary conviction for a fine not exceeding £40,000, imprisonment for up to 12 months or both or, on conviction on indictment, for an unlimited fine or imprisonment or both.

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

65. 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 significant environmental 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’. Failure to comply with a remediation order will be an offence punishable on summary conviction with a fine not exceeding £40,000 and, on conviction on indictment, with an unlimited fine.

Publicity and remediation orders: appeals by prosecutor

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

66. 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: Land no longer considered to be contaminated or to be special site

67. This section amends Part 2A (contaminated land) of the Environmental Protection Act 1990, by inserting new sections 78QA, 78TA and 78TB of that Act.

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

68. Inserted section 78QA enables a local authority, if satisfied that land 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).

69. 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 (for which see section 78E of the 1990 Act) ceases to have effect unless the non-contamination notice provides otherwise. A remediation notice requires action to be taken on the site. If the site is no
longer considered to be contaminated, there should normally be no need for remediation action. However, the authority could provide for some action, such as monitoring, to be continued.

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

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

71. 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.

72. Inserted section 78TA provides for an enforcing authority to be able to remove a notice relating to a special site from that register if it considers that the land no longer requires to be designated as such a site. If it does, 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**

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

**Authorisations relating to waste management: offences by partnerships**

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

74. 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**

75. 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).
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76. 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.

77. 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.

78. 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.

CHAPTER 5 - GENERAL PURPOSE OF SEPA

Section 38: General purpose of SEPA

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

80. 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).

81. 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

82. 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.

83. The term “relevant offence” applies, in particular, for the purposes of sections 12, 15, 19, 26 to 29 and 30 of the Bill.
84. 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

85. 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.

86. This section amends the 2010 Act by inserting new section 63A. This provides 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. The section also consequentially amends section 38 of the 2010 Act to exclude from its scope appeals against decisions to which section 63A applies.

87. 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.

88. 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).

Planning authorities’ functions: charges and fees

Section 41: Planning authorities’ functions: charges and fees

89. 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.
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

91. 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.

PART 4 - GENERAL

Sections 43 to 48

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

93. 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).

94. 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.

95. 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

96. 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

97. In this schedule, an environmental activity which is prohibited or authorised under regulations is described as a “regulated activity” (see section 9).
98. 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.

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

100. 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).

101. 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.

102. 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).

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

104. 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 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.

105. 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
These documents relate to the Regulatory Reform (Scotland) Bill (SP Bill 26) as introduced in the Scottish Parliament on 27 March 2013

regulations to provide for regulators to have regard to specified principles and to any directions or guidance in determining rules and imposing conditions.

106. 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. It 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.

107. 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.

108. 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.

109. 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).

110. 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.

111. 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.

112. 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.

113. 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.

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

115. 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.

SCHEDULE 3: MINOR AND CONSEQUENTIAL MODIFICATIONS

116. Schedule 3 has six Parts.

117. 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.

118. 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.

119. 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.

120. 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
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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.

121. 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.

122. 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.
FINANCIAL MEMORANDUM

INTRODUCTION

1. This document relates to the Regulatory Reform (Scotland) Bill introduced in the Scottish Parliament on 27 March 2013. It has been prepared by the Scottish Government to satisfy Rule 9.3.2 of the Parliament’s Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament.

2. This Memorandum considers the financial cost implications of the Bill, first in general terms and then in terms of key parts of the Bill.

3. The Bill is an important tool in delivering the Scottish Better Regulation agenda. The measures enacted in the Bill will allow this agenda to move to the next level. It is not about introducing new regulatory requirements and objectives. Rather it is about how we deliver regulation and help ensure that regulators and the regulated work together to achieve the required outcomes including sustainable economic growth.

4. From the Scottish Government’s perspective, there is a limited number of additional costs to be associated with the Bill which will be met from existing resources. Those costs that will be incurred principally relate to the development of secondary legislation. This reflects that many of the provisions in the Bill are enabling powers.

PART 1 – REGULATORY FUNCTIONS

5. This section considers the costs associated with the provisions contained in Part 1 of the Bill 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.

Costs on the Scottish Administration

6. Using the powers to improve regulatory consistency will require resource associated with the development of any proposed national standards and associated legislation. It is anticipated for the policy area implementing national standards that this could involve 1 x B2 and 0.2 x C1 staff at a cost of £50,000. Alongside publication and analysis costs for associated consultation, the estimated total cost to Scottish Government is £65,000 which will be met from existing resources. An option of funding a post to help coordinate the development and delivery of national systems with, in particular, COSLA and local authorities, is anticipated to cost around £70,000 per annum plus associated travel and subsistence costs. It is anticipated the development of a code of practice on the exercise of regulatory functions could involve 0.25 x C2 and 0.25 x B2 staff at a cost of £30,000. Alongside publication and analysis costs associated
with consultation of around £15,000, the estimated total cost to the Scottish Government is around £45,000, which will be met from existing resources.

**Costs on local authorities**

7. The provisions in Part 1 are anticipated to deliver efficiency savings as well as support the better delivery of regulation. There are likely to be nominal set-up costs in contributing to the development of the code of practice (shared with other regulators) and the development of national standards and systems although, in relation to the latter, funding a post to help coordinate the development and delivery of national systems (as referred to above) would support this. It is, therefore, anticipated that this will be absorbed into existing work streams and is likely to be cost-neutral as it will provide savings and efficiencies in the longer term as individual local authorities would not need to separately develop their own standards and procedures. No net impact on costs is, therefore, anticipated.

**Cost on other bodies, individuals and business**

8. The provisions to encourage or improve regulatory consistency will not directly impact on regulated businesses, but will benefit them through the Bill’s provisions shaping the regulatory environment in which they operate. Over time, these provisions will help deliver efficiency and compliance benefits for business through increased consistency in how they are regulated. This is particularly important, for example, for the retail sector which operates across the whole of Scotland and has to meet the requirements of a number of local authorities. More information on the efficiencies that might be achieved, using the example of mobile food business, can be found in paragraph 50 (street traders’ licences). National standards aim to provide clarity and simplicity for businesses in Scotland. They would be developed in an inclusive, multilateral way with the involvement and support of front line regulators and the regulated. While this would require some resource, this is expected to be negligible and provide savings and efficiencies in the longer term; for example, a reduction in costs incurred by business (staff time, legal/consultancy costs) to ensure compliance. Small businesses in particular can be disproportionately affected by regulation and may tend to over-comply due to lack of awareness or understanding of what is required. A more consistent approach should avoid this and deliver an associated reduction in compliance costs.

9. The Bill places a duty on listed Scottish regulators to support sustainable economic growth in exercise of their regulatory functions. In addition, a code of practice in relation to the exercise of regulatory functions will be developed collaboratively with business representatives, regulators, public bodies and COSLA. The code will strengthen arrangements in place to ensure that regulators consider their activities to find the optimum balance between regulatory functions and the Government’s purpose of increasing sustainable economic growth; and also ensure consistency with the principles of better regulation. Additional resource costs arising from this would be limited. There would be no cost implications for business or the public, but the code will provide clarity and transparency as to how regulatory objectives are being delivered in this wider context. There will, therefore, be business benefits arising from more consistent regulation.
PART 2 – ENVIRONMENTAL REGULATION

Costs on the Scottish Administration

10. As respects the environmental regulation provisions, the main costs will be associated with the development of legislation. This will principally involve a small team for up to three years dedicated to co-ordinating the Better Environmental Regulation programme (0.5 x C1 and 0.75 x B3 staff) as well as input from individual policy teams for their specific areas, for example, water environment and waste. This will be at a cost of approximately £70,000 per annum for staff costs associated with the development of the regulations. In addition there will be relatively small costs (approximately £500) for individual consultations (currently expected to be a maximum of 5 consultations).

11. Income which arises from any monetary penalties imposed by SEPA will not be retained by SEPA. Although there is no previous history on the use and level of fixed and variable monetary penalties, with proposed fines ranging from £500–£40,000, it is estimated that there will be approximately twenty cases per year. Among those cases, approximately ten are expected to be drawn from cases currently reported and prosecuted (see paragraph 14) or where no action is taken, with average penalties expected to be around £3,000 per case, giving a total estimate in penalties from those cases of £30,000 a year (10 x £3,000). Up to an additional eight cases (which presently result in enforcement action rather than referral to the procurator fiscal) are expected to result in monetary penalties at the lower end of the range of variable monetary penalties issued, giving a total estimated in penalties from those cases of £12,000 per year (8 x £1,500). There are also estimated to be a small number of fixed monetary penalties issued each year, ranging from £500 for an individual to £1,000 for a company, giving a total in penalties from these cases estimated at £1,500 per year (2 x £750 – the average of £500 and £1,000). Therefore in total, up to £43,500 a year is estimated to require to be paid to SEPA in penalties. SEPA will pay any penalty received to the Scottish Ministers as soon as is reasonably practicable.

12. In line with the ‘polluter pays’ principle, provision is also made for SEPA to be able to recover certain costs related to enforcement measures. This would enable SEPA to recover costs for its investigation, administration and obtaining of expert (including legal) advice from a person or business that has been issued with a variable monetary penalty. As these costs have been incurred by SEPA, they will be retained by SEPA. The costs will vary depending on the seriousness of the case, but on average they are expected to be in the region of £10,000 to £20,000 per case. The level of costs sought to be recovered will be a matter for SEPA.

Costs on the Crown Office and Procurator Fiscal Service and the Scottish Court Service

13. The introduction of additional enforcement measures (including fixed and variable penalties and enforcement undertakings) will extend the range of potential interventions that SEPA can make. Where enforcement is required, SEPA’s current flexibility to respond is limited and relies heavily on the criminal court system. The introduction of additional enforcement measures will allow SEPA to respond in a more proportionate way than the current

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1 Based on SG Average Staff Costs 2012-13
These documents relate to the Regulatory Reform (Scotland) Bill (SP Bill 26) as introduced in the Scottish Parliament on 27 March 2013

focus solely on the criminal courts allows, and, therefore, fewer cases are likely to be heard in the criminal courts in future.

14. The additional enforcement measures are not intended to be used against those with serious criminal intent or where the impact is significant – these would continue to be referred to the criminal courts as they are now. It has been estimated by SEPA for the year 2010-11 that, if the new enforcement measures had been available, they would have been used in approximately one-fifth of the cases that were referred to the procurator fiscal, and this would have had the knock-on effect of seven fewer cases being prosecuted in the criminal courts. The majority of SEPA cases, including those where an enforcement measure might be used instead of prosecutorial action, are tried summarily in the sheriff courts where the costs of court proceedings amount to on average £2,400 per case. This breaks down to £1,200 for Scottish Court Service costs associated with the case, £600 in Crown Office and Procurator Fiscal Service prosecution costs and £600 per case for SEPA or other Crown witnesses attending court. Under the new regime, and using 2010-11 figures as an estimate, all of the seven cases could be dealt with by enforcement measures instead of by prosecution. This would indicate a potential saving to the Scottish Administration up to the value of £16,800 per year (7 x £2,400).

15. Appeals from the fixed and variable monetary penalties are expected to be heard in an independent tribunal to be established at a future date. It is estimated that SEPA may serve around twenty financial penalties per year of which, based on current practice in relation to regulatory appeals, it is estimated two or three may be appealed. The proposed Tribunals (Scotland) Bill will inform the relevant tribunal to hear such appeals, and it is expected that this will be attached to an existing jurisdiction within the tribunal system where the costs will be absorbed within existing baselines, offset by savings from the criminal courts. Again, it is expected that the procedural requirements of the tribunal will involve lower costs to both the Scottish Administration and the appellant than the costs of a criminal trial.

16. The Bill confers powers to create a number of regulatory offences. Those offences are expected to be similar to existing regulatory offences made under other enactments, and will in some cases replace them on a like for like basis.

17. The Bill creates new vicarious liability offences and a new offence of causing or permitting significant harm to the environment. In terms of the new offences, it is considered that this will not lead to any increase in prosecutions in relation to SEPA, and therefore costs. For example, the Bill will enable offences to be prosecuted by reference to the significance of environmental harm that has been caused, rather than for a narrow regulatory breach such as a breach of permit conditions.

**Costs on local authorities**

18. The proposals in the Bill cover local authorities’ activities both as regulators and as persons carrying on regulated activities. As regulators, there are no impacts from the environmental proposals. Where they operate regulated enterprises, for example, landfill sites, they will be covered by the provisions of the Bill, and will benefit in the same way as other businesses.
Costs on the Scottish Environment Protection Agency (SEPA)

19. In terms of the environmental regulation provisions, the principal public sector impacts are on SEPA. The Bill’s provisions will support and facilitate SEPA’s organisational transformation programme. Considerable investment has already been made through SEPA to become a more efficient and effective organisation. The Bill will support SEPA to move to the next level in this work and underpins the next phase of SEPA’s transformation.

20. As an organisation, SEPA is funded by a combination of grant-in-aid and charges on regulated entities. No changes are proposed to SEPA’s grant-in-aid as a consequence of the Bill. Whilst not strictly part of the Bill proposals (as no legal change is proposed to its charging powers), a separate consultation has been undertaken on SEPA’s regulatory funding model. This is a key element in supporting SEPA’s move from its current focus on charges set by activity to a approach based on environmental risk.

21. In line with the requirements of the Environment Act 1995, SEPA’s charges are based on recovering full economic cost. Given the Scottish Government’s intention to maintain its grant-in-aid commitment, and the contribution of the Bill’s provisions in securing efficiency savings, it is anticipated that over time this will lead to a reduction in the sum to be raised from regulated persons in general.

22. SEPA has been delivering significant change to its operations for several years and will continue to commit internal resource to delivering, for example, the new permissioning framework, effective use of the new enforcement tools and the operational change towards becoming a more flexible and outcome-based regulator. The core SEPA change management resource to deliver this is anticipated to be around £0.75m in each of the next 3 financial years. The majority of this will be staff resource but this will also fund the publication of guidance and other material.

Costs on business

23. The environmental regulation provisions of the Bill set out the scope of the intended permissioning framework, which SEPA will administer using the new enforcement tools in the Bill. It does not introduce new regulatory requirements; many of which are EU obligations; but rather supports the efficient and effective delivery of these.

24. Through the introduction of a simpler and more coherent permissioning regime (focussed on environmental risk) there will be efficiencies in SEPA’s operating costs. Given that SEPA’s charges are based on full economic cost recovery this will, over time, benefit a number of businesses. Under the new regime, business will benefit from simpler permissions and guidance, more online processing of permit applications, more targeted advice and support and more proportionate enforcement and risk-based inspections. The single permissioning regime will also benefit those businesses which operate under more than one permissioning regime through efficiencies from consistent processes. Evidence from similar work by the Environment Agency (for England and Wales) has estimated that savings to administration costs for regulated businesses could be to the order of 20% per annum.
25. Scotland’s environment will benefit from SEPA’s focus on activities that present the greatest potential risk of environmental harm. This proactive approach, supported by the Bill’s provisions in terms of permissioning and enforcement, contributes to the preventative spend agenda for business and the public sector in terms of reducing the likelihood of actions that require to be cleared up or restored at a later stage.

26. The Better Environmental Regulation programme will mean that poor performers are likely to pay more to reflect the true cost of their actions. For example, the most serious offenders will continue to be referred to the criminal courts where they will potentially face larger penalties and any costs associated with their defence. Less serious offenders may avoid the criminal courts and instead be subject to a more appropriate and proportionate enforcement measure. This is consistent with the ‘polluter pays’ principle, and reflects the additional burden poor performers present to SEPA (and thus other charge payers). SEPA regularly assesses the compliance of businesses with their environmental responsibilities via a formal annual compliance classification scheme. The vast majority of Scottish companies comply with statutory requirements but there are some that currently fail to do so.²

27. Incentivising positive behaviour is a further tool to improve overall compliance. In addition to supporting appropriate and proportionate sanctions, the use of enforcement measures SEPA can use directly will also speed up the time in which breaches and follow-up action are resolved. This will be to the benefit of those who are subject to enforcement action; for example, through earlier decisions and thus reduced uncertainty whilst they await the outcome of the enforcement process. To provide an example, a land manager who has allowed silage effluent to overflow from land due to poor effluent management would currently face prosecution via the courts. This would be a relatively lengthy process potentially involving considerable time and legal advice. Under this proposed legislation, if the case has not resulted in significant harm, then a direct measure such as a variable monetary penalty or voluntary enforcement undertaking could be applied instead, saving time and money for both SEPA and the non-compliant person. The additional enforcement measures will be focused on remediation, and in particular an enforcement undertaking may provide remediation of the harm caused and/or some further benefit to the environment or the local community which would not otherwise have taken place or have to be financed by alternative means. In this example, the cost to the farmer related to the voluntary enforcement undertaking would depend on the nature of the incident and the level of remediation required. It is stressed that the decision to enter into an enforcement undertaking is voluntary. If the case has not resulted in significant harm then a direct measure could be applied, for example, a low financial penalty.

PART 3 – MISCELLANEOUS

MARINE LICENSING DECISIONS

Costs on the Scottish Administration

28. The process for authorising the development of offshore marine energy involves two consents. The first is a marine licence under section 29 of the Marine (Scotland) Act 2010. The

² As highlighted in the attached Progress on delivering better environmental regulation report http://www.sepa.org.uk/about_us/publications/better_regulation.aspx
second is consent by the Scottish Ministers under section 36 of the Electricity Act 1989, which is reserved legislation. To maintain and apply that approach, consequential provision would require to be passed following the passage of the Bill by the UK Parliament in relation to energy consents under the Electricity Act 1989 and marine licensing decisions beyond 12 nautical miles, which fall within reserved matters (though in practice are decisions made by the Scottish Ministers under the devolution settlement). This would require an order to be made under section 104 of the Scotland Act 1998 providing for consequential modifications to be made to the 1989 Act and to the Marine and Coastal Access Act 2009 in consequence of legislation passed by the Scottish Parliament. The section 104 order would be laid before the UK Parliament and would be debated in both houses.

29. Decisions under section 29 of the Marine (Scotland) Act 2010 are made by the Scottish Ministers. Section 38 of the Marine (Scotland) Act 2010 and regulations made under that provision - the Marine Licensing Appeals (Scotland) Regulations 2011 - provide that an applicant is able to challenge a decision in the sheriff court. 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.

30. The Scottish Government considers that the mechanism for bringing legal challenges to offshore marine energy decisions would benefit from being more consistent with the Planning and Roads Acts. The reasons for this are twofold. Firstly, to make transparent, focussed and consistent the legal basis and process by which a challenge may be brought, as the current arrangements (across a range of land and marine use management decisions) blend a mix of statutory appeals and judicial review. Secondly, to ensure that this vital democratic safeguard is exercised in a way which avoids unnecessary delay in the courts by applying a six-week time limit. Any such delay is obviously undesirable to both the challenger and to the projects themselves, particularly where any initial offer of private equity and debt funding available to these projects is time limited.

31. In addition, section 28 of the Marine (Scotland) Act 2010 provides that the Scottish Ministers may hold an inquiry in connection with their determination of an application for a marine licence. For consistency, these decisions made by the Scottish Ministers under section 28(1) concerning holding a public inquiry should be subject to the same challenge mechanisms as a licensing decision.

32. The Bill will, therefore, extend statutory review mechanisms to decisions by the Scottish Ministers under sections 28 and 29 of the Marine (Scotland) Act 2010 relating to those offshore marine energy projects with a permitted capacity of no less than one megawatt. The statutory appeal will be to the Inner House of the Court of Session.

33. Legal challenges to the Scottish Ministers’ decisions can be an expensive and time-consuming process. They come at a substantial cost to public finances, not just in terms of the effort of defending the legal proceedings, but also the additional costs incurred as a result of the delays to the services affected. The financial impact of the proposals is difficult to quantify in precise terms because the potential impacts will vary depending on the size of the projects to which the decision relates. In addition, the Scottish Court Service does not at present hold information on the relative costs of judicial review and statutory appeal. However, it is
considered that the provisions should reduce the impact on the commencement of the projects caused by litigation.

34. The amendments will allow the possibility for legal challenges under such circumstances to be heard in the Inner House of the Court of Session, rather than the Outer House, so reducing the number of potential layers of appeal and bringing earlier finality to legal proceedings. Moreover, strict time limits for bringing the challenge would apply. Thus, it is anticipated that the reduced number of tiers of appeal will help reduce the overall impact of delay to projects caused by litigation.

35. It is considered that the introduction of a statutory appeal mechanism will result in a reduction in the costs to the Scottish Government of each challenge to a decision of the Scottish Ministers by reducing a tier of appeal present in judicial review cases (cases would be heard in the Inner House only rather than being heard, or remittable to the Outer House). The effect of a challenge that starts in a higher court is a reduction in the number of possible appeal stages. The cost of an action in the Inner House is greater than that in the Outer House, not least because it is heard in the presence of three judges. The cost of a court hearing (in normal hours) before a single judge, payable by each party for every 30 minutes or part thereof, is £85. The cost of a court hearing (in normal hours) before three or more judges, payable by each party for every 30 minutes or part thereof, is £212.3 There are no centrally held records of the average length and duration of appeals as these depend on the circumstances of individual cases. Despite this, it is considered that the reduction in the number of appeal stages will lead to an overall saving in both its legal costs and time. It would also reduce the costs that the Scottish Government, under the protected costs order system or under Article 9(4) of the Aarhus Convention which may apply to many or most judicial reviews, cannot recover. Therefore, fewer layers or tiers of appeal will result in lower unrecoverable legal costs per challenge for the state.

36. There are approximately 11 to 12 offshore energy projects per year. As at March 2013, there has only been one licence granted under the Marine (Scotland) Act 2010 and there have been no applications for judicial review (though as there are no time limits, judicial review is still possible). There is a possibility that the introduction of a statutory appeal mechanism may result in an increase in challenges; however it is considered that the six-week time limit should mitigate the impact of this.

37. The costs of implementation are considered to be minimal. The court rules and their guidance are already in place and will only need the addition of a reference to the Regulatory Reform (Scotland) Act.4

**Costs on local authorities**

38. The offshore marine energy proposal to introduce a statutory appeal will only impinge on local authorities if they have made an application under section 29 of the 2010 Act. If that is the case, the effect will be the same as on other businesses or individuals who have made applications (see below).

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3 See the Court of Session etc. Fees Amendment Order 2012 (www.legislation.gov.uk/ssi/2012/290/contents/made).
Cost on other bodies, individuals and business

39. As regards other businesses or individuals, legal challenges can have a significant impact on projects both in terms of timing and cost. The main impact for applicants (aside from the costs of the litigation itself) is in delay to a programme or project concerned and the associated economic or environmental benefits it might be expected to have. In certain types of case, in particular those involving large planning developments or constructions where significant sums may be at stake, any delays can have an impact on the costs of the project, potentially putting its financial viability at risk. The measures proposed, alongside other work being taken forward by the Scottish Government seek, therefore, to ensure such cases can proceed as expeditiously as possible through the courts. The direct appeal to the Inner House and the imposition of a strict time-limit are designed to make the appeal process as efficient as possible whilst maintaining the public accountability of the Scottish Ministers.

40. It is anticipated that these provisions will reduce the costs for many who wish to challenge the decisions of the Scottish Ministers in that, if they wish to take the challenge to the highest level, there are fewer levels of appeal. There is a financial downside, however, for those cases which are not subject to further appeal in that the costs in the Inner House are higher than the costs in the Outer House of the Court of Session. Full information on the respective costs in each House is not available. However, there is a reference to the fees in each in paragraph 36 above.

41. In a majority of cases, challenges are unsuccessful. Independent research\(^5\) reported on 18 February 2013 into judgments in Scotland over the past 10 years in cases brought to challenge grants of planning permission, reveals a “relatively stable” picture with little change in the average number of cases and their success rate. A total of 64 cases between 2003 and 2012 resulted in 17, or just over 25%, being successful. According to the research paper, this compares with a success rate in England and Wales of between 45% and 55% annually. In one recent high profile judicial review action relating to another type of large infrastructure project which delayed the project by over two years, the Scottish Ministers accrued considerable costs in addition to those of instructing Counsel. During the legal challenge period there was a requirement for continuing project management costs, costs associated with responding to ongoing correspondence and costs associated with preparing briefings for Counsel in relation to legal challenges. The Scottish Ministers are concerned that similar challenges to their decisions regarding marine licences would result in similar delays and costs to them.

PLANNING AUTHORITIES’ FUNCTIONS: CHARGES AND FEES

Costs on the Scottish Administration

42. Establishing the legislative powers to consider performance when setting planning application fees will only have limited additional direct costs to the Scottish Administration if the provisions are used to reduce fees in specific authorities. As already indicated, the main additional cost will principally relate to bringing forward amending legislation to reduce planning application fees for planning authorities that the Scottish Ministers have determined are

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not performing. It is anticipated that this cost will be borne by existing budgets; this will be in the region of £15,000 which equates to about 30% of a policy officer’s time.

43. Additional implementation costs relate to amending the online fee calculator linked to the e-planning website. Amending the system to allow the site to calculate the fee based on location of the applicant is estimated at around £35,000 to £40,000. It is however possible that this cost is reduced or incorporated into other amendments of the system. It is also anticipated that any solution developed will allow annual updates to be carried out at least cost possible.

44. If the provisions are implemented (because planning authorities have not taken steps to address performance), the total implementation costs (incorporating the costs detailed above) of the planning elements are estimated to be in the region £50,000-£55,000, which will be met from existing resources. The provisions of the Bill will, however, have benefits in improving performance of planning authorities, leading to an overall reduction in costs through more efficient processing of applications and reducing uncertainty and waiting times. Although it is difficult to quantify these costs and benefits with any precision, it is anticipated that the benefits from improved performance are likely to significantly exceed the costs of implementation, and thus the overall effect will be to reduce regulatory costs to the Scottish economy as a whole.

Costs on local authorities

45. The planning provisions of the Bill relate to local authorities’ functions as planning authorities. If an authority fails to address performance issues, their planning application fee will potentially be reduced. In 2010-11, planning application fee income across all planning authorities was £22.3m; income for each authority varies considerably due to the number, size, location and development types coming forward. Planning fee income for smaller and more rural authorities is between £0.1m and £0.5m, while the income for larger urban authorities ranges from £1m to £2m. Overall resourcing of the planning service is the responsibility of the local authority. Irrespective of the level of income, any authority whose planning application fees are reduced will see a related drop in income which may impact their other budgets.

46. It is not clear if reducing fees will have a consequential impact on the number of applications submitted to poor performing authorities. Some businesses have indicated that they may not bring forward developments in poor performing authorities due to costs of delay which may outweigh any reduction in fee, whilst other developers, particularly smaller businesses, have indicated that they have little option about where they develop.

Cost on other bodies, individuals and business

47. One of the desired outcomes of linking fees to performance is to deliver an efficient and effective planning system that eliminates undue delay. The impact of delay can be significant in terms of lost opportunity as well as additional costs. This cost varies from development to development and, therefore, it is not possible to quantify at this point. A reduced planning application fee in poor performing authorities does mean that applicants will pay less to planning authorities. This will not necessarily cover any costs of delay, but it will encourage poor performing planning authorities to improve their response time.
APPLICATION FOR STREET TRADER’S LICENCES: FOOD BUSINESS

Costs on the Scottish Administration

48. The requirement, introduced by the Bill, that the food hygiene certificate produced for a street trader’s licence application must be from a food authority that the mobile food business has registered with, rather than the authority in which the application is made, has no cost implications on the Scottish Administration. The administration and issue of these certificates and licenses rests with local authorities.

Costs on local authorities

49. The requirement that the certificate must be from a food authority that the mobile food establishment is registered with will not increase local authorities’ costs, and may provide efficiencies for all local authorities issuing street trader’s licences. At present, a separate certificate is generally provided by each food authority in which an application for a street traders licence is made. In future, since the certificate must be from a food authority that has registered the establishment, certificates for multiple applications can be provided by the same food authority thereby offering some efficiencies in terms of administration costs.

Costs on other bodies, individuals and businesses

50. The requirement that the certificate must be from a food authority that the mobile food establishment is registered with could potentially benefit up to 1,300 mobile food businesses (to the extent that they might wish to operate in two or more local authority licensing areas). By reducing the need for mobile food businesses to obtain a certificate of compliance from each authority in which it is applying for a street traders licence, business may be expected to make savings, both in relation to any charges for the certificates and business time lost in seeking to obtain them. While not all authorities charge for these certificates, the costs can range from £25-£125. Businesses might also avoid loss of staff time and sales revenue if the number of inspections required to obtain multiple certificates is reduced accordingly. This would vary depending on the type of business – a half day lost sales could be around £150.

SUMMARY OF COSTS

51. The table below summarises the costs that arise as a direct result of the Bill:

<table>
<thead>
<tr>
<th>Costs arising as a direct result of the Bill</th>
<th>Scottish Government</th>
<th>Local authorities</th>
<th>Other bodies, individuals and businesses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Staffing and administration costs of £305,000 per annum (during implementation) which will be met from</td>
<td>Overall there will be no on-going direct costs to local authorities; however, should the planning fees provision be used there would a</td>
<td>Part 1 – Regulatory Functions - There will be no direct costs on businesses that will benefit through the way in which they are regulated.</td>
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<td></td>
<td></td>
<td>Part 2 – Environmental regulation - Direct costs to SEPA of £0.75m. Overall</td>
<td></td>
</tr>
</tbody>
</table>

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These documents relate to the Regulatory Reform (Scotland) Bill (SP Bill 26) as introduced in the Scottish Parliament on 27 March 2013

| Part 1 | Regulatory Functions | £180k |
| Part 2 | Environmental Regulation | £70k |
| Part 3 | Marine Energy Licensing | £0 |
| Planning fees | £50-55k |

Existing resources.
This comprises costs:

| Part 1 Regulatory Functions | £180k |
| Part 2 Environmental Regulation | £70k |
| Part 3 Marine Energy Licensing | £0 |
| Planning fees | £50-55k |

Financial loss to specified local authorities.

There will be no direct additional costs to businesses but those people who breach rules will be subject to a greater range of enforcement measures (including fines ranging from £500 to £40,000 depending on the severity of the offence and its impact) and potential recovery of SEPA’s enforcement costs.

Part 3 – Miscellaneous

Marine licensing decisions - Costs will only affect those seeking or defending an appeal and and overall streamlining of appeals process should reduce costs.

Planning authorities’ functions: charges and fees - There will be no costs on businesses from this provision.
SCOTTISH GOVERNMENT STATEMENT ON LEGISLATIVE COMPETENCE

On 27 March 2013, the Cabinet Secretary for Finance, Employment and Sustainable Growth (John Swinney MSP) made the following statement:

“In my view, the provisions of the Regulatory Reform (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

On 27 March 2013, the Presiding Officer (Rt Hon Tricia Marwick MSP) made the following statement:

“In my view, the provisions of the Regulatory Reform (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
These documents relate to the Regulatory Reform (Scotland) Bill (SP Bill 26) as introduced in the Scottish Parliament on 27 March 2013

REGULATORY REFORM (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

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