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Pàrlamaid na h-Alba

Official Report

RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

Wednesday 29 May 2013

Session 4

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RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE
19th Meeting 2013, Session 4

CONVENER

*Rob Gibson (Caithness, Sutherland and Ross) (SNP)

DEPUTY CONVENER

*Graeme Dey (Angus South) (SNP)

COMMITTEE MEMBERS

*Jayne Baxter (Mid Scotland and Fife) (Lab)
*Claudia Beamish (South Scotland) (Lab)
*Nigel Don (Angus North and Mearns) (SNP)
*Alex Fergusson (Galloway and West Dumfries) (Con)
*Jim Hume (South Scotland) (LD)
*Richard Lyle (Central Scotland) (SNP)
*Angus MacDonald (Falkirk East) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Bill Adamson (Food Standards Agency Scotland)
Lloyd Austin (RSPB Scotland)
Allan Bowie (National Farmers Union Scotland)
Roger Burton (Scottish Natural Heritage)
Dr Sarah Hendry (University of Dundee)
Graham Hutcheon (Scotch Whisky Association)
Susan Love (Federation of Small Businesses)
Gordon McCreath (UK Environmental Law Association)
Andy Myles (Scottish Environment LINK)
Andy Rooney (South Lanarkshire Council)
Dr Mark Williams (Scottish Water)

CLERK TO THE COMMITTEE

Lynn Tullis

LOCATION

Committee Room 6

Scottish Parliament

Rural Affairs, Climate Change and Environment Committee

Wednesday 29 May 2013

[The Convener *opened the meeting at 09:37*]

Regulatory Reform (Scotland) Bill: Stage 1

The Convener (Rob Gibson): Welcome to the 19th meeting in 2013 of the Rural Affairs, Climate Change and Environment Committee. I ask everyone to remember to switch off their mobile phones, BlackBerrys and other electronic devices, as they affect the broadcasting system.

Agenda item 1 is two evidence sessions on the Regulatory Reform (Scotland) Bill. The focus of the first session will be part 1 of the bill, and in particular section 4. In the second session, we will concentrate on part 2.

For the first panel, I welcome Bill Adamson, head of food standards, hygiene and regulatory policy at the Food Standards Agency Scotland; Roger Burton, programme manager for wildlife management and social and economic development programmes at Scottish Natural Heritage; and Dr Sarah Hendry from the University of Dundee.

I kick off with a general question, which I think is quite germane. Are you content with the consultation process? Do you believe that it was consistent with the Government's principles of better regulation?

Dr Sarah Hendry (University of Dundee): I am happy to start on that. I thank the committee for inviting us to give evidence. We generally welcome the ideas behind the bill. There has been a lot of consultation on the bill's principles, and we very much hope that that will continue in the next, critical stage of developing the regulations and the guidance.

The Convener: Okay.

Roger Burton (Scottish Natural Heritage): I second the appreciation for the invitation to be here. SNH is content with the way in which the consultation was carried out. We responded to the Scottish Environment Protection Agency's better environmental regulation consultation and the Government's better regulation consultation. I have also had other discussions with SEPA in particular about the way in which its agenda is shaping up.

The Convener: What about the FSA?

Bill Adamson (Food Standards Agency Scotland): Thanks for inviting me along, convener. Similarly, we have been involved in the consultation. We formally responded to it and we participate in some of the regulatory forums that Russel Griggs has set up, so we have day-to-day dealings with the department.

The Convener: Was the consultation transparent, accountable, proportionate, consistent and targeted? You do not have to address each of those things individually. If there is anything that stands out as not being any of those things, this is the time to tell us. Do you have any comments?

Witnesses: No.

The Convener: Okay. Those are the better regulation principles. We will now see whether they apply to the bill.

Nigel Don (Angus North and Mearns) (SNP): Good morning, colleagues, and welcome to what I hope will be a high-level discussion about sections 4, 5 and 38, which deal with codes of practice, what your priorities should be and the hierarchy—if one is needed—of duties and responsibilities. I start with an open-ended question to you all. Are you comfortable that you know what the bill says and what it will mean in context?

Dr Hendry: A number of aspects of the bill would benefit from greater clarity. They include the questions of what is meant by "sustainable economic growth" and why the regulatory principles appear in section 6 in relation to the code of practice, but are not applied to the regulator. I also have some questions about part 2 concerning things that it might be better to have in the bill, although I appreciate that we are not discussing that part just now.

Nigel Don: Thank you for that. We will discuss part 2 later. There will also be questions on the phrase "sustainable economic growth", which is an issue. I am asking more about the structure and the hierarchy of what is involved in sections 4, 5 and 38. Are you clear about what is in the bill and what it means?

Dr Hendry: Section 38 begins with the purpose of SEPA, which includes "sustainable economic growth". That is clear if one knows what "sustainable economic growth" means. The same applies to section 4.

On the code of practice, section 6 states that the regulatory principles are to be embedded in the code, but they do not appear in section 4 as applying to the regulators. That seems to me to be worthy of discussion.

Nigel Don: Yes, I am with you on that. Can your colleagues say something about where we are on this?

Roger Burton: SNH welcomes the general thrust of the bill and we are comfortable with the sense of section 4. We acknowledge that there are questions about the precise wording, but that does not give us a difficulty in relation to our existing balancing duties. There may be a question about the extent to which the specific powers are met by the way in which our balancing duties are expressed. However, we are comfortable with the broad interpretation of that.

Bill Adamson: Our response is similar, in general terms. Our organisation has a statutory function to protect public health from risks arising from food, and the phrase in section 4(1) is inconsistent with the exercising of those functions in that, although we will do a number of things to ensure that we promote economic growth, we will not do those things in such a way as to endanger public health. However, we take it that that is what the last part of the sentence in section 4(1) indicates.

We have one comment on section 5. We have a good sense of what the regulator's code of practice will be, but I suggest in my written evidence that it would be useful to have a clear caveat about where that code of practice might interact with other codes for which ministers have responsibility. For example, in our area, Scottish ministers already have powers under the Food Safety Act 1990 to provide codes of practice for the enforcement of food law, and they have made those codes of practice, which we oversee. The implication is that the new code would be without prejudice to any statutory provisions that exist elsewhere, but it may be useful to have some sort of caveat in the bill to clarify that that is indeed the case.

09:45

Nigel Don: Might the principle not be that the code in the bill will displace any previous code that is inconsistent with it? That is what I would expect as a general principle of statutory interpretation. I would have thought that an existing code of practice would be displaced by the one in the bill.

Bill Adamson: In so far as the code that we have at present is designed specifically to give authorities direction as to how they carry out their functions, and it has consistency elements, there is a potential overlap with regard to consistency. I guess that the code that is envisaged in the bill will be much broader in its sense of the requirement for regulatory consistency. The elements of the existing code of practice that we oversee are there not implicitly but almost as a consequence of what the code says. That code covers more than I envisage the new code will cover. Given that both codes will have been made under primary legislation, there might be an issue about which will take precedence.

Nigel Don: I am genuinely trying to see whether there is an issue. I am not trying to confuse you; I am trying to explore what the bill will do. Am I right in thinking that section 4(4) will mean that section 4(1) will not apply to any regulator that is already subject to a duty? If you already have something that you regard as a duty, regulation or code of practice, perhaps you are exempt anyway.

Bill Adamson: I read that in the context of the sustainable economic growth part of the bill, but I did not quite see that that reads across to section 5 and the code of practice.

Nigel Don: As I said, I am not here to try to confuse anybody, but am I entitled to suggest to anybody who is listening or anybody who will read the *Official Report* that you are not entirely clear how those things will interact? I am not trying to dig you into a hole; I am looking for your words and, indeed, those of your colleagues.

Bill Adamson: Some clarity would be useful.

Nigel Don: As I understand it, section 4(2), which provides for ministers to give you guidance, will probably not provide for anything that they cannot do anyway. Am I right in thinking that section 4(3), which colours the provision in section 4(2) by saying that you as regulators "must have regard" to that guidance, is perhaps the change? Is forcing you to have regard to that guidance a change to your current position?

Roger Burton: It makes no difference for SNH because we have regard to guidance that ministers give us in any event.

Nigel Don: If your lawyers disagreed with Government lawyers on what something meant, what would happen? Would you automatically do what a minister's guidance said?

Roger Burton: We would advise the Government. It would depend on what form the guidance took, but ministers can direct us under our founding legislation. Ultimately, ministers are at liberty to provide that direction and we need to observe it.

Nigel Don: So guidance that you would have to take notice of under the bill might be the same as direction under other statutes.

Roger Burton: It could be, or it could be more general guidance about the manner in which one approaches certain things, which would be, if you like, less directive and more of a steer on the general principles that we should adopt. Guidance is a broad term.

Nigel Don: Indeed. I ask you again whether you are comfortable that you understand what is in the bill and what it will mean for your organisations.

Roger Burton: It is a broad, enabling bill. There is a lot of detail that is not in it and we do not yet know precisely what form that detail will take, but we do not have any difficulties with the principles of the bill, the general thrust behind it and the structure that it provides.

Dr Hendry: I suppose that some things might depend on how "sustainable economic growth" is to be construed and developed in policy and guidance. Until we know that, it will be difficult to tell whether there will be any conflict with other functions or codes of practice.

The Convener: Graeme Dey has a supplementary question before we move on.

Graeme Dey (Angus South) (SNP): In practical terms, how feasible is it for one code of practice to adequately take account of the divergent roles and responsibilities of the various regulators that are set out in schedule 1?

Dr Hendry: That will be ambitious, unless it is done at a high level. It is hard to say how it could be done at a more detailed level without an extremely extensive piece of documentation.

Roger Burton: I agree. Any such code would have to function at a high level. Much of what the bill intends to achieve concerns culture, and I would be thinking in terms of a high-level code that can cover the desired behaviours.

Graeme Dey: Are we looking at having a sort of pyramid structure whereby there would be a high-level code with something more specific to the regulators underneath that?

Roger Burton: That is conceivable.

Graeme Dey: Would that be preferable?

Roger Burton: Again, we act as a regulator in a number of different ways, so there would be a question about how the various regulatory functions that we have would be dealt with. However, where it was necessary and it added some value, I would not have a difficulty with that suggestion.

Bill Adamson: Similarly, I expect that there will be quite broad principles. My organisation is a Government department and we have a role of directing others in terms of regulatory functions. In fact, the vast majority of functions are carried out on our behalf by local authorities. To a certain extent, the code is likely to affect those who deliver on our behalf as opposed to us. In that sense, our regulatory function has been a relatively limited one. As I said earlier, ministers have already issued a specific code of practice that gives local authorities direction with regard to the detail of those functions. Therefore, if the code involves high-level principles, I do not envisage there being any conflict.

Roger Burton: In the planning system, we provide guidance for others to observe. We can see benefits in the code giving weight to that sort of guidance, which will help to create a degree of consistency of approach to natural heritage issues in the planning system.

Graeme Dey: You are saying that there would be a broad, overarching code for everyone and that, below that, you would continue to do the same things that you do now, where that was appropriate. Is that correct?

Roger Burton: Underneath that, there is policy as well. As I see it, the code is about how regulators conduct themselves. Policy will then guide the detail of how they do that.

Nigel Don: Do SNH and the FSA feel that the duty to contribute to "sustainable economic growth"—we will deal with the precise words in a moment—conflicts with their existing primary purposes?

Roger Burton: We do not see that as a primary purpose under the bill. It is expressed as an additional requirement alongside our other balancing duties which, as our written evidence states, include taking account of the interests of agriculture and forestry—that is, rural businesses—and the needs of social and economic development. We see the duty as complementing that.

We are aligned to the Government's purpose. We sit in the context of the Government's overarching purpose rather than in isolation, and we contribute significantly through the national performance framework, which is, in effect, the expression of sustainable economic growth, which is the Government's purpose. We contribute strongly to national outcome 12, and to others in lesser ways.

Bill Adamson: Similarly, we do not see any conflict in that regard. Indeed, we have strategic outcomes that are better regulation orientated.

We believe strongly that it is important that regulation is proportionate, targeted and smart, and that such regulation has the benefit of sustaining economic growth. In our sector in particular, the worst situation that can arise is that a food incident happens that undermines public confidence and, in turn, the economy.

We do not think of those things as being incompatible. In fact, one of our current corporate priorities is to support growth through better, smarter regulation. That seems to be wholly compatible with the objectives of the bill.

Nigel Don: Thank you.

Claudia Beamish (South Scotland) (Lab): Good morning to you all.

I invite each of the panellists to give their perspectives on whether the purpose and effect of the bill would change significantly if a duty to contribute to achieving sustainable development was included rather than a duty to contribute to achieving sustainable economic growth. There are European Union obligations in law on sustainable development, which come through into some areas of Scottish law and policy. For example, there is a sustainable development obligation in the planning framework, as you will know.

Dr Hendry: In recent years, many national obligations have been established with regard to contributing to sustainable development.

There are different ways of looking at the issue. Given that "sustainable economic growth" is not defined, it might be that it is to be refined and supplemented by policy and guidance. That has also been the case with sustainable development—there has been a reluctance to provide a statutory definition of that. I would prefer the sustainable development concept to be taken a little further and for there to be increased vigour in pursuing and supporting it through the use of indicators and by going back to the policy principles in the 2005 statement, because a great deal of endeavour has been built up around sustainable development in the past 20 years or so.

A lot depends on what is meant by sustainable economic growth. Does it mean growth that is sustainable in economic terms, or does it mean economics that is sustainable in environmental and social terms? If sustainable economic growth was defined as growth that is within the carrying capacity of the planet, that would be an interesting innovation, but I suspect that it is not one that we are likely to see.

My preference would be for the duty to relate to sustainable development and, as much of my focus is on the environmental part of the bill, I believe that that would be more appropriate for SEPA and for SNH, although I take on board that SNH might have a slightly different view.

A lot comes down to how sustainable economic growth will be defined. Sustainable economic growth and sustainable development are not the same concepts. If we look at the current draft planning policy, there are paragraphs on each of them, but it is clear that they are not the same. Neither of them is defined there, either.

I suppose that there is an argument that it is problematic to put such broad and complex concepts into legislation, regardless of whether a definition is provided—there are arguments either way on that. It would be a different bill if the duty related to sustainable development, and I think that the evidence that the committee has received would have been substantially different. The provision has attracted a huge amount of attention, to the extent that it might be diverting attention from other parts of the bill that are extremely important.

Claudia Beamish: I would like to hear from all the witnesses, if that is okay.

Roger Burton: I have a lot of sympathy with a lot of what Sarah Hendry said.

For us, it is clear that the scope of the bill would be different if the duty related to sustainable development rather than sustainable economic growth. We would prefer sustainable economic growth to be expressed in terms of the overall Government purpose to help to guard against any reinterpretation of it at a later stage.

Beyond that, the use of either term would not concern us greatly. Which term is used is a matter for others to consider. In many ways, the term "sustainable development" is even broader than "sustainable economic growth", and its use in the bill would take us into a different area in terms of the regulations that contribute to it.

10:00

Bill Adamson: From our perspective, the term "sustainable economic growth" might be better, in that we envisage that we will minimise burdens on business and protect the marketplace by ensuring that regulation is effective and we do not have the incidents that I described, and through that mechanism we will ensure that the economy will grow. Using the word "development" might be a bit more difficult for our organisation, because it might involve more of a commitment to proactively do things that might be outwith our remit. The current wording aligns with our remit in that it is about having a proportionate regulatory regime, which in itself will protect the marketplace. In that sense, promoting "sustainable development" seems slightly wider and it might be more difficult for us.

Claudia Beamish: Are you saying that having the term "sustainable development" in the bill rather than "sustainable economic growth" would put the Food Standards Agency in some difficulty? I do not quite understand that. Correct me if I am wrong, but my understanding is that, to some extent, you would have to take into account people and the environment in your regulatory obligations.

Bill Adamson: I would not go so far as to say that it would cause us a problem. It comes down to semantics, I suppose, and what the words mean to different individuals. As a personal observation, the current wording sits better with me as I see us performing a function that would support that. It is less clear to me what role we would perform in delivering sustainable development.

Claudia Beamish: I take your point that there are questions about definition.

Bill Adamson: I would not say that we could not live with that wording—let me put it in that way. Our clear idea is that, through protecting the marketplace, we will be engaged in some fashion in helping to sustain economic growth. However, that is not our primary function, which is to protect public health.

Claudia Beamish: The point that I would make to all of you is that we have the wording "sustainable economic growth" but we do not seem to have a clear definition of that, either. Would that cause your organisations difficulty?

Bill Adamson: Section 4(2) is important. I think that we all envisage that some guidance will be provided that will clarify the expectation. I anticipate that, if anything in that guidance is incompatible, we will need to deal with that. At present, it is difficult to get to the nub of the matter. I know what I think the intention of the bill is, and I am content with that, but we need to see the detail in the guidance. The bill states:

"The Scottish Ministers may give guidance".

That will be essential to ensure that we clarify what is intended so that we do not jump to conclusions about what is meant.

The Convener: Graeme Dey has a supplementary question on that point.

Graeme Dey: Essentially, we are talking about environmentally responsible sustainable economic growth. Is that not the definition of what we are looking for?

Dr Hendry: It might be what we are looking for. To me, the term "sustainable economic growth" shifts the meaning further to the economy and away from the environment and society. To me, that would be the point that one is trying to make by selecting that term as opposed to "sustainable development". The term "sustainable development" gives more emphasis to the environment than the term "sustainable economic growth" does.

Roger Burton: Policy is clear that sustainable economic growth includes care for the natural environment, among a range of other interests. In a sense, the issue is how far legislation should rest on current policy for its definitions or whether that can change over time. I do not want to form a hard view about what should happen, but we might need to think about that issue if we are to create clarity on the subject.

Claudia Beamish: Given what you have all said, it might be somewhat challenging to answer my next question at this stage because of the lack of clarity about the detail of the regulation. How do you see a meaningful report coming forward on your performance in applying the duty? I am sorry—I mean the duty as it stands, namely the duty to contribute to achieving sustainable economic growth.

Roger Burton: That raises some questions in that, under the Public Services Reform (Scotland) Act 2010, we already report on sustainable development. I am not quite sure how we would tease apart a requirement to report on sustainable economic growth alongside that report on sustainable development. I would need to spend more time thinking about what such a document would look like and how much more work it would create to separate, somewhat artificially, those two closely intertwined concepts, accepting that there are different shades and breadths. The duty to report on sustainable development alone is not entirely easy, because our whole annual report contributes to sustainable economic growth and sustainable development, so everything that we do has a role to play in that sustainable dynamic.

Bill Adamson: The Food Standards Agency Scotland would not necessarily have a problem with providing auditable evidence. We are a United Kingdom department that is already required to provide evidence to the regulatory scrutiny committees at Westminster on what we are doing to meet the better regulation agenda down there. We also do that informally in Scotland—for example, by providing to Russel Griggs's regulatory review group examples of what we are doing to support that agenda—so it would not cause us a problem.

The only issue from our perspective is that we have more than one function, in that much of what is done on our behalf is done by local authorities. If we were asked to report directly both on what we are doing as a Government department and as a regulator, where we are a regulator, and on what is being done on our behalf by local authorities, there would need to be clarity about the mechanism for reporting that back.

Jim Hume (South Scotland) (LD): Do the witnesses believe that a code of practice is enough to help people understand what sustainable economic growth means in practice?

Roger Burton: I suspect that it can go a long way, but it may not be sufficient on its own. There is a range of other documents and policy statements that help to shed light on that, and I would not look to the code of practice to provide the one and only definition. Statements in the likes of national planning framework 3 and the Scottish planning policy are important in shedding further light on what Government means by sustainable economic growth.

Bill Adamson: It is difficult to answer the question, because we are being asked to comment on something that we have not yet seen, but I hope that the code of practice and the guidance envisaged by the bill will clarify exactly what is meant, so that we can be clear about that in our own minds. The bill provides both for guidance and for codes of practice, so one would hope that those would indeed help to clarify the matter.

Dr Hendry: It is a concept that will undoubtedly lend itself to endless debate and discussion, depending on what the code and/or the guidance says. There is a raft of policy that can help to clarify the issue, but I think that, like sustainable development, it will continue to be much debated, and there may still be differences in the ways in which certain regulators and other interested parties reflect on and carry out the duty.

Jim Hume: It could be argued that the provisions on whom to consult are fairly narrow. Do the witnesses agree with that? Should the consultation be broadened out, even to the general public?

Dr Hendry: It would be highly desirable for any provision in the code of practice, and any regulation under part 1 or part 2 of the bill, to be subject to extensive consultation. In all matters of public law where there is a requirement to consult, I would like to see the public added to the list of consultees. The Government generally does consult the public, and that is right and proper, and in matters environmental it is very important. There is a provision in part 2 of the bill with a list of consultees that does not include the environmental non-governmental organisations, which seems extremely strange. In general, I would like the public to be consulted.

Jim Hume: Do other panel members wish to comment on that point? It is quite important.

Roger Burton: I have not looked closely at those provisions and schedules but, in principle, SNH would prefer an open process that takes account of all views.

Bill Adamson: Similarly, the Food Standards Agency has a role, which is, to a certain extent, putting the consumer first. Therefore, in our consultations, we would always consult consumers. I envisage that the Scottish ministers would intend to consult the public under the “such other persons” provision, but I take the point that it is not explicit.

Graeme Dey: My question is perhaps best directed to Mr Burton. Will you provide us with examples of activities that could be deemed to contribute to sustainable economic growth but could take place on protected sites?

Roger Burton: Yes. The most obvious is the fact that nearly all protected sites are farmed and many have commercial forestry on them. Those activities contribute to economic growth. At a management level, that is really no issue.

How it would work with built development would be more complex. I cannot quote you precise examples in which planning consent has been given for developments that impinge on small parts of designated sites because they have not adversely affected the integrity of the site. I am just trying to think whether I can help further with that—no, I am sorry, I cannot.

Graeme Dey: Perhaps Dr Hendry has some thoughts on that.

Dr Hendry: A huge amount depends on the nature of the activity and the specific features of the site to be protected. We would be keen for adequate protection to be in place and maintained for sites that are protected under European and national law.

I am sure that there are plenty of examples of agricultural activities that are compatible with designations of protected sites and other activities that would not be compatible—it might depend on intensity and scale—but I do not have any specific examples to give.

There would be no need to have an outright ban on any economic activity in any protected area, but it is important that adequate protection continues to be given and it would be a great pity if the duty was to be used in future to encourage activity on protected sites of any sort that would not have been permitted or encouraged at an earlier stage. That would be unfortunate.

Roger Burton: I recognise that this is not about specific examples and that there are differences in the level of protection; for example, there are sites with a national designation, such as sites of special scientific interest, and there are sites with the European Natura 2000 designation. However, the argument starts from a slightly shaky premise in the sense that protected sites contribute to sustainable economic growth in their own right because their protection means that some of the most important areas are safeguarded from harmful development while allowing the development to take place elsewhere where it will cause less harm.

Dr Hendry: Their contribution to the tourism industry is also of major importance in many parts of Scotland.

The Convener: Dr Hendry, you hinted earlier that you may have other comments to make about the bill. I ask you to give us a flavour of them just now.

Dr Hendry: Thank you, I appreciate that, because I have spent quite a lot of time looking at part 2 and my responses to the previous consultations mainly concerned part 2-type issues.

There could be greater clarity in the bill on two issues in particular. One concerns the hierarchy of offences in the context of the new enforcement powers that are being developed for SEPA. I am strongly in favour of those enforcement powers. It is hugely important that we move away from the current system, which is very restrictive in what can be done.

The significant environmental harm offence—the big offence, if you like—comes at the end of part 2. Before that, we have the information on the penalty scheme, a great deal of which depends on the Lord Advocate's guidance for how it will work. By my reading, it is not clear in the bill whether there will be the significant harm offence and then a series of offences that will be covered only by the penalty scheme. Will those offences also be subject to criminal prosecution? Will there be a middle tier of offences that are only subject to prosecution but do not represent significant harm, which requires "serious adverse effects"? There are some questions around that we will not really know the answers to until the regulations are at a much more advanced stage.

It is not wholly clear at the beginning of part 2 what it is all about. We know from policy statements and the consultations that have already taken place that the purpose is to integrate the big four environmental control regimes, but you would not really know that from reading the bill. It is not clear how the layers of offences fit together and it is not clear enough what the appeals processes will be. You have heard evidence from the Law Society of Scotland and Colin Reid about that. What happens with continuing breaches? What is the effect of a successful appeal? What is the effect of a failed appeal?

I understand that there is a balance to be struck between the enabling provisions and the detail, but I would have preferred a bit more detail to be in the bill so that we were a bit clearer about things before proceeding to the next stage.

The Convener: Thank you very much. If the rest of the panel are content not to make any further comments, I thank all the witnesses for their contributions.

We will have a short suspension so that the clerks can reorganise the room.

10:16

Meeting suspended.

10:28

On resuming—

The Convener: I welcome our second panel of witnesses on the bill. We will go around the table for brief introductions before moving to questions—those of you who witnessed the first session will have an idea of what those questions are; the rest of you will just have to guess.

I am Rob Gibson, the convener of the committee.

Jayne Baxter (Mid Scotland and Fife) (Lab): I am a list MSP for Mid Scotland and Fife.

Lloyd Austin (RSPB Scotland): I am the head of conservation policy for RSPB Scotland.

Claudia Beamish: I am an MSP for South Scotland and shadow minister for environment and climate change.

Graham Hutcheon (Scotch Whisky Association): I am the group operations director of Edrington, and I chair the Scotch Whisky Association's environment committee.

Richard Lyle (Central Scotland) (SNP): I am a list MSP for Central Scotland.

Dr Mark Williams (Scottish Water): I am the environmental regulation and climate change manager at Scottish Water.

Andy Myles (Scottish Environment LINK): I am the parliamentary officer at Scottish Environment LINK.

Nigel Don: I am the MSP for Angus North and Mearns.

Gordon McCreath (UK Environmental Law Association): I am the environment and planning partner at Pinsent Masons, and am here on behalf of the UK Environmental Law Association.

10:30

Alex Fergusson (Galloway and West Dumfries) (Con): I am the MSP for Galloway and West Dumfries.

Susan Love (Federation of Small Businesses): I am the policy manager of the Federation of Small Businesses in Scotland.

Jim Hume: I am an MSP for South Scotland.

Andy Rooney (South Lanarkshire Council): I am an environmental health officer in South Lanarkshire Council.

The Convener: Angus MacDonald MSP was occupying the next seat. He will be back in a minute.

Allan Bowie (National Farmers Union Scotland): I am the vice-president of the National Farmers Union Scotland and a farmer from Fife.

Graeme Dey: I am the MSP for Angus South and the deputy convener of the committee.

The Convener: I will kick off with a general question. Have you been content with the consultation process that has led to the bill, and do you think that it is consistent with the Scottish Government's principles of better regulation? I will spell out those principles in a minute, if you want.

Gordon McCreath: It would have been nicer to have been given a bit more information—that applies to the bill, as well. You have already had some discussion about the very general nature of provisions in the bill and how difficult it can be to comment on the code of practice when you do not yet have it.

The consultation has been good—I do not wish to do it down—but it would have been good to get some more detail, as that is where the devil will be in this case. The information that accompanies the bill could also have been a lot more detailed.

Lloyd Austin: I agree that consultation has been good, in so far as it has followed general practice. I agree with Gordon McCreath about the lack of detail and the lack of clarity around some of the issues. You discussed that with the previous panel and we will deal with it again, I am sure.

There is a lack of clarity for stakeholders. That is common to a range of Government consultations, so I do not want to pick on this one in particular. There is a lack of clarity about how the various views have been taken into account at the next stage and why comments have or have not been taken on board. Some of the decision making around the next stage is not clear to stakeholders.

Graham Hutcheon: We feel that the consultation process—not necessarily on the bill itself but on some of the subordinate legislation that will come forward later—was positive. Our industry provided resources to SEPA to help to model some of the simplification of the issuing of permits on sites, which proved to be worth while. SEPA met a wide range of operators across the sector on a number of occasions. The devil will be in the detail. Subordinate legislation is the key for operators, and the bill is very much an enabling one. The stuff that we saw during the consultation process was fairly positive.

Susan Love: I echo what others have said, but I would also point out the importance of understanding impact at this stage in the legislative process. The lack of modelling to feed into a business regulatory impact assessment at this point makes it difficult to make decisions. Our regulatory review group has highlighted that on many occasions as a weakness in our legislative process, and it is not good practice.

The Convener: So, with a piece of legislation for better regulation and the creation of a better process, business has not been able to even make a guess about the financial impact.

Susan Love: A piece of enabling legislation in which there is no detail about who will be affected by certain measures, how many businesses or organisations will be affected, what size those organisations are or what the cost impact will be is not ideal when people are making decisions.

Andy Myles: The consultation process has been conducted according to the standards and has been quite satisfactory, but the bill might have benefited from having stakeholder groups similar to those established to examine the details and broad issues before the Marine (Scotland) Bill was introduced. The many years of discussion between stakeholders across the spectrum was enormously beneficial in that process, with a stakeholder forum first ironing out some of the problems and details that are now giving rise to the discussions on the bill that you are required to host.

The Convener: We head into the meat of the matter now. Nigel Don will kick off.

Nigel Don: I would like to go back to the territory that I explored with the first panel, picking up on the regulators' duty in section 4. I warn witnesses that whether it should be "sustainable economic growth" or "sustainable development" or any other form of words is not my point; that is something that we will come to later. Section 4 gives the regulators a duty in respect of sustainable economic growth—or whatever it may be—and states that Scottish ministers may provide guidance and that regulators must take that guidance into account, but section 4(4) states that that does not apply to a regulator to the extent that it is already subject to a similar duty. My question to the witnesses is whether, in the context of any of the regulated bodies, it is clear or unclear how all that fits together and what duties those organisations will have.

Andy Rooney: My background is in environmental services. South Lanarkshire Council takes guidance from the Food Standards Agency Scotland, as Bill Adamson said earlier, and from the Health and Safety Executive on health and safety enforcement in our premises, so I have to say that I am unclear about where everything sits. It was suggested earlier that it was a pyramid arrangement, and that is probably the best way of explaining it, but if the local authority is to deliver on the day, the component parts have to be bolted together to ensure that we can achieve consistency in our approach.

Nigel Don: Given that a local authority will itself be one of the organisations that has a duty, is there a risk that you could end up trying to fulfil the guidance from the Food Standards Agency Scotland although it might be inconsistent with guidance given directly to you?

Andy Rooney: Potentially. I do not think that it is likely, but it could happen.

Lloyd Austin: I would like to make a couple of points. I understand Nigel Don's perspective on separating the discussion about the use of the terms "sustainable economic growth" and "sustainable development" and dealing with it later, but the answer to his main question depends in part on the conclusion of that discussion. In interpreting section 4(4), what you mean by "sustainable economic growth" or by any other phrase that you might put in its place will depend on whether you think you are already subject to a duty to the same effect.

Let us take SNH as an example of one of the regulators. It already has a duty under the Natural Heritage (Scotland) Act 1991, first to seek to ensure that everything done in Scotland is done

"in a manner which is sustainable",

and, secondly, to take into account social and economic matters, except where European legislation overrides that. Depending on how you interpret "sustainable economic growth", you could argue that SNH already has a duty to the same effect as that in the bill, or you might not.

Essentially, you are setting up an opportunity for a debate—or, in the worst-case scenario, an argument—and for confusion. You also need to ask how the new duty sits alongside the other duties that apply to all public bodies, as well as duties that apply to Scottish ministers. It is interesting to note that the one regulator not listed in schedule 1 is Scottish ministers.

The Convener: Indeed.

Gordon McCreath: I think that this is a good example of another area in which it would be helpful to have some indication of the intention behind the section. As a lawyer, I think that there are a number of interpretations that could be put on section 4, because of the point about the duty applying only when it would not be inconsistent with other functions. In addition, there is the concept of functions as opposed to duties. Are functions different from duties? I do not know. We could talk about that for a while.

There is perhaps more clarity in relation to SEPA's duties and how they fit together in section 38, which is to be welcomed, but, in general, I would say that there is not enough clarity.

The Convener: Does anyone else wish to comment on that point?

Allan Bowie: I reiterate what Gordon McCreath said. From a farming perspective, we are keen that economic growth is considered, but it is the detail of the provision and how it is implemented on the ground that concerns us. I am sure that such detail will be forthcoming.

The Convener: We hope that your surety is realised, but we will try to tease out whether that will be the case.

Andy Myles: First, I thank the convener for arranging for the clerks to circulate the additional paper that I sent in yesterday, which explains Scottish Environment LINK's fear that the discussion that we are having about the compatibility—or lack of it—between sustainable development and sustainable economic growth could easily end up being decided in the courts. As our paper indicates, our suspicion is that the courts would end up deciding that the duty to contribute to achieving sustainable economic growth was properly given by Parliament in the bill but that regulators did not have a duty to support unsustainable economic growth. It seems to me that unsustainable economic growth has been left out of the discussion and of the bill and that, in many respects, that has caused the problem.

If there is sustainable growth, it is inevitable that there will be unsustainable growth. If we leave it in the hands of the courts to decide the Government's policy, the Government will not achieve what it is looking to achieve because of the confusion that exists. That might be the case even if the clearest guidance in the world is issued on the distinctions between the two concepts. I noticed that it was mentioned at last week's meeting that a greater number of such cases are arriving in the courts. The committee has a duty to look down the line at what might happen to this law when it is passed.

Nigel Don: In the light of those comments—particularly those of Gordon McCreath—I wonder whether section 38 might be a better model, because it gives SEPA specifically a duty under subsection (1) of the new section that it inserts in the Environment Act 1995 and what might be described as sub-duties under subsection (2), which apply only in so far as they are not incompatible with the provisions of subsection (1). Would that be a preferred model for introducing a requirement to contribute to achieving economic growth? The relevant provision is in paragraph (b) of subsection (2) of the new section that section 38 seeks to insert in the 1995 act.

Gordon McCreath: From the perspective of clarity of the law, it would be, but I am not sure exactly how that would fit in with other regulators

and their duties. Section 38 certainly provides clarity on where SEPA's duty to contribute to achieving sustainable economic growth sits and whether it is a balancing duty or a primary duty. In that case, it is clearly not a primary duty.

Nigel Don: I am suggesting that the balancing duties might be different for different regulators. Is that approach better from a structural point of view?

Gordon McCreath: Yes.

The Convener: Does anyone else have comments to make on that point? I do not want to pitchfork Andy Rooney into the discussion, but his authority might have a lot of dealings with SEPA. That is fine, because a definition is provided of what SEPA must do, but there are other regulators that South Lanarkshire Council has to deal with. Should as much definition of what they must do be provided as is provided in section 38?

10:45

Andy Rooney: This perhaps comes back to what I said earlier about our engagement with the Food Standards Agency and the Health and Safety Executive. There is perhaps a difficulty there. I accept the point that you are making about greater clarification. At this point, I must step back and say that we will need to revisit the matter and see where we stand overall.

Alex Fergusson: The question that I was going to ask has principally been covered, but I ask Mr Rooney to expand a little bit on what he has said. Given the points that have been made about the lack of detail and clarity that is currently available, can you say how the proposed legislation might impact on your day-to-day business as a local authority?

Andy Rooney: As far as our enforcement role is concerned, we have primary objectives to safeguard public health and to ensure that there is fair trading, so that reputable companies are not disadvantaged by rogue traders.

The provisions in relation to the code of practice sit at a very high level. We seek to work with business and to encourage development, but there is a difficulty in balancing things to ensure that we are not compromising public health for the success of business. That is the difficulty that I see.

Alex Fergusson: I understand that point about the interaction with business. Can you comment on how the eventual legislation might affect your dealings with SEPA, SNH and the FSA?

Andy Rooney: We work together with SEPA, and we have many elements of commonality. SEPA is also a regulator for the local authority in relation to our waste management sector. I see that there will be positives, but until the full detail is there, the issue is a difficult one.

Alex Fergusson: I appreciate that. It is useful to have a local authority's point of view.

Jayne Baxter: We have covered some elements of this question, but I want to bottom it out. Would the purpose and effect of the bill change significantly if a duty to contribute to achieving sustainable development was included, rather than sustainable economic growth?

Lloyd Austin: The bill would become a lot clearer and a lot more consistent with existing government policy and existing statute if that was the case. Sustainable development is well developed as a concept in international, Scottish and European policy making and guidance, but sustainable economic growth is a new concept. Sustainable development is already a duty in a lot of Scottish legislation, such as the Planning etc (Scotland) Act 2006, the Climate Change (Scotland) Act 2009 and the Marine (Scotland) Act 2010.

If the use of the phrase "sustainable economic growth" is intended to make regulation more biased towards economic aspects than towards the other two pillars of sustainable development, we would be very concerned, and we would wish for that to be shifted. If that is not the Government's intention, any new duty should follow the consistency of previous legislation, policy and so on. That there is a question about what is the Government's intention is an indication of the lack of clarity that is highlighted in the Law Society's written submission, which states:

"Regardless of the political merits of this provision"—

in other words, whether or not there is an intention to have bias in respect of the pillars of sustainable development—

"there are two problems with the imposition of a duty to contribute to sustainable economic growth. The first is the uncertainty of what this phrase means ... is it economically sustainable growth, or economic growth within the limits of (ecological ... sustainability?"

That question is completely unresolved and unclear. The practical effect of the change will remain unknown until the committee can answer it. If you answer it by seeking a bias towards continuation of sustained economic growth, that would be a very disappointing move after 20 years of developing the concept of sustainable development, which is about ensuring that social and economic matters are taken into account, and about living within the planet's environmental limits.

Andy Myles: If the definition of "sustainable economic growth" is economic growth within

ecological limits and taking into account social considerations, it is already part of sustainable development. It would not make sense, on the ground of consistency in the law, simply to stick in the phrase "sustainable development" instead of "sustainable economic growth".

I have an understanding of how the Government has argued over the past six years that sustainable economic growth is defined not just as economic growth that can be sustained. If it is perceived just as economic growth that can be sustained—as any old economic growth—or if that is the definition that comes out in the guidance, we are on the road to serious conflict.

Alex Fergusson: I will pursue that point a little. I am reminded that at least two of the three witnesses on the previous panel suggested to us that replacing the phrase "sustainable economic growth" with "sustainable development" would provide even less clarity than currently exists. The representatives of SNH and the FSA feel that there is already considerable emphasis on sustainable development in the duties that they have been tasked to undertake. There seems to be a conflict, so I seek a bit of clarity, which I think we would all appreciate. I am not sure that we are all singing from the same hymn sheet.

Andy Myles: I have to say that I was slightly confused by the evidence that was led by the two agencies in the previous panel, for the simple reason that—as Lloyd Austin pointed out—they have duties in respect of sustainable development and reporting on sustainable development. I therefore do not know how the inclusion in the bill of a duty of sustainable development on those agencies, as regulators, would make life any more complicated. I really did not understand at all the points that they made. Scottish Environment LINK has been told by Scottish Natural Heritage that we must promote sustainable development as part of our grant conditions, so it is obviously a concept that the organisation understands fully. I cannot see where the confusion lies.

What is more, SNH stated in its written response to the consultation that

"In addition, there is a risk that by applying ... a duty"

to sustainable economic growth, public bodies would

"when making decisions or providing advice ... be open to legal challenge that the duty has been wrongly applied."

The paragraph continues in that vein. The committee should look closely at that submission from SNH.

For what it is worth, my view—I think that I speak for the 35 NGOs that are members of Scottish Environment LINK—is that sustainable development has been worked on since the Brundtland commission and the Rio de Janeiro conference, and is a part of international, EU, UK and Scots law. As with any concept that is placed in a legal context, it will be the subject of debate and definition, but it has been well worked on and it allows for the idea of sustainable economic growth.

I cannot see why, if sustainable economic growth is a subset of sustainable development, it is necessary to make a change. I have serious fears that that will merely introduce confusion to the law, and conflict in the courts.

The Convener: We will chew over those things, and will discuss the issue with the minister soon.

Jim Hume: Would a code of practice be enough to clarify what sustainable economic growth means or do we need more?

Andy Myles: A code of practice might help to clarify the matter. It would be binding in law, so the suggestion does not undermine any of my comments. I just underline the fact that there is already an agreement between the UK Government and the four devolved Administrations on a definition of sustainable development. The agencies have been working with it already, so I am not sure that a code of practice would, in fact, add anything to the situation. Further, it could confuse matters if the definition of sustainable economic growth proved to be less compatible with sustainable development than I think is intended by the Government.

A code of practice could make matters better and could be a better route to getting things into law, but it could also cause a lot of trouble.

Gordon McCreath: It would depend on what the code of practice said. We need clear detail on whether we need sustainable development or something else.

The Convener: Consulting widely enough is important, too.

Jim Hume: I was just going to make that point. Some witnesses have felt that the consultation was wide enough, but do the panel think that consultation should include the general public or be otherwise wider?

Dr Williams: The consultation is critical to the process. The lead-up to the bill and the consultations that were carried out by SEPA and the Scottish Government in relation to their elements of the process provided us with a huge opportunity to learn more about the direction of travel. The important thing here is that we set out principles and enable those principles to be widely scrutinised and understood. The full range of measures and guidance that will come into the

code of practice need to be open to that level of scrutiny.

Lloyd Austin: It would be good if there were as wide a consultation as possible on the code of practice. Section 6 should specify that it should be as wide as possible and that it should include NGOs and the public.

It would be helpful if Government were to indicate how it took into account responses to the consultation. Another piece of legislation contains a provision that says that, when ministers consult on something and lay a final version before Parliament, they must also produce a report on the consultation process that says how the responses to the consultation have been taken into account. That ensures that Parliament is informed about the consultation process when it considers a bill.

I cannot recall whether that concerns the access code or something similar—I will research that and get back to you—but it is a procedure that I fully support.

Allan Bowie: It is important to get the principles right. It is great to have wide consultation—our members have no issue with that. However, if the principles are not right, we are just going to confuse things even more. That will make things hard to implement from a practical point of view. I do not doubt that the principles will be right, we simply need to think of the consequences if they are not. No pressure, convener.

The Convener: Thank you for that—as ever. We are here to tease those things out.

11:00

Graeme Dey: Is a single code of practice likely adequately to take account of the divergent roles and responsibilities of the regulators, as set out in schedule 1? Would we, in reality, need a pyramid system with an overarching broad code, and supplementary regulator-specific codes—perhaps taking in existing practices—sitting below that?

Andy Rooney: I have already commented on that from a local authority perspective.

Lloyd Austin: I would agree with one of the witnesses on the previous panel; to cover everybody, the code would have to apply at a high level. I agree with Allan Bowie with regard to the code being at a high-principles level. Would more detailed codes be needed underneath that for individual regulators? That would depend on the outcome of the previous discussion about the impact on other regulators in relation to section 4(4) and the definitions of sustainable economic growth and sustainable development. The second part of the question cannot be answered until you have resolved the debate that you were having earlier.

The Convener: We move on to part 2, chapter 1, which is on environmental regulations.

Richard Lyle: Do the witnesses consider that the new focus on

"protecting and improving the environment"

will serve the needs of both business and the environment? Are the definitions in the bill adequate and clear?

The Convener: That question refers to section 9.

Gordon McCreath: Will the focus help with the balance between business and protection of the environment? That question brings us back to what we have been talking about for the past half an hour or so: how will the provisions interact with whatever we mean by sustainable economic growth? Is the purpose clear? I understand that some of the drafting has been based on existing legislation, which is welcome. In particular, the definition of "environmental harm" eventually tracks through into SEPA's duties and is familiar stuff to environmental lawyers.

There is one exception: the final paragraph of section 9(2) refers to

"impairment of, or interference with, amenities or other legitimate uses of the environment."

That strikes me as being an incredibly wide provision. Guidance and further detail on what it is intended will be covered by that would be very welcome.

Andy Myles: It is a pleasure to move on to bits of the bill in respect of which, in our consultation response, we definitely support the general approach.

We have an issue with the use of the term "environmental activities" in section 9, however. We suspect that it means:

"activities which reduce or eliminate pressures on the environment and which aim at making more efficient use of natural resources."

In our written evidence, we go on to suggest that

"A more appropriate term should be substituted—such as 'activities potentially harmful to the environment'."

The rather bland phrase "environmental activities" is open to interpretations that could include going for a walk in the park or digging the garden. In fact, it is fairly clear from a reading of the context of section 9 that it means activities that are potentially harmful to the environment.

On the general point about business and the environment being compatible, I have no doubt whatever that, in the context of sustainable development, business and the environment can get on very well—as long as the principles of sustainable development are considered.

Graham Hutcheon: I read the briefings on the bill and I think that compatibility between the environment and business is essential. Business is part of the society that we live in, so it is not in business's interests to destroy the environment. That is particularly the case in my sector. The environment is a key factor in the global marketing that drives our exports.

The important point about part 1 of the bill, in relation to SEPA's management of our regulated industry, is that there is an attempt to move the focus away from compliant organisations—using a lighter touch in the administration of regulation, as opposed to regulation itself—and to direct it towards the unregulated and illegal activities that go on, which seems to be perfectly sensible. A compliant organisation or sector probably does not need many visits and assessments, so simplification of the system will reduce costs for SEPA and for regulated businesses. The general principles of the bill are about simplifying the system for businesses that generally try to comply with regulations, and directing resource at organised crime and non-compliant organisations.

Allan Bowie: It is also about getting businesses to change practice—and recognise that they must change—if there is an issue or they are not doing the right thing. I would hate to think that we must go through the courts to rectify everything. It is about getting the right mindset. We are conscious of what the Scotch Whisky Association is doing and we are part of that; the last thing we want is to have our business interests affect that.

Lloyd Austin: We support effective and transparent regulation. In the Government and SEPA's previous consultations, we have supported in principle the move towards what the Government described as better regulation, in so far as that means simplifying administration and processes for industries and activities that are compliant, and concentrating effort on those that are not compliant or which are in breach of regulations.

The key issue is to ensure that the objective—the environmental outcome that regulation is seeking to achieve—is achieved. That means that although a lighter touch might be taken to administration in relation to businesses, individuals and activities that are achieving the outcome, a harder approach must be taken to those that are not doing so. That caveat is important.

Claudia Beamish: Are the definitions in section 9 clear and adequate? Section 9(2) defines "environmental harm" as harm to humans and a great many other things—I will not read them all out. Evidence was provided in a written submission—I am sorry, I cannot remember which one—that biodiversity is not in the list. We cannot have a massively long list, but do the witnesses think that the definition of harm covers enough, in a broad sense?

Gordon McCreath: I think that it does. Colin Reid and others have mentioned biodiversity, which links to ecosystems. Ecosystems are mentioned in the definition. I cannot quite spot the reference, at the moment.

Claudia Beamish: It is in section 9(2)(b)(iii).

Gordon McCreath: I have no objection to the definition; it is familiar stuff to environmental lawyers, who see such wording not just in legislation but in contractual provisions. I assure you that the lawyers who draft the contractual provisions intend them to be as wide as possible. The definition is very wide—indeed, I have some concern that paragraph (e) of section 9(2) is too wide.

Jayne Baxter: Should the provisions to consult on relevant regulations apply to the general public rather than solely to regulators and other persons whom Scottish ministers "think fit"?

Gordon McCreath: Yes.

The Convener: That is simple.

Lloyd Austin: My answer is the same as my answer to the consultation question that Jim Hume asked.

The Convener: Okay. Does Susan Love have any points to make?

Susan Love: No—I have no objection to the definition.

The Convener: In that case, we move on to the next question.

Angus MacDonald (Falkirk East) (SNP): I apologise for not being here for the start of this evidence session. There was an issue that had to be dealt with.

My question follows Jayne Baxter's question about consultation on relevant regulations on environmental activities. Does the panel consider that regulations should be produced subject to the affirmative procedure, in order to allow detailed scrutiny of them?

Gordon McCreath: Yes—there is no question about that. The bill will lead to a rewriting of the entire corpus of environmental law. In his written evidence, Colin Reid makes the compromise point that, although scrutiny of all the regulations might not be a good use of parliamentary time, there is no doubt that the very first set of regulations should be scrutinised at a technical level of detail. The regulations will set out how this is all going to work for the entire country, and the idea that they should be simply laid before Parliament subject to negative procedure is a difficult one to go with.

Andy Myles: I agree completely with Gordon McCreath that this very important set of guidance should be subject to affirmative procedure.

The Convener: It would be a good idea to have more MSPs involved and more time for that.

Andy Myles: I said that last week, convener.

Graham Hutcheon: If I could leave the committee with one message, it would be my total agreement with what Gordon McCreath just said. The subordinate legislation is where the real detail will be and where the real impact on us will happen. We need to scrutinise it as fully as we have scrutinised the first part of the bill.

Dr Williams: I agree completely.

The Convener: Thank you. There is unanimity on that, by the sound of it. Is that okay for you, Angus?

Angus MacDonald: Yes.

The Convener: Let us move on to the powers of enforcement. How is this package of provisions going to work in practice? For example, what will it mean for industries such as whisky, aggregates and farming, where multiple permits for different regimes might be required across the business? How will companies that operate multiple sites be affected? Are you content that SEPA will apply licensing and regulation consistently across all sites?

Dr Williams: Scottish Water has a vast number of sites throughout Scotland that are subject to regulation through SEPA and through permitting, with the same site often under both water and waste regimes. We have been keen to support integration so that we can take a simplified approach to managing the interaction with SEPA and so that we can understand more clearly how things are moving forward. That will involve working with SEPA to understand, for example, the procedure at a site where there are both discharge licensing and waste management facilities. We are supportive of the approach, but we need to see how it works in practice by working jointly with SEPA.

There are examples of single permits that cover multiple sites. For instance, we have introduced a licensing regime for all our networks, which cover multiple outfalls and assets within a large geographical area. Such things can work, but it takes a lot of time and attention.

In broad terms, we are supportive of the proposed approach and are working with SEPA to understand how that can work in our sector.

Graham Hutcheon: My answer is along similar lines. Our industry is quite keen to look in detail at integrated permitting. The one note of caution is that we do not want integrated pollution prevention and control regulations lite—that is, extensive and complicated legislation that is suited to large operators being applied to small, low-risk units around the country. The legislation must be appropriate for and proportionate to single permits. In general, however, we fully support the simplification of permitting.

In addition, we support the idea of corporate permits, which would mean that, when we looked at an environmental management system for a business, we would not have to visit six or seven sites because the corporate process—not the environmental impact, but certainly the system—would be the same on every site.

11:15

Allan Bowie: We reiterate that point. We have a lot of small businesses and we fear that, if the heavy hand of corporate big business is landed on them, they will just go into meltdown. I give due credit to SEPA for looking at catchment policy and working with farmers. It is listening and is implementing a simplified scheme, while conscious that regulation must still apply—that is the crucial bit. I reiterate what Graham Hutcheon said about big corporate business.

Andy Myles: I agree that a good deal of simplification is going on in the bill, as has been discussed, and that the variety of tools that are included in the bill will allow SEPA and business to form suitable relationships. However, on SEPA's powers of enforcement, I agree completely with what Graham Hutcheon said about the bill's purpose being to ensure that the regime takes a lighter touch on one side, for the firms that are following and meeting the standards, to allow SEPA to concentrate its enforcement efforts on those who are polluting the environment or breaching the regulations.

We have questions about whether the enforcement powers in sections 12 and 15 are strong enough or should be strengthened. We would like SEPA to have the powers to get the bad guys who are distorting the markets through their activities, which fall below the standards, and to take them out of operation.

The Convener: We may come on to points about that.

Lloyd Austin: I agree with the broad principles of the approach that the bill applies, which is consistent with the better regulation approach that was discussed. We put some details on that in our submission.

I draw attention to the provision on the size of the monetary penalty in section 16(5)—

The Convener: We will come on to court powers and monetary penalties.

Lloyd Austin: Section 16(5) addresses the issue of ensuring that the methods that are adopted relate to the environmental outcome that we are trying to achieve and addresses the business of ensuring that no financial benefit arising from the offence accrues. I ask for the last bit of that to be altered to allow SEPA to have regard to the financial benefit, so that businesses at the wrong end of the scale that benefit by cutting corners can be hit in order to sort out the market and create a level playing field for those who are trying to comply.

Claudia Beamish: Does any of you have concerns about how marine licences will fit in?

Andy Myles: We took part in the BRIA exercise with officials to look at marine licences. We have serious concerns about how marine licences will fit into the process, particularly given the attempt to standardise the appeals process and make it as short as possible. At our meeting with officials, we argued—and we will continue to argue throughout the bill process—that there are serious questions about compliance with the Aarhus convention on access to environmental justice, which are not being taken fully into account.

Lloyd Austin: I agree fully with what Andy Myles just said, but I reiterate what we said in our written evidence and what Professor Reid said in his evidence: that the marine licence appeal provisions are yet another ad hoc appeal provision. Across environmental regulation and environmental legislation, there is a range of appeal procedures, to which different systems apply. Sometimes appeals are made to the sheriff court, sometimes to the High Court, sometimes to the Scottish ministers and sometimes to the Scottish Land Court. There are different procedures and different timescales.

I simply refer to the commitment in the Government's manifesto to explore the option of an environmental tribunal or court to simplify all those appeal provisions into one system. To carry on making ad hoc changes before we have done that review and explored the options of a simplified one-stop shop is an unfortunate continuation of an ad hoc approach.

Gordon McCreath: The UK Environmental Law Association heartily endorses that.

Andy Myles: The bill seeks to make an ad hoc change to an ad hoc procedure that has never been used so far. We do not know that the licensing and appeals provisions in the Marine (Scotland) Act 2010 are broken, and it seems remarkably odd that we are replacing them before they have even gone into operation. If it ain't broke, why are we fixing it?

The Convener: We note those points. Are you confident that SEPA has the ability fairly to determine the balance of probability in relation to proving that an offence has taken place?

Gordon McCreath: I have no doubt that SEPA will give that its utmost. To me, the more important point is how the appeals mechanism will deal with that. Will it be adequate to ensure due testing of the balance of probabilities? What will happen if someone is successful or unsuccessful in an appeal?

If I was to pick up on one gap in the bill above all others that requires filling and ought to be filled at this stage, it would be the need to say more about the interaction between SEPA's jurisdiction and the criminal courts' jurisdiction. There is a fundamental question on which we have no information. It looks as though, if SEPA imposes a penalty on someone, they can take that and cannot then have criminal proceedings raised against them, but it is not entirely clear whether they will nevertheless have an offence on record. If SEPA imposes a penalty on someone, does that person have the option of saying that, because a criminal offence is involved, they are not willing to have the decision against them made on the balance of probabilities and they would like to take the matter to the courts?

The Convener: Are you confident that SEPA's powers of enforcement will be proportionate? What discussions have any of the parties represented here had with SEPA on the matter? Have the local authorities had none?

Andy Rooney: None that I am aware of.

The Convener: Has Graham Hutcheon had any discussions with SEPA about enforcement?

Graham Hutcheon: We have had discussions, but we arrived at the same lack of clarity about how the mechanics would work. There are some positive things in the provisions. Having access to voluntary reparation is important, because it prevents us from going down the costly route of litigation. However, if a case goes to the courts, the courts will decide, I guess. We have reached no absolute conclusion and further clarification is required.

Allan Bowie: It is correct to say that one issue is the balance of probabilities. However, the appeals process is also an issue. The problem is really sections 13(6)(b) and 16(6)(b), which say that the grounds for appeal

"do not include the ground that SEPA failed to comply with guidance issued to it by the Lord Advocate".

Who will check SEPA? I am concerned that the only way to rectify the situation will be to go through the court procedure. We are trying to avoid that. If SEPA failed to comply with guidance, why should we have to go through an appeal?

Why does the thing have to stick? Can someone give me clarity on that?

The Convener: We will seek clarity—that is for sure.

Susan Love: I know that the committee will come on to sanctions. We have discussed with SEPA over the past year or so the anxiety that a lot of small businesses might feel about the discretion that SEPA will have to hand out sanctions and whether a small business will feel that it has the right to appeal and has been judged fairly. I am concerned about whether small businesses will feel that they are informed enough and whether they will be at a disadvantage, in that they will take whatever penalty is handed out to them because they will feel that they have no other option and cannot contest it.

Jim Hume: Do panel members think that the cap of £40,000 on fixed monetary penalties is appropriate? Should there be no cap, or should it be much lower?

Susan Love: Having read the evidence that the committee has received on the matter, I think that my view will probably be different from some of the others. Our question to SEPA is about the lower level of fixed penalties, which we believe might be about £500 to £1,000 for an individual or company for a relatively minor offence. I do not know what the definition of a minor offence would be, but it is easy to envisage a lot of small businesses being unaware of their responsibilities, particularly in relation to carrying waste. A fixed-penalty fine of £1,000 would be a huge sum for a small company. I am concerned about the clarity of the procedures, how and in what circumstances the fixed-penalty fines will be used, how we will ensure consistency and what monitoring will take place.

The same is true of the variable penalties that can be applied at SEPA's discretion. A penalty of £40,000 might not seem much proportionately for a large multinational company, but it would be a huge penalty for an individual company.

Andy Myles: I agree entirely with Susan Love that, with regard to penalties, a distinction must be made between the large corporate business and the small business. In general, though, we suggested in our written evidence that the cap should be lifted in several areas. Indeed, we suggested that the cap should be taken off completely for the provisions in section 26.

We should remember that for some cases £40,000 or £50,000 would be a drop in the ocean compared with the damage and costs involved. The enforcement powers and penalties are not being introduced so that SEPA can charge around the country using them, but SEPA must have a proper stick if it is to walk quietly, as Graham Hutcheon and others have suggested. We ask Parliament to ensure that the stick is adequate for dealing with the really serious dangers to Scotland's image, which is crucial for our tourism industry, whisky industry and food and drink industries and for a series of other economic purposes in Scotland.

Scotland has a history or reputation—certainly in comparison with the rest of the UK and some European countries—of not fining particularly hard. Our fines have been a lot lower than those faced by companies in England. SEPA needs to be given significant powers, not so that it can run around battering small or large companies, but so that it can deal with the exigencies and defend Scotland's reputation, environment, economy and people.

11:30

Lloyd Austin: I agree with Andy Myles and Susan Love. The key principle is to link the size of the penalty to the environmental impact and to the potential financial benefit that would be gained by subverting the regulation. That takes us back to sections 16 and 27(2). As a precedent, I refer the committee to the implementation of the EU greenhouse gas emissions trading scheme, in which the penalty is €100 per tonne of CO_2 emitted above the limits. It is absolutely clear in that climate change regulation that the fine is linked to the environmental impact that has been caused by the breach of the activity.

A large operator that is working at the margins of the law could find that £40,000 is a small enough fine to make causing a significant environmental impact worth while in a sense. We would like the limits to be raised or removed, but with the condition that the penalty should be linked to the size of the environmental impact and the financial benefit that is accrued, to address the issue about small companies and minor breaches that Susan Love raised.

Gordon McCreath: There is a fundamental question about where it is appropriate to draw the line between what SEPA does and what the criminal courts do. On the line being drawn a lot higher, we know that the civil sanctions regime down south would allow variable monetary penalties of up to £250,000. Whether that is an appropriate penalty for SEPA to go around handing out is a political decision. From a legal perspective, it needs to be absolutely clear in those situations that the appeals mechanism is adequate.

A more interesting question is about the extent to which there is a policy drive behind the reforms to put fines up. On the face of it, we might look at the variable monetary penalty powers as they

stand and say that, if SEPA has the discretion to impose fines of up to £40,000, that is consistent with where the maximum fines lie at the moment, but we seldom see those amounts coming in.

Is the intention that SEPA will hand out higher fines? The financial memorandum that accompanies the bill suggests not; it talks about fines of £3,000, which is the level that we are all fairly familiar with. There are fundamental questions about where the barrier lies between SEPA's remit and the criminal courts' remit and about the Parliament's intention on where the fine levels should fall.

Dr Williams: It is recognised that the purpose is to give SEPA a greater range of tools to allow it to deliver on its functions to protect the environment. That is understood. We need much more clarity on the guidance under which SEPA will have to operate on the range of activities that might be subjected to such a thing.

In the wider context of enforcement, how does focusing on those who are getting it wrong but who can work with SEPA to make things better sit in the sliding scale of activities and joint work that we might do with SEPA in a range of other areas? For example, we will work quite closely with SEPA on a number of things over the next five to 10 years that relate to investment to improve the environment. Those are good examples of sectoral joint working with SEPA that would not from our perspective come anywhere near higher-end enforcement but which will deliver substantial environmental improvements. The question is how that sits in the broader context, as opposed to just focusing on the fines element.

Graham Hutcheon: I support the previous statements.

I might have interpreted what I read wrongly and I am sure that people who are brighter than I am can help me. My interpretation was that the £40,000 maximum is within the civil penalty, but there is still recourse to the criminal courts. Therefore, that just gives us a parameter with which to work. Whether the figure is £30,000, £40,000 or £50,000, it gives a parameter for such fines.

If the offence was as bad as to merit further investigation and a fine above £40,000, I would expect the case to go to a criminal court for prosecution in the normal way. I am not worried about the figure; it is up for debate and someone will decide what it is. The principle is that fixed monetary penalties should lessen the bureaucracy, reduce the number of court proceedings for the majority of minor environmental breaches and clean up the process a bit.

A fine of £40,000 indicates that, in anyone's language, there has been a serious breach, and anything above that will go through the criminal courts. I am comfortable with the bill's philosophy. There is recourse to other arenas to penalise breaches of the regulations appropriately.

Claudia Beamish: I ask the witnesses to explore further the powers of the court in relation specifically—I appreciate that there may be other points—to the proposed cap on compensation orders in criminal proceedings at £50,000 in respect of costs incurred in

"preventing, reducing, remediating or mitigating the effects of ... any harm to the environment".

We have touched on the issue, but I seek other views. Does the proposed maximum adequately reflect the potential associated costs? Should compensation orders be capped? What difficulties might the courts have if they assess the benefit to be greater than the maximum potential compensation order?

The Convener: I ask for fairly short, sharp answers if possible.

Andy Myles: A short, sharp answer is that we do not believe that there should be a cap. If the courts are to use such a power, the level of compensation should be proportionate to the amount of damage caused to the environment.

To take on board Graham Hutcheon's previous answer, it is the courts that will deal with the matter; SEPA will not hand out a compensation order. I do not really know why the bill proposes a cap of £50,000.

The Convener: That has probably answered the question, so nobody else need say anything.

Graeme Dey: I seek views on the proposed power for criminal courts to make a publicity order that requires a person convicted of a relevant offence to publicise details of the offence. The submission from the Association of Salmon Fishery Boards suggests that publicity offers a potentially greater deterrent than a financial penalty, because of the fear of reputational harm. Is that right? Will the provision focus minds?

Andy Rooney: I agree that it is a very useful tool. Given that we are trying to promote sustainable development and sustainable economic growth, the only issue about it is what happens to a company that perhaps has a one-off failure. It could be reputationally damned for ever.

Graham Hutcheon: The use of the publicity order worries me a bit. If a company that operates in an industry whose reputation is built on its environmental performance commits a breach, a publicity order could be damaging, but if a company operates in an industry that has little

regard for the environment and is working at the other end of the scale, would it really be worried about a publicity order? I have three questions. How would the power to make a publicity order be used? When would it be used? Who would the orders be targeted at?

The Convener: We are looking for answers.

Susan Love: I am sorry, but I cannot give you any answers.

My concerns are much the same as Andy Rooney's. We agree that the power to make a publicity order is probably a useful sanction for the courts to have in certain circumstances, but I would be worried if it ended up being used routinely, particularly for a one-off offence that was caused by a lack of understanding or a genuine mistake on a small business's part. I am concerned about the impact on small businesses, which will probably not get advice on how to repair the damage, as they will not have the professionals that a larger company might have to advise them on how to deal with the reputational impact.

Graeme Dey: Ignorance of the law is no defence in other areas, so why should it offer a defence here?

Susan Love: Because the whole regime is about having a proportionate range of sanctions. That is not to say that a one-off mistake should not incur punishment. There will have been punishment and restoration, but is a publicity order necessary on top of that, or has the lesson already been learned? My point is that the response to each offence should be proportionate.

The Convener: Lloyd Austin, should we name and shame?

Lloyd Austin: The phrase "name and shame" perhaps links to the point that I will make, which is that any penalty should be intended to act as a deterrent to prevent similar offences in the future. We are really trying to prevent environmental damage in the first place rather than to penalise people. However, the deterrent will be different for different businesses—that depends on the nature and scale of the business involved.

The opportunity to name and shame—the bill provides that the court "may", not that it "must", make a publicity order, so it will be given a power rather than a duty—will give the court an alternative option, which will be a good option to have in appropriate cases. If there is concern about the cases in which using the power might be appropriate, it may be that—unless Gordon McCreath has other advice on what the appropriate mechanism is—the Lord Advocate could give guidance to procurators fiscal on the appropriate circumstances in which to seek such a remedy.

Perhaps a publicity order might be applied to cases involving large companies that should have known better rather than small companies that did not know better. The publicity order is an appropriate remedy to have on the menu of remedies, but the situations in which it would be appropriate might be subject to guidance and discussion.

The Convener: So the publicity order might be applied to a large arable farm as opposed to a croft.

Allan Bowie: Convener, I thought that you might point in that direction.

When people are abusing a regulation and are at it, obviously there is a need for a bigger stick. I think that we all accept that. The imposition of a publicity order will be at the court's discretion—the word "may" is very important. Bearing it in mind that any case that comes to court is pretty serious—and we should make no mistake that naming and shaming has a huge effect, regardless of the scale of the business involved—I think that, when the occurrence happened by accident, the court should take due consideration of whether the individual or company is trying to change and to rectify the position, regardless of whether the individual involved is a crofter or a small arable farmer in Fife.

The Convener: Or a large arable farmer.

Gordon McCreath: Drawing together everyone's comments, I think that the root of the issue is the fact that environmental offences are offences of strict liability, for which it does not need to be shown that the person meant to commit the offence or was negligent. There are grades of culpability when people commit such an offence, and there is precedent elsewhere in the UK for categorising those grades. South of the border, the Environment Agency has applied various categories to incidents for a number of years. A similar scheme could be used to assess the categories in which a publicity order might be used.

Alex Fergusson: Chapters 1 to 3 are all fairly subject specific, but chapter 4 leads us into the potentially murkier waters of what are called miscellaneous provisions. There is indeed a broad range of such provisions in the chapter.

I do not want to list all the provisions involved, but I notice that the submissions from the Federation of Small Businesses and the Scotch Whisky Association raise concerns about the offence of causing "significant environmental harm", on the ground that the definition of that harm, which is that it has "serious adverse

effects", seems very open to interpretation. Can Susan Love and Graham Hutcheon expand on that a bit? If anyone can give us an example of how "significant environmental harm" might be misinterpreted, that would be useful. It would also be interesting to know what discussions, if any, people have had with SEPA about those concerns.

11:45

Susan Love: As far as I recall, we have not specifically discussed with SEPA what the new offence might look like. Our concern is that, in trying to explain to our members the intentions behind the bill, we struggle to explain what the offence would look like because, to a layperson, the definition provided—that the harm may "have serious adverse effects"—is fairly vague. If Gordon McCreath could tell me that there is a well established principle here, that would be great, as I would then have an example to give my members. The definition of the new offence seemed quite vague to us in reading the bill.

Graham Hutcheon: I will reiterate that point. The provision is so broad that we have difficulty in understanding what "significant environmental harm" will mean. What will the regulator do? Will it start to interfere in our processes, in the materials that we choose and in how we operate? We need greater clarity on what "significant environmental harm" means and what actions SEPA will take in such conditions. That is the only statement that I can make on the matter. Again, the issue is a lack of clarity.

Alex Fergusson: Have you discussed your concerns with SEPA?

Graham Hutcheon: Not personally and not at that level of detail. That is an issue for our next set of discussions.

The Convener: We have one final question to ask.

Richard Lyle: Some of the miscellaneous provisions will have an impact on the 32 councils in Scotland, so I will draw on Andy Rooney's experience. What impact will the provisions on contaminated land, special sites, waste management authorisations and air quality assessments have on the day-to-day operations of Scottish councils?

Andy Rooney: Contaminated land, which is dealt with in section 34, is a legacy of the industrial past. Some areas of contaminated ground might not present too much of a problem, but those that pose significant harm to public health through groundwater, surface water or whatever can be identified as special sites. In effect, such a designation puts a blight on the land. The proposal to remove that blight—once a site has been cleaned up, obviously—is generally welcomed.

The only caveat that I might throw in relates to environmental information. As the Law Society has identified, the history would still appear in any property search, which is only fair enough. In South Lanarkshire, we have only one special site that has been declared as contaminated, but we would welcome the option to remove a site from the contaminated land register and bring it back into productive use. Another point to throw in is that, to safeguard the interests of all involved, it is likely that some monitoring of the land would continue, in case there was some change. The principle of getting land back into productive use is welcomed.

The Convener: Since everyone seems to have provided us with more than enough questions to put to the minister—we have a lot to mull over—I thank you all for a very illuminating discussion of the complex issues that are involved in the better regulation of activities and their environmental impacts. I thank you all, individually and collectively, for what has been a most fascinating session.

I ask people to leave relatively quickly, if that is at all possible, so that we can move on to our next item of business, which is in private.

11:49

Meeting continued in private until 12:29.

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