



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

Wednesday 5 June 2013

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RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE
20th 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:

George Burgess (Scottish Government)

Bridget Marshall (Scottish Government)

Neil Watt (Scottish Government)

Paul Wheelhouse (Minister for Environment and Climate Change)

CLERK TO THE COMMITTEE

Lynn Tullis

LOCATION

Committee Room 2

Scottish Parliament

Rural Affairs, Climate Change and Environment Committee

Wednesday 5 June 2013

[The Convener *opened the meeting at 10:00*]

Decision on Taking Business in Private

The Convener (Rob Gibson): Good morning everyone, and welcome to the 20th meeting in 2013 of the Rural Affairs, Climate Change and Environment Committee. Members and the public should turn off their mobile phones and other devices, as leaving them on can affect the sound system.

Agenda item 1 is a decision on whether to take in private item 4, which relates to evidence on the Regulatory Reform (Scotland) Bill. Do members agree to take item 4 in private?

Members *indicated agreement.*

Regulatory Reform (Scotland) Bill: Stage 1

10:00

The Convener: Agenda item 2 is our final evidence session on the Regulatory Reform (Scotland) Bill. I welcome the Minister for Environment and Climate Change, Paul Wheelhouse; he can introduce his staff. If you wish to make an opening statement, minister, that will be fine.

The Minister for Environment and Climate Change (Paul Wheelhouse): Thank you very much, convener. Good morning, committee.

On my immediate right is Neil Watt, who is the bill manager and deals with better environmental regulation policy in the Scottish Government's environmental quality division. Bridget Marshall also deals with better environmental regulation policy in the environmental quality division, and George Burgess is deputy director for environmental quality in the Scottish Government.

Thank you for inviting me to give evidence on the Regulatory Reform (Scotland) Bill. The Administration is focused on building a dynamic and growing economy that will provide prosperity and opportunities for all, and ensuring that future generations can enjoy a better quality of life, too. The bill is an integral part of the Scottish Government's sustainable growth agenda and reflects the fact that the protection of our environment and the sustainable management of our natural resources are not only valuable objectives in their own right but are critical to economic growth and the health and wellbeing of our communities.

Today is United Nations world environment day. It is therefore appropriate that we are meeting today to discuss a bill that will provide a framework that will protect and improve Scotland's internationally recognised environment.

I have followed the committee's scrutiny of the bill; in particular, I followed the very constructive round-table meeting with key stakeholders last week. I believe that that reflects the stakeholder-led and evidence-based approach that we have taken in developing the joint Scottish Environment Protection Agency-Scottish Government proposals. As members are already familiar with the content of the bill from the detailed evidence that was given in those sessions, I will refrain from providing another overview.

I would like to start with my view of the principles that the better environmental regulation is intended to achieve. The objective of the bill, and the wider programme that it supports, is not

deregulation; rather, it is about delivering necessary regulatory outcomes more effectively. Consistent, proportionate and targeted regulation is needed to deliver benefits for our economy, communities and environment, and to support delivery of the Scottish Government's purpose.

The statutory purpose for SEPA that the bill will introduce will give recognition to the broader role that SEPA now has and the importance of the environment to our economy and the health and wellbeing of our communities. It is important to note that, although that purpose is new, the need to balance environmental, economic and social considerations is not. As members have heard in evidence, balancing judgments are already taken by SEPA, Scottish Natural Heritage and other regulators on a daily basis. The new statutory purpose for SEPA will formalise what is already current practice and help to provide a line of sight from the Scottish Government's purpose to what our public bodies deliver. Let me be clear that this is not about sacrificing the environment to promote economic growth, as some have suggested. As is right and proper, SEPA's primary purpose is and will remain the protection and improvement of the environment. The approach reflects the fact that we cannot look at issues in isolation.

I know that the committee is interested in the bill's impacts on other regulators in my portfolio, such as SNH. Like SEPA, SNH already contributes to achieving sustainable economic growth in its work that supports farming, commercial forestry, renewable energy and tourism, to give just a few examples. The bill will help to ensure a consistency of approach across regulators and demonstrate that those in the public sector are working together.

The proportionate, risk-based framework of environmental regulation that the bill enables will better protect the environment, help legitimate businesses to flourish and protect communities. I take pleasure in highlighting the fact that there will be losers from the work: the criminals and the entrenched poor performers. It is all about providing a level playing field and protecting communities and the environment from harm.

The new framework will be easier for regulated businesses and SEPA to understand and administer and will lead to efficiencies for both. As a result of the bill, SEPA will change the way in which it prioritises its regulatory activities so that its resources are directed towards the most important, highest-risk activities that have the greatest actual or potential environmental impact on communities.

SEPA will continue to work closely with those whom it regulates and other interested parties to help to unwind complexity and deliver a more joined-up regulatory approach. The committee has

heard examples of how SEPA is working proactively with key sectors to help to make improvements on the ground. I welcome the contributions from NFU Scotland, the Scotch Whisky Association and Scottish Water in that regard.

The bill will give SEPA a wider, more strategic range of enforcement tools to deploy. Combined with the new sentencing options that are given to the criminal courts, those will play a key role in tackling poor performance and non-compliance. The polluter-pays principle is already widely accepted and supported. Those proportionate enforcement powers will ensure that the criminals pay the price for remedying damage that is done to the environment.

All responsible businesses, large and small, will benefit from an effective environmental protection system for Scotland. By focusing resources on the greatest environmental harms, SEPA can more effectively target lawbreakers, support non-compliers to become compliant with regulations and protect communities and our natural environment.

The bill is a product of extensive engagement with stakeholders and we remain committed to listening to our stakeholders and acting on feedback received from formal and informal consultation. I highlight the fact that SEPA, the Crown Office and the Scottish Government have jointly arranged a stakeholder event next week to consider the enforcement measures in more detail. That will be the first in a series of better environmental regulation workshops that will run in the months ahead. I am committed to maintaining that level of engagement as we move forward with the programme.

I am happy to answer questions from the committee.

The Convener: Thank you, minister. We will kick off with some questions about the term "sustainable economic growth". Where did it originate? Does it mean economically sustainable growth, or economic growth within the limits of ecological and social sustainability?

Paul Wheelhouse: We have a definition of sustainable economic growth, which the Cabinet Secretary for Finance, Employment and Sustainable Growth highlighted in a written answer on 20 November last year:

"building a dynamic and growing economy that will provide prosperity and opportunities for all, while ensuring that future generations can enjoy a better quality of life too."—[*Official Report, Written Answers*, 20 November 2012; S4W-10994.]

Some people have called for a definition of sustainable economic growth to be inserted in part 1 of the bill, which we consider to be all about

supporting and empowering regulators to be accountable for the often complex and difficult decisions that they take. However, there is no compelling case for that.

There is a clear definition of sustainable economic growth and there is also a good definition of sustainable development in the current Scottish planning policy and the national planning framework 2. I understand that Scottish Environment LINK and others strongly support and highlight it as one of the best existing examples of sustainable development. That is being taken forward in the current consideration of NPF3 and the consultation on the Scottish planning policy.

The two things are not mutually exclusive. We have regulators that have a primary function of regulating on the environment, but they can also be empowered to take into account economic development.

The Convener: Although there might not be a need for a definition in part 1, we might need to have some clarity later on. We have to tease out a little further your intention in using the term. Does it give extra weight towards economic growth in policy decisions, or is it a subset of sustainable development?

Paul Wheelhouse: As I said earlier, one of the key things that we want to achieve with the bill is greater transparency. As I stated in my opening statement, regulators such as SEPA already have to take economic issues into consideration to a degree when making decisions.

There is a hierarchy of duties. SEPA's primary function is obviously to protect the environment. However, it is not unreasonable to suggest that economic considerations would be taken into account in deciding which of two options for a project, both of which had a similar environmental impact—positive or negative—SEPA would recommend for implementation.

That is a potential positive benefit of formalising something that is already happening informally and making it transparent. It is clear that sustainable development principles are extremely important, but through the provisions in the bill we want to provide a line of sight to the Government's overarching purpose so that there is a consistency of approach across all our regulators. However, providing a line of sight to that overarching purpose does not take away from their primary function, which, in SEPA's case, is to protect the environment.

The Convener: Okay. Claudia Beamish wants to come in on that point.

Claudia Beamish (South Scotland) (Lab): Good morning, minister. I would like to pursue that issue a little further. Would the purpose and effect

of the bill change significantly if it included a duty to contribute to achieving sustainable development rather than a duty to contribute to achieving sustainable economic growth?

I listened carefully to what you said and have done my best to read some of the evidence and definitions. I completely take the point that, in the case of SEPA, the environmental aspects of its duties are the overriding priority when it comes to what the bill will do. In view of that, might "sustainable development" be a more appropriate term to use in the bill, given that it takes account of the environmental, economic and social aspects? Without wanting to labour the point, the concept of sustainable development is enshrined in European legislation and, as you said, in NPF2, as well as in the Climate Change (Scotland) Act 2009 and the Marine (Scotland) Act 2010. It would be helpful if you could comment on whether it would be better to use the term "sustainable development".

Paul Wheelhouse: That is a fair point. The point that I would make—this also deals with an aspect of the convener's question that I did not answer—is that although sustainable development and sustainable economic growth are clearly related principles, they are distinct concepts. I take the point about the social and environmental aspects of sustainable development being less explicit in the definition of sustainable economic growth that I read out earlier.

The value of having a duty on sustainable economic growth explicitly set out is that it gives a clear line of sight to the Government's purpose and provides a consistency of approach across all regulators in respect of the Government's economic strategy, which has at its heart objectives on low-carbon economic growth—that is a specific strand of the strategy. In parallel, we are taking steps to ensure that all public bodies will ultimately sign up to a duty on biodiversity in support of the Scottish biodiversity strategy, which will be launched soon. As I am sure that Claudia Beamish knows, we have public duties in respect of climate change that arise from the 2009 act. There are a number of public duties in existence that will ensure that the environment is taken into account in the activities of all public bodies, including the regulators.

The value of having specific reference to sustainable economic growth in the bill is that it ensures a line of sight to what is in the Government's economic strategy, although I take on board the member's point about being more explicit about sustainable development principles. We can take that away and reflect on it.

However, I would not want to lose the link—if I can put it that way—with sustainable economic growth, which empowers the regulators to take such matters into account in cases in which a

finely balanced decision has to be made. It might be the case that two alternative proposals would have a similar outcome from the point of view of environmental impact. The proposed duty in the bill will empower a regulator to take economic impact into account in the decision and to recommend approach B over approach A, as it might have more of an impact on the economy and might therefore benefit Scottish society more explicitly. I am happy to take on board the member's point and come back to her on it.

It might help if I bring in George Burgess at this point.

10:15

George Burgess (Scottish Government): It might help to look specifically at section 38 of the bill and the new general purpose for SEPA, because that brings together the various concepts. When we gave evidence to the committee two weeks ago, we had a look at section 38, which provides that SEPA's primary purpose is

"protecting and improving the environment",

and that its subsidiary purpose is

"improving the health and well being of people in Scotland, and ... achieving sustainable economic growth."

I view those three purposes together as sustainable development. Indeed, our initial proposals on the bill were that an existing duty in the Environment Act 1995 that required ministers to give guidance to SEPA on the contribution that it should make to sustainable development in exercising its functions was superfluous, because the new purpose was sustainable development written out in longhand.

We responded to the stakeholders' wish not to see the words "sustainable development" disappear, so the requirement for ministers to provide guidance on the contribution to sustainable development will remain in legislation alongside the purpose that we have set out. We envisage having a single set of guidance on the new purpose and the contribution to sustainable development to articulate clearly how the terms interrelate.

As I see it, sustainable economic growth is a component of sustainable development, but they are not one and the same thing.

Paul Wheelhouse: As well as providing guidance, we will improve the tools that are available to make decisions about the link between economic and environmental matters with the welcome introduction, albeit that it is early days, of the natural capital index and evolving an approach in terms of ecosystem services. We are gaining an understanding of what environmental investments can deliver in terms of economic gain,

and vice versa in terms of what economic investment can deliver for the environment. That will help not only those who promote projects but regulators to understand better the links between the economy and environmental issues.

Claudia Beamish: I am still puzzled, so I wonder whether you can help me to understand why, if sustainable development will be defined in guidance, it is not included in the bill. I think that understanding that might help to reassure a number of stakeholders who have made comments.

Paul Wheelhouse: I take the point that perhaps an explicit link is lacking, although George Burgess has explained that we feel that some aspects of the bill already collectively deliver the outcome that Claudia Beamish seeks. I do not want to lose sight of the importance of having consistency and line-of-sight issues delivered by explicitly bringing into the bill the purpose of sustainable economic growth. There has been a focus on sustainable economic growth because it is one of the Government's overarching purposes. There is a clear link between the Government's economic strategy and the regulators that interact with the economic community.

George Burgess: The reference to sustainable development is already in the Environment Act 1995. We do not need to refer to it in the bill, because it is already in the statute.

The Convener: Is it in section 20 of the 1995 act?

George Burgess: I think that it is in a section that is up in the 30s.

The Convener: You could remind us in writing of what section it is in.

Paul Wheelhouse: We will get back to you on that point, convener.

Nigel Don (Angus North and Mearns) (SNP): I have a point on George Burgess's comment about section 38 and the duty for SEPA, and the helpful hierarchy that puts the environment first, with the other two aspects being subordinate to that. I put it to the minister that it might help us—and, perhaps, many of those from whom we have already heard—if the general duties in the bill took a similar hierarchical approach. One of the points about sustainable economic growth is that we are not sure whether the environment or the economy comes first. My impression is that you feel that the environment comes first. If that position, which is explicitly stated in section 38, was stated as the general tenor of all the other duties for the other regulators, that would to an extent overcome our problem with what the words mean. I do not think that the problem is actually in the words; the

problem is in knowing what they mean and what the hierarchy of duties is.

Paul Wheelhouse: That is a reasonable point, but as I am not the lead minister for the bill, I can only take that back to Fergus Ewing to see whether there is an approach that he can find to accommodate that concern. However, it is worth stating that, in terms of the environmental regulators, the hierarchy is in place, in that the environment will remain the overarching responsibility and economic interest will come second.

George Burgess: To answer the convener's question, the reference to sustainable development and the guidance power is in section 31 of the Environment Act 1995.

Graeme Dey (Angus South) (SNP): How will the code of practice define sustainable economic growth so that it is readily understood and applied to the functions of the 10 listed regulators? Given the diverse nature of their remits, is one code of practice sufficient, or should each regulator receive detailed and specific guidance?

Paul Wheelhouse: That is a fair question. The code will apply to all the regulators that are listed in schedule 1, and will not be specific to any particular regulator. It will support regulators as they deliver on their economic duty, and is being developed by regulators and by business to capture and encourage best practice. It will very deliberately be the subject of substantial consultation, and will be subject to parliamentary scrutiny prior to its introduction. That process is important, and will give those who have an interest in delivery on the ground the opportunity to comment on the code of practice and guidance.

Neil Watt (Scottish Government): The code is being developed with the regulators, the purpose of which is to design the code to clarify the practicalities around how regulators' roles will be delivered.

Graeme Dey: It must be challenging to come up with what will, by definition, be quite a broad code that will cover things as diverse as charities, housing, tourism and healthcare. How will you make it relevant to such a diverse group?

Neil Watt: As the minister said, it is all about providing a line of sight to the Government's purpose. We are moving from part 1 of the bill to part 2 of the bill—section 5—and talking about SEPA's purpose before going back to part 1.

Part 1 of the bill does not establish a new purpose for the regulators; it introduces a new duty. It is important that, as Graeme Dey said, the full range of relevant regulators are involved in that and in development and implementation of the code of practice. I like to think that there will, as

the work goes on, be a great deal of input from regulators on how the process will work in practice.

Graeme Dey: In previous evidence-taking sessions, we have touched on the possibility that we might end up with a pyramid structure, where there is a broad code sitting at the top, with specific policy guidance for the regulators underneath that. Is that what will happen in practice?

Paul Wheelhouse: Graeme Dey has raised a fair point about interpretation. It will be difficult in practice to have specific guidance for every sector. I guess that it is about providing guidance about the approach that is to be taken and about the interpretation of guidance. I suppose that in some respects guidance on guidance is what is often needed—I am sure that you have experienced that.

We will have to come back to the committee to talk about how we will cover the areas that are beyond my portfolio, such as tourism, to which the duty will also be applicable. Clearly, however, I do not have as great a knowledge of those other areas as Fergus Ewing. We can come back to the committee on the point, if that will be helpful.

Graeme Dey: I appreciate the difficulty that you have in that regard, minister.

Given that ministers already have primary powers to issue codes of practice with respect to enforcement of food law, should a caveat be introduced to clarify that section 5 does not prejudice those powers, as the Food Standards Authority has suggested it might? Should a caveat of that nature include all regulators?

Paul Wheelhouse: Is there a concern about how section 5 might influence the FSA? Can you expand on that?

Graeme Dey: The FSA suggested that some clarity in that regard would be useful.

Neil Watt: The new powers are intended to complement the duties on bodies such as the FSA, not to circumvent or prejudice—as Graeme Dey suggested—their other powers.

Graeme Dey: My point is in keeping with themes that we touched on earlier, such as the need for greater clarity on what the bill is about. There is an issue in that respect, is there not?

Paul Wheelhouse: There are some fundamental principles, which I set out in my opening statement. We are trying—unlike under the deregulation agenda elsewhere in these islands—to improve the clarity and transparency of regulation, although it appears that that is not as easy as we expected.

As I said, the FSA is already taking economic issues into account with regard to the public duty issue. The bill enshrines that approach formally, so that it is transparent and clear.

We are trying to introduce greater consistency among regulators, and it will be helpful to have a code of practice to inform that. We are trying to ensure that there is greater proportionality—which is a theme that will, I am sure, be addressed in later questions, so I will not stray there just now.

There are some key principles at play, and I hope that the bill will benefit all sorts of regulators. As Neil Watt said, the new code is intended to support and encourage consistent regulation and compliance with regulatory principles. It is not in any way intended to circumvent or replace other codes of practice.

Graeme Dey: That is reassuring.

Neil Watt: The issues that the committee has heard in evidence and which we are discussing today were teased out in the consultation that was run by our better regulation colleagues, who are also appearing at the Economy, Energy and Tourism Committee.

We are genuinely trying to act on concerns and to work through them with stakeholders. The commitments to developing the code with regulators and other interested parties, and to ensuring that the code is subjected to parliamentary scrutiny is part of that process. We accept and acknowledge the concerns that the committee is raising this morning.

The Convener: Thank you. We note that.

Jim Hume (South Scotland) (LD): Section 6(4)(b) states that ministers will consider whom it is “appropriate” to consult on the draft code of practice. What organisations do you consider to be “appropriate”?

Paul Wheelhouse: Jim Hume has raised an important point, which others have also raised. Section 6(4)(b) guarantees that we will consult relevant regulators and “appropriate” stakeholders. We are committed to an inclusive and open approach in undertaking a consultation, and I hope that nothing in the bill suggests otherwise.

I am aware that there may be an issue with separate lists and ensuring that there is a consistent approach with regard to who will be consulted. I am aware that all stakeholders seem to be relatively happy—at least so far—with the degree of consultation that has been undertaken. We are keen to keep that engagement going, as I said in my opening statement.

If it would help the committee, I will discuss those issues with Fergus Ewing and come back with greater clarity on whom we will consult at

different stages on the code and on secondary regulation. We will have an on-going consultation exercise on issues such as equality. Those elements can all be taken in the round.

Jim Hume: That would be useful. When stakeholders gave evidence, there appeared to be no dissent from the view that the consultation should go out to the broader public and wider society. Did you consider that?

Paul Wheelhouse: The key thing is that we should make sure that those who have a direct relevant interest in particular measures are consulted. George Burgess will address the wider point about how to bring in the wider public for consultation on some of the measures.

10:30

Jim Hume: That would be useful. You mentioned that a diverse range of people—anyone and everyone—could be affected directly or indirectly.

Paul Wheelhouse: It would be fair to say that in the environmental sphere, we have a pretty good handle on who our stakeholders are. We interact with SEPA and SNH and our active stakeholder communities work very well with our regulators and with Government. I ask George Burgess to address the wider point.

George Burgess: I wonder whether requirements that there must be consultation of particular parties might be rather old-fashioned. They seem to come from an earlier day when only particular people were consulted, and not the wider public.

Practice during the past decade has been that any consultation would be an open public consultation that appears on the Scottish Government website. There would be absolutely no restriction on people feeding into it. There is some value in making sure that, as well as general consultation, there is consultation of particular parties, but I cannot think when last there was a closed consultation to which only certain people were allowed to respond. Government practice has been to use open consultations that anyone can feed into, and to have widely available and easy ways for stakeholders to become aware of upcoming consultations.

Paul Wheelhouse: It is also fair to say that we are always conscious of the degree to which there is consultation overload for some stakeholders. The point that I was making earlier is that we need to be sure that those with whom interaction is absolutely critical are aware that the consultation is happening so that we get their views on board. As George Burgess said, it is not about closing off consultation to others; it is about making sure that

those who need to know that the consultation is happening are aware of it so that they do not miss the opportunity to feed into it.

Jim Hume: I just want to get pure clarity and get it on the record. You will engage with some stakeholders to make sure that they engage with the consultation, but it will also be open to the public.

Paul Wheelhouse: As George Burgess said, that is the general practice. The consultation is available and it is an important principle of Parliament that such consultations are always open and transparent to the public.

Neil Watt: I guess that we are stereotyped as sitting at our desks waiting for written consultation responses to come in. I look at consultation responses and it is not just about reading letters; we are encouraged to get out there and speak to people. I hope that we have managed to do that in the policy areas for which I am responsible. I would like nothing better than to get out of the office and do that. We are not just talking about the formal element of consultation, important as it is.

Jim Hume: That has cleared it up quite well, thank you.

Richard Lyle (Central Scotland) (SNP): Good morning, minister. I welcome Neil Watt's comment that he is going to be out talking to people.

Many regulators already have the duty to report on sustainable development. How would you alleviate their concerns about how they can meaningfully distinguish and report on their duty to contribute to the achievement of sustainable economic growth? If they express concerns when you are out visiting them, what will you say to them?

Neil Watt: Do you mean regulators generally or SEPA specifically?

Richard Lyle: I mean regulators generally.

Neil Watt: There is a good understanding of the Government's purpose and we have already had a discussion about the definition of the terms that we have used. I would like to think that when the duty is picked up specifically in the code of practice, the discussion will be specifically about practical implementation. We are talking about the principles of better regulation and how we can ensure transparency and consistency across regulators; that is the purpose of having the duty, and that is the kind of discussion I will be having.

Richard Lyle: Imagine that I am a regulator and I do not know what sustainable economic growth means. What does it mean to you?

Paul Wheelhouse: It might be easier to look at the question as if, for the purpose of the argument,

Mr Lyle was SEPA. I am sure that he would enjoy that role.

In section 31 of the Environment Act 1995, to which George Burgess referred earlier, there is a requirement to provide SEPA with guidance on the contribution it should make

"towards attaining the objective of achieving sustainable development".

That will remain alongside SEPA's new clear statutory purpose, which relates to sustainable economic growth.

We will develop a code of guidance that will make it clear how to interpret that new public duty and which will also clarify the requirements as set out in the 1995 act to deal with the sustainable development aspects. The guidance will be an appropriate place to tease out the relationship between the two concepts. Clearly, there is a degree of overlap.

Claudia Beamish referred earlier to the fact that matters are taken into account in sustainable development that are not necessarily explicit in sustainable economic growth, such as environmental and societal aspects. We can set out in guidance the matters that go beyond sustainable economic growth that are covered under sustainable development.

SEPA already has a duty to provide annual reports, as other public bodies have. We expect that future annual reports will report on the outcomes of the new duties. As I said in response to an earlier question on the public duty in respect of biodiversity, we expect SEPA, SNH and other regulators to report on that as well as on the impact in terms of climate change mitigation, sustainable economic growth and sustainable development. It is important that we give them appropriate guidance, so it is fair to raise that point. That is something that we need to work on in consultation with stakeholders.

Richard Lyle: I am glad to hear that. Thank you.

Alex Fergusson (Galloway and West Dumfries) (Con): If I picked you up correctly in your answer to the very first question, you said that Scottish Environment LINK has a very clear understanding of the definition of sustainable economic growth.

Paul Wheelhouse: I said sustainable development.

Alex Fergusson: Thank you for putting me right on that.

One of the committee's briefing papers records that

"... evidence to the Committee from Scottish Environment LINK suggested that the concept of 'sustainable economic

growth' was so poorly understood that it would lead to a 'paralysis of indecision' from regulators,"

which could, in extremis,

"lead to challenge in the courts."

If you are imposing a duty to contribute to achieving sustainable economic growth, that suggests that we will need a way of measuring and monitoring whether the regulator has upheld that duty. How do you intend to do that?

Paul Wheelhouse: That is an important point that I should have raised earlier; thank you for the opportunity to address it.

A short-life working group will be established that comprises business representatives and regulators, including SEPA, SNH and the Convention of Scottish Local Authorities. That group will develop a code of practice which, as we said earlier, will be consulted on prior to introduction. Regulatory bodies that are not involved in that working group will be kept informed and invited to contribute to it, so that even if they are not directly involved in the group, they will have an opportunity to feed into the guidance to give support on how to interpret and give clarity on sustainable economic growth, and how to report on its key features and relevant measures. That will be a key outcome to support consistent and appropriate decision-making.

We want consistency across regulators; they need to have a coherent understanding of what the concepts and requirements are.

We hope to use the bill and development of the code as an opportunity to raise awareness and understanding further among regulators in order to address the concerns that Scottish Environment LINK and others have expressed.

Alex Fergusson: It is good news that the short-life working group will be established. Will it also be able to look at what enforcement procedures might be used if a regulator is found not to be upholding its duty?

Paul Wheelhouse: Consultation on enforcement will be key. After all, we must ensure that all regulators and actors understand the relationship between the public duty and the regulator, the interpretation of those public duties and the linkages with enforcement where harm is being caused to the regulator's objectives, so that people understand where these things come in.

Perhaps Neil Watt will comment on that.

Neil Watt: Huge new reporting requirements would not be in line with the principles of better regulation, and the new requirement will fit into well-established governance structures that regulators and public bodies use to report on their performance and contribution to the Government's

purpose. This is not about radical change, creating something new or adding an extra burden—we do not want to take resources away from front-line delivery—but about creating transparency and consistency.

Alex Fergusson: I entirely accept that, but if you put a duty on a regulator to achieve a certain aim and it fails to do so, you must have some mechanism for drawing that to its attention and seeking other actions that will assure everyone that the duty is being upheld. Is that not what should happen with a duty?

Paul Wheelhouse: As regulators such as SEPA and SNH in my portfolio are accountable to ministers in delivering on those outcomes, there would already be interaction with them on what they could do to improve their performance; they already report to me. For example, I recently received reports from them on their outcomes in relation to the Climate Change (Scotland) Act 2009 and the steps that they are taking to reduce their own damaging greenhouse gas emissions. Good progress is being made, but occasionally there are bumps along the way and they will write to me to explain the reason for their failure to deliver on a particular area and the steps that they are taking to address that in the forthcoming year. A mechanism already exists, but I am happy to take the committee's view on whether there are any other measures that we could consider.

Alex Fergusson: Thank you. That was helpful.

Jayne Baxter (Mid Scotland and Fife) (Lab): Good morning, minister. Your previous answer strayed a wee bit into the territory that I was going to cover, but I will still ask my question to ensure that we have an understanding on the record. Is it likely or possible that the lack of understanding of the concept of sustainable economic growth will lead to a paralysis of indecision? If that were to happen, would you intervene to move things forward?

Paul Wheelhouse: It is a fair question, but I hope that the short-life working group will provide much greater clarity on the code and how the concepts should be interpreted. I would certainly have on-going engagement with the regulators that I regularly engage with and the chief executives and chairs of those organisations if they found it difficult to interpret any aspect of our policy. That would be a vehicle for dialogue and interaction in which I would ask, "Okay, what in relation to your specific functions as a regulator are the challenges in delivering this approach?" We would provide better guidance either through a formal letter setting out supplementary guidance on interpretation or through a revision of the code. I do not know whether that has come up in discussion with Mr Ewing, but it is certainly the approach that I would be keen to take. Instead of

standing alone and aloof, I would want to have ongoing engagement with SEPA and SNH to ensure that, if they were uncomfortable with anything, we would have a chance to interact and improve the situation if necessary.

Jayne Baxter: That is good to know.

Angus MacDonald (Falkirk East) (SNP): Good morning, minister. Following on from the points that have been raised by Alex Fergusson and Jayne Baxter, I wonder how, in the event of a legal challenge in the courts with regard to the concept of sustainable economic growth and the possibility of a paralysis of indecision that has been mentioned and which was raised at the round-table session by Scottish Environment LINK, you will ensure that the courts interpret the spirit of the law in the absence of national and international guidelines or definitions.

10:45

Paul Wheelhouse: That is an important point. Obviously, in recent times there have been cases in which accusations have been made that SNH or SEPA has slowed down the process of supporting an investment in a particular area or industry. It is always a challenge for regulators to protect the environment while supporting legitimate and good economic investments.

An important point is that, to support the delivery of the bill and its supporting secondary legislation, we will provide guidance to reduce the room for misinterpretation. We hope that that will help the courts, which interpret matters as they see fit. Obviously, it is for the courts to interpret the law and we cannot directly influence their interpretation, but we can provide supporting information and guidance on the intent behind the law to give as much clarity as possible about our policy objectives in introducing the legislation.

George Burgess, from his knowledge of the area, might be able to explain how the courts will interpret that guidance.

George Burgess: In looking at the requirements, the courts would no doubt look at the provisions of the bill—by then an act—and at, for instance, the code of practice. To take a hypothetical example, if there was a case about whether a regulator had complied with the code of practice, the court would obviously look at the code of practice.

In cases where the court is unclear about the purpose from the statute or the code of practice, it is possible for the court to look behind that to the parliamentary proceedings, including the proceedings of this committee, to see what the Parliament's intention was in putting the statute in place. The courts can look behind the words of the

statute to discern what the purpose of the provision is.

Angus MacDonald: It is encouraging that it is acknowledged that the code of practice should be robust enough for the courts to follow. Thank you for the feedback on that.

Nigel Don: On that point, without wanting for one moment to disagree with what Mr Burgess said, I put it to him and to the minister that the last thing that anyone wants to do is to produce an act of Parliament that requires to be interpreted by the courts. The courts will interpret statutes when they are forced to do so, but surely we all recognise that it is much better to have statute that is so well drafted and clear that the courts never get involved.

Paul Wheelhouse: Nigel Don raises an important point. I suppose that there is greater scope for misinterpretation with the difficult concepts that formed the initial part of our discussions on sustainable development and sustainable economic growth. Those concepts are, if you like, outwith the comfort zone of most courts, so I think that it will be helpful to provide guidance on how they should be interpreted and delivered by regulators. That will assist the courts with the intent behind the concepts of sustainable development and sustainable economic growth.

Nigel Don: That is my point entirely.

Paul Wheelhouse: However, your fundamental point that the legislation should be as clear as possible is also fair.

Jayne Baxter: I cannot resist the temptation to point out that much of the committee's time is currently being taken up with the Crofting (Amendment) (Scotland) Bill, which is required because of the way in which provisions in the Crofting Reform (Scotland) Act 2010 were interpreted very soon after the act was passed. I know that there are many reasons for that, but I am anxious that we do not find ourselves in a similar scenario with this legislation in two or three years' time. Let us avoid any confusions of interpretation if we can possibly do so.

Paul Wheelhouse: I can assure you that, as a recent student of crofting law, I am in 100 per cent agreement with you on that point.

Let me highlight one stakeholder comment, which comes from Professor Colin Reid; I know that he had some criticisms of the bill, so I am not suggesting that he is 100 per cent enthusiastic about all of it. In his submission on behalf of the Law Society of Scotland, Professor Reid said:

"The Society welcomes the Scottish Government's drive towards the simplification of complex regulation, and generally support the adoption of measures aimed to

reduce inconsistency, streamline and clarify all and any environmental protection regimes.”

That is the intent that we are trying to achieve, which I am happy has been recognised by the Law Society of Scotland. I know that there will be potential issues along the way, but believe me that I am very keen to avoid a situation in which we have problems similar to those affecting decrofting.

The Convener: Of course, crofting legislation has a court all of its own to deal with such things.

Claudia Beamish: As another recent student of crofting law, I could not agree with the minister more.

I seek further reassurance on a matter that still concerns me. I understand that there is to be a short-life working group. Will it be possible for that group to look at definitions as well as at the criteria for sustainable economic growth? If we are to take the statute forward without a definition, how can we be sure that the definition that the working group comes up with will be appropriate? It all seems to be the wrong way round.

Paul Wheelhouse: I should be clear, and I am sorry if I have confused matters.

Claudia Beamish: I am not saying that—

Paul Wheelhouse: I may have confused you by the way in which I expressed the point, rather than its being your fault. There are existing definitions, and I read out the definition of sustainable economic growth. People might disagree with it, but that is the definition that is there to give guidance on interpretation, which is the key.

Picking up on Alex Fergusson's point, Scottish Environment LINK has suggested to me in stakeholder meetings that the definition of sustainable development that we already have in planning policy is one of the best that it has seen. There is widespread support for that definition, so I do not propose that we change it or ask the working group to change it, but the group can provide guidance and support to regulators on the interpretation of that concept. As Mr Dey has said, there are those who regulate sectors in which they will not be as familiar with those concepts as SEPA and SNH would be, and we need consistency of interpretation across all regulators.

I hope that that clarifies the point. We are not talking about going back to the beginning and scrapping the definitions that we already have. We are trying to provide support and guidance to people on how to interpret those definitions in practice in their sectors.

The Convener: We are clear, just to wrap up, that sustainable development is defined in the Environment Act 1995.

Paul Wheelhouse: Not in the act itself, as I understand it. Perhaps George Burgess can explain the situation with regard to that act. There is a reference to “sustainable development” in the act—

The Convener: Yes, I know.

Paul Wheelhouse: But there is a definition of sustainable development in planning policy; Scottish Environment LINK particularly respects that definition and has used it elsewhere.

The Convener: Can we have that cited, please, so that we have it for our report?

Paul Wheelhouse: You can indeed. We can give that to you.

George Burgess: The term “sustainable development” is quite commonly used in statute. To my knowledge, there is no statutory definition anywhere in the United Kingdom of what that term means. There are, of course, commonly understood and accepted definitions, particularly going back to the Brundtland commission in the early 1990s, so there is a common understanding of the term, but you would not find a statutory definition of what it means.

The Convener: Maybe we need one in Scotland—a world-beating one. I think that we could do with that, if you can help us, because we will try to find a way in our report, drawing on the views that are expressed around this table, to clarify those terms. Sustainable economic growth has been defined to a degree by the Cabinet Secretary for Finance, Employment and Sustainable Growth, John Swinney, but we need a definition of sustainable development. The Cabinet Secretary for Rural Affairs and the Environment might like to turn his attention to that.

Jim Hume: We have several European and international obligations, such as those relating to Natura sites, sites of special scientific interest and European protected species. Could the duty to

“contribute to achieving sustainable economic growth”

be used as a counter-justification for those who want to develop protected sites or use them inappropriately, creating an impact on sustainable natural resources?

Paul Wheelhouse: I understand Mr Hume's point. I refer to our discussion about the hierarchy. The duty does not prioritise sustainable economic growth over the other regulatory purposes. It is important to recognise that, so I thank Mr Hume for raising the issue, as it gives me an opportunity to put the matter on the record. Regulators need to determine an appropriate balance, which is legitimate; however, as the committee has probably heard in evidence, the regulators make

balancing judgments every day and are comfortable with that approach.

Earlier, I commented that we are making the relationship to the Government economic strategy more explicit by introducing the public duty on sustainable economic growth. That helps to provide clarity, but regulators already have to strike a balance between the environmental impacts and the impact on sustainable economic growth. Members should be in no doubt that, for SNH and SEPA, the environmental purpose is at the top of the hierarchy—ultimately, it is their first priority. The new duty will for the first time formalise the other priorities that sit under it.

The natural assets that SNH and SEPA work to conserve and enhance are integral to sustainable economic growth, which is why the development of our ecosystem services approach and the natural capital index, to which I referred, are so important. They allow all policy makers to understand the economic value of protecting the environment so that they can see an economic return from it, and to understand that it is not merely an add-on, but is integral to a more sustainable approach to economic growth. That is one area in which there is a bit of crossover between the two concepts.

As we develop our understanding of ecosystem services, the tools in the box for making decisions on such issues will become stronger and will help us to make more rational decisions that support the protection of the environment and economic growth. I appreciate that there are always tensions between the two objectives and between them and the social objectives to which Claudia Beamish referred. However, those tensions already exist. Those are all legitimate issues to take into account. As I said, SNH and SEPA make balancing judgments every day on such matters.

Jim Hume: I want to explore the issue slightly more deeply, putting protected sites to one side. You said that SNH and SEPA will have the environment as the top priority, but the duty to contribute to sustainable economic growth will surely still apply to them to an extent. Will you explore a bit further the extent to which it will apply?

Paul Wheelhouse: We could look at what already happens. It is generally acknowledged that, in recent years, SEPA and SNH have taken a much more constructive approach and have tried to work with the developers of projects. There are good examples from across Scotland of SEPA and SNH working with promoters of local projects to ensure that development takes place in a way that delivers economic benefit and employment opportunities but does not harm the environment, when that can be avoided.

Recently, I visited the Marine Harvest offshore salmon farm at Barra. I am aware that SNH worked closely with Marine Harvest before it even submitted its application to identify areas in the Sound of Barra that would be of minimal concern and would be an appropriate place to site a fish farm with minimal damage to the environment. Although other matters might have been taken into account when the application was made, there was engagement with the developer to ensure that as much as possible was done prior to that to minimise any environmental harm. That is a good example of how a regulator can assist in the process. Ultimately, a good project appears to have taken place. Unnecessary conflict between the developer and regulator was avoided through their talking to each other and making information available to ensure that the developer chose a good site that would have a minimal impact on the marine environment.

The Convener: We have explored that issue in considerable detail, so we will move on to questions from Claudia Beamish.

Claudia Beamish: How will the code of practice ensure that SNH, SEPA and the FSA will be able to prioritise between the multiple statutory duties? Is the provision likely to change the way in which regulators operate on a daily basis?

11:00

Paul Wheelhouse: Provisions in the bill will place a duty on regulators to exercise their functions in a way that contributes to sustainable economic growth, but only to the extent that that is consistent with the exercise of their other regulatory functions. We are not asking them to do anything that would subvert their existing regulatory functions, such as protecting the environment, which is obviously at the top of the hierarchy—that addresses the point that Jim Hume made, as well.

I will put the issue the other way round. We can foresee scenarios in which two projects have a similar economic impact and one has a better environmental benefit. As things stand, we would always want the project with the better environmental benefit to be picked. However, when two projects have a similar environmental impact—positive or negative—the provisions in the bill will formally empower organisations to take account of economic impact and choose the one that has the biggest employment and social impact. The bill will balance things up.

To be absolutely clear, we would not want and do not intend the public duty on sustainable economic growth to subvert in any way SEPA and SNH's existing regulatory duties, which must be at the top of the hierarchy. I would not subvert that

principle. Only when there is no conflict will regulators be able to take economic impact into account.

I do not know whether that answers Claudia Beamish's question. It is important to recognise that SEPA is not subject to the duty in part 1 of the bill and that the duty in respect of sustainable economic growth does not apply where a regulator is already subject to a duty to the same effect. Those things need to be taken into account.

My main point is that we would not do anything that would subvert a regulator's original public duty with regard to environmental protection, for example.

Claudia Beamish: Do you have any specific comments about that with regard to the FSA?

Paul Wheelhouse: The FSA is outwith my day-to-day duties. I will refer to Neil Watt. Have you had any discussion or interaction with the FSA on that?

Neil Watt: The FSA and SNH gave evidence last week about how the duty might work in practice. I do not think that I could explain it better.

The Convener: I seek clarification of a point about the duty of SNH and SEPA to

"contribute to achieving sustainable economic growth".

Does that duty applying to those bodies' roles as statutory consultees in the planning process create a conflict of interest?

Neil Watt: It applies only to their regulatory functions.

The Convener: Okay.

Paul Wheelhouse: As the minister with portfolio responsibility for SNH and SEPA, I know that those agencies sometimes come under a lot of pressure regarding important economic projects. However, they are fulfilling their statutory duties to protect the environment, and people need to recognise that important function.

Those who apply for projects can greatly assist by ensuring that they have the appropriate information and gather the appropriate evidence to support that process. Quite often, difficulties arise because insufficient information is provided in support of an application and not because of a lack of willingness on the part of SNH or SEPA to consider the application. It is important to recognise that those agencies are there for a reason: to conserve the natural environment and protect it from harm. That is their overriding purpose. Through the bill, they will get a better line of sight on other Government policy such as the sustainable economic growth agenda. Where it is appropriate, the agencies will be able to take those matters into account in their decisions, but I

would not ask them to do anything inappropriate to their primary statutory duties.

The Convener: That is very useful. We will move on to part 2, chapter 1, on environmental regulation.

Nigel Don: Part 2 largely covers SEPA and talks about control activities one way or another. In her written evidence, Dr Sarah Hendry made a point about the four sorts of control that appear to be in it: permit, registration, notification and general binding rules. I understand her point that although permits and general binding rules are things that we know about historically, the difference between a registration and a notification is not entirely clear.

My question is not necessarily a terribly technical one, but do we need to have two different things called registration and notification? Could we not just have permits, general binding rules and something else in between? Would a three-tier system be adequate?

Paul Wheelhouse: I take the point. As you have identified, schedule 2 provides for a four-tier system of authorisation, should that be required. The permit and registration have a similar legal effect. Notification is intended to be used as a means for an operator simply to tell SEPA that they are carrying out an activity in a particular location. Most likely, it would be combined with a general binding rule, so that there is a requirement on an operator to follow the rules set out in legislation or guidance and to notify SEPA that they are carrying out the activity. The Water Environment and Water Services (Scotland) Act 2003 provides for four similar tiers, so a similar approach is already being deployed. However, I take the point that we could perhaps do a little more to make it clear why that is necessary.

George Burgess may want to comment on the existing operation of a similar four-tier approach.

George Burgess: I have a couple of points on that. First, we should remember that what we are providing here is simply an enabling power. How many tiers are used in an individual bit of regulation would be a matter for the regulations. I certainly take the point that four tiers of control is probably too many. We discussed quite a lot among ourselves and with the lawyers whether three tiers of control would be sufficient—the permit, registration and general binding rules. We thought that it was best to retain the flexibility that is already in the WEWS act. In practice, though, down the line and in consultation with regulated parties, the regulations that are produced might only actually make use of a subset of the flexibility that is available there.

Nigel Don: Okay. I think that I now understand that. Notification might be an add-on to a general

binding rule process and registration might be a subset of a permit.

George Burgess *indicated agreement.*

Nigel Don: If those already exist elsewhere and they will be mixed and matched, I suspect that that is fine.

The Convener: We move on to chapter 2 and powers of enforcement, mainly related to SEPA.

Angus MacDonald: Minister, I was pleased to hear you say in your introductory remarks that environmental workshops with stakeholders will begin to be held next week. I am sure that those workshops will look at powers of enforcement.

The greater powers of enforcement will give SEPA powers such as fixed monetary penalties, variable monetary penalties, non-compliance penalties and cost recovery. As a constituency member with a number of waste management issues in my constituency, I very much welcome those. However, are you confident that SEPA will be able to determine fairly—on the balance of probabilities—whether an offence has taken place?

Paul Wheelhouse: In short, yes. We are confident that adequate safeguards are in place to protect those being accused of offences and ensure that there is a proportionate approach. Bridget Marshall has given evidence on the reasons for applying a balance of probabilities test to the evidence that SEPA must gather. There may be some interest in the relationship between criminal and civil actions and where the boundary falls. There is a role for the Crown Office and Procurator Fiscal Service in determining whether, on the balance of probabilities, something criminal has taken place—in other words, something quite malicious and deliberate rather than simply non-compliance as a result of ignorance of the requirements.

We need to distinguish the role of the procurator fiscal and the role of SEPA in the Scottish system. We are looking at other enforcement measures that SEPA can take, such as imposing an enforcement notice, which we received some responses about, and ensuring that the new enforcement measures sit alongside existing measures. We have looked at other civil penalty systems that SEPA is responsible for—such as under emissions trading, which is an area where we already have responsibility—and at other regulators that impose discretionary civil penalties.

As I am sure you are aware, there is an issue with regard to article 6 of the European convention on human rights, and an important safeguard will be the independent appeals tribunal that we are also providing. We recognise the need to keep

that tribunal independent of ministers to ensure that objective decisions can be made.

Angus MacDonald: But you are confident that SEPA's powers of enforcement will be proportionate.

Paul Wheelhouse: Proportionality is, along with transparency and other issues, a key part of the bill as far as enforcement is concerned. Even in the short time that I have been in this role, I have come to see that there is quite a difference between accidental non-compliers and, for example, the serious organised crime elements that as we know and as I have previously mentioned to the committee exist in some aspects of the waste sector—I make it clear that I am not making any link with the member's constituency, but there are certainly issues in relation to other sites. For example, I recently visited a site near Ikea that had been left in a horrendous state by a waste contractor who had clearly and significantly breached the regulations and had effectively left others to meet the huge cost of clearing things up. We need the powers to tackle such sites, but at the moment SEPA has one arm tied behind its back with its limited powers and the very modest fines and fixed penalties that it can apply. We need a more proportionate system, which reflects the fact that, in certain cases, there is a serious intention to ignore regulations or do something criminal and, in other cases, things happen because people are ignorant of the regulations that they have to work within.

Angus MacDonald: If I recall correctly, the possibility of putting bonds in place for new waste management developments has been raised with the committee and I think that that would certainly help to deal with people who do not follow the rules. What discussions have taken place with SEPA on the general issue of extra enforcement powers?

Paul Wheelhouse: I will ask Neil Watt and Bridget Marshall to talk about on-going engagement as they are actively involved in discussions with SEPA not only on the content of the bill but on wider enforcement issues.

Bridget Marshall (Scottish Government): We are having very active discussions with SEPA; indeed, I have been seconded to the Scottish Government partly to ensure that that link is as strong as possible. The other important partner in all of this is the Crown Office and the Lord Advocate, and the minister and the Lord Advocate have discussed how these enforcement tools will work in practice and have explored the territory between the role of the procurator fiscal and the role of SEPA. Very active discussions are going on with all the parties involved about what will be for SEPA a quite novel use of such tools.

Neil Watt: I also point out that next week's event will be jointly hosted by SEPA, the Scottish Government and the Crown Office to ensure that questions are answered from all angles and that, if required, we explain how things will work in practice, the impacts on people and of course the intention behind all this.

Paul Wheelhouse: I am conscious that time is passing but, on intent and following on from Bridget Marshall's reference to the Lord Advocate, I should say that the whole system will operate within the framework of the Lord Advocate's guidelines, which will set out in terms of proportionality and public interest the cases referred to the procurator fiscal for prosecution and the cases that SEPA will enforce directly. There will be clarity on where the boundary lies and I hope that next week's workshop will inform the debate.

Richard Lyle: Following on from Angus MacDonald's well made point about people who dump or cause such problems, I have to say that for my whole political life I have abhorred people who leave sites in a state, who dump or whatever; I have always wanted the issue to be taken up.

Minister, you talked about criminals and people might ask why a criminal did not get dealt with to the full letter of the law and why the judge or SEPA did not hit them with a bigger fine. What is the justification for setting the cap on fixed monetary penalties at only £40,000?

11:15

Paul Wheelhouse: The £40,000 cap was chosen after detailed consideration. It is the maximum amount that can be imposed by a criminal court in summary proceedings for most environmental offences. The policy intention is not to create an imbalance between the criminal courts, and £40,000 seemed an appropriate upper limit. Were the Crown Office and Procurator Fiscal Service to determine that there had been a really serious crime and serious criminal intent, the case would not necessarily go through summary procedure; it would be heard in full in the criminal courts and evidence would be taken. In such situations, the courts could apply more severe penalties. We are not saying that £40,000 is the absolute maximum limit, but it is the maximum limit that can be set in summary proceedings. That acknowledges that there might be a public interest in getting things tackled quickly, rather than having a huge delay before ending up with the same conclusion about the level of fine. I do not know whether Bridget Marshall wants to add anything about the approach that would be taken in the criminal court and what the penalties might be in that scenario.

Bridget Marshall: The £40,000 relates to the variable monetary penalty, which is something that SEPA will be able to impose directly. That is why the cap is at £40,000. As the minister rightly said, that is the maximum for most environmental offences in summary proceedings, which are for the less serious crimes. A serious crime will be taken to a jury trial under solemn proceedings, where unlimited fines and imprisonment are available. It is important to have in mind the fact that £40,000 is the maximum that SEPA can impose directly. Any more significant offences will be referred, as currently, to the fiscals for prosecution in the criminal courts, either under summary procedure or, if they are more serious, under solemn procedure.

Richard Lyle: I am certainly glad to hear that. Criminals beware!

Alex Fergusson: In oral evidence, the Law Society of Scotland and the UK Environmental Law Association raised concerns about the implications of enforcement measures being imposed by SEPA based on the balance of probabilities, as against following court procedures where the standard of proof is beyond reasonable doubt. They raised the issue of what could be viewed as the lower level of evidence, if I can put it as bluntly as that. What approach do you see SEPA adopting in deciding whether to go for the fixed or variable fine, based on the balance of probabilities, or to pass a case on to the procurator fiscal, which would require a greater burden of proof? Will you expand on that for us?

Paul Wheelhouse: You raise a number of issues. I recognise that there will always be concerns in this area. I know that there has been substantial feedback from the consultation and the evidence that you heard last week on these sort of matters. You referred to the procurator fiscal being satisfied on the balance of probabilities that the person has committed a relevant offence. A number of safeguards are built into the system, including the Lord Advocate's guidelines, which were referred to earlier, which will set the framework for the new enforcement measures, and SEPA will revise its enforcement policy to include the new enforcement measures, so there will be a linkage between the two.

SEPA is required by the legislation to provide detailed guidance about the new enforcement measures and how they will apply, so there is clarity for those to whom they will apply—although obviously people will try to avoid committing an offence. In most cases, apart from the purely administrative type of offences, SEPA will as a matter of practicality carry out an investigation of offences. Only at quite a late stage will the evidence be available to assess whether a case is significant or less significant. I recognise the need

to ensure that there is an appropriate evidential trail to support the prosecution of any offence by either SEPA or the Crown Office and Procurator Fiscal Service.

The evidence available will not dictate whether the case will be referred to the procurator fiscal or dealt with directly. That will be determined by the Lord Advocate's guidelines, the nature of the offence and whether there was a criminal intent as determined by the balance of probabilities.

Calum MacDonald, who is SEPA's executive director, gave evidence about the training that will be given to officers and the robust national governance arrangements, which will ensure that decisions under the new enforcement measures are scrutinised at an appropriate level within the organisation and are consistent. There will be continual monitoring of how they are delivered in practice so, if any inconsistencies of approach emerge, those will be tackled and rectified.

Has that answered your question?

Alex Fergusson: It has to a certain degree. It is incredibly important to get this bit right because, if there is room for doubt, SEPA could be open to accusations of saying, "Well, we haven't got enough proof to get it through the courts, but we'll do them through the powers we have ourselves." Obviously, one does not want that to happen.

Paul Wheelhouse: The important point is that the quality of evidence is not what will determine whether the case goes through the Crown Office and Procurator Fiscal Service or is dealt with by SEPA. The question is more whether, on the balance of probabilities, it is likely that criminal intent was involved. As I understand it, if that is the case, regardless of the quality of the evidence, the matter will go to the Crown Office and Procurator Fiscal Service under the Lord Advocate's guidelines. However, if it is just a matter of regulatory non-compliance due to accident or incompetence in some respect, there would be no criminal intent and it would be more likely for SEPA to take direct enforcement action.

I do not know whether that is consistent with Bridget Marshall's understanding. I ask her to confirm that.

Bridget Marshall: I gave quite a lot of evidence to the committee two weeks ago about why we chose the burden of proof as civil. The minister referred to that. I acknowledged that Mr Fergusson's point was a criticism that could be levied at the approach that we chose, but the minister has outlined in his answers some of the safeguards that mean that it is unlikely or virtually impossible that that will happen.

The framework that the Lord Advocate will put in place will make it difficult in practice for SEPA to

put its weaker cases through its own direct measures rather than referring them to the fiscals. The important point is that the sufficiency of evidence will not dictate the route that the offences will take through the new system.

Alex Fergusson: Will the Lord Advocate's guidelines be made public? Will we have access to them? If it is possible to say, when will they be in place?

Bridget Marshall: They will be made public. The workshop next week, which focuses on enforcement, is a joint workshop with the Scottish Government, SEPA and the Crown Office. The guidelines will be discussed at that workshop and will be made public subsequently.

Alex Fergusson: That is useful to us. Thank you.

Jayne Baxter: Is it possible that someone who is served with a notice of intent could decide to take their chances in, and ask to be referred to, the court because there is a need to demonstrate more proof there than the balance of probabilities? Is there any chance of the perpetrator being offered that choice?

Paul Wheelhouse: I am certainly aware of comparable systems in which somebody can choose to take the punishment or go to court—for a parking or a speeding offence, for example. That approach applies elsewhere in the system, so I appreciate the point that you are making.

I believe that that model was initially considered, but the principle of proportionality was felt to be important. If we followed that approach, some of the less significant cases could still be referred to the criminal system and, in many cases, that would be disproportionate and would reduce the benefits of speed, cost and removing such cases from the criminal justice system altogether when that is felt to be appropriate.

The appeals system is still relevant and is crucial to ensuring compliance with article 6 of the ECHR. Someone who is unhappy could still appeal, and one of the measures in the bill is to remove that appeal from ministers, so that there is not felt to be an undue balance in favour of SEPA. At least temporarily, such appeals will be heard at the Scottish Land Court. That is felt to be consistent with article 6 of the ECHR, so it is an important measure.

I take your point, but proportionality was felt to be important and, to avoid bogging down the criminal justice system with cases that were relatively minor and not of a criminal intent, we decided to go down a different route.

Jayne Baxter: Would a successful appeal against a notice preclude SEPA from pursuing

further action in the form of a second notice or prosecution?

Paul Wheelhouse: My understanding is that, if a fixed penalty is withdrawn by the tribunal, SEPA cannot have another go. At the point at which the final notice is served for a fixed or variable penalty, no further sanction can be imposed by SEPA in relation to the facts that constituted the offence, and nor can the case be referred to the procurator fiscal for prosecution. That is it, in effect; there is no double jeopardy.

Bridget Marshall will confirm whether my understanding is correct.

Bridget Marshall: That is correct. If offences continue and the facts that related to the first notice arise again, SEPA may impose another variable penalty, which might be higher, or decide to refer the case to the procurator fiscal for report because there is a course of offending that is continuing.

Paul Wheelhouse: It is worth saying that our general approach is to target our efforts on serious, regular offenders—in the criminal sense—and serial non-compliers, as part of the package of measures through which we will try to target SEPA's resources more effectively. I think that the point has been raised with NFUS.

I am aware of an instance in which a catchment had a serious problem with diffuse pollution. On investigation, it was found that there had been 5,000 breaches of regulations in the catchment. SEPA worked with NFUS, the local farming community and others to raise awareness of the issue and the importance of tackling diffuse pollution. There were repeat visits, and 75 per cent of farmers have now taken remedial action and are complying.

Where we can, we will use the potential for enforcement action from SEPA to encourage farmers or non-compliers to comply. When people consistently do not comply, we will target resources on prosecution. We will try to get people to comply in the first place, to avoid their becoming unnecessarily embroiled in the criminal justice system or indeed their being subject to direct action from SEPA.

Graeme Dey: What about relatively trivial offences? I am thinking about a company that owns multiple sites and is guilty of a series of misdemeanours at a range of sites, albeit that the offences are genuinely small fry. Should we be looking at the cumulative situation and sending a message that a company that has a bad attitude to environmental regulation will be pursued?

Paul Wheelhouse: I wholly endorse that approach. Up to now, we have probably been talking about serious breaches as opposed to an

isolated and minor breach or a small number of breaches on one site. It is fair to suggest that there might be people who turn a blind eye to a series of fairly low-grade environmental breaches, such as littering, which can add up to a serious problem over their entire estate. It is right that SEPA engages with such a company, to ensure that it is aware that there is a problem across all its sites—it might not be aware that things are happening everywhere, just because of its management structure—and is given a chance to comply. If the company fails to comply, we will look to SEPA to take enforcement action.

I do not know whether such a scenario was discussed in the build-up to the introduction of the bill. Neil Watt or Bridget Marshall might comment on that.

Bridget Marshall: The issue was raised with Calum MacDonald when he gave evidence to the committee. I think that he gave an assurance that we are beginning to look across not just sectors but corporate entities. In particular, we are thinking about how we organise our inspections and audits, which might be done on a corporate basis, rather than on the basis of individual companies in a corporation.

Measures in the bill—or, rather, in the regulations that are made under the act—will allow SEPA to consider corporate permits, so that we can consider issues on a company-wide basis instead of looking at individual sites.

11:30

Paul Wheelhouse: It is worth stressing that company executives who are responsible for a large chain of companies would be accountable for the actions of their subordinates across the network. It is a matter of making them aware that they are in breach and encouraging them as accountable officers to ensure that they bring the company within the regulations.

Graeme Dey: You are right. We were given that assurance by SEPA, but it is good to get the minister's enthusiasm for tackling the issue on the record.

Richard Lyle: Minister, I am impressed that you and SEPA will take a commonsense approach to people who unintentionally break the law. It is true that, at the end of the day, they will have broken the law, but I want you to go after the people who continually break the law, turn a blind eye and think that they get away with it.

Would the appeals process that is set out in the bill add to the current ad hoc approach for dealing with environmental appeals rather than support a move to a more strategic approach for such appeals?

Paul Wheelhouse: That is a fair point. Appeals against the technical decisions that SEPA makes are usually heard by the Scottish ministers. I am aware that concern was expressed about that in the consultation. It is a good example of our having listened to the consultation responses because we have taken an approach that, at least in the interim until we know the outcome of other discussions about tribunals in Scotland, ensures that appeals will be made to a body that is wholly independent of the Scottish ministers.

The Tribunals (Scotland) Bill is following a similar timetable to the Regulatory Reform (Scotland) Bill. We intend to set up the appropriate tribunal in regulations at a future point. We will be in a position to identify the most appropriate appeals route once we know the landscape of the new tribunals system for Scotland.

I am grateful for the opportunity to highlight the Tribunals (Scotland) Bill, because it is an important part of improving the current landscape. We are undertaking a range of ambitious and significant reforms to the justice system, of which I am sure members are aware. We hope that the implementation of Lord Gill's civil courts review will also pave the way for swifter handling of cases, including public interest cases such as environmental cases. The new tribunals structure will allow in time for certain specialist civil chambers to be set up.

I appreciate that the approach might appear a bit ad hoc at the moment. However, I assure you that we are aware of the Tribunals (Scotland) Bill and the fact that the landscape of tribunals will change. The Regulatory Reform (Scotland) Bill is having to go through Parliament at the same time as that bill and we cannot prejudge what the outcome of the tribunals review will be. However, we will look for the most appropriate tribunal to which to take such cases to maintain independence of decision making from the Scottish ministers in recognition of the concern that stakeholders have expressed about the need for appeals to be heard in an objective forum.

Angus MacDonald: Regarding the commonsense approach that has been mentioned, the NFUS has welcomed at the committee on more than one occasion the more collaborative approach that SEPA is taking towards Scotland's farmers. That certainly must be welcomed.

Will you provide more detail on potential future amendments to entry and search powers under the Environment Act 1995? Have they been consulted on? How will they better equip SEPA to tackle environmental crime?

Paul Wheelhouse: I will try to give a bit of clarity.

I am sure that members are aware of the environmental crime task force that the Cabinet Secretary for Rural Affairs and the Environment has established. That is a group of experts including SEPA, the Scottish Government, the police and the Crown Office. It is tasked with supporting the delivery of the Scottish Government's commitment to tackling environmental crime and is due to report in July this year.

It is hoped that the report will provide greater clarity. We understand that it will include proposed amendments to entry and search powers for SEPA under the Environment Act 1995 to make it more fit for purpose to tackle environmental crime as well as compliance issues.

I will pick up a point made by Mr Lyle and to which you referred, Mr MacDonald, on the proportionality of the approach and targeting. I think that I have mentioned before that serious threats of violence were made to SEPA staff at the site that I visited at Loanhead, as well as at other places. That is totally unacceptable, as the committee surely will agree.

Things have been so unbalanced that it has been difficult for SEPA officers to gain entry to sites to investigate issues of non-compliance. They often face physical threats and, in some cases, their families also have been targeted—there has been stalking or intimidation outwith their day-to-day work, using social media.

A lot of very aggressive behaviour is going on, and we need to rebalance the situation so that our guys have the tools to do the job and do not face unreasonable threats in carrying out their duties.

Angus MacDonald: I agree that any intimidation of SEPA officers is completely out of order; the sooner we have powers to address that, the better.

On the national litter strategy, can you provide more detail about the potential for new powers for public bodies other than SEPA to issue fixed penalty notices?

Paul Wheelhouse: If I may, at this point I will steal the cabinet secretary's thunder and confirm that shortly there will be a Scottish Government consultation on national litter strategy that will address exactly what the member has asked about. The consultation will look at issues to do with fixed penalty notices in the future and is likely to take place over the summer, so we do not have long to wait.

That is a high priority for the cabinet secretary, who is keen to see a more concerted effort made on forms of littering in Scotland. I would hope that the bill supports the approach but, in any case, we

will be able to feed into the consultation in due course.

Angus MacDonald: If the consultation is to be announced over the summer, circulation to the committee at the same time would be helpful.

Paul Wheelhouse: I am sure that that will happen as a matter of course, but I will make sure that it is noted.

The Convener: We now move on to questions on chapter 3, which is on court powers.

Graeme Dey: Minister, what considerations would a court be required to take into account in deciding whether it was appropriate to issue a publicity order? For example, would the fact that the offence was accidental be a consideration? As the Federation of Small Businesses suggested, a small business might lack understanding of its responsibilities. Would publicity orders be confined only to very serious offences in which the perpetrator had deliberately played fast and loose with the environment, or would past misdemeanours be considered, so that a company that is guilty of a series of relatively minor breaches is eventually made subject to an order on the basis that enough is enough?

Paul Wheelhouse: That is a very good question and I am grateful for the chance to clarify. The policy intent is that publicity orders will be used only for the most serious and deliberate breaches of environmental legislation; they are an additional sentencing power to be given to the criminal courts.

How to use that sentencing power will be up to the court's discretion. If there is on-going notification that breaches are taking place and are consistently ignored, it is open to interpretation about whether that non-compliance is deliberate. We will need to clarify at what point persistent non-compliance becomes a serious offence.

We need to have a proportionate approach, and I acknowledge Graeme Dey's point about the difference between those who are perhaps a bit daft and have not paid attention to their responsibilities versus those with clear intent to seriously subvert the environmental regulations within which they are duty-bound to operate. That is where we would seek publicity orders and, it is hoped, embarrass such people into action.

Graeme Dey: Clearly, although the damage will have been done when they are used, publicity orders have a role as a deterrent to the individuals concerned and to other companies, who see what happens if they are guilty of such misdemeanours.

Paul Wheelhouse: There is huge potential for a company to suffer reputational damage. The measure is already being used elsewhere—

including, I believe, Australia—and it has apparently already had an impact.

The aim is to deter actions that damage the environment and which undermine legitimate businesses, and I think that businesses will take the matters very seriously and will see the orders as a deterrent. I hope that we will not need to use the power often and that its mere threat will, as I have said, deter any actions in the first place.

Graeme Dey: Finally, will the courts receive guidance on what is deemed to be a serious offence?

Paul Wheelhouse: That is a reasonable point. Ultimately, such a decision will be at the courts' discretion but I imagine that clear guidelines on the intent will be produced.

George Burgess: The Government would never seek to guide the courts on such a matter. The procurator fiscal or the advocate depute would have an opportunity to draw the publicity order provisions to the court's attention, but sentencing is a matter for the courts and the Government would never seek provide guidance to the courts on how to use their powers.

Paul Wheelhouse: With regard to the deputy convener's point, we will need to be clear about the policy intent and to set out our understanding of the policy and where it would apply. Ultimately, as George Burgess has made clear, it is up to the discretion of the court as to when such a measure would be applied.

The Convener: Nigel Don will now ask a few questions about the miscellaneous provisions in chapter 4.

Nigel Don: I will address a number of miscellaneous things in what might be a fairly random order. First, minister, do you have anything more to say about possible amendments relating to contaminated land?

Paul Wheelhouse: Do you have any particular concern in mind?

Nigel Don: I understand from the letter that you sent the committee that you propose to lodge amendments at stage 2.

Paul Wheelhouse: We recognise that the contaminated land provisions contained in part IIA of the Environmental Protection Act 1990 are extremely technical. We think that we have got the provisions on contaminated land sites right, but we will need to make a few amendments and adjustments to the provisions on special sites to reflect the role of SEPA and local authorities. I must apologise; I appreciate that the area is hugely technical, but we hope that we can keep the amendments to the minimum necessary.

Nigel Don: We can look forward to seeing those amendments at stage 2.

Paul Wheelhouse: Indeed.

Nigel Don: That is fine. I just wondered whether there was anything to add.

On the general principle of vicarious liability, one question that has arisen is whether it extends to trusts. After all, quite a lot of our land is held in trust. Can you give us any detail on what that provision is intended to cover?

Paul Wheelhouse: You raise an important point. The vicarious liability provisions in the bill apply to non-natural legal persons such as a company or partnership, not individuals or sole traders. The intention is that they will cover any legal person—to use the vernacular—other than an individual, and they might therefore extend to unincorporated associations, bodies or persons, including trusts. If the committee has concerns that such matters need to be clarified, we will happily take them on board.

Nigel Don: I am not surprised by your reference to trusts, but I think that the mention of unincorporated associations will raise a few eyebrows. By definition, such things tend to simply appear and people do not realise that they are a part of what is going on. Has that issue been considered?

Paul Wheelhouse: I ask George Burgess to respond.

George Burgess: As the minister has said, the provisions apply to anything that the law recognises as a legal personality; as a result, if an unincorporated association has a legal personality, it will be caught. However, if it is a looser association that is not a legal person in law, the provisions will not apply. The key point is that only a legal person can hold a licence or permit from SEPA. In short, if the thing exists as a legal entity, the vicarious liability provisions will apply.

Nigel Don: On the offences, environmental harm is defined and understood elsewhere in statute, but it is not clear whether significant environmental harm is also understood in law.

11:45

Paul Wheelhouse: There are a number of existing regulatory offences under the Water Environment (Controlled Activities) (Scotland) Regulations 2011, the Environmental Protection Act 1990, the Pollution Prevention and Control (Scotland) Regulations 2012 and the Radioactive Substances Act 1993. The intention is to repeal those offence provisions and provide a single set of regulatory offences under the new, integrated regulatory framework. That is a good example of

where we seek to simplify and improve the read-across of regulation.

Regulatory offences include the failure to have an authorisation or failing to comply with a condition of a permit. In the waste sector, for example, failure to comply with conditions is a major concern, as we saw recently with a large site containing tyres in Lanarkshire.

In addition, there will be the new significant environmental harm offence, which will apply when the harm caused is outside that contemplated by the regulatory system, whether or not the offender has a permit. The examples that have been given relate to the health and wellbeing of the Scottish population and protecting and improving the environment. Although they are not specified in regulation, it is possible to define instances in which harm has been caused to the public's health and wellbeing—which is obviously a major concern for the Government and, indeed, the whole Parliament—or to the protection and improvement of the environment.

The bill will bring SEPA's purpose in line with the Scottish Government's purpose, as we set out earlier, and will help to demonstrate that environmental and economic objectives are mutually supportive. There is a side benefit to taking that approach.

George Burgess: On whether significant environmental harm is a clearly understood concept, section 31 sets out when environmental harm becomes significant environmental harm. That is defined as being when

“it has or may have serious adverse effects, whether locally, nationally or on a wider scale”.

We can imagine a sort of harm that is isolated locally but very significant because of what has happened in that place.

The section also provides that we can recognise harm done to a particular area, such as a Natura site, if it is designated by ministers. We are trying to give as clear a signal as we can of when environmental harm would be denoted as significant.

The Convener: That takes us to the end of the series of questions. The minister and his officials have given us a lot of material to think about for our report. I thank them very much for that highly detailed and interesting evidence.

Annual Report

11:48

The Convener: Agenda item 3 is consideration of our annual report for the parliamentary year 11 May 2012 to 10 May 2013. I refer members to the paper provided, which I intend to go through page by page.

Are there any comments or suggested alterations on page 1 of the draft annual report, which contains the introduction and refers to legislation with which we have dealt?

As members know, we are still in public so, if anyone has any comments, they will be on the record. That is why members are all so quiet.

Angus MacDonald: I do not have a problem with the content, but I just wondered whether the word “twitter” should have a capital T.

The Convener: Those are the kinds of questions that we should be asking. I think that it should have a capital T.

There is some more about legislation and subordinate legislation on page 2, followed by inquiries and evidence-taking sessions, which spill over on to page 3.

Jim Hume: I have a comment on paragraph 16, at the bottom of page 2. I reported back to the committee on my visit, so it would be useful to add, “and reported several points to the committee”.

The Convener: We can frame that accordingly.

At the bottom of page 3, and continuing on page 4, is a list of the petitions that we have looked at, some of which are open and one of which was closed.

On page 4, are members happy with what is said about engagement and innovation and about equalities?

Claudia Beamish: I wonder to what extent our responsibilities as a committee in relation to the nine protected characteristics are clearly identified in the report. We discussed them in relation to the budget, but to what extent are they identified in relation to our brief for rural Scotland?

The Convener: Can you suggest where something could possibly be inserted?

Claudia Beamish: I just wonder whether there might be some identification of issues that have come up in relation to the characteristics. If we mentioned things that have arisen during the year, that would make our report a little more robust.

The Convener: Can we think of any practical examples?

Claudia Beamish: If we consider some of the protected characteristics—such as disability, age and gender—it might help other committee members to think about how we have looked at those issues, which we have a responsibility to do.

The Convener: Nobody else is saying anything, although they are welcome to.

Alex Fergusson: I absolutely understand where Claudia Beamish is coming from, but in such a report, and given the committee’s remit and the obligations that we have to fulfil, attention should be drawn only if we significantly fail to pay due attention to something that is in our remit, rather than highlighting every example of where we do not fail. Given that we are expected to comply with all the equality measures, it should be taken as read that we do so, unless somebody wishes to point out an instance in which we have not done so. I would find it more helpful if we took that approach, rather than highlighting compliance with the measures. The report should be left the way it is. I am open to argument, but that is where I come from.

Claudia Beamish: I understand what Alex Fergusson says but, as there is an obligation on us, I do not agree that our compliance should just be taken as read. The committee needs to check whether it has looked at the nine protected characteristics, because we have an obligation under the Equality Act 2010.

The Convener: The annual report is about what we have done, so we should not look to add to it unless there is something very significant to add. I take Alex Fergusson’s point. If we felt that we had been negligent, I am sure that we would be able to bring that up. We are trying to ensure that we perform correctly on equalities and, if we have not done so, members should draw that to our attention at the appropriate time.

Richard Lyle: I tend to agree with Alex Fergusson. If we look through the whole report, including the good work done by Mr Hume on our behalf—I am sure that he is not listening to me—we can see that it has been an exciting year, given all the bills that we have considered and the visits that we have made. Unfortunately, I could not do some of the visits, although I went on the first one.

I take Claudia Beamish’s point, but I would like her to highlight exactly what she wants added to the report. It is an excellent report, which shows how well the committee has worked in the past year. I compliment you, convener, on your stewardship, and my fellow members on the work that they have done.

The Convener: That is kind of you.

We cannot add to the report unless we have specific examples of what Claudia Beamish

mentioned in relation to the nine protected characteristics, so we should leave it as it is at the moment. We should bear it in mind for the future that, when we come to the annual report, we should say what we have done. There has been no instance in the past year when we have raised an issue that would have breached our equalities obligations. If members are aware of any such instances, members should bring them up as we go along, so that they can be noted.

Jim Hume: On a completely different point, my arithmetic might be wrong, but paragraph 30 on page 5 states:

"The Committee met 33 times during the Parliamentary year. Of these meetings, 2 were ... in private and 21 were partly in private."

Twenty-one plus two makes 23, so there must be some mistake.

The Convener: The rest of the meetings were totally in public.

Jim Hume: Okay. Maybe that should be highlighted.

The Convener: We can get that spelled out clearly.

If members have no other comments on pages 4 and 5, do we agree to the draft annual report, as slightly amended?

Members *indicated agreement.*

11:56

Meeting continued in private until 12:24.

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