Scotland The Hydro Nation: Prospectus and Proposals for Legislation

RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

1. Name/Organisation

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United Kingdom Environmental Law Association (UKELA)

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CONSULTATION RESPONSE

Please provide comments on Scotland The Hydro Nation: Prospectus and Proposals for Legislation

Scotland the Hydro Nation: Prospectus and Proposals for Legislation

Response of the UK Environmental Law Association (UKELA)

UKELA (the UK Environmental Law Association) welcomes the opportunity to respond to this consultation. The response has been prepared by the Scottish water law sub-group in consultation with the working party on Scottish environmental law. UKELA seeks *inter alia* to influence the development of Scots environmental and water law by responding to key consultation papers.

The group is pleased to note the Government's intention to focus on the management of water as an area of emerging policy. The Government has not asked specifically for comment on the first, "Vision" part of the paper, and the group will not comment in detail on that part, which has no direct relevance to law reform. We would note generally that whilst we support the sustainable development of Scotland's resources, and the fullest promotion of Scotland's expertise abroad, we are also concerned with the safeguarding of the water resource for its own sake.

Depending on what use the Government intends to make of the "Vision" part of the paper, ie, if it is to form part of some sort of policy statement, we would suggest adding in section 1, before the bullet points:
"In taking these steps, Scotland will show it understands (1) that water is a precious local resource, (2) the key importance of water to the environment and wellbeing of the planet and the sustainability of communities wherever they are, (3) the diverse way in which different water resources are used and contribute to that wellbeing and sustainability and (4) that Scotland can use its understanding of these matters to create economic opportunities."

SECTION 2

<u>Hydro Nation and the Water Resources Bill</u>

Hydro Nation Duty

We note firstly, the general duty on the Ministers; secondly, the sustainable development duty; and thirdly, the meaning of "value" (but not development).

Clauses 1(1) and 1(3). The heading of Part 1 of the Bill is given as "Development of Water Resources". Insofar as the courts will give ordinary meanings to ordinary words, "development", even outwith the Planning Acts, would often be construed as involving perhaps some works, such as a hydro scheme, or other commercial or

potentially commercial uses. In that sense, the economic value of the water resource would of course be relevant. Clause 1(3) indicates that "value" is also to have a non-economic meaning.

"Value" is a word with many meanings. Non-monetary values may be religious, cultural or aesthetic. Water may have these values attached to it, and it might be very important to *protect* these values, but it is not clear how they can be "developed".

Alternatively, "value" and valuation methods are increasingly used to give a monetarised equivalent to things traditionally not easy to price, such as the natural environment, taking account of externalities (pollution), or opportunity costs (alternative uses to which a scarce resource cannot also be put), or the recreational or cultural uses to which the resource is put. (See, for example, The Economics of Ecosystems and Biodiversity project (TEEB) http://www.teebweb.org/ , or more recently, the UK National Ecosystem Assessment. These initiatives show the economic value of ecosystem services – the economic loss that would ensue if the planet no longer provided those services – and this approach is being taken in various contexts just now, including the pricing strategies under the Water Framework Directive (2000/60/EC Art.10).

It is not entirely clear within these two subsections which approach the Government is taking to the word "value". The trend as evidenced by TEEB is to provide a valuation of ecosystem services. Both the valuation and the concept of ecosystem services (unlike ecosystem function) are essentially economic concepts. It is certainly the case that the first consultation looked in some detail at ways of putting a more comprehensive economic valuation of the wider uses and benefits of the water resource. If this is still the way that the Government is thinking of value, then it is not clear that this is what clause 1(3) actually provides. If on the other hand the Government is (also) concerned about the intrinsic, non-monetary, non-economic value of water, then it is not clear how a duty to develop (rather than, say, protect or conserve) will enhance that sort of value.

As noted at the start of this response, UKELA is keen to support the sustainable development of Scotland's resources, for the general benefit, including economic benefit, of the people of Scotland. However, UKELA is concerned that the consultation as it stands does not sufficiently recognise the importance of water for its own sake, as part of the natural environment, as a habitat, water for fishing and for recreation (both of which have economic and intrinsic value) and other aesthetic and cultural uses.

Depending on how the Government proceeds to revise clause 1, we suggest specific reference to the protection of the resource as part of the natural environment, as habitat, for fishing, recreation and cultural and aesthetic use.

Clause 1(2)(b). The sustainable development duty as expressed here is found in other elements of Scots water law (Water Industry (Scotland) Act 2002, s.51, Water Environment and Water Services (Scotland) Act s.2(4)), and is in broad and aspirational terms. Recently, it has been argued that stronger sustainable development duties with specific procedural steps can be more effective (Ross,

2012, *Sustainable Development Duties in UK Law).* We suggest that Ministers should consider tightening the duty, and supporting it by procedural requirements, to ensure that it is effective.

We suggest an additional absolute duty in clause 1(2)(c), requiring Ministers, when formulating any proposal or exercising any function under this Act, to assess its ecological and social impact.

We also note that there are already sustainable development duties applying to SEPA, and to Scottish Water, but that statutory guidance on these duties applies only to SEPA. We suggest that guidance on achieving sustainable development duties should be applied to all public bodies with such a duty.

We also suggest that both the importance of water for its own sake, and the need to manage water in a way that is ecologically sustainable, might also be well placed in the "Principles" below.

Clause 2. We are concerned about the wide scope and potential impact of Ministerial directions, which effectively have the force of law without necessarily the transparency. In order to improve transparency and public accountability of the direction-giving process, we would suggest that clause 2(3) should therefore require Ministers "to consult a) each body to which they would apply, b) all the other designated bodies and c) the public".

Clause 3. Similarly, when a public body is to be designated or de-designated under clause 3(2), Ministers should "consult a) each body to which the modification would relate, b) all the other designated bodies, and c) the public".

Clause 4. The Ministers might wish to consider an ongoing reporting function in relation to this duty, as the use of water resources is a long term question. We therefore suggest adding at the end of clause 4(3) "and to every subsequent period of three years". We also consider it undesirable that the timescale for producing the report is open-ended. We therefore suggest adding after clause 4(2) "and in any event within 6 months of the end of that period".

Scottish Water - Principles

We see no objection to the development of these principles *per se*.

We would suggest that if "quality" regulation is to be specified, then so should the social regulation which is the other essential component of the system of economic regulation. "Economic regulation" can be used broadly, to include the social and environmental objectives / requirements which must also be part of the price setting, or narrowly, in which case both might be separately noted. Furthermore, "quality regulation" may relate to environmental regulation, or to drinking water quality, or even to other service standards. We would propose the following wording for the last sentence:

"Independent economic regulation will continue to be essential to the achievement of

social objectives, service standards and environmental quality requirements."

We agree with the removal of the word "exploitation".

Principle 3 suggests that there may be some risk from new commercial activities. It might be desirable to specify clearly that commercial activities will be separated from the core functions (in the way that Business Stream, or Scottish Water Solutions, are already separate).

The document says that "*The Government …. will use these principles to guide Scottish Water's future development*", but it is not clear where the principles will be located, or their status, and therefore how they will be used; whether they will find their way into law, or remain as part of some policy statement. We will comment further below on the role of policy statements *vis a vis* legal responsibilities.

As noted above, we would like to see the Principles reflect both the intrinsic value of water, and the need for environmental (ecological) sustainability in Scottish Water's activities, especially if these are to broaden. It is important that the Principles are not purely driven by economics but a holistic view.

Scottish Water – New Duties

The two possibilities specified are Scottish Water's contribution to the renewables agenda, and beyond that, the role of SW "*to generally support the Hydro-Nation agenda*". If taking legislative form, as we would expect a duty to do, the latter would presumably require some broad general provision of the types in clause 1 above. The former could be more tightly specified, or could again be couched in general terms.

There is also a general comment about "*promot[ing] the full utilisation of its assets*". Again it is not clear how far this might extend, but if such a duty is to be hedged with the policy constraints noted above, they might therefore require a statutory form. It would be less desirable to give SW new broad statutory duties whilst leaving the limitations on these to a policy statement.

Scottish Water – Clarifying Commercial Powers

We note the suggested revision of s.25 of the 2002 Act, and whilst additional specification is reasonable, s.25(1) is already expressed in broad terms. Also the amendment brings back the notion of development, without the countervailing consideration of protecting the resource. It may become clearer if the ideas behind the future development of the resource in clause 1 are further explained.

Scottish Water – Power for Ministers to Lend to Subsidiaries

This seems unobjectionable as long as these subsidiaries are clearly separated out from Scottish Water's core regulated business.

We note that there is nothing specific in these proposals to take forward any proposed reorganisation of SW's internal governance structure as discussed in the first consultation. It is not clear whether this part of the original proposal has disappeared, or whether it will find its way into the Bill when that is fully drafted.

Water Resources Reforms

Managing Temporary Water Shortages.

Review of drought orders under the 1991 Act was raised in the first consultation under the heading of water security, but there was also discussion of management of drought in the 2010 consultation on revising the Water Environment (Controlled Activities) (Scotland) Regulations (CAR), in the context of making better provision for emergencies. Regulation 18 of CAR now allows SEPA to amend or suspend authorisations to take account of emergencies, which as defined under the Civil Contingencies Act 2004 would include interruption to water supply. The consultation (on CAR) had also suggested that in future, SEPA would be "expected" to produce drought plans, which would be consistent with the River Basin Management Plans, take account of conservation sites and be consistent with plans prepared by SW. Although not mentioned here, if there was to be a duty on SEPA to do this, it could reasonably sit within the Water Environment Act, along with the RBMP requirements, or within a new Water Resources Act. Alternatively, it could be the subject of a Direction; or it could remain a policy, or an "expectation", with no binding force, no requirement to be resourced and no clarity as to the status of the plan. Such lack of clarity is one of the problems with policy statements not then enacted, and might also apply to the SW policy principles discussed above.

More generally, if SEPA is now to plan for water shortages, and this is also to be part of the water resources planning functions of SW, then these two sets of plans, appropriately funded and coordinated, should perhaps find their way into the legislation – which undoubtedly could be this Bill or the WEWS Act for SEPA, and this Bill, probably still amending the 1980 Act, for SW. This would ensure that their production was properly resourced within the funding settlements of both SEPA and Scottish Water.

In terms of the proposals here, to reform the two types of drought orders under s.20 of the 1991 Act, we note these are much more comprehensive and provide for a series of measures at different scales. We would support this.

Firstly, it is not quite clear whether these changes will amend s.20 of the 1991 Act, or replace it with new provisions in the Water Resources Bill. From what is said, the former seems likely, but we would support the latter. One of the great benefits of WEWS and CAR in a structural sense was the extensive repeal of earlier legislation, but this did not happen in the same way in relation to water services.

Secondly, there is new terminology. It may be broader in scope, but drought orders (and the concept of drought) are well-understood terms – we wonder if these powers will in fact be needed if there is not what we generally describe as a drought? Alternatively, if the reason is some sort of emergency resulting perhaps from

contamination of water, affecting social well-being or public health, but not associated with a shortage of water, then these powers alone are not sufficient.

We would agree with the extended list of domestic activities to which a temporary measure could apply, whether voluntary or compulsory. We also support the establishment of both voluntary and mandatory measures, with appropriate enforcement for the latter (presumably, some form of statutory offence and / or fixed penalty).

However, it seems the domestic customer is being treated very differently from the commercial. Commercial users pay a lot for water – but as it is metered, any reduction in use will also reduce the cost. It might be more appropriate to apply the list of voluntary measures to both commercial and domestic customers, and perhaps include there all uses by commercial customers that would not affect the actual delivery of a service or product (such as washing vehicles or windows). A Temporary Order could also apply to all of these. Emergency Orders, applying by compulsion to commercial users, would then only apply to activities that might interfere with the product or service. To clarify, we are suggesting that voluntary measures apply to commercial users before mandatory measures apply to domestic users.

We also wonder whether it would also be desirable to recreate the sorts of specific provisions previously found in s.18 of the 1991 Act, to allow SEPA, in the context of drought, to limit or suspend abstraction licences on an equitable, catchment-wide basis. Such a power is probably best located in CAR, and could apply to crop irrigation, golf courses, freshwater fish farms, distilleries etc. This type of restriction does not appear to be covered by the measures provided here, or (necessarily) by the new regulation 18 of CAR.

Protecting Drinking Water Sources in the Catchment

We strongly support the idea of catchment protection and protecting drinking water at source.

SEPA already has powers to monitor water quality, but not solely for drinking water quality, and there currently the prospect of reducing the monitoring network under the last “better regulation” consultation, so additional monitoring by SW would seem reasonable.

An access power in itself seems unobjectionable for these purposes. It might be necessary to make the usual provision for compensation.

We note the new diffuse pollution rules and recent efforts by SEPA to enforce these; these will be most effective if they are part of a package of measures to change behaviour and improve the management of the catchment as a whole. Scottish Water has duties in relation to the Water Framework Directive and catchment planning, and it is certainly desirable that every effort be made to protect water supply upstream, rather than increase treatment costs downstream.

It will be highly desirable to give SW a statutory function in this regard, which will then require to be costed and funded through the regulatory settlement agreed with the Water Industry Commission. It will also be desirable to match this up with existing “carrots and sticks”, perhaps using Land Management Orders or similar provision, and the diffuse pollution and other relevant rules.

Prescribed Substances

We would support steps to improve the future management of prescribed substances, which should not be limited to those under the Priority Substances Directive; we expect the “emerging pollutants”, which may not be prescribed, to be of increasing concern in the future.

A general power to manage drainage catchments pro-actively is a positive initiative and should be part of Scottish Water’s core business, funded under the regulatory settlement.

We would support the suggestion that within, say, an industrial site, a trade effluent consent should be able to identify a prescribed substance and therefore require the business to remove it for disposal internally, rather than disposing to sewer under the consent. In principle it is certainly better to remove at source rather than risk contamination of surface waters or require additional treatment. We note that Scottish Water already has broad powers to control the content of trade effluents under s.29 of the 1968 Act, though this could be further specified. We would make the caveat that Scottish Water will not want to lose too much income from their trade effluent consents. Industries required to make such arrangements may also seek to treat the remaining part of their own effluents and discharge directly under a CAR consent.

Similarly, s.46 of the 1968 Act already prohibits the discharge to sewer of any substance likely to harm the sewer or works, or adversely affect treatment. Certainly its application to fats and grease, as suggested here, could be specified, and the existing statutory defence may need revisited, but the principal difficulty with the provision is its enforcement, not least identifying the specific property where the substance originated. If on domestic property, then the detection and enforcement problems are magnified; and many “emerging pollutants” also emanate from households (such as pharmaceuticals, cosmetics or surfactants).

Finally, we would support in principle the proposal that cross-connection of foul sewers and surface water drainage be identified as a specific defect, to be remedied under the 1968 Act, including powers for SW to do works and recover costs. However, where the fault lies *prima facie* with the owner of premises, the new provision will need to take account of the fact that householders may have no recourse in terms of historic non-compliant pipework. Even where the work is relatively recent, a private claim for negligence against the contractor is unlikely to be practicable, whilst the householder may struggle to meet these costs.

The Ministers might also wish to consider whether new provision needs to be made in relation to the public networks, for example combined sewers and combined

sewer overflows.

Septic Tanks

The new framework of registering septic tank discharges under CAR should allow water quality monitoring to identify, at least, areas where septic tanks may be causing quality problems (and this is another reason for maintaining comprehensive water quality monitoring). Whilst each potentially defective tank or soakaway is a point source, the collective impact is a diffuse problem, so it is undeniable that the problem needs a "joined up approach" including education and raising awareness. This is especially so when the treatment system is shared by two or more properties.

Maintenance of shared, but private, septic tanks is undoubtedly a problem, and in terms of the "legal mechanism" to secure it, there are some possibilities that might be feasible.

Ideally, there might already be a title condition providing for liability for these mutual repairs – but there may not, and anyway, such conditions are only enforceable by the owners, at private law.
Such title deficiencies regarding common parts in urban tenements were addressed at least in part under the Title Conditions (Scotland) Act 2003 and the Tenements (Scotland) Act 2004. The approach taken in the latter could be considered for rural property sharing communal services such as septic tanks, soakaways and outfalls.

Septic tank discharges are registered subject to the structures and equipment used meeting relevant design standards and being properly maintained thereafter. However, when tanks and soakaways have been in place for some time it may be difficult, or costly, to comply with this even where the facility is not in shared ownership. Some of our suggestions below could therefore apply to any tank/soakaway, whether or not it is in shared ownership.

One possibility is to give SW new functions here. There is already a duty under s.10 of the 1968 Act to empty a septic tank where the owner requests, and on payment of a charge. This could be strengthened to include other maintenance, although we recognise that physical access for maintenance may be a problem with some facilities.

Such functions could possibly also be extended to communal tanks where Scottish Water (or SEPA) identify a problem regardless of whether the owners ask for the service, or even (more problematically) regardless of whether the owners' consent; or perhaps with the consent of a majority. This could be built around the requirement to register, which could be extended from point of sale to apply to tanks identified as causing a water quality problem, or failing the requisite design standards; in that case the suggestion that SEPA might not be willing to register the tank, or might withdraw the authorisation, might prompt agreement from the owners.

Another possibility for maintenance and upgrade might be the approach taken for sustainable urban drainage systems (SUDS), providing that communal tanks serving more than one property would be adopted by SW. The tanks causing the biggest

problems would inevitably be those that require repair or renewal. With SUDS, as with the adoption of private roads, the relevant design standards must first be met before adoption; but given the age of many private septic tanks and the likely resistance (or inability to pay) of the owners, it is likely that this would not achieve the optimal solution in terms of water quality, so the resultant burden on SW might be substantial. This again would need to be part of the policy objectives within which the price setting takes place, but it would provide the most effective mechanism to address the problem and in some ways, provide parity for those in rural areas with no likelihood of a mains sewer. There would be ongoing charges for the owners and adequate provision would need to be made to compel this – again the sanction might be the possibility of refusal to register the existing tank. The most effective, but not necessarily the cheapest solution, would be either to bring communal tanks within Scottish Water's core business, or to provide some sort of fund via local authorities to assist owners with the required works.

Non-Domestic Customers.

It is not entirely clear to us why a "gap or vacant site" would be "allocated to" a Licensed Provider, but we would agree that any business customer in receipt of a service should be required to pay for that and the LP should have the relevant powers.

We would support the proposal to charge empty properties for drainage, as this is a service that continues to be provided, but with some caution. Empty premises may not pay business rates but still receive some local services (for example fire services). It is important to ensure that a consistent approach is taken.

Conclusions.

The UKELA Scotland sub- group on water law is pleased to see the Government's continued commitment to taking forward a water agenda, reflecting on Scottish expertise in the governance of both water resources and water services. We would note that the consultation period was only 6 weeks, compared to the minimum of 12 weeks which the Government recommends, and that this may have made it difficult for individuals and organisations to comment fully. The hosting of public meetings in the central belt only, with very short notice, also made it difficult to secure participation. We hope that sufficient time will be made available to ensure that the draft Bill is fully consulted on and look forward to working with the Government to achieve the best legislative outcomes.