

# ANNEX B – RESPONDENT’S INFORMATION FORM AND CONSULTATION QUESTIONNAIRE

## CONSULTATION ON PROPOSALS FOR A BETTER REGULATION BILL: RESPONDENT INFORMATION FORM

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



### 1. Name/Organisation

Organisation Name

UK Environmental Law Association

Title Mr  Ms  Mrs  Miss  Dr  *Please tick as appropriate*

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Cowan

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### 3. Permissions - I am responding as...

Individual / Group/Organisation

*Please tick as appropriate*

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

*Please tick as appropriate*  Yes  No

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

*Please tick ONE of the following boxes*

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

*Please tick as appropriate*  Yes  No

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

*Please tick as appropriate*  Yes

## Introduction to response

The UK Environmental Law Association (UKELA) is the UK's foremost membership organisation working to improve understanding and awareness of environmental law, and to make the law work for a better environment. As such, UKELA has a keen interest in ensuring the effectiveness of the legal framework for environmental regulation in Scotland.

UKELA commented in detail on the recent consultation on the proposed Integrated Framework of Environmental Regulation. The response is available at [www.ukela.org/scotslawwp](http://www.ukela.org/scotslawwp) (near foot of web-page). The Better Regulation Bill, according to Scottish Government announcements on 4 September, "includes the new integrated framework on environmental regulation", so we would be obliged if our comments here could be read alongside those earlier comments.

## **CONSULTATION QUESTIONS**

### **Defining and implementing national standards**

Question 1 - What in your view is the case for and against the proposed enabling power? Please provide evidence to support your answer

*In principle, this seems like a sensible proposal, but it is difficult to answer this (and the following questions in this section of the consultation) more fully because the scope of the proposal is not clear from the consultation document. It is not clear (for instance) which "other regulators" are in scope, or if land use planning is in scope. This needs to be clarified at the next stage of consultation.*

### **Duty to promote economic and business growth in regulatory activity**

Question 9 - What in your view is the case for and against introducing a new generic statutory duty on Scottish regulatory authorities to consider (and report on) the impact of their regulatory activity on business and/or promote regulatory principles? Please provide evidence to support your answer

*There seems to be a big difference between a regulator having a duty 'to consider (and report on) the impact of its regulatory activity on business' (as set out in the question) and having a duty 'to promote economic and business growth' (as set out in the section heading). The former might be broadly acceptable, provided it does not become too onerous, but the latter would seem to go too far.*

*If any such new duty is introduced, how will it rank with the other generic legal duties imposed on authorities by diverse primary legislation, such as the duty to secure best value, to further the conservation of biodiversity, to act in the way best calculated to meet the greenhouse gas emission targets and in the way considered most sustainable? Which is to take priority when there is a conflict between them? The answer to these questions would*

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*need to ensure that regulators act in a way that ensures and facilitates compliance with European law, including duties on member states under environmental directives.*

*In principle a regulator should have the primary duty to pursue its statutory functions (e.g. for SEPA, the protection and improvement of the environment), balanced by duties to “have regard to” other factors, such as “the social and economic needs of any area of Scotland” (s. 32(1)(d) of the Environment Act 1995).*

*Again, the scope of the proposal is not clear from the consultation document. It is not clear whether SEPA (for instance) is in scope. UKELA understands that there will be a separate consultation on SEPA’s purposes, objectives and general duties, further to the statement of intent set out in paragraph 2.3.4 of the Integrated Framework of Environmental Regulation consultation document, so we would suggest that SEPA should be excluded from the scope of any new generic duty in the Better Regulation Bill.*

## **Reviews and sunseting**

Question 12 - What in your view is the case for and against introducing a sunseting policy in Scotland? Please provide evidence to support your answer

*Again, the scope of this proposal needs to be clarified.*

*UKELA considers that consolidation of existing legislation would achieve more (in terms of better regulation) than a sunseting policy. Certainly any review of existing regulations should involve consolidation, so that businesses, the public and the regulator have access to a single source of rules, rather than having to cross-refer to numerous amending provisions. For more evidence and analysis concerning the need to consolidate environmental legislation in the UK, see UKELA’s recent research report on ‘The State of UK Environmental Law in 2011-12’, available at: <http://www.ukela.org/Aim5>.*

## **Common commencement dates**

Question 22 - Should common commencement dates be introduced for Scottish regulations impacting on business. Please provide evidence to support your answer

Yes  No

*This would be desirable, but as a matter of policy, not a legal requirement. Too many things may get in the way of any rigid system, making departures from the set dates beneficial, e.g. elections, co-ordination with what other national or international authorities are doing, taking action promptly to avoid or respond to EU infringement action.*

## Extending Statutory Review Mechanisms to Challenges Against Scottish Ministers' Decisions in Infrastructure Projects

Question 26 - Do you agree that it is appropriate to expand the types of decisions subject to statutory review (instead of judicial review)?

Yes  No

Question 27 - If Yes, for what types of decisions would it be appropriate to introduce a statutory review mechanism?

*Our affirmative answer above assumes that the question is about increasing the availability of a statutory review mechanism for aggrieved third parties (i.e. persons or bodies with a sufficient interest), as opposed to a statutory appeal mechanism for aggrieved applicants, but the consultation document unfortunately appears to confuse the two – e.g. question 29 below confuses applicants with persons or bodies with a sufficient interest.*

*Clearly there should be a statutory appeal mechanism for an aggrieved applicant to challenge the merits of any decision of Scottish Ministers where they are the determining authority (e.g. under the Electricity Act), so if there is no such mechanism this should be corrected.*

*UKELA considers, however, that a specialist environmental tribunal, rather than sheriffs or Court of Session judges, should consider appeals against all environmental and planning decisions (no matter who made them), including those relating to major infrastructure proposals. There are many reasons for this, including the cost of going to court and the limited technical expertise of judges.*

*As regards introducing a statutory review mechanism for third parties with a sufficient interest, UKELA fully supports this, both as a replacement for expensive judicial review procedures where these have been made available as described in the consultation document (in purported compliance with the 'access to environmental justice' provisions of the Aarhus Convention), and where no such review is available (and where Scotland's compliance with those provisions is even more in question). Infrastructure projects clearly come within the scope of the Aarhus Convention. In UKELA's view, full compliance with Aarhus can only be achieved by allowing third parties to challenge the merits of a decision, not just the legality (which judicial review is restricted to). A statutory review mechanism should therefore cover the merits, as well as the legality of any decision.*

*Again, UKELA considers that statutory reviews by third parties of regulatory and planning decisions should be dealt with by a specialist environmental tribunal, in order to keep costs down (for all parties) and to develop and maintain the required technical expertise.*

Question 29 - Do you agree that a statutory review mechanism for people or bodies with a sufficient interest to challenge the legality of Scottish Ministers' decisions in the Court of Session should replace the current arrangements for applicants wishing to challenge in respect of granting a marine licence?

Yes  No

*See answer to question 28 above*

Question 30 - Do you agree that the procedure for review should be made the same across all relevant legislation?

Yes  No

*Consistency is highly desirable, but should not be used as a reason to delay introduction of review procedures where they are currently lacking.*