Written evidence for the Joint Committee on the draft Deregulation Bill

1. The UK Environmental Law Association aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study or formulation of environmental law in the UK and the European Union. It attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.

2. UKELA prepares advice on proposals of governments and regulators covering a range of environmental law topics, with the help of its specialist working parties.

3. UKELA is grateful for an opportunity to comment on clauses 27 to 30 and clause 58 of the draft Deregulation Bill. The comments are quite brief, owing to time pressure.

Introductory comments

4. UKELA is generally supportive of legislative reforms to make the law more coherent, transparent and better integrated, for example by removing provisions that are duplicated elsewhere. Some of the reforms under clause 27 and clause 30 appear to serve those purposes. However, UKELA has potential concerns about reforms that might result in a loss of scrutiny and accountability of regulatory decisions, or that might weaken or undermine protection of the environmental and action to address climate change.

Clause 27: reduction of duties relating to energy and climate change

5. The removal of the requirement on the Secretary of State (under section 4, CCSEA 2006) to publish targets for microgeneration systems appears to be proposed on the basis that it is no longer necessary because microgeneration is now promoted through financial incentive schemes, such as feed-in tariffs (FITs) and the Renewable Heat Incentive (RHI). UKELA considers that there may be value in preserving this requirement as a target for microgeneration helps reinforce the aims of incentive schemes like FITs and RHI.

Clause 28: Petroleum licence simplification

6. The amendments to section 4 of the Petroleum Act 1998, in particular the omission of s4(1)(e) and insertion of s4(2B), appear to allow the Secretary of State to pass model licence clauses in "other documents" than regulations. UKELA has concerns about the loss of accountability and lack of scrutiny that this implies. By-passing Parliamentary scrutiny is a particularly serious issue in this context given the impact of these licence provisions on property rights: the Petroleum Act 1998 effectively appropriates third party property rights to the state and then to a licence holder.

7. The loss of scrutiny and accountability is particularly topical given that at first blush the provisions would appear to apply to licences for fracking projects (and if they do not, it is not at all clear that they do not). Certainly the government seems to be working on the basis that the Petroleum Act 1998

licence provisions would apply: see for example the reference to Petroleum Act licences in the July 2013 Planning Practice Guidance for Onshore Oil and Gas (paragraph 22, at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/224238/Planning_practice_guidance_for_onshore_oil_and_gas.pdf)

8. When the government lifted the moratorium on fracking in December 2012, it did so on the basis that there were already appropriate environmental, health and safety and other permitting controls in place to ensure that any environmental or health and safety concerns that had been raised in the context of shale gas exploration would be adequately addressed (see https://www.gov.uk/government/speeches/written-ministerial-statement-by-edward-davey-exploration-for-shale-gas). UKELA considers it a mistake for the government to amend any of these regulatory controls (of which a petroleum exploration and development licence is just one) without a fuller more explicit consultation.

Clause 29: Household Waste Decriminalisation

9. UKELA welcomes the proposal in clause 29 of the Bill to de-criminalise household waste offences. This appears to be consistent with the Hampton and Macrory principles in terms of reducing regulatory burdens and maintaining or improving regulatory outcomes. However, UKELA suggests that the Government monitors the use by local authorities of the proposed fixed penalty notice system under the new clauses 46A-D of the Environmental Protection Act 1990 to ensure that it is not used as a revenue-raising mechanism by local authorities, in a similar way to what has

happened following the de-criminalisation of parking offences under the Road Traffic Act 1991. UKELA presumes that local authorities would be able to keep receipts from fixed penalty notices themselves, whereas any fines from criminal convictions under the existing Section 46 go to central funds, so there may be a financial incentive for local authorities to issue fixed penalty notices. To mitigate the risk of the system being abused, UKELA suggests that local authorities be required to ring-fence any receipts from fixed penalty notices issued under clause 46A for environmental purposes only.

Clause 58: Exercise of regulatory functions (duty to have regard to the desirability of promoting economic growth)

10. UKELA is concerned about the potential for this duty to be imposed on regulators in a way that would overlap with other current and proposed environmental laws and policies so as to weaken or undermine them. This could give rise to a risk of:

    - **policy and legislative fragmentation** – where relevant duties are spread across a range of legal and policy instruments and interact in sometimes complex ways, making the law less transparent and more incoherent or even inconsistent. This kind of fragmentation, and the general problems it gives rise to, are examined further in UKELA's research report The State of UK Environmental Law in 2011-12 (copy available at www.ukela.org/aim5). One of the issues highlighted in that report is the way that devolution adds a further layer of complexity that needs to be better understood and managed. That is a particular issue

here, given Welsh proposals for a duty on public services to consider the 'economic, social, environmental and long term implications' of their decisions (Future Generations Bill), and Scottish proposals for all Scottish regulators, including SEPA, to be required to 'contribute to achieving sustainable economic growth' (Regulatory Reform (Scotland) Bill).

- **confusion that could make regulators less effective** – where there is a lack of clarity about how to discharge their duties.

- **policy cannibalism** – where the proposed duty could undermine other environmental laws and policies.

- **increased litigation** – where, by trying to comply with the proposed duty, regulators act in a way that is arguably inconsistent with other duties or policies (and are alleged to act ultra vires, for example). This includes the risk of infringement proceedings brought by the European Commission, should regulators apply the new duty in a way that is inconsistent with duties under European law.

11. In particular, UKELA is concerned about how the proposed duty would relate to present and proposed sustainable development duties and policies. Examples of the sustainable development duties and policies applying in England/UK include:

- overarching UK government policy of ensuring policies and activities contribute to sustainable development. See

https://www.gov.uk/government/policies/making-sustainable-development-a-part-of-all-government-policy-and-operations

- duties on the Environment Agency, in particular section 4(1) of the Environment Act 1995. Section 4(1) makes it the Environment Agency's 'principal aim ... (subject to and in accordance with the provisions of [the EA1995] or any other enactment and taking into account any likely costs) in discharging its functions so as to protect or enhance the environment, taken as a whole, as to make the contribution towards attaining the objective of achieving sustainable development...'

12. In the words set out on the Defra website, 'sustainable development means encouraging economic growth while protecting the environment and improving our quality of life - all without affecting the ability of future generations to do the same'. Adding a duty to have regard to growth to the various sustainable development duties and policies noted above could at best amount to unnecessary duplication by simply restating one of the considerations that already has to be taken into account. At worst, it could distort or undermine the proper operation of the sustainable development policy by suggesting that undue weight should be given to economic considerations.

13. These provisions already address the question of how regulators should approach economic considerations. Given this context and the risks identified above, UKELA cautions against simply adding a new, different duty.

14. Rather, UKELA considers that present policies and laws promoting sustainable development already ensure that environmental regulators give due consideration to promoting economic growth. The sustainable development concept allows economic growth to be considered alongside and balanced against other issues that are relevant to regulatory decisions, in a way that is workable and meaningful. The concept is well understood and articulated in law, and consistent with the UK's European and international obligations.

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