

Friends of the Earth Scotland response to Scottish Government consultation on Proposals for a Better Regulation Bill

26 October 2012



About Friends of the Earth Scotland

Friends of the Earth Scotland is an independent Scottish charity with a network of thousands of supporters, and active local groups across Scotland. We are part of Friends of the Earth International, the largest grassroots environmental network in the world, uniting over 2 million supporters, 77 national member groups, and some 5,000 local activist groups - covering every continent. We campaign for environmental justice: no less than a decent environment for all; no more than a fair share of the Earth's resources.

We welcome the opportunity to respond to this consultation.

Duty to promote economic and business growth in regulatory activity

1. We are strongly opposed to the introduction of a generic statutory duty on regulators in relation to the promotion of economic and business growth. We reiterate our comments made as part of a broad coalition of civil society groups in response to the Government's National Performance Framework that economic growth is one of many means to the goal of flourishing, and not an end in itself, therefore should not form part of the Government's single Purpose.¹

2. As recognized in SEPA and the Scottish Government's consultation on Proposals for an Integrated Framework of Environmental Regulation, our long term wellbeing and prosperity is underpinned by a broad range of factors including very importantly a healthy and safe environment. However, on a finite planet in a resource and carbon constrained world, it is both a strategic priority and moral duty to ensure that Scotland does not exceed its fair share of the earth's ecological resources, particularly given the historical ecological debt we owe.

3. Regulatory reforms must recognise these constraints, and those of both intra and inter generational environmental justice. The UNECE Aarhus Convention, to which both the EU and the UK are signatories, enshrines a duty to "protect and improve the environment for the benefit of the present and future generations".²

4. Under the Natural Heritage (Scotland) Act 1991, SNH already has a clearly defined duty to take into account 'the need for social and economic development in Scotland or any part of Scotland' in exercising its functions.³ Likewise, under the 1995 Environment Act, in performing its functions, SEPA must 'have regard to the social and economic needs of any area or description of area of Scotland'⁴ and statutory guidance requires that SEPA 'will enforce high environmental standards whilst having regard to economic considerations'.⁵ Introducing a further statutory duty would risk confusing and undermining the primary purpose of these bodies as defined in legislation.

5. As effective, independent and respected authorities, SEPA's priority should remain the protection and improvement of the environment and SNH's to secure the conservation and enhancement of natural heritage. While both may have to take account of economic policy, the pursuit of economic growth must not override protection and improvement of our environment and natural heritage.

¹ Friends of the Earth Scotland, Oxfam Scotland and WWF Scotland briefing on Revising Scotland's National Performance Framework, Sept 2011 <http://foe-scotland.org.uk/npfbriefing>

² Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, preamble

³ Natural Heritage (Scotland) Act 1991, 3.1(c)

⁴ Environment Act 1995, 32.1 (d)

⁵ Statutory Guidance to SEPA made under section 31 of the Environment Act 1995

Extending statutory review mechanisms to challenges against Scottish Ministers' decisions in infrastructure projects

6. We support the proposal to extend statutory review mechanisms to major infrastructure projects. However the introduction of a new right of statutory appeal to the courts of Ministerial decisions should be in addition to, not instead of, judicial review.

7. Judicial review differs (albeit slightly) in terms of grounds and remedies to statutory rights of appeal such as those conferred in the Town & Country Planning Act 1997. While the extension of statutory rights of appeal to all major infrastructure projects is welcome, and likely to reduce judicial reviews of decisions where statutory appeal is not currently available, there would remain scope for such challenges.

8. We wish to take this opportunity to add that there are systematic issues with obtaining access to justice in Scotland in relation to planning and environmental appeals. Planning and environmental decision-making happens in a complex framework of legislation – not all specifically environment-related – and is initiated and regulated by numerous public authorities and bodies.

9. Ongoing reforms to the civil justice system, along with the requirement for Scotland to comply with the access to justice provisions of the Aarhus Convention,⁶ offers the chance to rationalize and simplify this framework, and an environmental tribunal could provide for this. We consider there is scope for an environmental tribunal to operate within an existing tribunal system offering a lower cost method of compliance with Aarhus obligations. We note that the Scottish Government made a manifesto commitment to exploring the option of an environmental tribunal or court.

10. Further, we note that the availability of appeal mechanisms is all but meaningless if they remain prohibitively expensive to pursue. While the introduction of an environmental tribunal could go some way to reducing the cost to both the public purse and the petitioner by dealing with cases swiftly and at an appropriate level, rights of appeal to such a tribunal and the higher courts must – under the terms of the Aarhus Convention – not be prohibitively expensive to those with sufficient interest.

11. Even with the introduction of Protective Expenses Orders, to be represented by Counsel and pay the various outlays and court fees involved will cost thousands of pounds. Planned increases to court fees will only serve to exacerbate barriers in what is already a highly inaccessible system.

12. Changes could be made to judicial review and statutory appeal procedures to make it a speedier and more cost effective procedure.⁷ In addition, changes to civil Legal Aid regulations must be introduced to remove the barrier that effectively prevents litigants wishing to pursue a public interest case from accessing financial assistance.⁸

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⁶ The third pillar of Aarhus requires that, members of the public have access to justice if access to information and public participation rights are denied, or if national environmental law is broken. Under Article 9(3) these procedures must provide effective remedy and be “fair, equitable, timely and not prohibitively expensive”. It is our position that the Scottish Government has not adequately complied with these obligations. This is supported by ongoing infraction proceedings against the UK for non-compliance with the access to justice provisions of the Public Participation Directive. Whilst the referral was prompted by complaints regarding English cases, our research demonstrates that compliance in Scotland is demonstrably worse.

⁷ In particular First Hearing could be used as a case management direction, with the respondent authority asked to lodge detailed answers in advance. Preliminary issues such as standing, and whether a PEO is to be granted should be raised and ruled on if possible at the initial hearing. The same judge should be assigned to the case throughout, with case management directions.

⁸ Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002 requires that SLAB looks at whether ‘other persons’ might have a joint interest with the applicant, when deciding whether to grant legal aid. If this is found to be the case – as would be the case in a significant proportion of planning and environmental cases – SLAB must not grant legal aid if it would be reasonable for those other persons to help fund the case. Further, the test states that the applicant must be ‘seriously prejudiced in his or her own right’ without legal aid. These criteria strongly imply that a private interest is not only necessary to qualify for legal aid, but that a wider public interest will effectively disqualify the applicant. Figures from SLAB confirm that very few environmental cases (5 since 2008) are granted legal aid. It is likely that these cases had a strong private interest in order to qualify.

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

Friends of the Earth Scotland

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

Surname

Church

Forename

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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

No