WRITTEN EVIDENCE FROM THE UK ENVIRONMENTAL LAW ASSOCIATION (UKELA)

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. UKELA's Scots Law Working Group comprises Scottish lawyers, consultants, academics and other professionals with an interest in environmental law in Scotland.

We responded in detail to the consultation on the Bill earlier this year. We welcome the opportunity to provide evidence to the Committee and will be glad to engage in any further discussion that the Committee might wish.

We welcome many of the specific proposals for amending legislation in Parts 4 to 7 of the Bill, but we have concerns about many of the provisions in Parts 1 to 3.

Part 1 of the Bill restates most of the draft clauses from the proposal in that consultation.

Clause 1(1)

The duty on Ministers remains as it was, to "take such reasonable steps as they consider appropriate for the purpose of ensuring the development of the value of Scotland's water resources". Whereas this duty was qualified in the draft clause with the usual formulation of a sustainable development duty in Scotland (ie, "in the way best calculated to contribute to the achievement of sustainable development") it is now qualified by a requirement to "do so in ways designed to contribute to the sustainable use of the resource". We would prefer to see a stronger procedural provision to ensure that the ecological impacts of any such steps are taken into account. "Sustainable use" may be more specific, but we are unconvinced that "designed to contribute to" is an improvement, and the word "use" (both here and in clause 1(3)) suggests a priority for steps that involve the human use of water, as opposed to letting it flow/sit naturally for the benefit of nature. This could be allayed by clarifying that "use" includes leaving water to fulfil its role in natural ecosystems, not just for direct human benefit. Failing this, we would like to see a parallel duty on the Ministers to protect the aquatic resource.

Clause 1(3)

Related to the above, the definition of the "value of water resources" remains unchanged. Whilst it mentions "other benefit" as well as "economic", the emphasis is clearly on economic benefit and human use, but we would note that water is essential to support all forms of life on earth. We would still like to see some stronger provision recognising the inherent value of the resource, which is quite distinct from any human "uses" or "activities". The EU Water Framework Directive (2000/60/EC), for example, acknowledges from the outset that "water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such".

Clauses 2-4 also remain unchanged. We would continue to seek some changes here to strengthen accountability and transparency.

Clause 2
We would suggest that before directions are given to any designated body, the Ministers are required to consult all the designated bodies for their views and hold a public consultation, except in emergencies. Directions have the force of law and yet they are not always easy to find, so there should also be a provision requiring their publication.

Clause 3
A similar requirement to consult should apply to any amendment of the list of designated bodies; we note that at least one respondent to the Hydro Nation consultation has asked to be so designated.

Clause 4
We appreciate that it may be some time before there is a need to report under this legislation and that reporting does take human resource that could be used elsewhere. Nonetheless we would like clarity that the three yearly reporting here will be an ongoing requirement, not just a one-off. Also, the report is to be laid "as soon as reasonably practicable": we consider that a maximum period for laying the report should be stipulated ("as soon as reasonably practicable*, and in any event within X months of* the end of the reporting period"), otherwise the requirement is effectively open-ended.

Part 2 of the Bill, on a new consenting regime for "qualifying abstractions" is new and was not suggested in either of the consultations; nor did it appear to be suggested by any respondents. As such we consider that it is appropriate to articulate general concerns as well as particular points about individual provisions.

We have a number of general concerns about this Part:

The underlying purpose of and need for the new regime;
Its relationship to existing and future consenting regimes;
The degree of transparency and publicity around the new application process.

We suggest that the policy objectives as stated in the accompanying Policy Memorandum could be achieved by Ministers exercising their current call in powers under the Water Environment (Controlled Activities) (Scotland) Regulations (SSI 2011/209, CAR, Reg.20), for all applications of this type. This would avoid the need for a separate consenting regime and ensure integration if further reforms are made to CAR.

The Policy Memorandum contains several paragraphs addressing these powers, and suggests that the Ministers are better placed to take account of a wide variety of social and economic impacts and consequences – climate change, population change, urbanisation

and industrialisation are all mentioned – than SEPA, whose remit under CAR is focused on environmental consequences. However, CAR (regulation 15) requires SEPA, before determining any application for a new controlled activity such as an abstraction, to apply the requirements of Article 4 of the Water Framework Directive (WFD). This Article sets out the requirements of good ecological status, as well as the circumstances in which deterioration in status may be permitted and the conditions that must be met. If the benefits of a proposal to human health, human safety or sustainable development outweigh the costs of failing to maintain good ecological status, or if the proposal is of overriding public interest, derogation from the requirement of good ecological status may be granted and the proposal can proceed. The balancing exercise required to determine this involves the consideration by SEPA of a wide range of social and economic, as well as environmental factors. A qualifying abstraction under this Bill would, because of its size, almost certainly cause deterioration in ecological status, so before deciding it if could be authorised under CAR, SEPA (and Ministers, if they exercised their call-in powers) would have to consider a much wider range of factors than the direct impact of the abstraction on the water environment. This rather calls into question the policy justification for this separate Ministerial approval regime for qualifying abstractions.

If the intention is to secure additional political control over large scale abstractions for industrial use within Scotland, perhaps by foreign investors, then that is a reasonable policy objective. However the Policy Memorandum also says that Ministers might "have a longer term and wider view of the merits of any large scale abstraction which related to the end use of water outside Scotland, which although environmentally sustainable, did not properly take account of the longer term view of the value of that resource and the needs of indigenous economic activity and growth" (para.24). The implication would seem to be that there is a likelihood of applications to abstract large quantities, possibly for use outwith Scotland, and that SEPA's powers and environmental focus would not enable SEPA to prevent such use. Yet currently, proposals for abstraction for export are being raised by the Ministers themselves. Further, it would seem generally likely that the economic, and perhaps the social, factors might support large scale abstractions for many purposes either within or outwith Scotland, whereas the environmental factors would, normally, be those restricting development: under WFD/CAR, the benefits of any large scale abstraction for human health, human safety or sustainable development would have to be huge in order to outweigh the considerable impact on the water environment of such an abstraction. Accordingly, we question whether creating an extra layer of decision-making power for Ministers adds anything to the existing regulatory regime as regards having the policy effect that seems to be intended, of protecting against unsustainable large-scale abstraction for use outwith Scotland.

At the very least, if out-of-Scotland uses are envisaged, the exemptions listed in clause 7(4) should specifically not apply outwith Scotland, in the same way as the exemption for public water supply under clause 7(3) is restricted to Scotland. It is worth noting that the Institute of Civil Engineers has recently counselled against complacency in assuming an abundant resource in the longer term.

There also seems to be an underlying presumption that the Ministers, and/ or Scottish Water, hold ownership rights over water in its natural state sufficient to enable that resource to be divested, anywhere and for any purpose. Yet water, running water, has always been a special branch of property law (see, eg, for an early discussion, *Magistrates of Linlithgow v Elphinstone* (1768) M Dict. 12805). This question was not directly addressed in the Water Environment and Water Services (Scotland) Act (2003 asp.3, WEWS) when the new comprehensive water use licences were brought in under CAR, and the new licensing regime was never challenged as an interference with property rights either at common law or in terms of the European Convention on Human Rights, presumably because those abstracting under the common law recognised that the new regime was proportionate and within the state's margin of appreciation. That regime enables control of abstractions, and other water uses, for purposes within Scotland but it does not amount to ownership of the water. A better understanding of it might be that the Ministers, and other public authorities, all answerable to Parliament, are exercising some form of public trust, or managing a public good, which enables them to allocate the water. Bulk sale for purposes outwith Scotland is a very different thing.

Our final general concern about this Part is that it runs counter to the general policy drive towards doing away with unnecessary regulation. Any large scale abstraction will almost certainly require planning permission as well as CAR authorisation, and both are subject to Ministerial call-in, so the imposition of a third consenting regime on developers seems excessive as well as unnecessary.

Clause 9

In terms of the outline of a licensing regime, applications may be made to the Ministers, who *may* make procedural regulations, which in turn *may* (*inter alia*) provide for publicity and third party representations (our emphasis). Fees may be levied for administrative costs but these will require regulation. We consider that, if this separate approval regime for large abstractions is deemed necessary (which we have queried above), it should be made subject to a transparent process involving advertising and public participation, given that significant interests will be at stake, as acknowledged in the Policy Memorandum. If the detail of that process is going to be left to secondary legislation, full public consultation will be needed on the proposed regulations.

Clause 11

Conditions can be imposed, but these seem quite broad and general. There is a provision for compensation (cl.11(2)(c)) and it is not clear if this is financial, or a compensation flow, or potentially both. This should be clarified.

Clause 12

There is a duty on the holder of an approval to report on their activities – but only to the Ministers and in such form as the Ministers require. We would suggest that such reports should be publicly available.

Clause 13
Both Scottish Water (unless they are the applicant) and SEPA must give advice on adverse impacts if asked – but the Ministers are not required to ask for advice. We suggest that this should be a requirement. As SEPA will also be determining the CAR application, it should not be unduly burdensome for SEPA to also advise the Ministers.

Clause 16(2)
Ministers *may* make regulations to provide for monitoring, the keeping of records and importantly, the access to such records. We would hope that such records would be made public, and anyway would be covered by either the Freedom of Information (Scotland) Act (2002 asp.13) or the Environmental Information (Scotland) Regulations (SSI 2004/520). Given the high degree of Ministerial discretion, especially in a unicameral Parliament, we would like to see more detail around publicity, to achieve maximum transparency.

Clause 17
The offence is not strict liability, which makes conviction less likely. We would recommend that, if a separate approval regime is deemed necessary (which we have queried above), it is subject to strict liability offences (as under CAR) and administrative penalties, as are under consideration in the new integrated framework for environmental regulation. A higher upper limit to the fine (on summary conviction) than the statutory maximum might be more appropriate, in line with environmental offences, where an upper limit of £40,000 is the norm.

Finally, there is no provision for the sequencing of the different approvals, and what might happen if the ministers approve an abstraction but SEPA do not (or the other way round.) If such a conflict arose, we suggest a public inquiry might be the best response.

Part 3 takes forward the proposals for new duties on Scottish Water. Our key concerns here are the additional powers for Scottish Water (SW) and the need to ensure that these are separated from their core functions.

Clause 21
The new general power clarifies that in particular, SW's existing general power extends to "do anything that Scottish Water considers will assist in the development of the value of Scotland's water resources…". This is certainly specific but does still depend on knowing what that development is likely to mean, as queried above in relation to Clause 1. We appreciate that many different activities and actions have been put forward under the Hydro Nation consultations, many but not all of which will be relevant to SW.

Clause 22
As in Clause 1, value is stated to include "economic and other benefit" which (again) will stem from "use … or activities". We consider that, in the context of SW's assets and expertise (as opposed to water resources), the emphasis on economic (as opposed to

environmental) benefit is more justifiable; again, though, the implications of cl.22 in particular come back to what may be meant by "developing value" in this context.

Clause 23

We note favourably that SW is already taking steps to use its assets for the generation of renewable energy, and we welcome the introduction of this new duty for SW to do so.

Clause 24

The proposed new s.70(2) in the 2002 Act no longer excludes the exercise of SW's general powers under s.25(1) and in time, the proposed s.25(1A). Taken together, it would seem to mean that "hydro nation" activities are no longer excluded from s.70 insofar as they are "relating to the provision of water or sewerage services in Scotland". If anything, this would seem to potentially widen the definition of the core functions. Again, this may well depend on the specific activities in question and what is meant by developing the value of the resource. If the intention is to bring these activities, whatever they might be, within the regulatory settlement then that is a significant change that needs to be much more explicit. The current consultation on Investing in Water Services[1] begins by stating that it is not related to the Hydro Nation or the Water Resources Bill, but the dividing line is not always easy to draw. If, for example, and given the focus on renewables generation, the intention is to distinguish between generation of power used by SW for its own activities, which would be "relating to"; and "external" generation for supply, through SW Horizons, which would not, then that might be a helpful clarification for the accompanying policy.

The Investment consultation does mention several "innovations" that may take place in the near future, including catchment protection, managing pollutants at source and customer education (all of which are in the Water Resources Bill in some way), as well as generating electricity from waste (which is relevant to the Hydro Nation). This again indicates the difficulties of segregating the policy environment for SW's core functions, from its new opportunities; and the need for clarity.

Clauses 25 and 26

The Ministers have stated in the Investment consultation that the total borrowing available for SW will be less than currently in the next price review. We would agree that separate provision for borrowing by SW Horizons in particular will allow the furtherance of the Hydro Nation agenda whilst minimising risk for the core business and its customers, but it is important that any lending to the subsidiaries would not reduce the moneys available to SW. Reforms to SW's corporate structure were mentioned in the first Hydro Nation consultation but were not taken forward; whilst there may be no need to do so, this again comes back to clarity about the core functions, and the separation required for non-core activities.

[1] Scottish Government 2012 *Investing in and Paying for Your Water Services from 2015: An Invitation to Engage with the Government and to Provide Your Views* http://www.scotland.gov.uk/Resource/0039/00395226.pdf

Part 4

Clause 27

Given the wide powers of entry granted under this clause, we would seek clarification that the general provision for compensation in s.10 of the 1980 Act will apply. As the term "premises" is used throughout, but must clearly mean land as well as buildings, it would probably be helpful to provide (as is done later in Part 7) that "premises" includes land and buildings. Also, if the intention is that the new Part VIB of the 1980 Act should potentially apply to raw water for private supply, this should be clarified.

Clause 28

We note the new power (proposed s.68A of the 1980 Act) for SW to enter into agreements with land owners, occupiers or local authorities to do or refrain from doing anything that will impact on raw water quality. A water services provider should be a key stakeholder for water resource management – both at large-scale, through river basin planning under the WFD, and this small-scale, "catchment based" approach that is developing in England as well. We might have expected more references, at least in the accompanying policy documents, to the WEWS Act and the WFD regime as a context for this Bill, and this might in turn address some of the concerns over the new general duties, if the Ministers' view is that sufficient "protection" is provided through the general duties in WEWS. It is important that the service provider is involved in the protection of raw water and there is much that the service provider can do. However it is arguable that SEPA is better placed than SW to carry out monitoring of raw water quality and that if further monitoring is required, that SEPA should have additional resources here. It is our understanding that currently SEPA is reducing its water quality monitoring network.

It is also important to maintain a strong regime to control diffuse pollution through the environmental regulator, and that SW is not diverting resources to encourage, persuade or incentivise farmers and land managers to behave in ways that they are already required to do by law (i.e. the general binding rules relating to diffuse pollution under CAR). SW should be working closely with SEPA here and a specific duty to coordinate their activities with SEPA's programmes might help to clarify. We assume that this is a core function, regulated by the Water Industry Commission and paid for by SW's customers.

This is one of several provisions in the Bill where we think that a requirement for SW to provide information and education, to supplement s.1 of the 1980 Act, might be useful. We identify a number of these opportunities below.

We are content with Part 5 on commercial premises and the provision of retail services by licensed providers, including SW Business Stream. We have no specific comments on this proposal.

Part 6

Clause 31

We would support this provision in principle, to reduce the costs of treatment and the need for SW to make special provision for specific difficult substances, and also to reinforce the principle of producer responsibility. It does leave open the possibility that if operators install their own pre-treatment then revenue to SW from trade effluents will fall, and it does not address the possibility that some priority substances may emanate from private houses or other sources of domestic sewage. This is another area where a requirement for SW to provide education and information might be helpful and relevant.

Clauses 32-33

Section 46 of the 1968 Act is already a general offence and it appears to cover oil and grease, but the biggest problem is tracing the culprit; also much fat, oil and grease emanates from private houses (and the same difficulty applies). Nevertheless, we would support this additional clarification and expansion of the current provisions. We would suggest that a more specific duty on SW to provide information and education to domestic customers (and through Business Stream, to business customers) would again be useful here. It might be desirable to also consider what information and education provisions could be put in place to assist rural communities with either private water supplies or private sewerage provision, or both. SW, or SW working with SEPA, may be better placed than local authorities to offer such information even if they are not providing the service in these areas.

Clause 34

We welcome this clause. We would note that the proposals will not address a situation where no one owner is willing to take on the responsibility of coordinating the work, making the expenditure and then having to recover the same. We wonder if this is another area where a more specific duty on SW to provide education and information would be relevant, perhaps working with SEPA; we are thinking here specifically of phosphates, and more generally of effective maintenance of septic tanks and soakaways. We recommend that pro-forma styles of the two types of notice are set out in schedules to the Bill for use by affected property owners, in order to ensure consistency and reduce the risks of legal challenges to notices that are served.

We welcome Part 7 on Water Shortage Orders, and note that many of our concerns in response to the last consultation have been addressed. Perhaps the water-saving measures listed in Sch. 2 could also be tied into stronger provisions on information and education. We wonder if there is scope for an exception for ponds where fish life is at risk.

Part 8

Clause 48 and Schedule 3 repeal section 26 of the WEWS Act, which requires an annual report to Parliament on the operation of that Act. This reporting is high level, in contrast to the river basin management plans, but contains a useful overview of activities, and we

caution against repealing it without good reason. We note that reporting under the Flood Risk Management (Scotland) Act (2009 asp.6) is still required.