

# Evidence to Review of Environmental Governance

## Friends of the Earth

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### 1 Introduction

Friends of the Earth perceives the lack of effective environmental governance in Northern Ireland as being essentially an issue of environmental justice. It is an environmental injustice affecting everyone in Northern Ireland that for so long we have been an environmental backwater within the United Kingdom resulting in significantly greater environmental degradation than most other parts of the UK. The injustice is amplified by the fact that as a society we have higher levels of poverty than any other part of the UK or Ireland and we are one of the most unequal societies in the western world.

Very little work has been done on the dimensions of environmental injustice in Northern Ireland but it is generally accepted that it is the poorest and most marginalised in society that suffer most from the effects of a degraded environment – whether it is those living in the poorest wards of Belfast suffering the effects of poor air quality generated by commuter traffic or those that whose holiday options are confined to the polluted beaches of North Down while those responsible for the injustice jet off to sunnier and cleaner climes.

Good environmental governance can help alleviate fuel poverty; enable healthy eating; and potentially vastly improve the quality of people's lives through the planning system. It can also contribute to justice on an international level by ensuring that Northern Ireland contributes its fair share of cutting climate changing emissions.

In this submission we do not address all these issues but focus on a number of governance points which we believe will help deliver a more just and sustainable society. We expand upon the position of the Coalition for Environmental Protection on regulatory issues; we describe the barriers to good governance that Friends of the Earth has experienced over its years of campaigning; and we conclude by offering thoughts on the implications of direct-rule and devolution for environmental governance.

### 2 Regulation

#### 2.1 Role and scope of an EPA

- 2.1.1 Friends of the Earth is a member of the Coalition for Environmental Protection and, as such, we support the position set out by Dr James Robinson in his paper, *An Environmental Protection Agency for Northern Ireland, Building the Best Model*. This paper adds to that written by James Robinson.
- 2.1.2 Friends of the Earth sees the new Environmental Protection Agency as a regulator first and a champion for the environment second. A third area might be broadly described as 'operational', for example the management of land or, it has been

mooted, the operation of a flood defence system. Friends of the Earth would like this third area kept to an absolute minimum. We do not wish to see the EPA burdened with a large operational portfolio, as is the case with the Environment Agency whose workload is dominated by flood control. Ownership of land is a distraction from the regulatory function in that it necessitates the employment of staff (eg wardens, factors, interpretation and marketing staff, and car park attendants) that perform very different roles from those needed for the core business of regulation. Conflicts of interest would also arise in that the Agency would be regulating itself in its ownership and management of an ASSI, for example.

- 2.1.3 Responsibility for land management could be transferred to local authorities or devolved to NGOs. For example, Delamont Country Park is managed successfully by Down District Council. As a regulator, the EPA must be free to concentrate on the operation of consent regimes and, as a champion for the environment it must be free to concentrate on its advocacy role.
- 2.1.4 Regarding its advocacy role, the agency must earn the right to act as an advocate for the environment by first discharging its regulatory function properly. The Environment Agency acts as a champion for the environment in areas such as energy and transport where it has no regulatory role and the same principle should apply in Northern Ireland. At present EHS acts as an advocate for the environment with respect to the general public, for example its Wake Up To Waste campaign, however the new agency, as a body independent of Government would be free to speak out against:
- DOE Planning Service for its liberal granting of planning permission for single dwellings in the countryside;
  - DETI's Energy Strategy which protects the carbon-dense lignite reserves near Ballymoney;
  - DRD Water Service for polluting waterways with raw and inadequately treated sewage; and
  - DARD for having allowed the trawling and dredging of Strangford Lough which decimated the horse mussel communities.
- 2.1.5 The EPA has a role in advising Government on policy, however the policy-making machine belongs within Government and there must be sufficient scientific expertise within the policy core such that the policy community is not overly dependent on the agency for advice. Rather, the role of the EPA is to comment on the practical implications of policy - whether a particular piece of policy or legislation can be implemented on the ground. There is a tension between policy advice and advocacy: the former becomes the latter when it reaches the public domain and the agency must not imagine that it can offer all its advice in confidence. Indeed, there exists a spectrum ranging from policy advice at one end, through advocacy to all-out campaigning at the other end. While it would not be appropriate for the new agency to engage in campaigning of the NGO variety, it must be fully prepared both to enter public debate and to take a view contrary to that of a Government Department on matters of policy, both settled and emerging.
- 2.1.6 Regarding the scope of its responsibility, it would seem sensible to concentrate in a single body all the regulatory functions pertaining to the environment, including those which lie outside the responsibility of the current regulator, EHS. For example, responsibility for the operation of Northern Ireland's Emissions Trading Scheme lies with DOE's policy core (Environmental Policy Group) so we would suggest this be transferred to the new agency. Other consent regimes pertaining to the environment are dispersed across Government and ought to be transferred to the new agency.

## **2.2 Administrative penalties**

- 2.2.1 Friends of the Earth would like to see the new Environmental Protection Agency empowered to impose administrative penalties as an alternative to criminal prosecution. Two pre-conditions for this are suggested by Richard Macrory in his recent report: the adoption of a modern, risk-based system of regulation and the existence of a specialised tribunal to which the regulated body could appeal, as an alternative to paying the fixed penalty.
- 2.2.2 A recent report by the House of Commons Environment Committee on the Environment Agency also called for the introduction of administrative penalties. The Committee backed the Agency's proposal that a team of magistrates be trained specifically to hear environmental cases.

## **2.3 Right to appeal land-use planning decisions**

- 2.3.1 The EPA ought to enjoy the right to appeal land-use planning decisions. (These decisions will be made in future by seven new local authorities.) This appeal right would not be instead of but as well as a broader Third Party Right of Appeal. The appeals ought to be heard by an independent appellate body, namely the Planning Appeals Commission or its successor, in the event that the PAC evolved to become a Planning and Environmental Appeals Tribunal.
- 2.3.2 If the EPA were to enjoy the right to appeal land-use planning decisions, it would go some way towards correcting the injustice inherent in the planning system which allows a developer to appeal the refusal of planning permission but does not allow third parties to appeal the grant of planning permission. At present, planners grant consents in the knowledge they will never have to defend their decision in an appeal hearing whereas they refuse consents more cautiously knowing their decision can be challenged.
- 2.3.3 It could be argued that a general Third Party Right of Appeal removes the need for the EPA to enjoy such a right but this is not so. Many third party appeals will be focus on issues of local importance whereas the Agency is likely to appeal decisions of wider regional significance. It could also be given a right of appeal under other consent regimes such as Article 39 of the Energy Order, a recent example of which was the decision to allow the installation of install flue-gas desulphurisation at Kilroot power station. (This decision extended the life of the ageing power plant which is Northern Ireland's single largest source of carbon dioxide.)

## **2.4 Future water regulation**

- 2.4.1 With the externalisation of Water Service into a GoCo, an opportunity arises to ensure that environmental and economic regulation are mutually reinforcing rather than undermining of each other. Experience of regulation of the privatised industry in England has shown that tension between the two regulatory regimes can lead to poor outcomes for both. This is well captured in a report published by Green Alliance entitled "Regulating for a sustainable water sector" which raises issues such as: the need for longer planning horizons to manage the shift from 'end of pipe' to source control solutions; investment within the river basin planning cycle under the Water Framework Directive; targets and incentives for innovation; regulatory flexibility when assessing investment decisions for innovative techniques; the relationship between sectors such as farming and spatial planning and water management.

- 2.4.2 New water legislation requires cooperation between the Department for Regional Development and the two regulators. We understand that little or no discussion has yet taken place between EHS and Ofreg on the issue.

## **2.5 Cultural/leadership change**

- 2.5.1 Friends of the Earth has argued strongly for independence and this remains the single most important element in the reform package, however structural reform alone will not be sufficient to bring about the cultural change that is required. A key determinant of cultural change is leadership change. There must therefore be open competition for the senior positions within the new agency - by which we mean Grades 5 and above.
- 2.5.2 A parallel might usefully be drawn with the policing situation in which Ronnie Flanagan was replaced as Chief Constable by Hugh Orde. The change in leadership was necessary if the policing reforms were to appear credible; if the new PSNI (Police Service of Northern Ireland) was to avoid the accusation that it was merely a re-badged RUC (Royal Ulster Constabulary); and in order to allow the necessary cultural change to take place. This was no reflection on the calibre of Mr Flanagan, who went on to a senior position elsewhere, and likewise Friends of the Earth's call for a new leadership team for the EPA does not reflect on the calibre of existing senior EHS staff.
- 2.5.3 It is assumed that staff at lower grades would have the opportunity to transfer across to the new EPA without any significant change to their terms and conditions of employment. The issue of staffing will need to be fully explored and it is not one in which Friends of the Earth intends to become heavily involved, except to remind the Review panel of the report of the Northern Ireland Audit Office (NIAO) on the performance of EHS's Waste and Contaminated Land Unit. The NIAO blamed EHS's poor performance in the arena of waste regulation on, among other factors, the lack of suitably qualified personnel within EHS. Staff who were surplus to requirements within Water Service were transferred to EHS, despite not having the skills necessary to carry out their new roles. It is clearly critical that all staff transferred to the new agency are suitably qualified and experienced.

## **3 Barriers to good governance**

Over its many years of campaigning for a decent environment in Northern Ireland, Friends of the Earth has come up against a number of governance related barriers to progress. The following are the more important examples.

### **3.1 Transport**

- 3.1.1 Roads Service has dominated the transport arena. Indeed until the Regional Transportation Strategy was published in 2001, 84% of all transport monies were being devoted to roads, with only 16% on public transport. And this in a region with unusually low levels of car ownership. Public transport was starved of investment and this led in turn to high levels of transport poverty as many people neither owned a car nor had access to a decent public transport system.
- 3.1.2 An example of Roads Service dominance is the announcement by Peter Hain on 9 December 2005 of a £250m scheme to dual the Dungiven-Derry road despite this

scheme having been ruled out in the relevant transport planning document, namely the Regional Strategic Transport Network Transport Plan.

- 3.1.3 One governance issue arises in particular, namely the need for a Passenger Transport Executive (PTE). PTEs are statutory bodies with a duty to plan and co-ordinate public transport in their regions. At present, responsibility for strategic transport planning lies with DRD, however this function is not being fulfilled adequately due to the centrality of Roads Service within DRD's decision-making structure and the fact that insufficient expertise exists within DRD on public transport issues.

## **3.2 Crown Immunity**

- 3.2.1 The existence of Crown Immunity for Water Service has contributed to Northern Ireland's dismal record on compliance with the Urban Waste Water Treatment Directive. An official complaint by Friends of the Earth to the European Commission that Crown Immunity is a breach of Article 10 of the Treaty of Rome is being pursued by the Commission.
- 3.2.2 EHS claims that Crown Immunity has not inhibited its ability to regulate water service and it claims to be 'an effective regulator'. Since EHS started producing annual reports on Water Service performance in 2001 as a result of severe audit office criticism, it has become apparent how difficult EHS finds it to criticise an agency belonging to a fellow Government Department. The word 'failure' has yet to appear in any of these reports and tone is one of defence of the efforts of the regulated body.
- 3.2.3 Crown Immunity will be removed in April 2007 when the water GoCo is created but the legislation provides for a 'due-diligence' defence by the GoCo for legacy compliance failures until the end of 2008, fundamentally restricting EHS's regulatory role and replacing Crown Immunity with 'corporate immunity'.
- 3.2.4 It is a matter of great concern that waste water regulation, a key area of environmental governance, will continue to be fundamentally compromised until December 2008, effectively tying one arm behind the back of the environmental regulator. The provision of the due-diligence defence will be made under regulations under Article 306 of the currently draft Water and Sewerage Services (NI) Order 2006. There appears to be no reason why the date of December 2008 is sacrosanct. Indeed, given that Water Service has admitted that a number of schemes in its capital works programme will not be compliant by then, it seems quite likely that there will be pressure to extend that date. It is possible that the fettering of the environmental regulator in this manner may even extend beyond the formation of an EPA.

## **3.3 Ministerial decision making**

- 3.3.1 Recent years have thrown up three examples of problematic Ministerial decision making: the Nesbitt decision on sewage hotspots; the Rooker decision on John Lewis; and the Hain decision on Marine Current Turbines. All three involved the over-ruling of officials or rejection of official advice in slightly different ways and in different contexts. This is a complex area, especially as Friends of the Earth supported the Hain decision and was opposed to the other two. It raises issues of in what contexts Ministers should use their powers, especially when under direct-rule there is no political accountability.
- 3.3.2 The Nesbitt decision involved silencing EHS to the extent that it was 'failing in its regulatory duty' as a memo from DOE's Permanent Secretary to the Minister put it. The Minister acted with full knowledge of this but chose to proceed. EHS had no

route open to it to challenge the Minister. An independent EPA would, while still probably subject ultimately to Ministerial control, have sufficient political clout not to be silenced in a similar manner.

- 3.3.3 Lord Rooker's decision to reject Planning Service's advice and grant planning permission for a large out-of-town John Lewis based development at Sprucefield is one of the most controversial of recent years. It sparked several judicial reviews. There had been no public inquiry. It is clearly deeply unsatisfactory that a Minister not elected by anyone in Northern Ireland (in this case not elected by anyone anywhere) and appointed by a Prime Minister who does not subject his party to the electoral test in Northern Ireland should take such a decision without any form of accountability to the people it affects most.
- 3.3.4 The decision to grant a FEPA (Food and Environmental Protection Act) licence to Marine Current Turbines was welcomed by Friends of the Earth. It was, on the face of it, a decision by EHS. It is widely known, however, that the Secretary of State played an active role in persuading EHS to overcome its concerns. This left a number of EHS staff feeling very angry that their advice had not been heeded. Regardless of whether the decision to grant the licence was the correct one, it is clearly unsatisfactory that EHS may have been leant upon politically. Of course Mr Hain's reasons for intervening are likely to have been for the wider environmental good, his thinking, one might surmise, being that the implications for combating climate change of this new technology justify any possible actual risk to a protected habitat. But this is not a satisfactory form of environmental governance.
- 3.3.5 Rather this kind of decision should be made by the regulator free of Ministerial influence. There should then be a right of appeal to an independent Tribunal which, in its deliberations, would be able to take government policy on climate change into account.

### **3.4 Failure to legislate**

Under direct rule environmental legislation is only rarely made for Northern Ireland at the same time as England and Wales. Recent legislation that does not apply to Northern Ireland includes the Household Waste Recycling Act and the recent Climate Change and Sustainable Energy Act. The problem is an old one – parts of the 1990 Environmental Protection Act and the 1995 Environment Act took over a decade to be implemented in NI. Under devolution there was a long lead-in to passing any legislation. Both direct-rule and devolution suffer from a lack of experience and capacity in drafting legislation in the NI civil service.

### **3.5 Land-use planning**

- 3.5.1 In October 2004, the Environment Minister announced that Planning Service would divert staff time from policy work and area plans to processing planning applications. The background was that a surge in planning applications for single dwellings in the countryside and thousands of objections to area plans had put such a strain on staff resources that planning applications were being processed unacceptably slowly in the eyes of many. Ironically it was the prospect of a PPS on single dwellings (PPS14) and the restrictions on single dwellings in the new area plans that generated the flood of applications and objections. Thus an absence of policy triggered a downward spiral as Planning Service diverted resources to dealing with the consequences of the policy vacuum rather than the causes.

- 3.5.2 Friends of the Earth would argue that Planning Policy Statement 14, Sustainable Development in the Countryside (PPS14) should have been introduced at the same time as the RDS to prevent the bungalow blitz which the latter triggered during the period 2001-2006. The RDS gave developers a warning that time was running out and the countryside became heavily suburbanised as a result.
- 3.5.3 Currently a team of about four is responsible for producing a number of long overdue PPSs including general principles; renewable energy; nature conservation; minerals; industry; pollution control; and tourism. Area planning is similarly under-resourced and meanwhile planning powers are to be transferred to local councils as soon as April 2009.
- 3.5.4 Thus a combination of lack of resources and a disconnection between strategic spatial planning and detailed planning policy guidance has had severely malign environmental outcomes. In this case the same Department is responsible for both documents (most other PPSs are published by DOE Planning Service) so the division of policy between Departments cannot be blamed. Rather it seems that the lack of any environmental champion in has led to a severe lack of resources and a mechanical prioritisation of the statutory obligation to process planning applications.

### **3.6 Climate change**

- 3.6.1 Experience of working on climate change issues in Northern Ireland has thrown up a number of governance issues. The botched privatisation of the electricity industry has lead to the impossibility of Government restricting AES Kilroot's emissions of carbon dioxide due to the terms of Kilroot's contract that render it immune from the effects of the EUETS and restrict competition from clean generators. Neither the planning regime nor energy legislation were able to cope with the issue of fitting of FGD, the CO2 implications and the cost to customers.
- 3.6.2 Climate change policy rests with DOE while energy policy sits with DETI. The former largely concerns itself with administering the EUETS. At the planning appeal hearing into the fitting of FGD to Kilroot, DOE raised no concerns about CO2 emissions relying entirely, and erroneously, on the EUETS. Friends of the Earth wants Government to produce a PPS on climate change as is to be the case in England. There is as yet little evidence that Planning Service considers itself to have a key role in reducing CO2 emissions, despite the fact that it sits in the Department with responsibility for climate change policy.

## **4 Conclusion**

We have recommended a number of means of overcoming the barriers to good environmental governance outlined in section 3 above, for example: a Passenger Transport Executive; the removal of the 'due diligence' defence for legacy failures by the new Water GoCo; and the rationalisation of climate change and energy policy. In some cases we raise more questions than answers. A key theme, however, is the alternative challenges facing Northern Ireland as it proceeds to a future of devolved government or a further period of direct rule.

### **4.1 Direct rule**

- 4.1.1 Any study of governance in Northern Ireland must first recognise that we are a society that is not practised in the ways of democracy. For only 34 months of the last 34 years has power been devolved to a locally accountable Assembly. Prior to that we

had 50 years of majority rule by a single party with no prospect of change from one election to another. And prior to that, people who live in what is now Northern Ireland only experienced one general election in which women had a vote.

- 4.1.2 It is therefore not possible to make the same assumptions about how government works as one might in Great Britain or the Republic of Ireland. The absence of local democratic accountability has led to the dominance of the bureaucracy and the innate conservatism in the public sphere that that implies. In healthy democracies the bureaucracy is a usefully conservative brake on political parties pursuing radical agendas, ideally leading to a more sustainable implementation of a political project. In Northern Ireland under direct-rule there is rarely a political project to galvanise the bureaucrats from their now deeply ingrained conservatism. Indeed such has been the lack of accountability of public servants that many appear to have forgotten what it is to serve the public, tending instead to simply serve the needs of the bureaucracy. This is not a criticism of individual public servants but rather the inevitable result of decades of lack of political leadership. With the best will in the world, direct-rule Ministers, have little chance of getting far beyond the guiding hand of their permanent secretaries, and perhaps having not been elected by people in Northern Ireland they may not feel it important or appropriate to do so.
- 4.1.3 People's engagement with governance in general and environmental governance in particular is often slight having experienced decades of an unresponsive planning service and environmental regulator, for example.
- 4.1.4 A measure of the unhealthy nature of governance in Northern Ireland is the extent to which Friends of the Earth's work has been influenced down distinct paths in an effort to deal with the lack of accountability of Government. Unable to influence Government through normal democratic channels, we have been particularly reliant on the law, having pursued and won two judicial reviews and threatened others. Reliance on the law to pursue ends that should really be achieved through public pressure on elected politicians is not particularly healthy in a democracy. Friends of the Earth general avoids the legal route if it can but in Northern Ireland there is often no alternative.
- 4.1.5 Official complaints to the European Commission are a quasi-legal route that Friends of the Earth has used on a number of occasions. Complaints have been made under five different directives and the Treaty of Rome. One has been referred to the European Court of Justice to date. This is far from being an ideal means of calling government to account
- 4.1.6 Thus direct-rule as a continuing form of government presents a significant challenge for those that would achieve major improvements in environmental governance. Means of making civil servants and Ministers more accountable to the people they exist to serve must be built into the architecture of environmental governance. This could range from codes of practice requiring higher standards of public participation than would be the norm elsewhere in the UK to the widespread use of citizens' juries, for example, to the establishment of institutions that formally involve civil society in the governance process

## **4.2 Devolution**

- 4.2.1 Should devolution return, the outlook for democracy is undoubtedly much healthier although that for environmental governance may not be so positive, at least in the short term. This is in part due to the inexperience of our political class but it is also a

legacy of deep rooted cultural attitudes that militate against good environmental governance. Briefly, and bluntly, Catholic antipathy to civil authority (born out of centuries of British rule) and Non-conformist individualism combine to greatly diminish the kind of civic support that is widespread for the planning system in England where the common good is placed above individual interests. Similar attitudes often prevail to pollution and waste disposal.

- 4.2.2 Environmental governance in a devolved context needs to take account of these important cultural characteristics of our society. Paradoxically, perhaps, the answer may lie in high levels of civic participation.

### **4.3 Governance for Sustainable Development**

Environmental governance, whether in a direct-rule or devolved context, is only separable from governance for sustainable development with difficulty and to do so would be to miss an opportunity. If environmental governance is to be successfully laid as a foundation stone of sustainable development, the Review could usefully explore the broader issue of embedding the new paradigm across government while achieving successful civic participation in a sustainable future. This will be the subject of further evidence to the Review.

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