



United Kingdom Environmental Law Association

Northern Ireland Working Party

Response to the Department of the Environment Discussion Document – “Environmental Governance in Northern Ireland, 5 August 2011”

Introduction

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.

UKELA prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics. This response has been prepared with the help of the Northern Ireland Working Party.

UKELA’s current priorities include:

- Informing and actively influencing the broad law and policy debate on climate change including the measures to reduce greenhouse gas emissions and manage their impacts at the international, EU and domestic level
- Helping deliver more effective and efficient environmental regulation including enforcement at the EU and UK level, not lower standards nor less regulation unless the same or better outcomes will be achieved

UKELA works on a UK basis and seeks to ensure that best legislation and practice are achieved across the devolved jurisdictions.

UKELA welcomes this opportunity to comment upon the Department of the Environment’s Discussion Document on possible changes to Environmental Governance in Northern Ireland.

UKELA considers that effective governance on environmental matters is critical for environmental quality, justice and equality, sustainability and economic competitiveness.

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The Case for Change

UKELA fully supported the 2006 independent Review of Environmental Governance in Northern Ireland and the recommendations of the 2007 Review of Environmental Governance Final Report. UKELA acknowledges that in the transition to political and social stability that has taken place over the past decade in Northern Ireland, environmental issues were inevitably unlikely to be at the top of the political agenda. However, UKELA considers that the decision in 2007 by the then Minister for the Environment not to create an independent Environmental Protection Agency for Northern Ireland was a missed opportunity to make fundamental changes to Environmental Governance in Northern Ireland which would have served to benefit society as a whole. Whilst the reorganisation of the Environment and Heritage Service into the Northern Ireland Environment Agency ("NIEA") has brought about some improvements, the fundamental concern over lack of separation between policy making and operational responsibility remains. The pace of change in terms of the Department's "Better Regulation" program has also been disappointing to practitioners.

In the English and Scottish model the Environment Agency is able to act as a consultee to legislative reform, but NIEA (as an Executive Agency within DOENI) cannot adequately fulfil this role in Northern Ireland. There is concern in Northern Ireland that because responsibility for both regulation and policy lies with the same department, there is not the same capacity for public debate on new legislation and policy that exists in other parts of the UK.

The problems arising from lack of separation between policy maker and environmental regulator manifested in the "*Seaport*" case as referred to the European Court of Justice (Case C-474/10). The fact that the EHS (as it was then) was acting as consultee to matters arising in relation to Local Development Plans drawn up by the Department of the Environment (in direct contrast to, for example, Natural England as consultee in England), raised fundamental issues on the lawfulness of the consultation procedure. Had the NIEA been an independent body, this particular issue may not have arisen.

Further, there are concerns that the NIEA is under-resourced and lacking in enforcement powers and expertise, as well as a perception that there are certain areas in which little regulatory or

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enforcement activity is occurring at all. The NIEA's lack of independence has been further entrenched by the fact that a single official now holds the operational post of CEO of the Environment Agency, as well as the administrative role of Under Secretary of Environmental Policy.

The distribution of certain environmental regulatory functions across other Northern Ireland departments also creates problems in terms of consistent and co-ordinated regulation. For example, fisheries and river protection as part of both the Department of Regional Development and Department for Culture Arts and Leisure as well as DOE leads to a lack of focus in ensuring protection of water resources. It is no coincidence that significant improvements in river water quality were made in England in the early 1990s through the establishment of the National Rivers Authority (subsequently an integral part of the Environment Agency). Water pollution and river quality remains a significant issue in Northern Ireland, reflected in the persistently low penalties imposed for water pollution offences in the Northern Irish courts.

Consideration of Options

Accordingly, UKELA welcomes this further review, but also recognises that in these financially constrained times some consideration must be given to the extent of the structural changes required. We comment below on the options considered in the Discussion Document.

Option A – “Do Nothing”

For the reasons outlined above, UKELA agrees with the Discussion Document's conclusion that a 'do nothing' approach preserves the wide gulf between the NIEA and other Environmental Agencies. UKELA does not consider that maintaining the status quo is an acceptable option.

Option B – Status Quo 'Plus'

UKELA also does not consider this to be a viable option. The rebranding of the EHS to the NIEA and subsequent "Better Regulation" programme was intended to achieve a similar outcome relative to the position under the EHS, but significant improvements have not generally been seen in practical terms.

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Most significantly, this option does not address the fundamental issue of the need for greater independence for the regulator.

Option C – All NIEA functions to an independent agency

UKELA considers that, whilst an attractive proposition, detailed consideration must be given to whether this represents the best model. As noted above, there are environmental protection functions outside of the NIEA and DOE that would benefit from being brought within a new EPA. Similarly, those functions such as Drinking Water Inspectorate and conservation of State Care monuments may not be appropriate for transfer. This option may not be the most effective use of the considerable financial resources that would be required to create and maintain an independent EPA.

Option D – Full Reorganisation

UKELA considers that this option represents the best-case scenario in that it would bring together all of the key areas required for good and consistent environmental governance. However, UKELA is also mindful of the costs of undertaking this type of reorganisation in the current economic climate. The Discussion Paper notes the likely political resistance to any fundamental reorganisation that involves the creation of an independent EPA by those parties that resisted change in 2007. There are perhaps dangers that the short term economic argument will override any proposal of this scale and complexity, particularly where the political will amongst other parties on the Executive remains sadly lacking.

Option E – A regulation oriented independent EPA

On the basis that Option D above may, unfortunately, be over ambitious in terms of what may be palatable in the current economic and political climate, this option in UKELA's view represents the 'next best' option. This could provide a 'stepping stone' to the transfer of further functions in the future when the regulatory and cultural changes required to shift key functions have been dealt with. However, more clarity needs to be provided on what exactly the "key regulatory functions" are. Presumably this would include licensing/permitting (i.e. waste, water and PPC) and environmental crime. Further, this type of change would not address other significant issues including for example

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the role of the present NIEA as consultee to the DOE on strategic planning matters.

Given that new primary legislation would be required to create an EPA, there may be the opportunity at the outset to provide a framework for transition of other functions via implementing legislation. This would allow for the eventual creation of a broader EPA as per Option D following the establishment of a 'core' EPA.

Conclusion

UKELA firmly considers that a 'do nothing' approach to the future of environmental regulation in NI is not an acceptable option. The ideal outcome of this review would be for the timely creation of an independent Environmental Protection Agency that encompasses functions currently overseen within the NIEA but also brings in environmental protection functions from other NI government departments. However, UKELA acknowledges that, given current financial constraints and potential lack of political will across the Executive, a regulatory-focused EPA may be a more practicable compromise position that could pave the way for more significant change in the medium term.

The last review on environmental governance concluded in 2007. If this review does not achieve real change, another five years (if not longer) of the status quo will have lasting negative impacts upon Northern Ireland's environment and economy. UKELA commends this review and will be pleased to provide further input into more detailed consultations on this issue.

UKELA Northern Ireland Working Party

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