



**Friends of
the Earth**

**Response by Friends of the Earth to Transparency and Trust:
Reshaping Environmental Governance in Northern Ireland (The
Macrory Report)**

This paper addresses options for “Delivery mechanisms surrounding Environment and Heritage Service”. Friends of the Earth’s views on options for ‘Improving accountability’ and “Cross-departmental independent policy advice on the environment” are contained in the attached proforma response.

1 Introduction

Northern Ireland’s system of environmental governance is an anomaly in these islands. This is the only jurisdiction that does not have an independent environmental protection agency. Friends of the Earth believes that we should now move swiftly to establishing a new independent environmental regulator.

The current debate on environmental governance would not be taking place were it not for the widespread perception that Environment and Heritage Service (EHS) is failing in its role of environmental regulator. Friends of the Earth has particular knowledge and experience of failings in three key areas.

1.1 Water

The 1998 Audit Office report¹ on river pollution was expansive in its criticism of EHS. The subsequent PAC report² noted that despite the two and a half years which had elapsed since the Audit Office report ‘*there are still many areas where progress has been extraordinarily slow*’ and ‘*DOE has been slow to the point of lethargic in taking the actions recommended by its own consultants and in the C&AG’s report*’.

EHS has been constrained in its regulation of Water Service by the latter’s Crown Immunity. EHS claims, however, that it operates a system of regulation for Water Service similar to that which the Water Order provides for private industry. In Friends of the Earth’s experience this is not the case and Water Service experiences only minimal regulation by EHS. The fact that EHS is unable to convert its registered standards into discharge consents for the planned externalised water body bears this out.

1.2 Waste

The recent report by the Waste Management Advisory Board³ on EHS's delivery of Northern Ireland's Waste Management Strategy describes comprehensive failure. Friends of the Earth's experience of EHS in this context is of chaos within the agency and widespread failure to enforce waste regulations. This has resulted in two complaints to the European Commission based on widespread illegal landfill operations and failure to control the closure of landfill sites.

1.3 Habitats

The recent temporary ban on trawling in Strangford Lough in order to protect what remains of the horse-mussel beds was achieved by a combination of pressure from DOE and environmental NGOs on DARD. The root of the problem, however, goes back to the fact that EHS designated the Lough as a candidate SAC in 1997 and then failed to maintain it at favourable conservation status as the Habitats Directive required. EHS may claim it did not have adequate powers over DARD but there is no reason why EHS could not have taken such powers and averted the damage. It did not do so.

The Strangford Lough issue raises the fact that other candidate SACs are equally unprotected by EHS. The Audit Office report on ASSIs⁴ was also strongly critical of EHS's performance in protecting special sites. Friends of the Earth understands that EHS has only partial information on the conservation status of sites in Northern Ireland.

1.4 Options for change

It does not necessarily follow that because EHS is failing it should be replaced with a differently constituted body. The reform of EHS into an effective regulator is at least theoretically possible but there are a number of reasons why it would be undesirable.

- The thrust of regulation in the UK and Ireland has for a number of years been towards the establishment of regulators which are independent of Government. Northern Ireland is missing out on the many benefits to be derived from independent regulation.
- There has been a loss of public confidence in EHS's ability to regulate effectively. Internal reform is unlikely to restore that confidence.
- There is a clear need to raise standards of performance. To achieve this will require changes in ways of working; personnel; and culture. This is much more likely to be achieved through establishing a new organisation than by attempting to reform an existing one which is constrained by its location within Government.

In Friends of the Earth's view, these concerns rule out Macrory's options 1 and 2. We do not see any significant difference between these two options. Although EHS was established as a 'next steps' agency, in practice it appears not to enjoy a degree of autonomy within the Department of the Environment that would be of significance to this debate.

Option 5, we reject for the same reasons that Macrory lists. It is worth noting that one of the key drivers behind the establishment of the Irish EPA was the impossible task local authorities faced in implementing increasing quantities of increasingly complex legislation.

Given the obvious failure of the current arrangements the onus should be on Government to show why neither of Macrory's independence options (3 and 4) are acceptable to it, if indeed that is the case. Nevertheless, we are happy to make the case for independence.

2 The case for independence

The Better Regulation Taskforce⁵ describes the benefits of independent regulation experienced by those being regulated as:

- More consistency of decision making
- Long term decisions rather than short term
- More transparency
- Better accountability
- More trust between the regulated and the regulator; and
- Freedom from political interference.

Given EHS's failure to provide effective regulation as exemplified above, it is apparent that environmental regulation in Northern Ireland would benefit significantly from improvement in all the areas highlighted by the task force. We set out below how we think independence would deliver two types of benefits in these and a number of other areas: those due to the removal of constraints attributable to location within government; and opportunities to be gained from the fact of independence.

2.1 Active political interference

Political interference comes in two forms: active and passive. The active form is when Ministers directly intervene in EHS decisions. The classic example in recent years was the 2002 decision⁶ by the then Environment Minister, Dermot Nesbitt MLA, to forbid EHS to object to planning applications on the grounds that the sewage infrastructure was inadequate and in breach of European standards, standards which it was also EHS's role to enforce. This interference effectively suspended EHS's role in the planning process as a statutory consultee and undermined its role in environmental protection.

2.2 Passive political interference

Passive political interference comes in less obvious but equally problematic forms. At the heart of EHS's role is a fundamental conflict of interest. The senior officials of EHS are civil servants whose first duty is to their Minister. When it comes to a choice between protecting the environment and protecting the Minister, it is the Minister who comes out on top.

2.3 The Ministerial filter

Policy initiatives by EHS are inevitably filtered by the need to take account of Ministerial preferences. Civil servants do not, as a rule, advise Ministers to take a course of action to which they know the Minister is opposed or will cause the Minister significant political difficulty. The result can be that the optimum environmental outcome is compromised at the start by political considerations.

2.4 Cultural reluctance to criticise other Departments

EHS is compromised by a cultural reluctance to criticise other Government departments. Its report on Water Service regulation published in Dec 2003⁷, was strongly worded by EHS standards but weak by the standards of most independent regulators. Indeed there is evidence to suggest that the wording of the report was significantly influenced by Water Service.

Likewise, EHS's poor performance on protecting special sites is constrained by the cultural difficulties in confronting the Department of Agriculture and Rural Development with its failings. Much of the damage to Strangford Lough can be attributed to this.

2.5 Expertise: personnel constraints

Location within Government obliges EHS to operate personnel policies which compromise performance. For example, the Waste and Contaminated Land Unit needed to significantly expand its staff in order to deliver the Waste Management Strategy and implement new regulations. A large number of unqualified staff were simply transferred from Water Service which had a need to shed staff at the time. The result has been compromised environmental outcomes due to inappropriate staff. This is commented upon by the Waste Management Advisory Board⁸ in its recent strategy review. Senior staff appointments are often made from within the civil service, simply appointing from those who are at the appropriate stage in their career. Inevitably this means that the pool of talent outside the civil service is not used properly and performance can be compromised. An environmental regulator is expected to be a specialised and expert body. It cannot adequately achieve this while located within Government.

2.6 Budgetary constraints

EHS is constrained by its dependence on a single income stream decided on an annual basis. It cannot vary its income through levies and fees in that an increase in fee income, for example, does not result in increased resources for the agency. The Better Regulation Task Force argues that financial independence from a combination of sources (direct grant, levies and fees) is important to successful regulation. It is only in the context of an independent agency that such a system could deliver the benefits of certainty and autonomy that the new body would need in order to avoid over-dependence on the sponsoring department.

2.7 Legal constraints

EHS is not able to take independent legal advice in instances such as the Nesbitt decision on planning and sewage infrastructure. An independent body would be able to seek its own advice where it felt subject to inappropriate political interference.

2.8 Transparency

Macrory makes the case for transparency and that a regulator located within Government cannot achieve the kind of transparency that is now expected by stakeholders. We note the Scottish Environmental Protection Agency and the Environment Agency's practice of open Board meetings and publishing minutes on their web-sites. It is impossible to imagine that a Government department would allow such an arrangement.

2.9 Accountability

Accountability in Northern Ireland depends on whether devolution or direct rule is in operation. Under direct rule, Ministers are not accountable to the Northern Ireland electorate in any form as none of the main UK parties organise here in any serious way. Ministers hold a number of portfolios in addition to their party and constituency duties and are lucky if they manage to devote a day a week to an individual department. Ministers can become over-dependent on their officials and the business of government is effectively left to civil servants who have no accountability to the people they exist to serve. 30 years of direct rule have embedded a culture of disconnection between the public service and the concept of serving the public. Considerable efforts at improved consultation have been made by Government but these do not constitute any serious form of accountability. The lack of accountability under direct rule, therefore, is both structural and cultural.

Under devolution there is more conventional accountability of a regulator located within Government via the Minister to the Assembly and ultimately to the electorate.

The accountability to which an independent regulator is subjected depends on the relevant legislation and the culture of the organisation. Thus the establishment of an independent regulator under direct rule is an opportunity to improve accountability significantly by drawing on the very best practice from elsewhere.

It could be argued that an independent regulator under devolution would constitute a loss of direct accountability to the Assembly and the electorate. The Better Regulation Task Force, however, states:

Whilst accountability to Ministers and to Parliament is important, it is equally important that regulators are more clearly answerable both to those who they regulate and those on whose behalf they are regulating

It also reports that those regulated report ‘better accountability’ from independent regulation. The challenge is to establish a body that has optimum accountability to its stakeholders.

2.10 Credible commitment

Shipan⁹ notes that one benefit of independence is the ability to make a credible commitment to certain policies and actions. He writes of the Irish EPA:

In general, then, the establishment of the EPA would help to solve the credibility problem – the problem that government policies were neither predictable nor consistent – in a number of ways. It would allow for consistent enforcement. It would create a set of clear and predictable standards. It would ensure that adequate resources would be provided to address environmental issues. In short, it would be a more credible way to deal with the environment.

2.11 Raising standards

The failures of EHS described above illustrate a real need to raise standards of performance significantly. This will require not just a range of practical measures such as recruiting appropriately qualified and experienced staff, but achieving substantial cultural change in order to become a ‘champion for the environment’. Such a cultural

shift is extremely unlikely without the far-reaching changes associated with establishing a new and independent body.

2.12 Restoring public confidence

Environmental NGOs are in no doubt that there is a lack of public confidence in EHS. Friends of the Earth has daily contact with individuals and community groups who experience deep frustration at EHS's failures. The frustration is usually targeted at 'the DOE' but it is the failure of the regulatory function of EHS which is the substance of most concerns.

EHS's own research¹⁰ show that there is an almost total lack of awareness of it or its role. That, in itself, is evidence of a failure to serve the public.

2.13 Summary

Thus if an independent environmental regulatory body were established, it would be able to improve substantially on EHS's performance because:

- it would be largely free from political interference;
- its mission would be to protect the environment rather than ministers;
- political considerations would not filter out important options at an early stage;
- it would be free to criticise government departments where necessary;
- it could recruit the best staff for the job;
- it would have more certainty and greater autonomy in the management of its budget;
- it could seek its own legal advice;
- it could meet public expectations of transparency;
- it could replace the current lack of accountability with best practice;
- it could enhance accountability under devolution with best practice;
- it would enable credible commitments to be made;
- it would facilitate the raising of standards of performance; and
- it would create an opportunity to restore public confidence in environmental regulation.

3 Objections to independence

Macrory identifies a number of arguments against independence and others have been raised elsewhere.

3.1 Extra costs

Undoubtedly there would be extra costs involved in setting up and operating an independent agency. But the costs of not doing so are likely to be greater. The failures of EHS have either resulted in, or are likely to result in, infringement proceedings by the European Commission ultimately leading to fines. Friends of the Earth is directly involved in a number of cases under the Urban Waste Water Treatment Directive including the consequences of the Nesbitt decision on planning and sewage infrastructure; two cases under the Waste Framework and Landfill Directives; and the Strangford issue under the Habitats Directive. The fines that may ultimately be levied by the European Court will dwarf any additional expense attached to an independent agency. Of course a new agency would not avert fines from cases which are already proceeding but effective regulation in the future would obviate the need for Commission

legal action. Having said that, there is an argument that by demonstrating to the European Commission that Northern Ireland intends to take enforcement of European law seriously, the Commission may pursue the existing cases through the Court with less vigour. Furthermore, were the more litigious environmental NGOs to be satisfied with new structures of environmental regulation, they would be less likely to press the Commission for action on outstanding cases.

A second balancing argument on the additional costs issue is the cost to the economy of poor environmental regulation. There is ample evidence (FOE, Working Future) that strong environmental regulation can boost economic activity and of course income from tourism, both foreign and domestic, is likely to suffer as Northern Ireland's clean and green reputation is exposed as being far from the truth.

3.2 Policy delivery separated from design

There is a concern that separating policy delivery from policy development could cause problems. These can be overcome, however, by ensuring that new structures contain policy feedback loops within them. The Environment Agency, for example, has a policy unit whose job is to engage with DEFRA on policy development, thus ensuring that DEFRA benefits from the hands-on experience of the Agency. In Northern Ireland it is questionable whether there currently exists a satisfactory relationship between policy delivery and design. It appears that EHS has failed to adequately engage with Environmental Policy Division on the development of waste regulations, for example. EHS's failure to anticipate its responsibilities under a raft of European Directives suggests that either it chose to ignore what it knew was coming in the way of new duties, or, more benignly, it was not adequately involved in the process that transposed those Directives. Either way it appears that the fact that delivery and design are within the same government department does not guarantee a satisfactory relationship between the two.

3.3 NDPB regulating Government

It has been suggested that it would be inappropriate, an affront even, for an NDPB to regulate a Government body, as would be the case if an independent agency were created ahead of the externalisation of Water Service. It is important to address and refute this objection, particularly given the probable delay in the Water Reform process. The creation of an independent agency must not be made to wait for the externalisation of Water Service.

There are many examples of an NDPB regulating Government. The most obvious is the Health and Safety Executive (England and Wales). Government Departments there are bound by the Health and Safety Act, even though full regulation is not possible where Crown Immunity remains in place. (In these cases, the Health and Safety Executive enforces by means of a Crown Censure. There was controversy recently when the HSE could only issue a Censure Notice in respect of a death at the Royal Mint. Nonetheless, they were the regulatory authority.)

Government Departments in England and Wales are increasingly bound by environmental legislation and the Environment Agency, an NDPB, regulates most Government activity. Admittedly, the protection of Crown Immunity means that full regulation is not possible but there is a general principle that such immunity will be removed. For example, Crown Immunity for breach of planning control was lifted by the recent Planning Act.

These exemptions notwithstanding, it is clear that many Government bodies are subject to regulation by NDPBs, therefore we see no reason why an Environmental Protection Agency structured as an NDPB should not regulate DRD Water Service.

3.4 Reduced size of DOE

There is one other objection to removing the role of environmental regulation from the Department of the Environment but we feel this is something of a red herring. The argument revolves around the expectation that the planning function of DOE will be transferred to a reduced number of local authorities in the not too distant future. If environmental regulation were also to be lost, it is argued that DOE would be so diminished as to be an unattractive proposition for any party to choose under the d'Hondt process. There are two points to be made here. First, the need for 10 Departments was always based on a political imperative and had nothing to do with achieving the best administrative outcomes. This is a fact of Northern Ireland life.

In fact, were EHS and Planning Service both to be removed from DOE, the total staff complement would be reduced from c.2600 to c.1250. This compares with the Department of Culture, Arts and Leisure, which has a total staff complement of c.450.

Secondly, DOE would still possess the crucial environmental policy function. This is a growing area of responsibility and one in which DOE has had only limited engagement. Removing the regulatory function creates an opportunity to concentrate on this critical area.

4 Conclusion: a champion for the environment

The constraints and missed opportunities described above either lead to a failure to privilege the need to protect the environment over political considerations or to poor operational performance, resulting in compromised environmental outcomes. In essence it is not possible for a body operating under these conditions to be the 'champion for the environment' that Macrory identifies as being of such importance (7.2).

We also concur with Macrory's view that the

'sweep of environmental powers encompassing pollution control, nature conservation, and heritage protection' creates the potential 'to take a truly integrated approach to the issue.' (7.3)

and his comment on Option 3:

'using the basis of current EHS responsibilities, Northern Ireland could create one of the leading, integrated environment agencies in Europe.' (p38)

Friends of the Earth recommends that the delivery of environmental regulation should be transferred from EHS to a new non-departmental public body and that Government moves swiftly to establish such a body.

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References

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² Public Accounts Committee (2001), “Report on the Control of River Pollution on Northern Ireland”, The Stationery Office Limited.

³ Waste Management Advisory Board for Northern Ireland (2004), “Northern Ireland Waste Management Strategy Review Report”, Environment and Heritage Service Publishing Unit.

⁴ Comptroller and Auditor General for Northern Ireland (2003), “Areas of Special Scientific Interest”, The Stationery Office Limited.

⁵ Independent Regulators (2003) “Better Regulation Task Force”, Cabinet Office Publications & Publicity Team.

⁶ Official Report of the Northern Ireland Assembly 7 October 2002, Volume 18, Water Quality and Planning.

⁷ Environment and Heritage Service (2001), “Regulation of Water Service Discharges”, Environment and Heritage Service Publishing Unit.

⁸ Waste Management Advisory Board for Northern Ireland (2004), “Northern Ireland Waste Management Strategy Review Report”, Environment and Heritage Service Publishing Unit.

⁹ Shipan, Charles R (2003), “Independence and the Irish Environmental Protection Agency: a comparative assessment”, Working Paper, The Policy Institute at Trinity College Dublin.

¹⁰ Market Research Northern Ireland (2003), “EHS Customer Survey”, Market Research Northern Ireland Ltd.

Annex

Proforma response to consultation