Northern Ireland Environment Agency Revised Draft Enforcement and Prosecution Policy – A Consultation Paper

A written response from RSPB Northern Ireland, June 2009

Summary
The RSPB is keen to see the Northern Ireland Environment Agency (NIEA) develop a strong and effective enforcement and prosecution policy to ensure that environmental objectives are delivered through effective implementation of legislation in Northern Ireland. In this response to the NIEA’s consultation, as a matter of priority we want the revised policy to include provisions for:

- the development of an enforcement implementation plan;
- policy statements on individual aspects and priority areas of its enforcement remit to provide detail and clarity in relation to each of these aspects;
- a transparent and objective methodology for determining the appropriate course of action;
- presumption in favour of enforcement;
- the creation of a single incident and enforcement database;
- a programme of training, work experience, and skill enhancement for enforcement staff;
- targeting of specific types of offence or offences affecting particular features;
- promotion of effective prosecutions to the media to deter potential offenders;
- a review of the punishments available undertaken to determine whether any changes to the levels are required to secure implementation of the ‘polluter pays’ principle;
- an annual report on the implementation of the ‘polluter pays’ principle in Northern Ireland;
- a framework of formalised Service Level Agreements, Memoranda of Understanding and other bilateral agreements developed to strengthen partnerships; and
- a thematic review of wildlife crime enforcement in Northern Ireland at an appropriate date.

To ensure Northern Ireland introduces a transparent and streamlined process of environment regulations, in line with recommendations from the Criminal Justice Inspectorate, we urge the Executive to create an independent environmental protection agency to tackle enforcement and prosecution work in the future. We also recommend an Environmental Tribunal for Northern Ireland to tackle appeals fairly and appropriately.

1. The RSPB and its interest in the revised policy
The RSPB is the largest nature conservation charity in Europe, supported by over a million members of which around 11,000 live and support our work in Northern Ireland.

The RSPB strives to conserve wildlife and the environment. In order to fulfil its overall aim, RSPB Northern Ireland inspires the public to support nature conservation, champions wildlife and the environment to decision-makers, researches problems and identifies practical solutions, protects and manages important habitats, and shares its expertise and knowledge with people to help everyone enjoy the natural world in Northern Ireland. We have attempted to influence on-going discussions regarding improvements to
environmental governance in Northern Ireland for many years and have contributed significantly to the debate.

The RSPB employs over 40 staff in Northern Ireland. RSPB staff in Northern Ireland work to understand the ecological world, conserve species from direct threats, protect the best places for wildlife, improve wildlife value of the countryside and seas, and restore lost biodiversity. The RSPB invests around £1.4 million pounds annually in Northern Ireland and we are a major owner and manager of land (c. 3,000 ha), so we have a major stake in the protection of our natural heritage and how we are regulated.

We believe it is important that the Northern Ireland Environment Agency (NIEA) adopts a strengthened enforcement and prosecution policy to help secure delivery of environmental objectives. The deficiencies of the Environment and Heritage Service (now the NIEA) in these areas have been expertly analysed by the Criminal Justice Inspectorate (CJI 2007) and the Review of Environmental Governance (REGNI 2007) and the RSPB expected the revised policy to act on the full range of recommendations made during these reviews.

Although many of the changes proposed are welcomed, the RSPB is disappointed that a major overhaul of one of the most important elements of environmental governance in Northern Ireland has neglected the views and opinions of experts and does not offer confidence that the administration is adopting best practice. We are still unclear why there is such a resistance to act on these recommendations.

2. Our responses to the consultation questions
We have some answers to the questions in the consultation document that highlight our serious concerns on the robustness of the proposed policy.

Introduction and Scope (Section 1)

Question 1 – Do you have any comments on the scope of the revised policy?
Yes.

Performance management
The CJI (2007) report recommended that enforcement operations should be based on a clear performance management framework to ensure strategic objectives are met. We urge the NIEA to include a section in the revised policy to cover this area and suggest the development of an enforcement implementation plan to provide necessary structure. This should include policies, procedures, risk analysis and SMART performance targets, not just that the policy ‘will be monitored by the Chief Executive’. Without mention, it is unclear how stakeholders like the RSPB will be able to measure the success of the NIEA in this area and for decision-makers to identify the resource requirements to achieve stated results and outcomes. Overall, the lack of performance targets will create a lack of public confidence in the system.

Data management
One of the key recommendations of the CJI (2007) was that a single incident and enforcement database should be introduced. This would act as a central repository of information that could be shared among enforcement staff and other enforcement agencies to improve current activity and identify new priorities. We believe such a unified database should be developed and that this is a core element of the revised policy.

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1 Robinson, J.A. 2006. An Environmental Protection Agency for Northern Ireland: Building the best Model. A paper prepared by the RSPB on behalf of the Coalition for Environmental Protection.
2 RSPB Northern Ireland 2006. Review of Environmental Governance in Northern Ireland: Written submission by the RSPB. RSPB, Belfast.
Staff training and skill enhancement
We are pleased to hear that a new Office of Environmental Enforcement has been set up to tackle serious breaches of environmental legislation. We would like to know how decisions on the size and expertise within this new team were informed and whether this new team is capable of dealing with the size of workload. For example, we are keen to learn where expertise in criminal investigation and strategic management of enforcement have been sourced and how the provision of legal advice and prosecutorial services will be handled. We suggest more details on the new team and its structure and expertise should be captured in the revised policy document.

We agree with CJI (2007) that enforcement staff should receive training, work experience, and skill enhancement etc. to deliver required standards. We suggest that this element of work should be addressed in the revised policy document.

Question 2 – Have we clearly explained the nature of our regulations and links with other agencies?
The development of NetRegs has provided a useful tool for those regulated to understand environmental laws and the departments/agencies responsible for them. Recent promotion of this service to the public has been helpful and we are keen to learn whether this has made a difference to understanding and compliance and how the NIEA has measured this.

However, the question posed here relates to the proposed revised policy that provides only a very short summary of responsibilities. We suggest that a full list of environmental regulatory responsibilities across the Northern Ireland administration is published in the revised policy document to offer detailed information to those who require it.

With a more diverse and complex environmental agenda developing, and with issues cutting across the various government departments in Northern Ireland, the RSPB still believes there is an urgent need to develop a more integrated approach to environmental regulation. We think integration of responsibilities in one body could create a more effective ‘one-stop-shop’ for those requiring advice and authorisation and we are keen to raise this issue again in this consultation. Not only would this simplify the system for users, but would remove the administrative costs that are faced by each of the regulatory authorities currently in place.

Principles of enforcement (Section 2)

Question 3 – Do you have any comments on these principles?
Yes.

The RSPB believes that bureaucracy could be reduced by creating a regulatory system that is proportionate (only intervening when necessary), accountable (subject to public scrutiny), consistent (securing fair implementation), transparent (simple and user friendly), and targeted (only solving problems) – so-called ‘better regulation’. We are therefore content with the list of principles adopted in the revised policy.

Proportionate
The RSPB agrees that the NIEA should adopt the proportionality principle, but we are concerned that the draft policy lacks clarity about the nature of the mechanisms to be used, the way in which they are to be applied, and the work required to ensure that the foundations to underpin effective enforcement are in place and are fit for purpose. We suggest the revised policy includes more detail.

Transparent
We are pleased that an Annual Enforcement Report will be published by the NIEA. We believe this report should include action on all cases reported to the NIEA and a full list of all permissions granted for activities within environmental legislation. In particular, we would like to see annual publication of the number and detail of wildlife licences issued, their purpose and impact, and the number and detail of consents granted for work on Areas of Special Scientific Interest.
Targeted
Although we applaud the adoption of the targeting principle, the risk assessment procedure outlined in Section 2.4 is unclear. For example, targeting seems to refer only to the selection of individual cases based on their merits. This is of course entirely valid and necessary. However, we would suggest that given resource constraints, and the often cyclical nature of some threats (for example expected increases in breaches of the Agricultural EIA Regulations when food prices are high), targeting of specific types of offence or offences affecting particular features (for example upland habitats) would also be appropriate. We urge the NIEA to define its risk assessment procedure in more detail in the revised policy document.

Accountable
We believe the Assembly’s Environment Committee should have a role in scrutinising the work of the NIEA and Office of Environmental Enforcement. See also answer to Question 1 on performance management and public accountability.

Question 4 – Are there any other principles that should be included?
Yes.

The independence on enforcement agencies removes them from politics, therefore allowing them to make improved, scientifically based, decisions. The independence of an agency has major implications for the public’s trust of enforcement and prosecution activity. The need for independence in promoting transparency and encouraging trust in the Northern Ireland administration’s approach to the enforcement of environmental regulations was identified by the CJI (2007) and REGNI (2007).

As an Executive Agency within the Department of the Environment (DOE), the NIEA does not currently have the freedom to act as a voice independent of government. It undertakes executive functions yet remains within the DOE (i.e. is not fully independent). For example, the Minister for the Environment is well within his/her rights to make representations on constituency cases to the DOE in their capacity as MP and MLA and outside of their Ministerial role. CJI (2007) recommended, “Clear procedures must be in place to ensure the independence of the regulatory function so that enforcement staff are not subject to political and other internal/external pressures”. This important recommendation has yet again been ignored in the draft policy document.

The RSPB does not believe that the principle of transparency can be achieved in the enforcement system in Northern Ireland unless it is regulated by an independent agency. Therefore, we continue to call for the creation of an independent environmental protection agency in Northern Ireland and we look forward to the review of the NIEA in 2011 when the issue can be debated again.

Supporting compliance (Section 3)

Question 5 – Do you have any views on how NIEA’s compliance assistance could be improved?
Yes.

As mentioned above, the NetRegs initiative is a depository of excellent information for the regulated. However, regular promotion of this web-based tool needs to be targeted and monitored to secure use. We support the NIEA’s proposal to develop new ways of maximising the reach, accessibility and effectiveness of advice and their wish to measure the success of publicity initiatives. We also suggest that effective prosecutions of major breaches of environmental regulations are promoted to the media to deter potential offenders and that this action should be defined in the revised policy document.

Enforcement powers (Section 4)

Question 6 – Do you have any views on the range of enforcement powers available to NIEA and its approach to secure compliance with the law?
Yes.

High fines for non-compliance can be used to maintain an effective deterrent and complement a lighter-touch risk-based approach to regulation (i.e. involving less frequent inspections). Such a regime can maintain or increase the overall probability of facing a fine for non-compliance without increasing administrative burdens. Fines need to act as a deterrent, with judicial guidance to ensure fines are set at sufficient level to do so. This would produce a fairer system and reflect the ‘polluter pays’ principle in regulatory practice. In summary it would ensure:

- Those complying with environmental regulation face reduced costs;
- Those accidentally breaking the law are dealt with in a non-criminal system, reducing costs for all, and are charged in proportion to the costs of monitoring and remediying their non-compliance; and
- Those intentionally breaching regulations face criminal proceedings and penalties that act as an effective deterrent.

Recent proposed changes to penalties for breaches of the Wildlife (Northern Ireland) Order 1985 indicate that deterrents do need to change to help the NIEA secure its biological objectives. Continuing high levels of damage to Areas of Special Scientific Interest also indicates the deterrents available are not appropriate. In Section 6.1 of the consultation paper, there is short description of the punishments available to the courts. However, we suggest that a review of the punishments available is undertaken to determine whether any changes to the levels are required. Then relevant changes should be made as a matter of priority. This action would assure the public that the ‘polluter pays’ principle is being taken seriously in Northern Ireland and that administration costs are being minimised, reducing the burden on the taxpayer.

In addition, REGNI (2007) recommended that an annual report on the implementation of the ‘polluter pays’ principle in Northern Ireland was required that:

- sets out levels of fines imposed for different categories of crimes across the various judicial tiers;
- ‘names and shames’ those convicted of environmental crime;
- clarifies the extent to which concepts of equality and justice have informed enforcement decisions and decisions by the NIEA to use its third party right of challenge; and
- assesses the extent to which environmental regulation in Northern Ireland compounds or reduces incentives to participate in legitimate or ‘black’ economies.

In the interest of transparency, we believe the NIEA should adopt these recommendations and include them in the revised policy document.

Enforcement powers will need to encompass all those necessary to support the introduction of the Environmental Liability Regulations, on which DOE recently held a consultation.

**Question 7 – Would you welcome access to a wider range of enforcement tools, such as fixed penalties or voluntary undertakings?**

We believe the range of enforcement tools is appropriate, but refer the reader to our answer to Question 7 regarding the effectiveness of each step in providing a deterrent to potential offenders in line with the ‘polluter pays’ principle.

**Factors determining prosecution (Section 5)**

**Question 8 – Do you have any comments on the factors determining whether prosecution should be pursued?**

Yes.

In the first bullet point under Sections 5.1, we would like to see more clarity of the definition of ‘significant consequences on the environment both natural and built’. We believe that any illegal activity should merit
consideration by the Public Prosecution Service and we are uncomfortable that ‘significant’ may be interpreted in such a way that reduces the chances of prosecution.

We are unclear how the ‘attitude of the offender’ will be considered in the ‘Other factors’ section. Further details are required.

We consider it inappropriate for the personal circumstances of an alleged offender to be included within the ‘Other factors’ that the NIEA will consider. We believe that this is an issue for the courts to consider in relation to sentencing, and should not influence the NIEA when determining whether to progress with a prosecution in the first instance.

**Court action (Section 6)**

**Question 9 – Do you have any comment on NIEA’s use of financial penalties and involvement with the Serious Organised Crime Agency?**

Yes.

We fully support the policy to work with the Serious Organised Crime Agency, PSNI and Public Prosecution Service to tackle cases where significant financial gain has been accrued from the proceeds of unlawful activity.

**Working in partnership (Section 7)**

**Question 10 – Do you have any comments/views on NIEA’s working arrangements with other enforcement agencies?**

Yes.

We are pleased that the NIEA prioritises its relationships with other enforcement agencies as a matter of policy. However, there is little in the revised policy that convinces us that existing problems with poor departmental communication and joint action will be tackled. The protracted debacle over damage to the Strangford Lough Special Area of Conservation showed very clearly that the ineffective regulation of fisheries and nature conservation management by the NIEA and the Department of Agriculture and Rural Development was a result of poor co-operation.

To improve the situation, we agree with CJI (2007) that a structured framework of formalised Service Level Agreements, Memoranda of Understanding and other bi-lateral agreements should be developed to strengthen partnerships. These agreements should also extend to relevant regulatory bodies elsewhere in the UK and in the Republic of Ireland. The latter will become increasingly more important as new legislation to manage the marine environment across territorial and UK waters will necessitate closer cross-border cooperation.

**Question 11 – Are there any other enforcement agencies you think NIEA should be liaising with?**

Yes.

To secure greater consistency in the hearing and sentencing of actions concerning environmental regulation, we support the REGNI (2007) recommendation to create an Environmental Tribunal for Northern Ireland. Such a body would also offer access to legal review mechanism for those who wish to pursue further action and would reduce the burden on judicial bodies less well suited to handling environmental appeals. We understand that decisions regarding the creation of such a body are outside the scope of this review, but it is disappointing that no action has been taken to take this forward since the publication of REGNI (2007) and CJI (2007), and relevant vocal support from many within the judiciary.

We also believe that the identification of best practice in enforcement and prosecution should not stop at this review of policy. We therefore agree with the recommendation of CJI (2007) that the NIEA should establish
an effective mechanism to draw upon and learn from best practice on enforcement and that this policy should be captured in the revised policy document.

The RSPB has been working with the NIEA and PSNI to tackle wildlife crime in Northern Ireland for many decades. We have devoted many resources and capacity to provide this support and prompted the creation of a Partnership for Action Against Wildlife Crime group in Northern Ireland. It is, therefore, disappointing that the role of external bodies in supporting enforcement and prosecution is not mentioned in the revised policy document. We believe the added value provided by the RSPB and others should be explained and developed in the new policy.

3. Other issues
We have a number of other recommendations that we believe the NIEA should consider during the finalisation of the revised policy document:

Policy statements for individual policy areas
We believe the NIEA should develop policy statements on individual aspects and priority areas of its enforcement remit to provide detail and clarity in relation to each of these aspects.

Presumption in favour of enforcement
We believe that the NIEA’s policy and approach should be explicitly underpinned by a presumption in favour of enforcement, including prosecution where appropriate.

Defining courses of action
We believe the NIEA should develop a transparent and objective methodology for determining the appropriate course of action in individual enforcement cases, such that this may be applied consistently at all levels of the organisation, and as a basis for the scrutiny of the decisions made. We recommend that this should be based on a gravity factor points system. It should take account of, and weight, factors such as the type and priority of the site and/or species affected, the number of offenders and offences committed, and the scale of damage incurred, and set a score above which prosecution should always be undertaken.

Wildlife crime enforcement
We believe the NIEA should join the RSPB in calling for a thematic review of wildlife crime enforcement in Northern Ireland some time in the future, similar to that recently undertaken in Scotland.

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