

# Student article

## Environmental Crime: a symptom of institutional neglect in Northern Ireland's Planning System?

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On 4 June 2013, the then Minister of the Environment, Alex Attwood, announced he was getting tough on environmental crime. In a carefully worded press release he reported an environmental crime on an unprecedented scale:<sup>1</sup> one of the largest illegal landfill sites ever uncovered in Europe.<sup>2</sup> This super dump, located on the rural Mabuoy Road, only 1.5km from Londonderry, Northern Ireland's second largest settlement, has since been confirmed to contain over half a million tonnes of putrefying illegal waste releasing a toxic soup and dangerous gases into the environment. In its annual conference invitation, the Chartered Institute of Wastes Management for Northern Ireland describes this environmental crime as being "...on a scale that can barely be believed."<sup>3</sup>

The western edge of this super dump abuts the River Faughan Special Area of Conservation, so designated for its internationally important populations of Atlantic salmon and river otter, running for a length of 1.4km. Just a kilometre downstream of the waste site, two thirds of Londonderry's water supply is abstracted, raising serious concerns over public health. The concerns appear to have been justified by the discovery of pollution in a tributary only a few hundred metres from where it joins the main river.

Whilst former Minister Attwood's tough stance on environmental crime is to be welcomed, the current Minister, Mark H Durkan, must now examine the extent to which his Planning Department bears responsibility for creating the conditions and opportunities that have encouraged environmental waste crime.

### The Department of the Environment for Northern Ireland.

Since 1973, the Department of the Environment ('DOENI') has administered the development management and planning enforcement functions in Northern Ireland through a centralised Planning Service, unique in the UK, now known as DOE Planning. The Northern Ireland Environment Agency ('NIEA') also operates under the umbrella of the DOENI. For forty years, the twenty-six local councils have played only a consultative or advisory role in the planning decision making process. Yet all this is about to change as it is envisaged that a majority of planning functions will return to eleven newly established local authorities in 2015 as part of the implementation of the programme of Local Government Reform,<sup>4</sup> ('LGR') to be completed by April 2015. This being the case, it is crucial that a fit-for-purpose planning system is operational to ensure smooth transition. However, as LGR looms large, years of institutional bad practice in the current planning system, are coming to light, leaving the new local planning authorities with a legacy they are unlikely to wish to inherit.

It has been well documented (for example by Macrory<sup>5</sup>) that environmental regulation and enforcement in Northern Ireland have been lagging behind the rest of the United Kingdom for some time. Indeed concerns have long been raised about the effectiveness of NIEA (formerly the Environment and Heritage Service) as a regulator, and how a body charged with safeguarding the environment could command so little authority within the DOENI.<sup>6</sup> As the sheer scale of the environmental crime at Mabuoy Road unfolds, it has become obvious not only that there has been a systemic failure by the regulator to tackle illegal waste, so openly criticised by the Minister,<sup>7</sup> but also that the planning system has played a pivotal role in facilitating this crime.

The extent to which the Town and Country Planning regime performs an influential environmental regulatory function through its decision making and planning



enforcement functions should not be underestimated. This includes what should be a primary and overriding responsibility to ensure that the requirements of Directive 2011/92/EU<sup>8</sup> (Environmental Impact Assessment, 'EIA') are complied with. Unfortunately, when this responsibility is not properly understood within the organisation charged with planning regulation, or where advice and warnings from other competent authorities better placed to evaluate likely environmental effects are set aside, this can give rise to the risk of environmental damage, or, as we are now witnessing, result in actual environmental harm on a potentially vast scale. As such, the danger of violating the EIA Directive and other Directives is high, thereby placing the UK at risk of infraction proceedings by the European Commission.

## Late lessons from early warnings

For over a decade DOENI's Strategic Planning Division appears to have presided over unauthorised sand and gravel extraction and waste related developments at Mabouy Road. Six unauthorised mineral extraction sites were mined out without any ever receiving planning permission. It is these vast holes created by unregulated quarrying which have become the repositories for substantial amounts of illegal waste. For over eleven years DOE Planning refrained from taking formal enforcement action on the basis that it was in receipt of retrospective planning applications to regularise the ongoing unauthorised extraction. The fact that it is still unable to determine six of these retrospective applications due to outstanding environmental issues (a seventh having been erroneously withdrawn by the applicant two weeks after it should have been deemed refused under the *Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 1999* for failure to submit an addendum to an inadequate Environmental Statement), is perhaps a measure of how dysfunctional the planning system now appears.

Evidence from the NIEA of actual environmental harm being caused in 2009<sup>9</sup> did little to persuade the planners to stop these breaches of planning control, despite the Regulator's reports of unauthorised quarrying being responsible for emissions of leachate and litter from the illegal waste site.

Another competent authority, The Loughs Agency, called for enforcement action that same year because of "...concerns over any potential extraction processes and the associated potential for disturbing leachate and waste material with carcinogenic properties".<sup>10</sup> This seemingly fell on deaf ears as DOE Planning permitted unauthorised extraction and environmental harm to continue. In 2009, in an attempt to justify their failure to respond to calls to stop unauthorised EIA development, DOENI Strategic Planning Division advised that "*Planning applications have been submitted to Planning Service to regularise the unauthorised activities at this location. As such Planning Service has no grounds to serve formal enforcement notices on the operator at this time (especially if the notices were to be appealed).*"<sup>11</sup>

There appears to have been a clear violation of the EIA Directive, which according to EU case law (Case C-215/06<sup>12</sup>), requires the applicant to have obtained development consent and carried out the EIA before commencing works on the project. Taken together with the findings of the independent Mills Report detailed below, the position adopted by DOE Planning at that time seems incomprehensible and unjustifiable.

## The Mills Report

An independent report<sup>13</sup> recently conducted by Chris Mills, the former Head of the Welsh Environment Agency, has roundly criticised the DOE Planning for its policy of after-the-event regularisation of unauthorised mineral extraction and called for a change in enforcement policy; in fact, he need only have called for a change in the Department's seemingly lax attitude to enforcement. *Planning Policy Statement 9: The Enforcement of Planning Control*,<sup>14</sup> contains a specific chapter on enforcement of planning control over minerals operations that acknowledges the particular problems associated with extractive industries and the speed at which significant damage to the environment can be caused. Thus, it was never the case that policy on enforcement was inadequate. It was the decisions taken by DOE Planning not to enforce against unauthorised mineral extractions that not only permitted environmental damage to be caused, but created the cover under which illegal dumping could take place on an unprecedented scale.

## Cost to the Northern Ireland economy

The Mills Report calculated that on the Mabuoy Road site alone some £34.6 million in evaded landfill tax revenue has been lost to HM Treasury, with the costs of cleaning up the site estimated to be anything up to £100 million. Ironically, in his investigations, Mills recorded how DOE Planning stated that it took a “*positive approach*” to enforcement so as not to jeopardise employment and considered this to be consistent with policy. Although his report did not consider what seems a clear violation of the EIA and Habitats Directives, his recommendation on page 55 that changes are made to enforcement policy to “...no longer allow the granting of retrospective planning permissions for sand and gravel workings” seems a clear indication that he did not accept DOE Planning’s “*positive approach*” to enforcement that essentially placed short-term and uncertain economic interests ahead of compliance with European environmental law and without any consideration of the future adverse social, economic and environmental impacts. There is even the possibility of the Department for Regional Development acquiring the now contaminated land, and the liability that will come with it, by compulsory purchase, as the site is integral to its Strategic Roads Improvements programme. The planned construction of the new A6 dual carriageway and associated lands required as flood compensatory areas (a scheme co-funded by the EU), should it go ahead, is likely to significantly increase the costs to the public purse and the EU because of the added requirement to address contamination on a monumental scale. Indeed, the extent of this contamination, astronomical clean-up costs and the potentially catastrophic environmental effects must now surely call the viability of the road scheme into question.

## Infraction

Unfortunately, the existence of a 516,000 tonne illegal landfill threatening a European site is only a symptom of a more systemic failure with DOENI. Mills has estimated that known illegal waste sites identified over the past ten years in Northern Ireland are likely to leave the UK tax payer with an estimated £250 million clean-up cost. Indeed, his sobering report reads as a ready-made EU law infraction complaint against the UK as he confirms that few of these previously discovered waste disposal sites have been remediated or had the illegally-deposited waste removed, an almost certain violation of the EU Waste Framework Directive. And all this as the Department’s Environmental Crime Unit embarks on its latest round of investigation, examining 26 priority sites of suspected illegal landfilling spread across the six counties.

## The dirty corner

In 2004 UKELA branded Northern Ireland the “...*dirty corner of the UK*”,<sup>15</sup> and called for a number of urgent environmental governance measures, including the creation of an independent Environmental Protection Agency (EPA). There has long been Northern Ireland Executive resistance to an independent EPA in Northern Ireland, despite burgeoning public and political support for the setting up of such an organisation. The latest rejection was in 2008 by the then Environment Minister, Arlene Foster, who, after considering the well-received *Foundations for the Future: A Review of Environmental Governance*<sup>16</sup> report, advised the Northern Ireland Assembly “*I and my party take the matter of environmental governance too seriously to externalise the organisation.*”<sup>17</sup> Some six years on, and faced with environmental crime on a monumental scale, Minister Foster’s rejection of an independent EPA seems ill-considered in light of the environmental disaster unfolding on the banks of the River Faughan Special Area of Conservation, and particularly given current Minister Durkan’s stark public admission of the subsequent systemic failure within NIEA.

Shocking as the story of Mabuoy Road is, when considered in the context of Minister Durkan’s recent confirmation that 33 out of 55 yet to be determined minerals applications being processed by DOE Planning are retrospective,<sup>18</sup> and that only six permanent stop notices were served in the 13 years between 2000 and 2013,<sup>19</sup> it seems that his Department has been instrumental in creating the conditions where eco-crime can flourish. Furthermore, by doing so, in terms of environmental law, it may be guilty of sustained institutional neglect<sup>20</sup> due to persistent and repeated failures to enforce against environmentally harmful developments.

The recent revelations on the scale of illegal waste disposal in Northern Ireland and the

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role the planning system has apparently played in facilitating eco-crime would tend to suggest that UKELA's 2004 "dirty corner" label of Northern Ireland is, sadly, turning out to be somewhat of an understatement in 2014.

## Endnotes

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- 2 Harte, A. 2014. BBC1 NI Spotlight URL: [http://www.bbc.co.uk/iplayer/episode/b03vm2b/Spotlight\\_18\\_02\\_2014/](http://www.bbc.co.uk/iplayer/episode/b03vm2b/Spotlight_18_02_2014/) [Accessed: 24 February 2014]
- 3 Chartered Institute of Wastes Management, 2014. Waste in the Right Place: Conference Invitation. URL: [http://www.ciwm.co.uk/web/FILES/NIRDO/2014\\_Conference\\_Invitation.pdf](http://www.ciwm.co.uk/web/FILES/NIRDO/2014_Conference_Invitation.pdf) [Accessed: 4 March 2014]
- 4 The reform of local government which will see the reduction of 26 Councils to 11 and a majority of planning functions restored to local authorities by April 2015. See: [http://www.doeni.gov.uk/index/local\\_government/local\\_government\\_reform.htm](http://www.doeni.gov.uk/index/local_government/local_government_reform.htm)
- 5 Macrory, R. 2004. Transparency and Trust: Reshaping Environmental Governance in Northern Ireland. Centre for Law and the Environment, London, University College London
- 6 Turner, S. 2006. Transforming Environmental Governance in Northern Ireland. Part Two: The Case of Environmental Regulation. *Journal of Environmental Law*. 18(2), 245-275
- 7 Davenport, M. 2014. BBC Radio Ulster Inside Politics: Interview with Environment Minister Mark H Durkan. URL: No longer available [Accessed: 25 March 2014]
- 8 DIRECTIVE 2011/92/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification) (Text with EEA relevance) Available at : <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:026:0001:0021:EN:PDF>
- 9 Planning application Ref: A/2009/0400/F, Extraction of sand, gravel, shale and soft rock (retrospective) at Mabuoy Road, Londonderry. Consultation response from NIEA dated 10 December 2009.
- 10 As per footnote above. Extract from consultation response from Loughs Agency dated 28 September 2009.
- 11 As per footnote above. Extract from e-mail from Strategic Planning Division in response to Loughs Agency dated 29 September 2009.
- 12 Commission of the European Communities-v-Ireland. 2008. Case C-215/06 Judgment of the Court (Second Chamber) of 3 July 2008. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006CJ0215:EN:NOT>
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- 14 Department of the Environment for Northern Ireland (DOENI). 2000. Planning Policy Statement 9: The Enforcement of Planning Control URL: [http://www.planningni.gov.uk/index/policy/policy\\_publications/planning\\_statements/pps09-enforcement.pdf](http://www.planningni.gov.uk/index/policy/policy_publications/planning_statements/pps09-enforcement.pdf) [Accessed: 4 March 2014]
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- 16 Burke, T., Bell, G. & Turner, S. 2007. Foundations for the Future: Review of Environmental Governance. URL: [http://www.doeni.gov.uk/foundations\\_for\\_the\\_future\\_-\\_final\\_report.pdf](http://www.doeni.gov.uk/foundations_for_the_future_-_final_report.pdf) [Accessed: 11 January 2014]
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- 19 NI Assembly. 2013. Assembly Question AQW25917/11-15. URL: <http://aims.niassembly.gov.uk/questions/writtensearchresults.aspx?&qf=1&qfv=2&ref=AQW%2025917/11-15> [Accessed: 13 January 2014] (for ref. Stop Notices served between 2000-2013).
- 20 Bell, S., McGillivray, D. & Pedersen, Ole W. 2013, p15. *Environmental Law – 8th Edition*. Oxford, Oxford University Press. "...lack of enforcement of domestic environmental laws by national authorities often resulting in rather serious situations of institutional neglect."

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