

MODERNISING THE REGULATION OF WATER POLLUTION IN NORTHERN IRELAND

PART ONE: THE STIMULUS FOR REFORM & THE PRINCIPLE OF POLLUTION PREVENTION

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INTRODUCTION

For almost thirty years, the Water Act (Northern Ireland) 1972¹ has controlled the system of regulation governing the pollution of inland, coastal and ground waters in Northern Ireland. Although innovative in its time, the system of pollution control laid down in the Act became increasingly outdated as successive waves of reform during the 1980s and 1990s considerably upgraded the entire regulatory system governing the prevention and control of water pollution in Great Britain. Eclipsed by the security concerns that engulfed the Province in the early 1970s, water law and policy in Northern Ireland, as with the rest of its environmental laws, effectively petrified until the early years of this decade. During this period, the Government made no effort to prepare legislation designed to ensure parity between water pollution laws applying in Great Britain and Northern Ireland and a blind eye was turned to the Department of the Environment (Northern Ireland)'s² endemic failure to implement EC water pollution Directives. In addition, direct rule effectively immunised the Government from public pressure to improve water pollution controls in Northern Ireland. Even the highly critical findings of the Halcrow Report³ submitted to the Department in 1988 concerning the management of water quality issues in Northern

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¹ c 5

² Hereinafter referred to as the DoE(NI).

³ In 1988 the DoE(NI) commissioned an efficiency study of its Environmental Protection Division (the predecessor of the Environment and Heritage Service). The study was carried out by William Halcrow, then Director of the Forth River Purification Board in Scotland. The Halcrow Report has not been published and therefore remains as an internal DoE(NI) document. Although the present author requested a copy of the report during the writing of this paper, the EHS made a decision (over 3 months later) to refuse access on the grounds that the report is a confidential, internal document within the meaning of Regulation 5(2)(c) of the Environmental Information Regulations (NI) 1993. However, reference to Halcrow's core findings can be found in the Report of the Comptroller and Auditor General for Northern Ireland, *Control of River Pollution in Northern Ireland*; HC 693, Session 1997-98, p 26 *et seq.*

Ireland were largely ignored. An effective stimulus for reform finally emerged in 1990. Led by Sir Hugh Rossi, the House of Commons Environment Select Committee conducted the first external study of the legal framework and regulatory structures governing the environment in Northern Ireland. Their final report, published in 1990,⁴ highlighted in no uncertain terms their profoundly neglected state. Fortunately, the Committee's recommendations were not ignored. As a result, the Government pledged to undertake an extensive programme of reform designed to bring environmental law and policy in Northern Ireland into line with national and EC law in this field.

The mammoth task of modernising water law and policy in Northern Ireland began almost immediately. The first phase of reform, spanning from 1990-1996, was dominated by the urgent need to implement the enormous backlog of EC Directives on the aquatic environment.⁵ The purpose of the present article is to examine the results of the more halting second phase of change which has focused on bringing Northern Ireland's water pollution legislation into line with that applying in England and Wales. Although it began auspiciously in December 1993 with the publication of the *Review of the Water Act (Northern Ireland) 1972: A Consultation Paper*,⁶ the second phase of reform did not bear fruit until the adoption of the Water (Northern Ireland) Order in March 1999.⁷ The making of this new legislation represents an important milestone in the protracted process of modernising the legal framework that exists to protect and manage the freshwater environment in this jurisdiction. When it comes into force,⁸ the Order will repeal and replace the Water Act (NI) 1972 as the central pivot in the system of regulation governing the pollution of inland, coastal and groundwater in Northern Ireland. The new Order will effectively bring Northern Ireland broadly, but not completely, into line with the more sophisticated and environmentally progressive controls imposed on water pollution in England and Wales⁹ under the Water Resources Act 1991,¹⁰ the Environmental Protection Act 1990¹¹ and the Environment Act 1995.¹² In doing so, it will considerably strengthen the powers available to the DoE(NI) to deliver effective

⁴ *Environmental Issues in Northern Ireland*; HC 39, Session 1990-91.

⁵ In this regard, see: S. Turner and K. Morrow, *Northern Ireland Environmental Law*, Gill and Macmillan (1997), Chapters 3 and 5; S. Turner and K. Morrow, "The Impact of EU Law on the Environmental Law of Northern Ireland", in Holder, (ed.) *The Impact of EU Environmental Law in the United Kingdom*, Wiley (1997), pp 69-84.

⁶ Published jointly by the DoE(NI) and the Department of Agriculture (NI).

⁷ SI 1999/662 (N.I. 6).

⁸ At the time of writing, no date has been set for bringing the Water (NI) Order 1999 into force. However, it is anticipated that the Order will not come into force for at least another twelve months.

⁹ Water pollution in Scotland is governed by the heavily amended Control of Pollution Act 1974 (c 40), which essentially approximates to the terms of the provisions applying in England and Wales. In the interests of clarity, this article will use England and Wales as the principal point of comparison – however, significant differences in Scotland will be highlighted where relevant.

¹⁰ c 57.

¹¹ c 43.

¹² c 25.

freshwater pollution control in Northern Ireland. The purpose of this article is to examine the nature and scope of the reform introduced by the Water (NI) Order 1999 and to propose an agenda for future reform in this field. Due to the scale of change wrought by the Order, the analysis will be published in two separate parts.¹³ The present article (Part One) will address two issues. First, it will examine reasons for reform; namely, the changes in the wider policy and legislative framework governing water pollution control in England and Wales that provided the stimulus for eventual reform in Northern Ireland. It will then move on to discuss the first principal feature of reform introduced by the Water Order, namely, the implementation of the principle of pollution prevention. Part Two of this analysis will address two further issues. First, it will examine the significance of the changes wrought to the core regulatory mechanism; namely, the discharge consent system. Secondly, it will identify three core weaknesses that exist within the regulatory system governing water pollution all of which should be resolved as a matter of urgency by the Northern Ireland Assembly.

THE NEED FOR REFORM

Clean water has been recognised as being sufficiently important in the United Kingdom to be protected by legislation for the past 150 years.¹⁴ Concern over public health and the prevention of water borne disease was the principal concern underlying most of the early legislation in this field. However by the early 1970s increasing public concern about the state of the environment led to the adoption of legislation which focused on the protection and enhancement of the aquatic environment in its own right. The Water Act (NI) 1972 introduced the first coherent system for freshwater pollution control in Northern Ireland. One of the last measures adopted by the old Northern Ireland Parliament, the Act consolidated and extended the fragmented system of water pollution control that had previously been governed by a range of legislative provisions and administered between various bodies.¹⁵ Although the new Act was heralded as introducing 'one of the most modern codes of law protecting water anywhere in the world',¹⁶ in national terms its pollution control provisions were lax¹⁷ compared to the

¹³ Part two of this article will be published in a forthcoming edition of this journal: (2000) 51 NILQ.

¹⁴ Report of the Comptroller and Auditor General for Northern Ireland, *Control of River Pollution in Northern Ireland*; HC 693, Session 1997-98, p 24, para 5.

¹⁵ In particular a series of Fisheries Acts since 1842, the Rivers Pollution and Prevention Act 1876 and 1891, the Water Supplies and Sewerage Act (NI) 1945 and the Public Health Acts 1878-1907. Responsibility for the administration of these Acts was also fragmented between various bodies including Local Authorities, the Fisheries Conservancy bodies and the Department of Agriculture.

¹⁶ Parliament of Northern Ireland Commons Debates 1971-72, Vol. 82, July 8 1971, at pp 740-792, *per* Northern Ireland Minister for Development (Mr Bradford MP), at p 744.

¹⁷ Confines of space do not permit a detailed comparison between the two measures. Suffice it to say, however, that it was widely accepted during the Parliamentary debates on the Water Act (NI) 1972 that the protection of the aquatic environment in Northern Ireland did not require the introduction of legislation containing the same degree of legal control as that applying in England and Wales under the Water Act 1945 and Water Resources Act 1963 – the predecessors of COPA 1974.

more environmentally progressive powers introduced in Great Britain under the Control of Pollution Act 1974¹⁸ (COPA). Despite this, both provisions shared certain common features. As was the case under COPA, the discharge consent system was the principal regulatory instrument contained in the Water Act (NI) 1972, and for the first time in Northern Ireland, regulation was extended to discharges from industrial, commercial and domestic sources.¹⁹ Both consent systems were reinforced by criminal offences and a range of administrative powers designed to facilitate the prevention and remediation of water pollution. In addition, both COPA and the 1972 Act contained provisions enabling public participation in the regulatory system through the establishment of public registers of information and the advertisement of applications for discharge consents. However, only limited provision was made for public participation in Northern Ireland.²⁰ The bodies responsible for administering and enforcing the regulatory system operated both as poacher and gamekeeper in the context of water pollution control. In England and Wales, Parliament enacted the Water Act 1973²¹ which established ten public sector bodies, known as Regional Water Authorities, who were made responsible for both water pollution control and operational activities, such as the supply of water and the treatment and disposal of sewage. Similarly, in Northern Ireland, the DoE(NI) was made responsible (under the Water Act (NI) 1972) for the regulation of water pollution²² and (under the Water and Sewerage Services (NI) Order 1973²³) the operational aspects of the aquatic environment.²⁴ Finally, although COPA and the 1972 Act were considered radical in their time, their potential impact was blunted by the considerable delays in bringing many of their most innovative provisions into force; in fact some of their provisions were never implemented. However, there the similarities ended. Whereas the next thirty years witnessed a period of profound legislative stagnation in Northern Ireland in relation to all aspects of the environment, by contrast, the same

See for example, Parliament of Northern Ireland Commons Debates 1971-1972, Vol. 82, June 22 1971, pp 759-760.

¹⁸ c 40.

¹⁹ Prior to the 1972 Act, the only system of control imposed on pollution came under fisheries legislation, which made it a criminal offence to pollute water – see note 15 *supra*.

²⁰ The extent of this difference is discussed in detail in Part Two of this article.

²¹ c 37.

²² The DoE(NI)'s pollution control function was originally exercised by the Department's Environmental Protection Division. In 1990 the EPD was subsumed into the Environment Service, which in turn was subsumed into the Environment and Heritage Service (established as a Next Steps Agency of the DoE(NI)) in 1996. For a fuller discussion of the historical evolution and current function of the DoE(NI), see S. Turner and K. Morrow, Gill and Macmillan (1997), note 5 *supra* at pp 18-31.

²³ SI 1973/70 (N.I. 2).

²⁴ Specifically, the treatment, supply and distribution of drinking water and the collection, treatment and disposal of sewage and waste water. Today the DoE(NI) exercises its operational functions in relation to the aquatic environment via the Water Service (established as a Next Steps Agency of the DoE(NI) in 1996). For a fuller discussion of the historical evolution and current function of the DoE(NI), see S. Turner and K. Morrow, Gill and Macmillan (1997), note 5 *supra* at pp 18-31.

period in England and Wales was characterised by fundamental reform in almost every area of environmental law and policy.

The process of modernisation in Great Britain began in the field of water pollution law with Europe providing the initial stimulus for reform. Despite lacking a Treaty basis for Community action on the environment, the EEC (as it was then known) adopted its First Action Programme on the Environment in 1973 and immediately identified water pollution as a priority issue. A veritable outpouring of Directives on water pollution followed, the cumulative effect of which has considerably strengthened the legal protection afforded to the aquatic environment. Although the Government's initial reluctance to ensure full implementation of these Directives in Great Britain was well documented,²⁵ no action whatever was taken to prepare equivalent implementing legislation for Northern Ireland. The implementation of EC Directives on the environment was simply not a priority for the DoE(NI) during the 1970s and 1980s.²⁶ Not surprisingly, Northern Ireland gradually became synonymous with worst practice in the implementation Directives on the environment. As a result, its aquatic environment did not benefit from the more stringent standards laid down by the Community for almost two decades – many years after the deadlines for implementation had expired. Further stimulus for reform during the mid-1980s came from the Conservative Government's political commitment to privatisation. The Government's decision to privatise the water industry in England and Wales, and mounting public pressure concerning environmental issues generally, ultimately led to a fundamental restructuring of the approach to water pollution control in Great Britain. After several years of political debate, the Government introduced the Water Act 1989,²⁷ which overhauled the regulatory and administrative structures governing the water environment in England and Wales and considerably strengthened the control of water pollution in Great Britain.²⁸

²⁵ See for example: Haigh, *Manual of Environmental Policy: The EC and Britain*, Longman (1992), Chapter 4.2; Somsey, "EC Water Directives" (1990) *Water Law* 93; Weale, "Environmental Regulation and Administrative Reform in Britain", in Majone (ed.), *Regulating Europe*, Routledge (1996), pp 106-130; Maloney and Richardson, *Managing Policy Change in Britain: The Politics of Water*, Edinburgh University Press (1995); Bell, *Ball and Bell on Environmental Law*, (4th ed, 1997), pp 439-447.

²⁶ In this regard it should be noted that non-implementation of EC environmental Directives in Northern Ireland had been addressed in the context of a number of enforcement actions taken by the European Commission against the United Kingdom, all of which are discussed by S. Turner and K. Morrow, Wiley (1997), note 5 *supra*. Although the European Court declared that the United Kingdom had failed in its obligations in relation to Northern Ireland, the breaches persisted, and at that point the Treaty did not empower the Court to impose a penalty for failure to comply with its judgments. For a fuller discussion of the strengths and weaknesses of the Commission's enforcement powers in the context of environmental law, see: Macrory, "The Enforcement of Community Environmental Laws: Some Critical Issues" (1992) 29 CML Rev. 347.

²⁷ c 15.

²⁸ It should be noted however, that the 1989 Act did not privatise the water industry in Scotland. Separation of the poacher-gamekeeper problem only occurred in Scotland under the Local Government (Scotland) Act 1994. COPA continues to

The most obvious change introduced by the 1989 Act was the privatisation of the water industry in England and Wales and the separation of the conflicting poacher-gamekeeper roles that had weakened the credibility of the previous system of pollution control. Prior to this point, ten Regional Water Authorities – established under the Water Act 1973²⁹ as multi-purpose public sector bodies – were responsible for both pollution control and operational activities such as the management of water provision, water treatment and supply, sewerage, sewage works and sewage disposal. By the 1980s this system was widely regarded as ineffective in principle and practice.³⁰ The Water Act 1989 brought an end to this conflict of interest by separating regulatory and operational functions.³¹ The structure of the ten water authorities in England and Wales in 1973 was based on a fully integrated approach to water management, and initially the Government intended to preserve this approach by privatising the authorities in their existing form, combining both operational and regulatory functions. But in order to minimise the potential for compromise, they would operate against a much more explicit statutory framework of legally binding water quality standards and objectives. European Community water legislation, however, required Member States to appoint ‘competent authorities’ in order to implement many Community obligations. There was considerable legal doubt whether a fully privatised body could be a competent authority in this context, and threat of legal action by the Council for the Protection of Rural England, amongst others, forced the Government into a major rethink. The result was that the responsibility for regulatory functions was transferred to the National Rivers Authority – an independent, non-departmental public agency established under the Water Act 1989 – while the remaining operational side of the water industry (encompassing water supply and waste

apply in Scotland, albeit amended by the Water Act 1989 and by numerous successive provisions.

²⁹ c 37.

³⁰ Increasing financial restrictions imposed on water authorities led to a decline in water quality and under-performance in the sewage works operated by Regional Water Authorities (RWAs). Discharges from sewage works meant that RWAs were both significant polluters and regulators. See also: Bowman, “*Improving the Quality of Our Water: The Role of Regulation by the NRA*” (1992) 70 Public Administration 565; Richardson, Maloney et al, “*The Dynamics of Policy Change: Lobbying and Water Privatisation*” (1992) 70 Public Administration 157; Byatt, “The Impact of EC Directives on Water Customers in England and Wales” (1996) 3 Journal of European Public Policy 665; McLoughlin, *The Law and Practice Relating to Pollution Control in the United Kingdom*, Graham and Trotman (1982); Vogel, *National Styles of Regulation: Environmental Policy in Great Britain and America*, Cornell University Press (1986); Howarth, *Water Pollution Law* (1988); Richardson, Ogus & Burrows, *Policing Pollution*, Oxford University Press (1982).

³¹ In this regard see generally: the original White Paper Privatisation of the Water Authorities in England and Wales (1986) Cmnd 9734; The Water Environment: The Next Steps (DoE/W.O. Consultation Paper, April 1986); The National Rivers Authority: The Government’s Proposals for a Public Regulatory Body in a Privatised Water Industry (DoE, Ministry of Agriculture, Fisheries and Food, and Welsh Office, July 1987); and The Public Utility Transfers and Water Charges Act 1988.

water treatment) was privatised in the form of statutory sewerage and water undertakers.³²

More important, for present purposes, were the improvements made by the Water Act 1989 to the legal framework governing the prevention and control of water pollution in Great Britain.³³ The Act retained the traditional system of discharge consents, but introduced the first system of statutory water quality control. Although regional authorities had operated water quality controls prior to this point, these standards had been applied on an informal basis and they varied from area to area. The negotiation of the 1976 Dangerous Substances Directive³⁴ revealed deep philosophical disputes between the United Kingdom and other Member States, with the United Kingdom resisting the majority preference for minimum emissions standards for discharges of the most dangerous substances because this failed to take account of the physical capacity of differing receiving waters to absorb and dilute pollution. This was at a time when environmental Directives required unanimous voting, and eventually a compromise was reached which gave Member States the option of applying either an emissions approach or a quality objective approach in relation to the most dangerous black list substances. However, the introduction of a statutory system of quality control, based on explicit and consistent quality classifications and objectives, was necessary to ensure compliance with the quality objective approach permitted under EC law. Three further changes were introduced by the Water Act 1989: namely, the strengthening of the system of charges for trade and sewage discharges;³⁵ the improvement of pollution prevention and remediation powers; and increased transparency and accountability in the regulation of water pollution. The decision to strengthen the system of discharge fees reflected not only the Conservative Government's commitment to the development of market-based regulatory strategies, but also the wider 'polluter pays' principle which had by then come to the fore in European and global policy on environmental management. The introduction of stronger powers to prevent and remedy pollution implemented the principles of prevention and precaution – championed by the European Commission – that replaced the essentially reactive approach adopted by earlier systems of pollution control. Pressure for enhanced transparency and public accountability in the regulation of water pollution also owed its origins to changes in EU environmental policy. Mounting public concern about the deteriorating state of the environment led to an

³² Three core regulators were created to replace the old Regional Water Authorities. Environmental regulation became the responsibility of the National Rivers Authority. The Office of Water Services (OFWAT) took charge of economic regulation of the water industry, while the Drinking Water Inspectorate (DWI) had responsibility for drinking water quality.

³³ The Water Act 1989 replaced Part II of COPA 1974 concerning water pollution in England and Wales. However, COPA (although much amended) continues to apply in Scotland. A consolidated version of COPA appears in Tromans, *The Environment Acts 1990-95*, Appendix 4.

³⁴ Directive 76/464/EEC, OJ L129, 18 May 1976.

³⁵ Section 7 of the Public Health (Drainage of Trade Premises) Act 1937 (c 40) introduced the first discharge fees by allowing local authorities in England and Wales to impose charges on the owners and occupiers of trade premises, by agreement, for the reception and disposal of any trade effluent produced.

acceptance, enthusiastically at European level, of the need for greater public access to environmental information and public participation in decision-making on the environment. The Water Act 1989 reflected this policy development in a number of ways. In particular, through the introduction of a statutory system of water quality controls based on public consultation; increasing the regulator's obligations to ensure public consultation concerning the operation of the discharge consent system; and widening the range of information held on the public register. The legal framework governing water pollution law in England and Wales was consolidated two years later by the Water Resources Act 1991, which also replaced the Water Act 1989.

Another milestone in the modernisation of the United Kingdom's approach to the protection of the environment was laid down in 1990. In September 1990 the Government published *This Common Inheritance*³⁶ – Britain's first comprehensive White Paper on the environment. Later that year Parliament enacted the Environmental Protection Act 1990, which overhauled the regulation of Great Britain's most polluting industrial processes and provided the basis for further reform in 1995. *This Common Inheritance* was intended to provide not only a baseline survey of action taken thus far, but also a statement of intention for future action throughout the United Kingdom. The Government identified the 'ethical imperative of stewardship', embracing the interrelated concepts of sustainable development and intergeneration equity, as the fundamental objective for all environmental policies. In order to realise this objective, *This Common Inheritance* stated that Britain's³⁷ environmental policies would be based on four key principles, namely: reliance on the best evidence and analysis available; adoption of the precautionary principle; the enhancement of public participation in decision-making on the environment; and use of the best instruments (including market mechanisms) to achieve environmental objectives.³⁸ The Government emphasised its commitment to the introduction of integrated pollution control and the application of advanced technical solutions. Separating the roles of regulator and producer were deemed to be integral to Britain's pollution control strategy, as were the establishment of strong pollution inspectorates with clear remits to impose high standards.³⁹ In the specific context of water pollution control, *This Common Inheritance* identified four key strategies for ensuring effective protection of Britain's inland and coastal water resources. First, the establishment of 'the right organisations' to manage the water resource and the supply of water to the public and to monitor and control quality; secondly, the introduction of statutory water quality standards; thirdly, the adoption of regulations to prevent pollution and providing advice on how to avoid pollution; and finally, setting guidelines for recreation and wildlife conservation. The changes wrought by the Water Act 1989 and those, then forthcoming, in the Environmental Protection Act 1990 (EPA) were identified as having established a regulatory system capable of delivering effective pollution control in line with Government policy. The EPA 1990 introduced not only a more sophisticated

³⁶ Cm 1200.

³⁷ Stated to include all parts of the United Kingdom, p 32, para 2.1.

³⁸ p 10, paras 1.14 - 1.32.

³⁹ pp 136-140 and pp 162-169.

and more stringent system of integrated pollution control for Great Britain's most polluting industrial processes, it also strengthened the application of the polluter pays principle by increasing the maximum fine for water pollution offences from £2,000 to £20,000. The main structure of water pollution law remained unchanged by the EPA 1990 however; the regulation of water pollution in England and Wales was split once again, this time between the National Rivers Authority (NRA) and Her Majesty's Inspectorate of Pollution (HMIP), the regulator responsible for administering Integrated Pollution Control. This controversial departure from the trend towards integrated pollution control was eventually resolved by the merging of the NRA and HMIP into a unified Environment Agency under the Environment Act 1995.

While emphasising the need for a coherent national policy on the environment, *This Common Inheritance* also acknowledged that Northern Ireland (like Scotland) faced environmental challenges particular to this region. A separate chapter was therefore devoted to a discussion of the state of the environment in Northern Ireland and the objectives that should be attained to ensure effective protection of its environment. The unspoilt nature of its local environment provided the central focus for the Northern Ireland chapter. In the context of water pollution control, emphasis was placed on the high quality of Northern Ireland's aquatic environment with particular reference made to the high quality of river water reported by the DoE(NI) in 1989 and the high level of practical compliance with the EC Bathing Water Directive.

To say that the chapter glossed over the problems facing the environment in Northern Ireland is an understatement. By 1990, environmental law and policy in Northern Ireland and the regulatory bodies designed to deliver environmental protection in the Province, failed to comply with virtually all of the principles, policies and strategies identified as being central to the United Kingdom's approach to environmental protection in *This Common Inheritance*. Because environmental issues in Northern Ireland had been so completely neglected during the previous two decades, by 1990 the United Kingdom was a long way from achieving a coherent national policy on the environment. Despite this, the Northern Ireland chapter made no mention whatever of the gap that had opened up in the legal framework governing water pollution in Great Britain and that applying in Northern Ireland. Draft legislation had still not been prepared to introduce the terms of the Water Act 1989 into Northern Ireland. The EPA 1990, which contained the centrepiece of the Government's policy on pollution control, did not apply to the Province and draft legislation to ensure its enactment in Northern Ireland was in preparation. Similarly, the enormous delays in the legal implementation of all EC water Directives (including the Bathing Water Directive⁴⁰) went

⁴⁰ Formal implementation of Directive 76/160/EEC OJ L31, 5 February 1976, was by then thirteen years late – a fact that had been highlighted by the European Commission in a reasoned opinion issued to the United Kingdom in 1980. In this regard, see S. Turner and K. Morrow, *Northern Ireland Environmental Law*, Gill and Macmillan (1997), p 213.

unmentioned.⁴¹ The DoE(NI) lacked not only the statutory powers to introduce a system of discharge consent fees, but had also failed to introduce any written policies or procedures or guidance for the staff of its Environment Service (as it then was⁴²) or for its agents on recovery of costs arising from pollution incidents.⁴³ In addition, the Northern Ireland chapter ignored the fact that the DoE(NI) could not comply with the Government's vision of the 'right organisation' to manage the water resource and control water quality. By 1990 the Department was still acting as both the regulator and a polluter of water resources. In addition, no provision had been made for the introduction of a statutory system of water quality control; hence the Department could comply neither with national policy on water quality control nor the requirements of the EC water quality Directives in Northern Ireland. It also lacked the statutory powers to adopt pollution prevention regulations and therefore the capacity to implement an effective strategy for preventing water pollution. In 1988 the organisational structures and management of water quality in Northern Ireland were the subject of vigorous criticism – none of which was alluded to in *This Common Inheritance*. William Halcrow, then the Director of the Forth River Purification Board in Scotland, was commissioned by the DoE(NI) to conduct an efficiency study of the Department's Environmental Protection Division (the predecessor of the Environment and Heritage Service).⁴⁴ The Halcrow Report, submitted in 1988, was the first external professional review of water quality management in Northern Ireland for twenty years. Although the report commended the work of the fisheries bodies that assisted the Environmental Protection Division in the enforcement of water law in Northern Ireland, several major shortcomings were identified in the organisation and management of water pollution control. In particular, the Halcrow Report observed that water quality management functions were dispersed in 'penny packets', an approach described as not only inherently inefficient and ineffective in key areas, but which also failed to provide a reasonable level of service or value for money. The management and control of agents employed to assist the EPD in the control of water pollution was also regarded as poor. In addition, the systems in place for measuring water quality were described as 'wholly insufficient to measure the performance of the regulatory authority or to give an indication of overall water quality in the Province.' The Department did not fully accept the report and despite the

⁴¹ 'Legal' implementation meaning the introduction of formal legislation designed to transpose the requirements of EC Directives on water into the legal system of Northern Ireland.

⁴² note 22 *supra*.

⁴³ Report of the Comptroller and Auditor General for Northern Ireland, *Control of River Pollution in Northern Ireland*; HC 693, Session 1997-98, p 79, para 8.8.

⁴⁴ In this regard, see note 3 *supra*. It should also be noted that in 1990 the Environment Protection Division was amalgamated with the DoE(NI)'s Conservation Service to form the Environment Service, which in turn was replaced by the Environment and Heritage Service (A Next Steps Agency of the DoE(NI)) in 1996. For further discussion of the structures responsible for environmental protection within the DoE(NI), see S. Turner and K. Morrow, Gill and Macmillan (1997), note 5 *supra* at pp 25-31.

serious nature of the criticisms made, it did not produce a formal response to the Halcrow Report.⁴⁵

The publication of the House of Commons Environment Select Committee report on *Environmental Issues in Northern Ireland* followed close on the heels of *This Common Inheritance*. Published in November 1990,⁴⁶ the Rossi Report⁴⁷ squarely expressed what had remained unsaid in *This Common Inheritance*. The House of Commons Committee Report was seminal for Northern Ireland in three respects. First, it was the first detailed review of environmental law and practice in Northern Ireland that had been published for twenty years. Secondly it was highly critical of almost every aspect of the regulatory structures and legislative framework designed to manage the environment in Northern Ireland. Thirdly, and most importantly, the Government did not ignore its findings.

Like *This Common Inheritance*, the Rossi Report identified the quality of its natural environment as one of Northern Ireland's greatest cultural and economic assets. However, the Committee went on to point out that Northern Ireland faced environmental problems that were as great as, and in some respects greater than, those facing the rest of the United Kingdom. The system of environmental protection operating in Northern Ireland was described as being "much less highly developed than in Great Britain".⁴⁸ In addition, the Rossi Committee stated that since its establishment in 1973 the DoE(NI) has paid rather 'cursory' attention to environmental matters. Although it acknowledged the impact of the legislative and administrative system imposed due to the 'troubles', the Report stated that direct rule did not remove the need for dealing effectively with environmental problems facing the Province. The Committee emphasised that although it was less industrialised than the rest of the United Kingdom, Northern Ireland does not escape pollution problems and could not afford to be complacent about its environment. The development of a clear, coherent policy on the environment was deemed essential as economic recovery in Northern Ireland gradually took hold, a process that would depend heavily upon the Government's ability to maintain a high level of environmental quality. The Rossi Committee made a total of twenty-nine recommendations for reform spanning the entire framework of environmental law and regulation in Northern Ireland. However, those most relevant to the reform of water law were as follows.

The outdated nature of the legislative framework governing environmental protection was identified as a core problem affecting every sector of environmental law. This legislative lag took two forms. First, there were lengthy delays in the implementation of EC Directives on the environment that marred every sector of environmental law in Northern Ireland. Secondly, there were considerable delays in enacting domestic legislation on

⁴⁵ A decade later the Department was asked by the Comptroller and Auditor General for Northern Ireland to explain this decision. The Department responded that the Halcrow Report was "always regarded as semi-official and that there was never any question of a formal response", note 43 *supra* at p 28, para 1.9.

⁴⁶ HC 39, Session 1990-91.

⁴⁷ As it became known after its chairman, Sir Hugh Rossi.

⁴⁸ Preface, para 2.

the environment that was not covered by EC law. The Committee stated that the delays in transposing EC Directives exposed the United Kingdom to an unacceptable threat of infringement proceedings under the EC Treaty and reminded the Government that it was obliged under EC law to ensure the timely implementation of Directives for the country as a whole.⁴⁹ Two recommendations were made in this regard. First, the Government was strongly urged to transpose the backlog of EC Directives as soon as possible, and secondly to review implementation practices to ensure simultaneous implementation for the United Kingdom as a whole in the future.⁵⁰ The Committee was equally critical of the legislative lag that had also occurred in relation to environmental legislation not covered by EC law. Particular reference was made to the fact that the sweeping changes introduced in Great Britain under the Water Act 1989 and the Environmental Protection Act 1990 had not been matched in Northern Ireland.⁵¹ The Northern Ireland Minister for the Environment and Agriculture (then Mr Peter Bottomley MP) explained this state of affairs to the Rossi Committee in the following terms:

“Some parts of [the legislation] are delayed because draft Directives are changing. In other parts it is because either it has been thought that other priorities in terms of work were more important, until we had extra staffing, or it was that we did not think it was directly relevant or the work was going on and one cannot always get things done immediately.”⁵²

No specific explanation was provided as to the nature of the competing work priorities, nor was any attempt made to explain how past failures to ensure legislative parity could be justified by forthcoming changes to EC legislation. In any event, the Rossi Report emphasised that Northern Ireland should not lose out on the improvements and upgrading of pollution laws contained in the 1989 and 1990 Acts and recommended, as a matter of general principle, that the Government should ensure that environmental legislation is consistent throughout the United Kingdom.⁵³

A second core problem identified by the Rossi Report concerned weaknesses in the regulatory structures responsible for the delivery of environmental protection in Northern Ireland. In this regard, it is worth noting that the DoE(NI), when giving evidence to the House of Commons Environment Select Committee, failed to refer the Committee to William Halcrow’s findings concerning the organisational structures and management of water quality in the Province despite being clearly relevant to their deliberations. This omission was specifically highlighted by the Comptroller and Auditor General for Northern Ireland in his 1998 report on the *Control of River Pollution in Northern Ireland*.⁵⁴ The House of Commons Committee was particularly critical of the conflict of interest inherent in the DoE(NI)’s

⁴⁹ Paras 25, 26 and 28-31, pp xiv-xv.

⁵⁰ Para 32, p xvi.

⁵¹ Para 27, p xiv.

⁵² Para 30, p xvi.

⁵³ Para 33, p xvi.

⁵⁴ HC 693, Session 1997-98, at p 29. It should however be noted that the Fisheries Conservancy Board for Northern Ireland did refer the Rossi Committee to the Halcrow Report, at p 144, para 4.4 and provided a summary of the report to the Committee in Annex I to its evidence.

regulation of water pollution. One of the most frequent complaints submitted to the Committee about water services in the Province was that the DoE(NI) was both a regulator (through the Environment Service, as it then was) and a polluter (as a result of discharges from sewage treatment operated by the Water Service). Although the Report recorded the difference of opinion between local interest groups and the two fisheries boards concerning the scale of the pollution caused by the Department's sewage works,⁵⁵ the Committee declared that it was unsatisfactory to have polluters regulating pollution.⁵⁶ The Committee was of the opinion that the Department's role as regulator would always be treated with suspicion and resentment while it remained unaccountable through its Crown immunity for pollution incidents caused by the Water Service.⁵⁷ It strongly urged the Government to increase the weight given to environmental issues in Northern Ireland, and saw resolution of the poacher-gamekeeper conflict as being a central element in this process. The Rossi Committee left the Government in no doubt that it regarded the establishment of an independent environment agency as the best means of increasing the profile of environmental issues and ensuring delivery of effective environmental protection. However, the Committee concluded that if the Government still found itself unable to accept these recommendations, then it was at least necessary to considerably enhance the status and resourcing of the Environment Protection Division.

The final recommendations made by the Rossi Report in relation to water pollution related to the enforcement of water pollution offences. Although the Committee commended the DoE(NI)'s prosecution record,⁵⁸ it regarded the fines imposed as being too low to act as a deterrent or to stimulate investment in pollution abatement facilities.⁵⁹ The Report emphasised that water pollution offences must be treated very seriously and that Resident Magistrates⁶⁰ should give very careful consideration to the level of fines imposed for breaches of water pollution laws.⁶¹ In addition, the Department was urged to publicise data on the full environmental costs of selected pollution incidents to engender a broader public understanding of the costs of water pollution.⁶²

⁵⁵ Para 78, p xxiv-xxv. The British Field Sports Society expressed the view that the Department was probably the biggest single polluter in NI (evidence not printed in the report), a view echoed by a member of Kells and Connor Angling Club (evidence not printed). The Report noted that the DoE(NI)'s figures for pollution incidents did not support this contention and the Foyle Fisheries Commission and Fisheries Conservancy Board both stated that sewage plants were generally well maintained and only caused a small amount of incidents (Appendices 20 and 21).

⁵⁶ Para 78.

⁵⁷ Para 78.

⁵⁸ Para 74.

⁵⁹ Para 75. The average fine for a conviction for a water pollution offence was reported to be £250; however, fines of £25-50 were normally imposed for first offences.

⁶⁰ In Northern Ireland responsibility for trying less serious criminal offences lies with full-time, legally qualified magistrates called Resident Magistrates. For further details as to the jurisdiction of the RM, see: B. Dickson, *The Legal System of Northern Ireland*, 3rd ed SLS, (1993) (new edition forthcoming).

⁶¹ Para 76.

⁶² Para 77.

The Rossi Report was not ignored. Not only did the Government formally respond to the recommendations contained therein,⁶³ it also reported three years later on progress made in the implementation of these recommendations.⁶⁴ The Government fully accepted the Committee's recommendations concerning the urgent need to bring environmental legislation in Northern Ireland into line with EC law.⁶⁵ In addition, the Government accepted the need to remove the disparities between domestic environmental law applying in Northern Ireland and the rest of the United Kingdom.⁶⁶ The Government made a commitment to achieving broad parity with Great Britain and to doing so more quickly than hitherto. In addition, the Government stated that additional resources had been deployed to ensure that the overall legislative backlog would be eliminated.

The process of modernising water law and policy began almost immediately. In March 1991 the Government announced that priority would be given to the implementation of EC Directives on the environment; however work also progressed on reforms designed to implement domestic legislation on water pollution. In December 1993 the Government introduced the Water and Sewerage Services (Amendment) (Northern Ireland) Order 1993⁶⁷ which conferred powers on the DoE(NI) to establish a system of statutory water quality objectives, thereby providing the basis for bringing Northern Ireland into line with various EC Directives on water quality and the terms of the Water Resources Act 1993 (which had by then replaced the Water Act 1989). In addition, the Order increased fines for water pollution offences from £2,000 to £20,000 in line with those imposed in the rest of the United Kingdom under the Environmental Protection Act 1990. December 1993 also witnessed the publication of the *Review of the Water Act (Northern Ireland) 1972: A Consultation Paper* in which the Government proposed the repeal of the Water Act (NI) 1972 and the introduction of a new Water Order which would, in effect, achieve some level of parity between the DoE(NI)'s pollution control powers and those exercised by the regulator in England and Wales. Progress on making the new Order was, however, brought to an almost immediate halt by the more urgent need to ensure formal implementation of EC Directives on the environment. In 1992 the Maastricht Treaty amended the EC Treaty to confer powers on the European Commission to recommend to the European Court of Justice the imposition of financial penalties on Member States who fail to comply with a Court judgment declaring that they are in breach of their Community obligations. This strengthening of the European Commission's enforcement powers meant that the Government was faced for the first time with the very real threat of significant penalty for its endemic failure to implement EC environmental Directives in Northern Ireland. Not surprisingly the need to

⁶³ *The Government's Response to the First Report from the House of Commons Select Committee on the Environment: Environmental Issues in Northern Ireland*, (1991) Cm 1484.

⁶⁴ House of Commons Environment Select Committee, *Environmental Issues in Northern Ireland, Minutes of Evidence*; HC 861-i, Session 1992-93.

⁶⁵ Note 63 *supra.*, at Chapter 1, para 1.1; Chapter 2, paras 2.1-2.2 and Chapter 3, paras 3.1-3.5.

⁶⁶ *Ibid.*

⁶⁷ Article 16; SI 1993/165 (N.I. 16).

ensure at least formal compliance with the very considerable backlog of unimplemented Directives across all sectors of environment law in Northern Ireland eclipsed reform initiatives that involved the enactment of purely domestic legislation.

Over four years were devoted to the task of implementing the backlog of EC Directives on the environment.⁶⁸ Finally, in May 1998 the DoE(NI) published the proposal for a draft Water (Northern Ireland) Order thus launching (or in this case re-launching) the second phase in the reform of water law. The making of the draft Order was delayed a further year due to pressures on the Parliamentary timetable caused by the devolution legislation;⁶⁹ however, the draft Order was finally laid before Parliament in February 1999 and was made on 10 March. Despite its lengthy gestation, the Environment and Heritage Service anticipate that the Water (NI) Order 1999 will not come into force for at least another year.

When it comes into force, the Order will achieve four principal objectives. First, although it was not mentioned in the Consultation Paper or explanatory documents, the Order will belatedly implement one of the principal recommendations made by the Rossi Committee, namely, that the aquatic environment in this jurisdiction should benefit from the more sophisticated legal protection afforded to freshwater in Great Britain. It is important to emphasise, however, that the Order will achieve a much greater degree of legislative parity than was initially envisaged by the Government in the *Review of the Water Act (NI) 1972*. Even though the review document was published four years after the enactment of the Water Act 1989 and two years after the enactment of the Water Resources Act 1991, the Government's modest proposals for reform represented only a limited implementation of the pollution controls operating in England and Wales. The Water (NI) Order 1999, as finally adopted, represents a much more enthusiastic attempt to embrace the stringent legal protection afforded to the aquatic environment in England and Wales. Although significant disparities remain, the Order makes considerable strides in the process of bringing water pollution law in Northern Ireland into line with the terms of the Water Resources Act 1991, the Environmental Protection Act 1990 and even the recent amendments introduced by the Environment Act 1995. As a result, the new legislation considerably strengthens the DoE(NI)'s powers to prevent and control water pollution in Northern Ireland. Indeed, it is interesting to note that, although no concerted attempt was made to improve on, or develop national provisions on water pollution, there are instances where the Water Order confers slightly wider pollution control powers than are given to the Environment Agency in England and Wales. In effect, if properly administered and enforced, the Order will play an important role in bringing the United Kingdom closer to realising the objective laid down in *This Common Inheritance* for a coherent national strategy on the environment. Needless to say, as we enter an age of devolution, the Northern Ireland

⁶⁸ For a detailed discussion of the numerous measures introduced in response to EC Directives on the environment during the early 1990s, see: S. Turner and K. Morrow, Wiley (1997), note 5 *supra*.

⁶⁹ See the comments made by Mr John McFall (Parliamentary Under-Secretary of State for Northern Ireland) during the meeting of the Third Standing Committee on Delegated Legislation; House Commons, 2 March, 1999, p 14.

Assembly may decide to exercise its devolved powers concerning pollution control⁷⁰ to deviate from national policy on the aquatic environment (although not in a manner that is incompatible with EC law⁷¹). In the immediate future, pressure is likely to mount to weaken controls on emission to freshwater in the interests of economic regeneration. It can only be hoped that the new Assembly will resist such pressure as failure to fully resource and support the administration and enforcement of the new Order is likely to ensure that Northern Ireland rapidly emerges as the United Kingdom's pollution haven.

The second major objective underlying the Water Order is the implementation of a range of horizontal⁷² principles and policies, which since the early 1990s, have been regarded as fundamental to contemporary systems of environmental management at both national and European level. They are: the principle of pollution prevention;⁷³ the polluter pays principle;⁷⁴ the need to enhance public participation in environmental decision-making and public access to environmental information;⁷⁵ and the need to base pollution control

⁷⁰ Pollution control powers have been transferred to the Northern Ireland Assembly. However, the creation of offences and penalties and enforcement policy are currently reserved matters under Schedule 3, para 9 of the Northern Ireland Act 1998, c 47.

⁷¹ Section 6(2)(d) of the Northern Ireland Act 1988, c 47.

⁷² These principles are referred to as 'horizontal' principles because they cut across all sectors of environmental law.

⁷³ See generally: *This Common Inheritance: Britain's Environmental Strategy*, (1999) Cm 1200, at p 11 (para 1.18 and p 136, para 10.3); *Sustainable Development: The United Kingdom Strategy*, (1994) Cm 2426, Chapter 3; *A Better Quality of Life: A Strategy for Sustainable Development for the United Kingdom*, (1999) Cm 4345, at p 23; EC's Third Action Programme on the Environment 1982-86, OJ C46, 17 Feb. 1983; EC's Fourth Action Programme on the Environment 1987-92, OJ C328, 7 Dec 1987; and *Towards Sustainability*, the EC's Fifth Action Programme 1993-2000, OJ C138, 17 May 1993; Hughes, *Environmental Law*, 3rd ed. Butterworths (1996), at pp 20-21; Kramer, *E.C. Treaty and Environmental Law*, (2nd ed., 1995), at pp 54; Jans, "Objectives and Principles of EC Environmental Law", in Winter, (ed.), *European Environmental Law: A Comparative Perspective*, Dartmouth (1996), at pp 277, 282-284; Kiss and Shelton, *Manual of European Environmental Law*, (2nd ed, 1997), Chapter 2; Alder and Wilkenson, *Environmental Law and Ethics*, Macmillan (1999), Chapter 6; Sands, *Principles of International Environmental Law: Volume 1*, Manchester University Press (1995), at pp 194-197 and pp 208-213.

⁷⁴ See generally: *This Common Inheritance*, *ibid.*, at p 13 (para 1.28), p 136 (para 10.3) and p 168 (paras 12.23-25); *Sustainable Development: The United Kingdom Strategy*, *ibid.*, chapter 3; *A Better Quality of Life*, *ibid.*, at p 23; Hughes, *ibid.*, at pp 21-23; Kramer, *ibid.*, at pp 56-57; Kramer, *Focus on European Environmental Law*, Sweet & Maxwell (1992), Chapter 11; Jans, *ibid.*, at pp 285-287; Kiss & Shelton, *ibid.*, at p 43; Alder & Wilkenson, *ibid.*, at pp 171-184; O'Riordan, *Ecotaxation*, Earthscan (1997); and *Towards Sustainability*, *ibid.*, Chapter 7, section 7.4; Sands, *ibid.*, at pp 213-217.

⁷⁵ See generally: *This Common Inheritance*, note 73 *supra*, at p 10 (paras 1.14-15, 1.20 and 1.38); *A Better Quality of Life*, note 73 *supra*, at p 23; Royal Commission on Environmental Pollution, *Setting Environmental Standards*, (1998) Cm 4053, Chapters 7 and 8; Bell, *Ball and Bell on Environmental Law*, (4th ed, 1997), Chapter 7; Kramer, *Focus on European Environmental Law*, Sweet & Maxwell (1992), Chapters 5 and 14; Alder and Wilkenson, note 73 *supra*, chapter 12;

systems on the best available scientific evidence.⁷⁶ A third purpose of the Water Order is to clarify the legislative framework governing water pollution control by consolidating the amendments made to the Water Act (NI) 1972 in recent years. For the first time, the provisions governing the discharge consent system and the system of water quality control – the two major systems of pollution control – are brought together in a single piece of legislation. In addition, the Order consolidates the increase in fines for water pollution offences introduced into Northern Ireland under the Water and Sewerage Services (Amendment) (NI) Order 1993.⁷⁷ The final objective of the Water Order is to implement Government policy on ‘better regulation’ – that is, regulation which delivers objectives without imposing unnecessary burdens.⁷⁸

In terms of structure, the Order is divided into four parts and eight schedules. Part II and its attendant schedules govern the DoE(NI)’s powers to prevent and control freshwater pollution and comprise the principal body of the legislation. The remaining provisions of the Order make changes to the Department of Agriculture (NI)’s powers in relation to water recreation and navigation; however, unless relevant to pollution control, these will not be addressed in the present analysis. As with much of the contemporary pollution control legislation recently introduced in Northern Ireland, Part II of the Water Order anticipates the adoption of a considerable amount of further legislation by the DoE(NI); hence the Order provides the framework, but not the total system, of freshwater pollution control. The remaining Parts of this analysis provide a detailed examination of the principal features of the new pollution control regime introduced by Part II of the Water (NI) Order 1999 and their success in bringing Northern Ireland into line with contemporary national and EC law on water pollution control.

IMPLEMENTING THE PRINCIPLE OF POLLUTION PREVENTION

One of the most important features of contemporary environmental law and policy is its emphasis on the prevention of environmental harm. Whereas the first generation of environmental laws adopted a largely reactive approach to

Towards Sustainability, note 73 *supra*, Chapter 3; Somsen, (ed.) *Protecting the European Environment: Enforcing EU Environmental Law*, Blackstone Press (1996); Principle 10 of The Rio Declaration on Environment and Development, adopted June 14, 1992 at Rio de Janeiro, UN Doc. A/CONF.151/5/Rev.1, (1992) 31 ILM 874.

⁷⁶ See generally: *This Common Inheritance*, note 73 *supra*, at p 10 (para 1.15-16); Sustainable Development: The United Kingdom Strategy, note 73 *supra*, chapter 3, para 3.17; A Better Quality of Life, note 73 *supra*, at p 23; Towards Sustainability, note 73 *supra*, chapter 7, section 7.1.

⁷⁷ SI 1993/3165 (N.I. 16), article 17.

⁷⁸ Sustainable Development: Opportunities for Change – A Consultation Paper on a Revised United Kingdom Strategy, DETR February 1998, www.environment.detr.gov.uk/UnitedKingdom/sustainable/consult1/inde.htm at para 85. See also: *A Better Quality of Life: A Strategy for Sustainable Development for the United Kingdom*, (1999) Cm 4345, at p 27, para 5.10; *The Better Regulation Guide*, Cabinet Office, Regulatory Impact Unit, August 1998; *Modernising Government*, (1999) Cm 4310.

pollution control, the past thirty years have witnessed a growing global, European and national consensus that in the environmental arena, prevention is better and cheaper than cure. It is not intended in the present context to retrace the extensive discussion surrounding the development and scope of this concept. Suffice it to say that, since the 1990s, the prevention of pollution at source has been acknowledged as a fundamental principle of national, EC and international environmental law and policy.⁷⁹ At the United Nations conference on Environment and Development at Rio de Janeiro in 1992, the international community (including the United Kingdom) acknowledged the fundamental importance of precautionary and preventative action to contemporary environmental law and policy.⁸⁰ The EC's Fourth⁸¹ and Fifth⁸² Action Programmes on the Environment and the EC Treaty⁸³ specifically identify the principle of prevention as one of the core bases of EU policy on the environment. Similarly, in 1990 *This Common Inheritance: Britain's Environmental Strategy* identified preventative action as one of the key principles underlying the Government's policy on the environment.⁸⁴ Consistent with this shift in policy, the Water Act 1989, and later the Environment Act 1995, strengthened the regulator's powers to prevent water pollution in England and Wales. Linked to this change was a corresponding increase in the fines imposed for pollution offences and in the Environment Agency's powers to ensure that polluters rather than taxpayers undertook and bore the cost of appropriate clean-up action. When it comes into force, the Water (NI) Order 1999 will bring the DoE(NI)'s pollution prevention powers into line with those conferred on the Environment Agency under the Water Resources Act 1991 (WRA) 1991 as amended by the Environment Act 1995, although it is regrettable that Northern Ireland has had to wait so long for the conferral of equivalent powers. The Water (NI) Order 1999 contains five principal mechanisms for ensuring pollution prevention and control; namely, pollution prevention notices, pollution prevention regulations, powers to conduct anti-pollution works, enforcement notices and pollution emergency notices. With the exception of its emergency powers, which remain unchanged from the Water Act (NI) 1972,⁸⁵ the Water Order significantly strengthens and extends the DoE(NI)'s powers to prevent and remedy water pollution. One unusual feature of the Order is the decision to retain the formula used in the Water Act (NI) 1972 to define liability for pollution offences. Whereas liability in England and Wales is based on a person who "causes or knowingly permits"⁸⁶ poisonous, noxious or polluting matter to enter freshwater, the Northern Ireland Order bases liability on the person who "knowingly or otherwise"⁸⁷ discharges or

⁷⁹ For a more detailed discussion of the scope and role of this principle in contemporary environmental law, see note 73 *supra*.

⁸⁰ Principle 15 of The Rio Declaration on Environment and Development, adopted June 14, 1992 at Rio de Janeiro, UN Doc. A/CONF.151/5/Rev.1, (1992) 31 ILM 874.

⁸¹ 1987-92, OJ C328, 7 December 1987.

⁸² 1993-2000, OJ C138, 17 May 1993.

⁸³ Article 130R(2) (now article 174 EC as amended by the Treaty of Amsterdam).

⁸⁴ (1990) Cm 1200, p 11, para 1.18 and p 136, para 10.3.

⁸⁵ c 5.

⁸⁶ Section 85(1) WRA 1991.

⁸⁷ Article 7(1) – retained from section 5(1) of the Water Act (NI) 1972.

deposits such matter so that it enters freshwater. Although the courts in this jurisdiction have not yet addressed the meaning of this phrase, the present author has previously argued that the Northern Ireland formula appears to create an even more strict liability than that applied in England and Wales.⁸⁸ In law, at least, this provision strengthens the DoE(NI)'s power to prevent and control water pollution. Finally, it should be noted that the Water Order also represents a clear shift in emphasis towards the polluter pays principle. The Order not only consolidates the increase in fines for water pollution offences introduced in 1993, but considerably increases the powers available to the DoE(NI) to require potential and actual polluters to pay for the cost of pollution prevention and remediation. Although there are concerns that the courts in Northern Ireland have not yet made use of the increased ceilings for pollution fines,⁸⁹ if enforced to their maximum effect these reforms would have a powerful deterrent effect. The Department's new pollution prevention powers will each be addressed in turn.

New Powers to Serve Pollution Prevention Notices

Under section 6 of the Water Act (NI) 1972 the DoE(NI) was empowered to issue a pollution prevention notice where it appeared to the Department that a water pollution offence was likely to occur: (i) as a result of a proposed or actual use of a waterway or land for the purposes of disposing or storing any potentially polluting matter, or (ii) by reason of the use or proposed use of a vessel or vehicle from which poisonous, noxious or polluting matter could enter inland or ground waters. A notice could prohibit the proposed use of the waterway, land, vehicle or vessels or permit it subject to certain conditions. Although, *prima facie*, the Act provided the DoE(NI) with a potent means of preventing pollution, section 6 was fundamentally weakened by the fact that the Department could not prosecute for failure to comply with the terms of the notice. Prosecution could only be launched in the event that the anticipated pollution actually occurred, thus weakening the preventative effect of this power to say the least. Inadequate storage and management of farm effluent has long been a major cause of water pollution in Northern Ireland.⁹⁰ Similarly, spillage and leakage of fuel oil and chemicals from both agricultural and industrial sources cause serious water pollution throughout the Province.⁹¹ Neither form of pollution is susceptible to control under the discharge consent system, nor was the DoE(NI) given sufficiently wide powers under the Water Act (NI) 1972 to adopt regulations for the purposes of preventing pollution of this nature. Although a pollution prevention notice could be served, if it was ignored the Department was powerless to act until pollution actually occurred. While the DoE(NI) had the power under section 6 to remove and dispose of potentially polluting material, and could recover expenses incurred in doing so from the recipient of the notice, it was impossible to undertake the removal of all potentially

⁸⁸ S. Turner and K. Morrow, *Northern Ireland Environmental Law*, Gill and Macmillan (1997), pp 168-169.

⁸⁹ Discussed *infra*.

⁹⁰ *Review of the Water Act (NI) 1972: A Consultation Paper*, December 1993 (DoE(NI) and DANI), at p 12, para 6.2.

⁹¹ *Ibid.*

polluting substances throughout the Province. Not surprisingly, such action was only taken in exceptional circumstances.

The Department's ability to ensure pollution prevention by serving a pollution prevention notice has been considerably strengthened under the Water Order. Failure to comply with the terms of a prevention notice is now a criminal offence irrespective of whether a pollution incident actually occurs.⁹² In addition, conviction for such an offence may attract the considerably increased penalties for water pollution offences introduced into Northern Ireland in 1993 – even though a pollution incident may not have occurred. If the Environment and Heritage Service pursues a rigorous enforcement policy in relation to pollution prevention notices and is supported by the imposition of penalties that reflect the environmental importance of pollution prevention, then recipients of prevention notices should be provided with a sufficient incentive to comply.⁹³

When compared to the equivalent provisions operating in England and Wales, it would appear that the Water (NI) Order 1999 has conferred greater powers on the DoE(NI) in relation to pollution prevention notices than are available to the Environment Agency. Under section 86 of the Water Resources Act 1991, the Environment Agency may issue a notice prohibiting the making or continuation of a discharge likely to result in the commission of a general water offence under section 85. Alternatively the Agency may issue a notice subjecting the discharge to certain conditions. The DoE(NI)'s equivalent powers under the Northern Ireland Order are more extensive in two regards. First, the DoE(NI) has the power to issue prevention notices in relation to a wider range of potentially polluting activities, specifically the actual or proposed use of land or waterways for the purposes of storing matter, and the proposed or actual use of a vessel or vehicle from which

⁹² Article 8. As was the case under the 1972 Act, the notice will not come into force until 28 days from the date on which it is served, during which time the recipient of the notice may appeal to the Water Appeals Commission (an independent non-departmental body established under article 7 of the Water and Sewerage Services (NI) Order 1973 (SI 1973/70 (N.I. 2))). If no appeal is brought, the notice will be final and conclusive as to any matters which could have been raised on appeal. Although there is a time-lag of 28 days before a notice comes into force, any person who knowingly or otherwise discharges or deposits polluting matter into water, or discharges or deposits polluting matter so that it enters water, will be guilty of the general pollution offence under article 7.

⁹³ The DoE(NI) is obliged to furnish information concerning the notice to any person who appears to the Dept to be "interested in any land" if they request the information. The information is provided at the expense of the person requesting the information. Although the Order does not place the DoE(NI) under an obligation to provide this information to parties such as NGOs or residents groups who may be affected by the action of the potential polluter (but do not have an interest in the land), the Department would be under an obligation to provide such information under the Environmental Information Regulations (NI) 1993 (SR 1993 No.45) if requested. It should also be noted that an 'interested' party has the power to include anyone's name in the request for information concerning the notice and thereby invoke the DoE(NI)'s obligation under the Water Order. Finally, it should be noted that all prevention notices issued under article 8 and any convictions for offences under article 8 must be recorded in the public register maintained under the Order.

polluting matter may enter freshwater. Although the Environment Agency has wide powers under section 161A of the WRA 1991 to serve notices requiring persons to carry out anti-pollution works, identical powers are also conferred on the DoE(NI) under the new Order (discussed below). Secondly, as stated above, failure to comply with a prevention notice served under the Northern Ireland Order is a separate offence, distinct from the violation of article 7 (general pollution offence) which would also be committed were pollution also caused. However, an offence is only committed under section 86 of the WRA 1991 if the discharge is actually made.

Pollution Prevention Regulations

Although the greatly invigorated power to issue pollution prevention notices under article 8 represents an important articulation of the principles of prevention and precaution, it would be impossible for the DoE(NI) to serve an individual prevention notice for every site in Northern Ireland at which potentially polluting matter is located. Consequently, in order to implement an effective strategy for preventing water pollution in Northern Ireland, it was vital that the DoE(NI) be conferred with sufficient powers to set standards for particular categories of activity carried on throughout the Province. Under section 12 of the Water Act (NI) 1972 the Department was empowered to adopt regulations for the specific purpose of preventing water pollution; however, as already noted, these powers were very limited indeed. Regulations could only be adopted to prohibit or restrict washing or cleaning of things in controlled water, or putting litter or other ‘objectionable’ matter into water and keeping or use of vessels with sanitary appliances that may pass polluting matter into water. The *Review of the Water Act (NI) 1972: A Consultation Paper* proposed that this power be considerably extended.⁹⁴ In particular, the DoE(NI) proposed that it be empowered to adopt regulations that provided clear standards for industry and agriculture as to the preventative measures that should be taken to avoid water pollution. The Consultation Paper pointed to regulations adopted in England and Wales setting standards for silos, slurry tanks and oil storage in agriculture and plans to adopt corresponding measures for industry. Power to adopt these regulations was conferred on the Secretary of State for England and Wales under section 92 of the Water Resources Act 1991⁹⁵ and were used in the same year to introduce precautionary controls for a range of potentially very polluting agricultural activities, in particular, silage making and slurry and agricultural fuel oil storage.⁹⁶ Three years later the National Audit Office reported that these regulations had been of considerable value in improving standards and that the threat by the then National Rivers Authority to serve an improvement notice was “usually sufficient to secure upgrading of facilities”.⁹⁷ More importantly, the National Audit Office Report noted that the existence of enforceable standards may have contributed to the decrease

⁹⁴ DoE(NI) and DANI, December 1993, p 13, para 6.7.1

⁹⁵ Section 92 essentially re-enacted the power to make regulations given under s 31(4) of COPA 1974, but which was never exercised.

⁹⁶ The Control of Pollution (Silage, Slurry and Agricultural Fuel Oil) Regulations 1991, SI 1991/324.

⁹⁷ National Rivers Authority: *River Pollution from Farms in England*; HC 235, Session 1994-95, at p 22, para 3.7.

in farm pollution incidents in England and Wales. This is an experience echoed by the former Clyde River Protection Board (now part of SEPA) which noted in its 1994-95 annual report that warnings of forthcoming improvement notices were 'very effective' in ensuring that farmers took remedial action.⁹⁸

Given that industry and agriculture have long since been identified as the two principal sources of water pollution in Northern Ireland, it seems extraordinary that we have had to wait so long to remedy this gap in the Department's powers. Although the Department of Agriculture (NI) has required all new waste stores built with grant aid to comply with the standards contained in the British Regulations,⁹⁹ there were no powers to control stores built without grant aid or to compel farmers to repair defective stores. Article 14 of the Water (NI) Order 1999 retains the terms of section 12 of the Water Act and includes provisions identical to those contained in section 92 of the Water Resources Act 1991. Regulations can be adopted that prohibit a person from having custody or control of any poisonous, noxious or polluting matter unless prescribed works and precautions have been taken to ensure the prevention or control of pollution of inland, coastal and ground waters. Similar regulations may be adopted which require a person who already has custody of such matter to carry out specific works or take certain precautions to ensure the same end. Wide-ranging new powers are also conferred on the Department to specify the circumstances in which persons affected by these regulations must carry out pollution prevention works or take precautions or other steps and may also specify the nature of the action or works to be taken. It is also interesting to note that the maximum penalty laid down in the 1999 Order (£20,000) may be imposed for contravention of regulations adopted under article 14. Once again, the Order does not tie the imposition of the maximum penalty to offences involving actual pollution incidents. Instead, the penalty is being used as a means of reinforcing the Department's ability to prevent pollution. Given the effectiveness of the regulations introduced for Great Britain in reducing and preventing pollution from agricultural sources, the Comptroller and Auditor General for Northern Ireland strongly recommended in 1998 that the DoE(NI) should produce finalised draft regulations which can be laid without delay following the introduction of the Water (NI) Order 1999.¹⁰⁰ However, given that the Department only once used its powers under section 12 of the Water Act, and given the further delays anticipated in bringing the Water Order into force, the introduction of regulations for industrial fuel oil and chemical storage for Northern Ireland may not be imminent.

Anti-Pollution Works

The changes made to the DoE(NI)'s anti-pollution powers represent the most potent expression in the Water Order of the principles of prevention and precaution and the Government's commitment to implementing the polluters

⁹⁸ Equivalent Scottish powers for the adoption of pollution prevention regulations exist under section 31A of the Control of Pollution Act 1974; these powers were exercised to adopt equivalent regulations, SI 1991/346.

⁹⁹ *Control of River Pollution in Northern Ireland*: Report by the Comptroller and Auditor General for Northern Ireland; HC 693, Session 1997-98, at p 57.

¹⁰⁰ *Ibid.*, at p 57, para 5.7.

pays principle. Under their original powers conferred by section 13(6) of the Water Act (NI) 1972, the DoE(NI) had the power to carry out anti-pollution works where it appeared to the Department that any poisonous, noxious or polluting matter was present in, or was likely to enter inland, coastal or ground waters as a result of an accident or other unforeseen act or event. The Department's powers were, however, limited to removing and disposing of the polluting matter and remedying or mitigating any pollution caused. The Department did not have the power to ensure restoration of the water, or the aquatic life of affected waters. In addition, because it did not have the power to require those responsible for a pollution threat or actual pollution incident to carry out anti-pollution work, the responsibility for undertaking such work lay entirely with the DoE(NI). Even though it could recoup its costs from the person in default, the DoE(NI) was required to undertake the work before attempting to recover its costs which undoubtedly inhibited the Department's willingness to utilise its powers in this regard. Articles 16 to 19 of the Water (NI) Order 1999 set down the Department's considerably expanded new powers to carry out anti-pollution works, to investigate the cause and source of pollution, and its new powers to require potential or actual polluters to carry out anti-pollution works. In this regard, it should be noted that the Water Order brings the DoE(NI)'s powers into line with those powers conferred on the Environment Agency under section 161 of the Water Resources Act 1991 as amended by the Environment Act 1995.

Under article 16, the DoE(NI) retains its discretion to carry out anti-pollution works where it considers that polluting matter is likely to enter or to be present in inland, coastal or ground waters. In addition, the Department may exercise its powers to conduct anti-pollution works where polluting matter "has been present" in such waters. The range of work that may be carried out by the Department is not only more explicit under article 16, it is also expanded in several important respects. The preventative and remedial aspects of the Department's powers are set out separately in articles 16(1)(a) and (b), which clarifies the Department's power to undertake works to prevent polluting matter from entering water. Although the Department's anti-pollution powers under the Water Act (NI) 1972 did encompass a preventative dimension in that the DoE(NI) could take action where polluting matter was 'likely' to enter water, the specific anti-polluting works that could be undertaken were principally remedial in nature. The only preventative works identified by section 13(6) were the removal and disposal of polluting matter from land. Article 16(1)(a) of the new Order provides that the Department may undertake "such works and operations as it considers appropriate" to prevent polluting matter from entering the relevant waters. Hence, not only is the preventative dimension of the Department's powers emphasised through article 16(1)(a), there are now no limitations imposed on the nature of the works that may be carried out to prevent a pollution incident. The Department's remedial powers in the event of a pollution incident are also considerably expanded. Whereas the DoE(NI)'s powers to respond to a pollution incident were previously limited to the removal and disposal of polluting matter and to remedying and mitigating the effects of pollution, the Department now has the additional power to carry out "such works and operations as it considers appropriate" to restore the affected waters, in so far as is reasonably practicable, to their state immediately prior to the pollution incident, including the restoration of the flora and fauna present in the polluted water. This power is of considerable

significance as it will enable the DoE(NI) to respond much more fully to the environmental impact of water pollution. Regrettably, however, the DoE(NI)'s powers in this regard appear to be diminished in one important respect compared with the equivalent powers conferred on the Environment Agency under section 161(1) of the WRA 1991. Whereas the Northern Ireland provision refers to the restoration of flora and fauna '*in*' waters, section 161(1)(b)(iii) of the WRA 1991 refers to flora and fauna '*dependant on the aquatic environment of the waters.*' Consequently, bird life, for example, which may be 'dependent on', but not '*in*' the polluted water body, would not be protected under article 16.

One of the major problems in taking prosecutions for water pollution is identifying the polluter – without adequate investigative powers the Department's ability to control or prevent pollution is considerably blunted. Two new powers of investigation are conferred on the DoE(NI) under article 16 both of which are also conferred on the Environment Agency(EA). Under article 16(1) the Department may "carry out investigations"¹⁰¹ to establish both the source of the pollution and the identity of the person responsible for its entry into relevant waters. This new power can be used either to prevent likely pollution incidents or when pollution has actually occurred. It is also identical to the equivalent power conferred on the EA under the WRA 1991.¹⁰² Article 16 of the Northern Ireland Order also confers an additional power of investigation on the DoE(NI) to carry out works to assess the actual or likely effect of the existing or potential pollution levels on inland, coastal or ground waters,¹⁰³ which will undoubtedly enhance the Department's capacity to act preventatively. This power is equivalent to the Environment Agency's incidental powers conferred under section 37(a) and (b) of the Environment Act 1995.

Another important change in the Department's anti-pollution powers concerns its improved powers to recover costs reasonably incurred in carrying out this work from the person responsible for the threatened or actual pollution. Under section 13 of the Water Act (NI) 1972 the Department could recover any reasonable costs incurred in carrying out works from the person in default.¹⁰⁴ Article 16(4) of the Water Order also enables the Department to recover any reasonable costs incurred in exercising its powers under article 16(1). One important weakness in the cost recovery power conferred on both the Environment Agency and the DoE(NI) in this context was that the regulator was required to undertake the anti-pollution work before it could recover its costs. Not surprisingly, this situation generated a degree of uncertainty as to the prospects of actual cost

¹⁰¹ The term 'investigation' is not defined by the Order. It is unclear whether this power is wider than, or circumscribed by the DoE(NI)'s powers of entry and inspection laid down in articles 25 and 26 discussed *infra*.

¹⁰² Article 161(1) of the WRA 1991 as amended by the Environment Act 1995.

¹⁰³ Article 16(1)(b)(iv).

¹⁰⁴ Under section 161(4) of the WRA 1991 the Environment Agency is unable to recover costs incurred in carrying out anti-pollution works or investigations from any person in relation to pollution caused by a discharge from an abandoned mine. The Water (NI) Order 1999 does not impose a similar exclusion in relation to abandoned mines in Northern Ireland. The exclusion contained under the WRA 1991 will expire on 31 December, 1999.

recovery, which inhibited the regulator's willingness to exercise its anti-pollution powers under section 13.¹⁰⁵ This weakness was addressed in England and Wales by section 60 of the Environment Act 1995 and is dealt with in Northern Ireland by article 16(2) of the 1999 Order. Article 16(2) provides that the Department may only exercise its powers to conduct anti-pollution works (excluding investigations) if it is either necessary to carry out those works 'forthwith' or the Department has been unable to identify a person on whom a works notice (discussed below) could be served. By implication, if such a person can be identified, then a works notice must be served thereby shifting the costs of anti-pollution work to the recipient of the notice. Although the Department's power under article 16(4) to recover the costs of investigative work is not restricted by the need to identify a person responsible for the threatened or actual pollution, the Order clearly seeks to encourage implementation of the polluter pays principle in the conduct of anti-pollution works. Article 17(9) provides that the DoE(NI) will be able to recover the costs incurred in conducting investigations under article 16(1) even where the Department has served a works notice on the person connected to the matters to which the investigations relate.

Although the Department's anti-pollution powers are no longer linked specifically to accidental pollution or pollution caused by unforeseen events as was the case under the Water Act (NI) 1972, in practice, the Environment Agency (EA) has tended to use its equivalent anti-pollution powers to deal with accidental acts of pollution. These powers may also be used where a discharge consent has been breached; however the EA is more likely to issue an enforcement notice under the Water Resources Act 1991 where a consent is breached.¹⁰⁶ The DoE(NI) is also conferred with equivalent powers to issue enforcement notices in relation to discharge consents (discussed below), so it is likely that the Department will utilise its anti-pollution powers in a manner similar to the EA. It should be noted, however, that the Department may not use its anti-pollution powers or issue a works notice which impedes a discharge that is being made in accordance with a discharge consent.¹⁰⁷

One of the most important implementations of the principle of pollution prevention is the conferral of new powers on the Department to serve 'anti-pollution works notices'. Indeed, the Department's powers in this regard are arguably stronger those conferred on the Environment Agency under sections 161A to D of the WRA 1991 (as inserted by the Environment Act 1995). Article 17 provides that the Department may serve a works notice on any person who has "caused or permitted, whether knowingly or otherwise", poisonous, noxious or polluting matter to enter relevant waters, or to be present at a place from which the matter is likely to enter such water. As already stated, this formula is potentially more stringent than that used in section 161A(1) of the WRA 1991 which only allows the EA to serve a works notice on a person who has "caused or knowingly permitted" such matter to enter controlled waters.¹⁰⁸ The circumstances in which a works

¹⁰⁵ See Bell, *Ball and Bell on Environmental Law*, (4th ed, 1997), at p 472.

¹⁰⁶ *Ibid.*, at p 473.

¹⁰⁷ Article 16(3) and 17(8).

¹⁰⁸ Discussed at notes 86-88 *supra*.

notice can be served mirror those in which the Department may exercise its own powers under article 16, namely where the Department considers that pollution is likely to occur, or where polluting matter is present in or has been present in relevant waters. A works notice can be used to require a person to carry out identical anti-pollution works to those available to the Department under article 16(1). Not surprisingly, only the DoE(NI) may carry out investigations into pollution incidents, or assess the effect of potential or actual pollution. It should also be noted that even where a works notice is served, the Department retains its powers to conduct anti-pollution works and investigations.

The Department's ability to ensure that effective anti-pollution work is carried out is consolidated by article 18. Under article 18 the DoE(NI) has the power to request that preventative or remedial works must be carried out on any land or in any waters, regardless of whether the recipient of the notice has a right of access or a right to conduct such works on that land or in those waters.¹⁰⁹ The definition of 'land' and 'waters' in this situation also includes adjacent and adjoining land and waters. In such situations, the owners, occupiers or other rights holders must grant or join in granting permission to allow the specified works to be carried out. Consequently, effective pollution control does not depend on the Department ensuring voluntary co-operation from other holders of land and water rights. Although the DoE(NI) is required to reasonably endeavour to consult with such persons prior to the works being conducted, failure to do so will not invalidate the works notice. Owners, occupiers and other rights holders of such land are entitled to compensation; however, consistent with the polluter pays principle, compensation is payable by the recipient of the works notice, not the taxpayer.¹¹⁰

Before serving a works notice, the Department is required to make a reasonable effort to consult with the intended recipient of the notice concerning the works that might be required under the notice. Since failure to consult will not invalidate the notice, potential recipients are not given an incentive to evade consultation. A works notice must specify the period within which the works must be carried out. Hence, although a works notice may be appealed¹¹¹ within 21 days of being served, beyond this point its recipient will not be able to ignore the notice while the effects of the pollution become more extensive or entrenched. As is the case in relation to pollution prevention notices under article 8, failure to comply with the terms of a notice is an offence, regardless of whether pollution actually occurs or not. Once again, courts may impose a maximum penalty of £20,000 for such an offence, thus reinforcing the message that pollution prevention is taken as

¹⁰⁹ Article 18 is identical to section 161B of the WRA 1991.

¹¹⁰ Conditions governing payment will be prescribed by regulations to be made by the DoE(NI).

¹¹¹ The appeal will be taken to the Water Appeals Commission (an independent non-departmental body). It should be noted that the Water Order does not indicate whether a works notice is to be suspended pending the outcome of an appeal. However, the Anti-Pollution Works Regulations 1996 (SI 1999/1006) recently brought into force in England and Wales, make clear that lodgement of an appeal under the WRA 1991 will not suspend a works notice. It is likely that equivalent regulations will be adopted for Northern Ireland. Discussed *infra*.

seriously as pollution itself. The Department may take proceedings for such an offence before the High Court where it is of the opinion that it is necessary to do so to obtain an effective remedy. In the event that a notice is ignored, the DoE(NI) may carry out the works specified in the notice, and may recoup any expenses reasonably incurred from that person.

Articles 16 to 19 will not only bring the DoE(NI)'s anti-pollution powers into line with those available to the Environment Agency in England and Wales, but also these new powers should act as a powerful deterrent to potential polluters in Northern Ireland. Because the costs of clean-up may far exceed the maximum penalty that may be imposed as a result of a successful prosecution for a pollution incident, potential polluters are given a clear incentive to conduct their business or activities in a manner that is environmentally responsible. The deterrent effect of articles 16 and 17 is further underlined by the fact that a polluter's liability for clean-up costs now encompasses a liability to restore the water, including its flora and fauna, to its state prior to the pollution incident. Although this does not oblige the polluter to return normally polluted water to a pristine state, the cost of restoring fish stocks and aquatic life could be far greater than the maximum fines imposed for the water pollution offence itself.¹¹² The case law surrounding the application of section 161 of the WRA 1991 has also established that the Environment Agency can utilise its powers under section 161 even in the absence of a successful prosecution for water pollution.¹¹³

Important indicators of the likely application of the power to issue anti-pollution works notices are contained in policy statements and regulatory impact assessments surrounding the coming into force of the Environment Agency's powers in this respect in April 1999. The Anti-Pollution Works Regulations 1996¹¹⁴ were adopted to implement the Environment Agency's powers to serve an anti-pollution works notice in England and Wales. The Regulations did not, however, come into effect until April 1999 – hence the Agency's powers in this regard have only recently come into use.¹¹⁵ It is likely that the adoption of regulations implementing the Department's powers in Northern Ireland will be similarly delayed. Commenting on its new powers, the Environment Agency identified the construction industry as the “prime candidate” to receive works notices.¹¹⁶ The 1996 Regulations are essentially procedural in that they prescribe the content of works notices and require such notices to be recorded on the public register maintained under the WRA 1991. It is interesting to note, however, that although provision is

¹¹² In this regard, one often quoted example of the relationship, or lack thereof, between pollution penalties and clean-up liabilities occurred in *National Rivers Authority v Shell (United Kingdom)* [1990] Water Law 40. In this case Shell was fined £1m for leaking oil into the River Mersey; however, its clean-up liability was reportedly in excess of £6m.

¹¹³ Bell, note 105 *supra* at p 473. See in particular, *Bruton v Clarke* [1994] Water Law 145.

¹¹⁴ SI 1999/1006.

¹¹⁵ 29 April, 1999. In this regard, see also ENDS Report 291, April 1999, p 42. It should also be noted that the arrangements laid down in these Regulations are very similar to those introduced in relation to waste management licences in March 1999 – see ENDS Report 291, p 44.

¹¹⁶ ENDS Report 291, April 1999, p 42.

made for appeals against the service of works notices, the 1996 Regulations provide that such notices will not be suspended pending the outcome of an appeal. It is likely that the Northern Ireland regulations will adopt the same approach in this regard.¹¹⁷

Another important issue addressed with the coming into force of the 1996 Regulations was the overlap between the Environment Agency's powers to issue anti-pollution works notices and other water pollution control powers. One area of overlap concerns the requirement under section 161A(7) of the WRA 1991 that an anti-pollution works notice cannot require works which would impede or prevent the making of a consented discharge. The regulatory impact assessment of the Agency's powers produced by the Department of the Environment, Transport and the Regions (DETR) states that this provision means that a works notice "cannot be served where a discharge is made under and in accordance with a discharge consent". It is possible, however, that an anti-pollution works notice could be served on the holder of a discharge consent without impeding or preventing him from continuing the discharge. The ENDS Reports suggest, for example, that the Environment Agency "could order a discharger to restore waters to aquatic organisms damaged by a consented discharge."¹¹⁸ A policy statement¹¹⁹ issued by the Environment Agency (in agreement with the DETR) concerning the Agency's use of its powers to serve an anti-pollution works notice addresses additional overlaps with the contaminated land clean-up provisions introduced by the Environment Act 1995 and the regimes laid down in regulations concerning groundwater pollution and pollution from agricultural sources. The Agency has taken the view that it will, "in the first instance", use its specific powers to serve pollution prevention or control notices under the ground water or agricultural pollution regulations rather than resort to the service of an anti-pollution works notice. It is likely that the DoE(NI) will use its powers under regulation 18 of the Groundwater Regulations (NI) 1998¹²⁰ in a similar manner. As already discussed, Regulations have not yet been adopted for Northern Ireland to control water pollution from agricultural sources. The policy statement also makes clear that an anti-pollution works notice will only be served to deal with water pollution from contaminated land until such time as the new regime laid down in the Environment Act 1995 is brought into force. Even then, works notices will only be served to tackle pollution which will be addressed under the new regime: for example, to prevent serious pollution or where there is an imminent danger of such pollution. The equivalent regime concerning contaminated land is not yet in force in Northern Ireland; hence it is likely that the DoE(NI) will follow the Agency's practice concerning the use of its power to serve an anti-pollution works notice. The Environment Agency statement does, however, point out that the contaminated land clean-up regime may not be able to address cases of historic pollution from contaminated sites – for example, where pollutants have entered ground water from a contaminated site in the past, but the seepage has ceased. In

¹¹⁷ In this regard, it should be noted that provision is made for an accelerated appeals procedure.

¹¹⁸ ENDS Report 291, April 1999, at p 42.

¹¹⁹ ENDS Report 291, April 1999, p 42.

¹²⁰ SR 1998 No. 401.

such a situation, an anti-pollution works notice may be served. Finally, the policy statement makes clear that the Environment Agency will carry out risk assessment in deciding whether to issue a works notice and will have regard to the costs and benefits under the powers conferred by section 5 of the Environment Act 1995 – both are also anticipated for Northern Ireland.

Enforcement Notices

The enforcement notice is another new addition to the DoE(NI)'s pollution prevention armoury – however, this power is limited to the control of actual or threatened pollution from holders of discharge consents. Under article 12 the Department has the power to serve an enforcement notice on the holder of a discharge consent where the consent has been, or is likely to be, breached.¹²¹ The notice must state the opinion of the Department, specify the nature of the contravention or threatened contravention, the steps that must be taken to ensure compliance with the consent and the period within which these steps must be taken. Service of an enforcement notice has a strong preventative effect. In the first place, although it is possible to appeal service of an enforcement notice, the legal effect of the notice will not be suspended pending the outcome of the appeal.¹²² In this regard enforcement notices are unique in the context of the Water Order. Under article 13(5), an appeal against a decision to revoke or modify a consent will normally suspend the legal effect of the Department's decision pending the outcome of the appeal.¹²³ Although the Water Order allows the DoE(NI) to require that in the interests of preventing or minimising pollution or harm to human health, its decision to revoke or modify the consent will continue to have effect pending the outcome of an appeal,¹²⁴ the consent holder is entitled to compensation for any loss suffered as a result of the Department's decision if the Water Appeals Commission decides that in doing so, the Department acted unreasonably.¹²⁵ There is no equivalent right to compensation for loss sustained as a result of service of an enforcement notice. The preventative effect of the enforcement notice is further underlined by the fact that failure to comply with an enforcement notice is a criminal offence, conviction for which may attract the more substantial penalties imposed for water pollution offences (£20,000). Once again this penalty may be imposed regardless of whether the threatened breach of the consent actually occurs.¹²⁶

The importance of this new power cannot be underestimated. Not only does it give the Department a means of enforcing the terms of the 1999 Order without launching a prosecution, the enforcement notice also provides an important mechanism for suspending the operation of a discharge consent without risking liability for compensation. The Department cannot use its powers to serve an anti-pollution works notice that impedes or prevents the making of a consented discharge. Although the Department has the power to

¹²¹ The terms of article 12 are identical to those contained in section 90B of the WRA 1991.

¹²² Article 13(8). The appeal will be brought before the Water Appeals Commission.

¹²³ Article 13(5).

¹²⁴ Article 13(6).

¹²⁵ Article 13(7).

¹²⁶ The DoE(NI) also has power to take proceedings in the High Court where normal proceedings would not secure an effective remedy.

modify or revoke a consent as a result of a review, a review cannot be conducted without the consent holder's consent, except in specific limited circumstances, for at least four years after the consent has been granted. The only alternative mechanism available to the Department for suspending a discharge consent without having to wait for a minimum of four years is its emergency power conferred under article 15. Article 15 retains the powers conferred on the Department under the 1972 Act to serve a notice prohibiting the discharge or deposit of any matter onto land or into any inland, coastal or ground water where it is necessary in the public interest. Such a notice will take effect even if the Department has previously granted a consent for the discharge and will continue to have effect until it is revoked by the Department or a further consent is granted in response to an application made by the discharger. Although failure to comply with the notice is an offence, punishable by the maximum penalty under the Order, the Department's capacity to exercise these powers is limited in two important respects. First, although the term 'public interest' is not defined by the Order, the heading 'pollution emergencies' clearly indicates that this power will only be used in exceptional circumstances. Secondly, if the notice has been complied with and is successfully appealed, the Department will be obliged to compensate the person on whom it was served for loss sustained as a result – thus further inhibiting the exercise of this power.

CONCLUSION

It is clear from the foregoing discussion that the Water (NI) Order 1999 marks an important milestone in the modernisation of water pollution law and policy in Northern Ireland and certainly represents an enthusiastic response to the recommendations of the House of Commons Environment Committee. When it comes into force, the Order will transform the statutory powers available to the DoE(NI) to prevent pollution at source and also to mitigate and remedy its effects. In doing so, the Order not only gives powerful expression to one of the most fundamental principles of contemporary environmental law, but also provides potential and actual polluters in Northern Ireland with a potent incentive to ensure that pollution is avoided or minimised. In particular, these powers will provide the DoE(NI) with a vital means of controlling pollution from agricultural sources and accidental spillage which normally cannot be controlled through the discharge consent system. Regrettably, however, there are worrying indications that a considerable gap may exist between the formal legal position under the Water Order and reality on the ground.

For the first indication, one need go no further than the Order itself. Unlike the Environment Agency in England and Wales, the DoE(NI) is not placed under a general duty to exercise its pollution control powers in a preventative manner. Section 5(1) of the Environment Act 1995 explicitly requires the Agency to exercise its pollution control powers for the purpose of "preventing or minimising, or remedying or mitigating the effects of pollution of the environment." Although the implementation of the principle of pollution prevention is one of the major innovations made by the Water Order, the DoE(NI)'s general duties in relation to the aquatic environment do not even require the Department "to have regard" to this fundamental dimension of the new regulatory framework. This would also appear to be a deliberate rather than accidental omission as the Order does require the

Department “to have regard to the prevention of pollution” in exercising its powers to carry out engineering or building works.¹²⁷ In addition, the Department of Agriculture (NI)¹²⁸ is explicitly required to pay similar regard to pollution prevention in exercising its new powers under the Order concerning inland water navigation and recreation.¹²⁹ Hence, although the Environment and Heritage Service Annual Report 1998-1999 states that “we regulate to prevent and control pollution of our water. . .”¹³⁰ this role is not reinforced by statutory obligation.

Further important signals concerning the Department’s capacity to exercise its new pollution prevention powers are found in the report published in 1998 by the Comptroller and Auditor General on the *Control of River Pollution in Northern Ireland*.¹³¹ Although the Auditor General’s report addresses all aspects of the DoE(NI)’s functioning in this context, the central theme running throughout this lengthy report is one of deficient regulation. The findings made by this report concerning the regulation of the discharge consent system and the monitoring of water quality will be discussed in Part Two of this analysis of the Water Order – all of which reflect negatively on the DoE(NI)’s likely capacity to exercise its pollution prevention powers adequately in the short term. However, as against this, two recent improvements introduced by the DoE(NI) give some cause for optimism. During the course of the Auditor General’s examination the Department acquired a new information system (PILOTS) that will enable it to record not only the number of reported pollution incidents but also – for the first time – their severity and whether the report has been substantiated.¹³² This new system will undoubtedly make considerable improvements in the Department’s ability to make informed decisions on pollution prevention expenditure in both the public and private sectors, but also provide meaningful indicators as to how well the DoE(NI) is fulfilling its statutory duties to promote the cleanliness of water. The introduction of a reliable information system for measuring the extent of pollution will also enable the Department to make strides towards complying with Government policy stated in *This Common Inheritance* that decisions on environmental protection must be based on the “best information and scientific evidence available”. The second improvement relates to the introduction of a new ‘pollution hotline’ in 1997 which has been used effectively by the regulator in England and Wales to identify sectors where anti-pollution initiatives are necessary.¹³³

The final significant barrier to the effective implementation of the principle of pollution prevention in Northern Ireland concerns the low level of fines

¹²⁷ Article 23(3)(b).

¹²⁸ It should also be noted that the pollution control powers allocated to the DoE(NI) under the Water Order will not be reallocated as a result of devolution. However, the powers conferred on the DANI concerning recreational uses of water will be transferred to the Department of Arts, Culture and Leisure.

¹²⁹ Article 40(1).

¹³⁰ p 19.

¹³¹ HC 693, Session 1997-98.

¹³² *Ibid.*, pp 32-35. See also the *Environment and Heritage Service Annual Report 1998-1999*, at pp 21-22 for a report on the recent use of the PILOTS system.

¹³³ *Ibid.*, pp 66-67.

imposed by the courts in Northern Ireland for water pollution offences. One of the most important recommendations made by the Auditor General concerned the need to encourage the courts in Northern Ireland to consider the full range of fines for pollution offences. Although the Environment and Heritage Service prosecution rate is high, the levels of fines imposed are low.¹³⁴ Despite raising the ceiling for fines in relation to water pollution from £2,000 to £20,000 in February 1994, the Auditor General reported that this change made “very little difference to the general level of fines.”¹³⁵ Remarkably, despite a resolution of the Northern Ireland Water Council in 1991 expressing concern that the level of fines was too low to act as a deterrent, the Auditor General reported that the level of fines actually dropped the year after legislation was enacted which considerably increased the maximum fine.¹³⁶ It goes without saying that unless potential and actual polluters face the full range of fines for offences under the Water Order – particularly those offences which do not require proof of actual pollution – the practical implementation principles of pollution prevention and polluter pays will be considerably thwarted. Consequently, as recommended by the Auditor General, it is important that the Environment and Heritage Service makes every effort to provide courts in Northern Ireland with information on the full costs of dealing with pollution incidents as a means of encouraging the judiciary to consider the full range of penalties available for offences.¹³⁷

Part Two of this extended analysis of the Water (NI) Order 1999 will focus on two further issues. First, it will assess the significance of the changes wrought to the discharge consent system. Although the United Kingdom and the EC are committed to the development of economic instruments as alternative strategies for delivering environmental protection, administrative regulation will remain at the heart of national and European policy on the environment for the foreseeable future. Consequently, the discharge consent will remain as the core regulatory mechanism used to prevent and control freshwater pollution throughout the United Kingdom. The Water (NI) Order 1999 considerably upgrades the discharge consent system operating in Northern Ireland and thereby brings this pivotal mechanism into line with the more sophisticated and environmentally sound systems operating in Scotland, England and Wales. Part Two will conclude by setting out an agenda for further reform in this field. As already stated at the outset of this article, three fundamental weaknesses remain at the heart of the regulatory framework governing water pollution in Northern Ireland. First, the DoE(NI) still operates as both poacher and gamekeeper in the field of water pollution control. Secondly, despite the reforms introduced by the Water (NI) Order 1999, freshwater in Northern Ireland is still not afforded the degree of legal protection extended to the aquatic environment in England and Wales. Thirdly, serious concerns have been raised by the Comptroller and Auditor General as to the DoE(NI)’s ability to administer and enforce the new Order in an effective manner. Consequently, despite the changes wrought by the Water (NI) Order 1999, the process of modernisation is far from complete. Although we are now entering an age of devolution in which

¹³⁴ p 83, para 8.22.

¹³⁵ p 81, para 8.15.

¹³⁶ p 81, para 8.15.

¹³⁷ p 83, para 8.19.

parity with Great Britain will become less important, it is submitted that the Assembly must take action to ensure that Northern Ireland comes into line with modern standards of control operating in England and Wales. Failure to do so will not only inhibit, to a considerable degree, the potential effect of the new Order; continued tolerance of comparatively lax regulation will also ensure that Northern Ireland rapidly emerges as a pollution haven within the United Kingdom.