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Your reference:

Our reference:

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Dear Ciara

Thank you for your letter of 28 September 2015 seeking the Department's response to comments/observations made by the Environment Committee in relation to the Environmental Better Regulation Bill.

The Department is grateful to the Committee for its comments on the Bill.

I attach for your information a copy of your letter with the Departmental response inserted in respect of each of the comments/observations made by the Committee for discussion at its meeting on 8 October 2015.

Please let me know if you require any further information.

Yours sincerely,

Greg Cunningham
DALO
[by e-mail]



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28th September 2015

Dear Robert

At its meeting on 24th September 2015, the Committee agreed to write to the Department for its response in respect of the following comments / observations made in relation to the Environmental Better Regulation Bill.

In line with the Bill's timetable, it would be useful to have your written comments for the Committee meeting on 8th October.

This is not an exhaustive list, and other issues are likely to emerge as the Committee continues to take, and reflect on, oral evidence.

EMERGING COMMENTS

Explanatory and Financial Memorandum

- The overall aim of the Bill, as set out in paragraph 3 of the EFM, does not appear to be reflected on the face of the Bill;

1. DEPARTMENT'S RESPONSE – Paragraph 3 of the EFM states that the overall aim of the Department's Regulatory Transformation Programme is to provide a more streamlined and effective regulatory system for businesses and regulators. The Bill is one element of the Regulatory Transformation Programme. The long title of the Bill, as set out on page 1, is comprehensive in describing the main purpose of the Bill. The EFM is published along with the Bill and needs to be read in conjunction with the Bill. It is designed to assist the reader of the Bill and help to inform debate on it. We have checked other Assembly Bills and the style of the information in the long title of this Bill is in keeping with that in many other Bills. We appreciate the point being made but would take the view that the reader of the Bill has easy access to the accompanying EFM and therefore has a complete picture of the purpose, aims, background and policy objectives of the Bill.

- Are there any guarantees in the Bill itself that the Bill will address the fragmented and complex nature of current environmental legislation?

2. DEPARTMENT'S RESPONSE – There are no such guarantees in the Bill, however, a key purpose of the Bill is to allow the Department to deliver through subsequent subordinate legislation a more streamlined and effective regulatory system for businesses and regulators. As stated in the Delegated Powers Memorandum the proposed new Environmental Permitting Regulations will replace a range of legislation dealing with various environmental authorisations with a single set of statutory rules. The new structure will be a significant improvement on the present system which is perceived as unnecessarily complex and burdensome for industry, regulators and the public and so in need of simplification. Also the Bill is designed to address the fragmented nature of powers of entry across the wide range of environmental law. The plethora of powers of entry across the body of environmental law makes it difficult for individuals and businesses to understand the law. The Bill contains provisions to allow the Department, through subsequent regulations and following a review, to rationalise powers of entry making it easier for all parties to understand and follow. The policy intention behind the Bill is clear and the Department will be working to ensure that any subordinate legislation brought forward will address the fragmented and complex nature of current environmental regulation.

Part 6 – Miscellaneous and Supplementary

Commencement

- Clause 26(3) – can the Department explain what is meant by the phrase 'including provisions modifying statutory provisions'? For example, is it effectively giving the Department the ability to do anything it likes in connection with the provisions of the Bill; and does it include provisions of the Bill itself. Can the Department expand on what is allowed / not allowed by this phrase? Does it provide the Department/Minister with powers to change the act?

3. DEPARTMENT'S RESPONSE – The meaning of the phrase "*including provisions modifying statutory provisions*" is covered by the definitions in clause 24 – i.e. "*modify*" in relation to a statutory provision includes amend, repeal and revoke and "*statutory provision*" has the meaning given in section 1(f) of the Interpretation Act (NI) 1954. The said phrase must be read in the context of clause 26(2) and (3) – the context is commencement orders. Clause 26(2) allows commencement orders to

contain consequential, incidental, supplementary, transitional or saving provisions. A provision modifying a statutory provision included in such a commencement order can only be a provision the effect of which is in the nature of a consequential, incidental, supplementary, transitional or savings nature. It does not give the Department the ability “to do anything it likes in connection with the provisions of the Bill”. Technically it could extend to the provisions of the Bill itself but only subject to the above limitation. The power in clause 26(3) is therefore narrow in scope and if it is used in the future to modify any Northern Ireland legislation it can only do so subject to the Assembly affirmative resolution procedure.

Regulations and Orders

- Clause 23(2)(a) – Can the Department advise why the first set of regulations are subject to affirmative resolution, followed by further sets subject to negative resolution. Can the Department provide examples of what is likely to be included in the first set and subsequent sets that justify this level of control?

4. DEPARTMENT’S RESPONSE – The Department took account of the control procedure used for similar Westminster legislation, namely the regulations under the Pollution Prevention and Control Act 1999, in reaching its decision on the appropriate level of Assembly control. The first set of Environmental Permitting Regulations to be made under section 2 of the Bill and, therefore, subject to the affirmative procedure by virtue of clause 23(2)(a), will be very substantial and will, in effect, be the principal Regulations setting out the detailed framework for new Northern Ireland permitting system. Subsequent regulations are likely to be dealing with minor changes to the principal regulations and as such the negative resolution procedure is considered to be more appropriate. The Department is of the view that the Assembly control afforded by the Bill to the Permitting Regulations is very robust given the fact that any subsequent regulations containing any provision that creates an offence or increases a penalty or any that amend any Northern Ireland legislation will also be subject to affirmative resolution.

- Clause 23(2)(b) – can the Department explain why the Bill does not cover affirmative resolution regulations which (1) create penalties of a non-criminal kind; and (2) provide for compensation?

5. DEPARTMENT’S RESPONSE – (1) The Department does not intend to make any regulations under the Bill containing penalties of a non-criminal kind i.e. administrative/civil sanctions. (2) The first set of Environmental Permitting Regulations will cover compensation provisions and will be subject to affirmative resolution.

- Clause 23(2)(c) – Can the Department clarify if there are any provisions in the Bill that change the effect of Northern Ireland legislation that is not subject to affirmative resolution.

6. DEPARTMENT’S RESPONSE – Northern Ireland legislation cannot be changed by any subordinate legislation made under the Bill unless that legislation is subject to affirmative resolution.

Part 1 – General Environmental Regulation

Interpretation Clause 5 (definitions)

- ‘activities’ – Can the Department clarify whether this includes residential homes;

7. DEPARTMENT’S RESPONSE – There is no restriction on the meaning of the word “premises” as it appears in the definition of “activities”. Therefore if an activity as described in the definition is being carried on in a residential home it would be caught by the definition.

- ‘environmental harm’
 - offences to the senses of human beings – can the Department explain the actual meaning of the phrase and the justification of its inclusion? Can the Department provide examples of what this might cover? Could it have an unintended consequence?

8. DEPARTMENT’S RESPONSE – This is a common phrase, used in other environmental legislation such as the Regulatory Reform (Scotland) Act 2014, the Environment (NI) Order 2002 and the Pollution Prevention and Control Act 1999. It takes its common meaning, i.e. something which causes offence to the senses of human beings – noise, noxious smells, light pollution, etc.

The Department does not see how it may have an unintended consequence.

- damage to property – Can the Department explain what is meant by this phrase and the justification of its inclusion? Can the Department provide examples of what this might cover? Could it have an unintended consequence?

9. DEPARTMENT’S RESPONSE – Again this is a phrase already in existence in the primary legislation listed above. It is intended to cover things like buildings and other structures which are not covered elsewhere within the definition of “environmental harm”.

The Department does not see how it may have an unintended consequence.

- Impairment of, or interference with, amenities or other legitimate uses of the environment - can the Department justify and explain the use of the word ‘legitimate’. Who decides what is ‘legitimate’.

10. DEPARTMENT’S RESPONSE – Again this is a phrase already in existence in the primary legislation listed above and is also provided for in the IPPC Directive (96/61/EC).

A “legitimate” use of the environment is one which does not contravene any laws.

- ‘regulator’ – can the Department clarify this definition and its parameters.

11. DEPARTMENT’S RESPONSE - A regulator, for the purposes of Part 1 of the Bill, will be the Department (NIEA) or a district council, i.e. those who currently issue permits/licences.

General purpose: protecting and improving the environment

- Clause 1 – can the Department clarify and justify the use of the phrase ‘including (but not limited to)’. Why is it not limited? Can the Department provide examples of what requires this phrase to be included?

12. DEPARTMENT’S RESPONSE – The list at clause 1(1)(a)-(c) is not meant to be exhaustive and is used to ensure that the general power in clause 1(1) to make regulations for or in connection with protecting and improving the environment is not limited to the specific powers in subsections (a), (b) and (c).

- Where on the Bill are the broad purposes outlined and legislated for? Where does it state what the Bill’s aims are and what it is not legislating for?

13. DEPARTMENT’S RESPONSE – See the Department’s response to no. 1 above

Regulations relating to protecting and improving the environment: consultation

- Clause 3(b) – can the Department explain and justify the phrases ‘such other persons as it thinks fit’ and ‘as it considers appropriate’. Why are ordinary people not included in the list of consultees?

14. DEPARTMENT’S RESPONSE – As always, the Department will be conducting extensive public consultation on all regulations flowing from the Bill. “Such other persons as it thinks fit” and “as it considers appropriate” are wide ranging definitions which do not seek to restrict a list of consultees in legislation. “Ordinary people” will be entitled to respond to the consultation in the same way as a regulator or business.

General Environmental Rules

- Clause 4 – can the Department justify the lack of statutory oversight of rules made under the regulations? Can the Department provide examples of what this will include?

15. DEPARTMENT’S RESPONSE – All general environmental rules will be subject to robust statutory requirements. General environmental rules specified in regulations will be subject to normal Assembly rules applying to proposed regulations. General environmental rules may also be made by the Department under regulations. In making such rules the Department is under a statutory duty, under clause 4 of the Bill, to publish a draft of the proposed rules, publicise the opportunity for any person to make representations about the proposed rules and make copies of the proposed rules available for public inspection. At this stage the Department intends to include all general environmental rules in the first set of Environmental Permitting Regulations to be made under the Bill. The policy development work in relation to Environmental Permitting Regulations is at an early stage and it is too soon to provide examples. A full public consultation on the proposed regulations will be required and the Committee will be fully consulted at that time in the normal manner.

Schedule 1 - Matters for, or in connection with, which regulations may be made under section 2

- Paragraph 1(1) – can the Department justify the use for ‘Further defining environmental activities’. Can the Department provide examples of what this might cover that is not already covered on the face of the Bill?

16. DEPARTMENT'S RESPONSE – The Bill defines “*environmental activities*” as activities that are capable of causing, or liable to cause, environmental harm or activities connected with such activities. The Department accepts the very broad nature of this definition, however, in developing the Bill the Department had regard to similar provisions in the Regulatory Reform (Scotland) Act 2014. That Act contained the definition of “*environmental activities*” referred to above but also included a regulation making power to allow “*further defining environmental activities*”. The Department was of the view that this was a useful way to future-proof the definition in case a new activity should emerge damaging to the environment that would not be caught by the general definition. At this point in time the Department cannot provide any examples as requested.

- Paragraph 13(8), (10), (11) – can the Department explain why powers relating to breaching regulations, and maximum fines, are not on the face of the Bill. What is the justification for allowing magistrates daily fines?

17. DEPARTMENT'S RESPONSE – These powers are in Schedule 1 to the Bill. Schedule 1 must be read with section 2 of the Bill and as such it contains substantive provisions on the face of the Bill. Provision for daily fines is not unusual in environmental law – they are a tool to encourage timely compliance to protect the environment. A daily fine may be appropriate if there is a continuing breach which the person could take action to remedy. The finer details and the circumstances in which daily fines will be appropriate will be considered in the context of the policy development work for the Environmental Permitting Regulations under the Bill.

- Paragraph 14 – why is there not a guaranteed right of appeal?

18. DEPARTMENT'S RESPONSE – The Environmental Permitting Regulations to be made under the powers in the Bill, including the powers in paragraph 14 of Schedule 1 to the Bill, will contain provisions conferring rights of appeal. The regulations will be subject to the affirmative resolution procedure.

- Paragraph 13 and 15 – can the Department clarify the relationship between compensation and civil proceedings? If a regulator requires a payment of compensation, does this mean civil proceedings cannot be taken?

19. DEPARTMENT'S RESPONSE – Matters of detail such as the point raised above will need to be considered by the Department as part of the policy development process in respect of the Environmental Permitting Regulations to be made under the powers in the Bill, including the powers in paragraphs 13 and 15 of Schedule 1 concerning enforcement and offences and compensation. Proposals for these regulations will be subject to full public consultation and robust Assembly scrutiny. At the moment the preparation of the regulations is at an early policy development stage and the Department is not yet in a position to respond to this question.

Part 2 – Powers of Entry

Rewriting powers of entry

- Clause 8(2)(b) – is it possible that there could be an increased level of interference as a result of rewriting and attaching an offence that did not previously exist.

20. DEPARTMENT'S RESPONSE – This is a matter that will need to be considered in the context of the robust review of powers of entry to be completed by the

Department under clause 9 of the Bill. That review will determine the likely content and scope of any proposals for regulations under clause 8 of the Bill (rewriting powers of entry and connected offences). Issues such as a possible increased level of interference will need to be fully explored in the context of that review. Clause 9 requires the Department to prepare a report of the review and to lay a copy of the report before the Assembly. In developing the review the Department will also need to fully engage with key stakeholders and the Committee.

Part 3 – Amendments to the Clean Air (Northern Ireland) Order 1981

Exempt Fireplace

- Clause 15, inserted paragraph (7) – what is meant by the term ‘*substantial quantity of smoke*’? How can this be quantified? How will this affect air quality – what will be the consequences?

21. DEPARTMENT’S RESPONSE – The phrase “*any smoke or a substantial quantity of smoke*” is as provided for in Article 17 of the Clean Air (NI) Order 1981. The wording in the 1981 Order allows the Department to determine what a substantial quantity is.

Currently smoke emission limits for appliances for use in Smoke Control Areas are set between 0kW and 44kW are based upon limits provided in British Standard PD 6434:1969. Emissions should not exceed 5g/h + 0.1g per 0.3kW output of the appliance. $(\text{Output (kW)} \times 0.3333) + 5 = \text{Emission limit (g/h)}$. Emission limits for appliances with an output between 44kW and 240kW are interpolated between the limit at 44kW in BS PD 6434 and the limit at approximately 240kW in the Clean Air (Emission of Grit and Dust from Furnaces) Regulations 1971 (SI 1971/162). The Department will not approve an appliance for use in a smoke control area unless it has been tested against these limits.

The proposed amendments the Bill will maintain the improvements in air quality already achieved since the introduction of the 1981 Order and provide for further improvements where new Smoke Control Areas are declared.

General Issues

- What impact, if any, will there be to this Bill should an independent Environment Protection Agency be established in the future?

22. DEPARTMENT’S RESPONSE – It is not envisaged that the future establishment of an independent Environmental Protection Agency would have a significant impact on the Bill/Act.

While significant new primary legislation would be required to establish such a body and to transfer current DOE functions to that body (in the same way that the Environment Act 1995 established SEPA and the Environment Agency), it is unlikely that anything other than minor and consequential amendments to the Environmental Better Regulation Act would be required.

Any amendments would, of course, be subject to the usual Assembly scrutiny of primary legislation.

- Can the Department provide an overview of the regulations that will come under this Bill?

23. DEPARTMENT'S RESPONSE – The Delegated Powers Memorandum provides an initial outline/overview of the Environmental Permitting and Powers of Entry Regulations that will come under the Bill. The Department is unable to provide any further detailed information at this stage.

- Can the Department outline what functions could be added to / removed from Councils and what the financial implications of this are?

24. DEPARTMENT'S RESPONSE – The Department is not yet in a position to provide this information because the Regulations that will come under the Bill are at an early policy development stage. Any possible impact the Regulations may have on the functions of Councils will be fully explored through consultation with councils. A robust Regulatory Impact Assessment will be developed to accompany consultation documents and legislative proposals and this will deal with any financial implications.

- What guarantees are there in the Bill that 'Better Regulation' will mean enhancing, and adding value, to industry? Can this be more explicit in the Bill?

25. DEPARTMENT'S RESPONSE – Better Regulation is a broad strategy to improve the regulatory environment which is comprised of a range of initiatives to consolidate, harmonise and simplify existing legislation and to improve the quality of new legislation by better evaluating its potential economic, social and environmental impacts. Better environmental regulation will mean a cleaner, safer environment for all. It will also mean that businesses will benefit from a simplification and reduction in the legislative burden under which they operate while the Department will also benefit from a more cost-effective use of its resources. The Department is bringing forward the Bill as part of a better regulation agenda and the Bill's better regulation principles have been broadly welcomed. Given the wholly better regulation nature of the Bill it is to be expected that its outcomes will be beneficial to industry.

The Regulatory Impact Assessment for the Bill states *“Standards of environmental protection will not be compromised as a result of these proposals; on the contrary, they will benefit the environment by simplifying regulatory requirements and targeting regulatory activity where it can deliver the greatest benefit. Compliant businesses will see reduced administrative regulatory burdens and simplified and improved interactions with environmental regulators.”*

- Can the Department clarify whether it is the Minister's intention to legislate for managing and controlling bonfires using the Environmental Better Regulation Bill?

26. DEPARTMENT'S RESPONSE – The Minister does not have any plans to use the Bill to legislate for managing and controlling bonfires.

You will be aware that the Committee received correspondence from the Examiner of Statutory Rules on the Department's Delegated Powers Memorandum. The Examiner has made some observations, outlined below for the Department's response.

Assembly control: regulations and orders

Clause 26(2) should perhaps be expressly limited to giving full effect to any provision of the Bill or to the coming into operation of any of its provisions. It may perhaps be implicit to some extent but it might be better to spell it out, especially in the present climate in the Assembly against Henry VIII clauses. Even then, it could be considered a fairly wide power, and it could be limited to facilitating commencement.

27. DEPARTMENT'S RESPONSE – See the Department's response to No. 3 above.

Other matters

The first issue raised by the Examiner to the Department was in relation to the question of *sub-delegated* general environmental rules made *under* the regulations (that is, the clause 2 regulations) rather than being specified *in* them. Clause 4 and Schedule 1 paragraph 5(3)(c) and (5) refer. The Examiner suggests that it would be better to specify all of the rules in the regulations themselves (not least from the point of view of Assembly scrutiny). The Department has indicated its intention to specify all the general environmental rules in the general permitting regulations. But it wants to retain the "flexibility" afforded by clause 4 to allow rules to be made under the regulations. It points to precedents for this approach in the Environment (Northern Ireland) Order 2002 and regulations made under that Order. Can the Department clarify its position in relation to this and explain its rationale for wishing to retain the flexibility.

28. DEPARTMENT'S RESPONSE – As stated it is the Department's intention to specify all of the General Environmental Rules in the Environmental Permitting Regulations. The flexibility is required simply to allow the Department, if necessary, to make such Rules in the future under the new Environmental Permitting Regulations rather than making a new set of Regulations. There is precedent for this approach in other areas of environmental law.

The second point raised by the Examiner was a point about penalties (rewriting offences in connection with powers of entry). He suggested that clause 8(3) should take account of the distinction in the statement of maximum fines as between summary-only offences (not exceeding the statutory maximum) and summary fines (not exceeding the statutory maximum) in the case of offences triable/punishable either summarily or on indictment. The Department is proposing a suitable

amendment to deal with this point. However, it is important that the provision is clear, not least for the Department (which has the task of framing the offence and penalty provisions appropriately in regulations).

29. DEPARTMENT'S REPOSE – The Department accepts this point.

I look forward to hearing from you.

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