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Dear Robert

At its meeting on 8th October 2015, the Committee agreed to write to the Department for its response in respect of the following issues raised by stakeholders during the evidence sessions with the Committee in relation to the Environmental Better Regulation Bill.

In line with the Bill's timetable, it would be useful to have your written comments in time for the informal deliberation session with the Committee on Thursday 15th October.

Part 1 - General Environmental Regulation

Clause 1: **NIHRC** commented that 'international obligations' as already defined in the act includes the relevant human rights law (which are not already part of domestic law).

1. DEPARTMENT'S RESPONSE. Noted.

Clause 2: **NILGA** are supportive of a single permitting scheme, but stated that it is vital that any changes that will impact on council provision are subject to prior consultation with the councils in a timeframe that will allow for appropriate business planning. In particular Clause 2 and Schedule 1 have the potential for wide-ranging impacts on councils, including financial costs, particularly where single environmental permitting will remove or introduce new functions to councils.

2. DEPARTMENT'S RESPONSE. Clause 3 of the Bill places a duty on the Department to consult. Impacts, benefits and financial implications will be fully considered in the Regulatory Impact Assessment which will accompany the future regulations.

Clause 3: **ARC 21** suggested amending clause 3(1) (a) to cover cases whereby the regulations would also remove functions from any regulator as well as conferring new functions.

3. DEPARTMENT'S RESPONSE. The Regulations will not be removing any functions.

The Northern Ireland Human Rights Commission suggested that Clause 3 of the Bill should be amended to reflect the provisions of the Aarhus Convention, Article 8, where the regulations will have a "significant effect on the environment". This should include:

- removing the subjective test within Clause 3(b) and replacing it with "such other relevant persons";
- including specific time-frames, and including a provision noting that the consultation outcome will be "taken into account as far as possible"
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4. DEPARTMENT'S RESPONSE. The importance the Department attaches to consultation in respect of the Environmental Permitting Regulations is reflected in the fact that Clause 3 imposes a statutory duty on the Department to consult before making any such regulations. In addition to the consultees specified in clause 3 the Department will be consulting with a wide range of interests. The Department will be following the current OFMDFM guidance on Distribution of Departmental Publications and Consultation Documents. In keeping with current practice details of the consultation will also be advertised and published on the Department's website. The distribution list for any consultation on the Regulations will be very comprehensive. In Department is therefore satisfied that in keeping with the Aarhus Convention the public will be given the opportunity to

comment, directly or through representative consultative bodies. The Department also accepts that the overall time-frame for the consultation process must be sufficient for effective participation. In keeping with normal practice the Department will analyse all responses to the consultation and publish a synopsis of those responses.

NILGA noted that this clause specifically requires the Department to consult councils "as it thinks fit" and suggested that the clause should also specify consultation in cases in which proposals would lead to functions being removed from councils to allow for business planning. It stated that Local Government should be a partner in government and be involved in ongoing discussions regarding proposed changes.

5. DEPARTMENT'S RESPONSE. See Response 3 above. The Department will be under a statutory duty to consult with local government before making any regulations.

Clause 5: **NIEL** has suggested adding concern for the functioning of natural systems should also be extended to the definition of 'protecting and improving the environment', thus:

'(a) preventing deterioration or further deterioration of, and protecting and enhancing, the functioning of natural systems, the status of ecosystems, biodiversity, geodiversity, habitats, species, historic monuments, archaeological objects or protected landscapes'

NIEL suggested that this was about recognising the importance of the functioning of natural systems and taking a long term view of what was needed with the Environment. They cited examples such as hydrological systems; rover catchments; natural drainage systems; coastal and dune systems.

6. DEPARTMENT'S RESPONSE. The Department is satisfied that the definitions listed in clause 5 are very comprehensive. In particular the definition of "protecting and improving the environment", by virtue of the use of the word, "includes" is open to a broad interpretation. The term "protecting and improving the environment" should be given its normal every day meaning, but the definition also makes clear that the term includes those matters listed in (a), (b) and (c). The definition is not, therefore, solely confined to those matters listed in (a), (b) and (c). Having said that the Department is of the view that it is not necessary to include the words "the functioning of natural systems" given that the definition already includes the words "...protecting and enhancing, the status of ecosystems...". An ecosystem can be defined as including all of the living things (plants, animals and organisms) in a given area, interacting with each other, and also with their non-living environments (weather, earth,

sun, soil, climate, atmosphere). The Department is, therefore, of the view that the current definition is wide ranging enough to cover the “functioning of natural systems”.

AFBI has indicated that the regulation will protect and improve the environment by (a) preventing deterioration of and enhancing the status of ecosystems. However, for this to happen, repeat assessments of ecosystem status are required to indicate whether or not change (deterioration or enhancement) has occurred. The UK National Ecosystem Assessment (published 2011 and which included NI in Chapter 8) gave an assessment of the state of ecosystems at that time. But further on-going assessments are needed to ascertain if ecosystem statuses are deteriorating or improving over time.

7. **DEPARTMENT’S RESPONSE.** Noted. Determining the status of ecosystems will be an operational matter for the regulator.

Part 2 - powers of entry and associated powers

General: **ASDA** states that good communication is key in relation to powers of entry and associated powers.

8. **DEPARTMENT’S RESPONSE.** Agreed. And issues such as this will be a matter for the Code of Practice under clause 12.

Clause 10: **NILGA** highlighted the need for the Department to consult with councils, where any council powers of entry are to be changed. It highlighted the importance of the Department working with local government on drafting the code of practice; and suggested that the code of practice be given adequate scrutiny through the relevant Assembly mechanisms.

9. **DEPARTMENT’S RESPONSE.** Clause 10 imposes a statutory duty on the Department to consult before making any regulations affecting powers of entry. Councils will be included in any such consultation exercise. Clause 12 imposes a statutory duty on the Department to publish a draft code of practice and to invite representations, to consider the representations and amend the draft accordingly. The Department will therefore be consulting with local government/councils in developing the content of the Code of Practice. In keeping with normal working arrangements with the Environment Committee the Department will be also consulting with the Committee in developing the Code. The Department is satisfied that the arrangements concerning the publication and consultation, including the engagement with the Environment Committee on the draft and subsequent development of the Code of Practice, are sufficient to allow full and detailed scrutiny of the content before any final publication.

Clause 12: **National Trust** considers it reasonable that the Department prepare guidance on the exercise of powers of entry and associated powers, to clarify the situation for business and other organisations, while ensuring consistency across the Department's activities. However any revision of powers and/or new guidance should not rule out the possibility of unannounced inspections, which will still be necessary in some circumstances.

10. DEPARTMENT'S RESPONSE. Agreed.

ARC 21 has suggested that the provisions of clause 12 do not envisage any role for the Assembly and that other similar provisions such as that covering the Duty of Care in Article 5 of the Waste and Contaminated Land (Northern Ireland) Order 1997 do provide for a role. It suggested that the extra democratic tier is added to the scrutiny in taking it forward, given that it is a fairly significant aspect of the Bill.

11. DEPARTMENT'S RESPONSE. To see response no. 9.

Clause 13: **The Northern Ireland Human Rights Commission** suggested that the clause should be amended to ensure that no particular group is discriminated against, eg travellers. NIHRC has interpreted the omission of residential premises in this clause as an intentional omission so that residential premises are not included. However, the Clause then refers to 'any tent or moveable property'. Certain groups use moveable property as residential premises. Therefore, there are concerns this could impact them in a discriminatory manner.

12. DEPARTMENT'S RESPONSE. The definition of premises in clause 13 is wide ranging and includes residential premises. The word "premises" should be given its ordinary every day meaning, but it also includes moveable property. There is therefore no possibility that this provision could impact in a discriminatory manner.

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

The Committee has already written to the Department regarding comments made under this Clause.

13. DEPARTMENT'S RESPONSE. Noted

Part 4 - Amendments to the Environment (Northern Ireland) Order 2002

No suggested amendments were made

14. DEPARTMENT'S RESPONSE. Noted

Part 5 - Amendments to the Water and Sewerage Services (Northern Ireland) Order 2006

No suggested amendments were made. NILGA noted the potential impact that expected changes to government department structures may have on the eventual wording of the Bill.

15. DEPARTMENT'S RESPONSE. Noted

Part 6 - Miscellaneous and Supplementary

Clause 23: **NIHRC** welcomes the requirement for affirmative resolution procedure contained within Clause 23(2)(b) of the Bill and advises the Committee of its importance to enable adequate legislative scrutiny of regulations which will engage a number of human rights standards.

It also welcomes the requirement for an affirmative resolution procedure contained within Clause 23(2)(c) of the Bill and advises the Committee of its importance to enable adequate legislative scrutiny of regulations which amend significant provisions relating to the boundaries of environmental protection within the proposed legislation

16. DEPARTMENT'S RESPONSE. Noted

Schedule 1 – Matters for, or in connection with, which Regulations may be made under Section 2

This section demonstrates general comments regarding Schedule 1.

Paragraph 2: **NIEL and UAF** were supportive of an Emission Trading Scheme, but stressed the need to encourage a change in mind-set in industry towards efficiency and an understanding of

natural capital. Such a scheme should guard against possible unintended consequences of 'off-shoring emissions'.

17. DEPARTMENT'S RESPONSE. Noted

Paragraphs 6,7,8: **National Trust** provided general comments regarding integrated environmental permitting. It welcomes common permitting hierarchy in principle; but that risk assessments need to be done on potential environmental impacts.

18. DEPARTMENT'S RESPONSE. Noted.

ASDA commented that integrated environmental permitting has the potential to deliver simpler process for retailers; and that cost savings should be passed back to businesses.

19. DEPARTMENT'S RESPONSE. The Department agrees that the new permitting regime under the Bill has the potential to realise cost savings. More detailed analysis will be possible when subordinate legislation is developed. There are provisions in the Bill concerning regulations dealing with charging schemes. The issue of fees and charges and what those fees and charges should be will be the subject of a separate consultation exercise in due course.

NILGA commented that the thrust of a single environmental permit is to be welcomed; and that it needs to be balanced in a way as to ensure that the regulator has the appropriate skills set if that single permit is to extend the breadth of work that they are already doing.

20. DEPARTMENT'S RESPONSE. Noted

Paragraph 15: **L&CCC** welcomed the provision to make regulator pay compensation in respect of a loss or damage, the actual process in recovering compensation will be difficult.

21. DEPARTMENT'S RESPONSE. Noted.

General issues

Theme: Purpose of Bill – Better Regulation

Lisburn & Castlereagh City Council suggested that there was a need to lessen the burden on business as over complex compliance and licensing requirements drive illegal activity. Conversely for those operators which do attempt to comply the system is cumbersome, protracted and costly. Streamlining processes should assist and encourage the business sector to comply with Environmental Legislation.

22. DEPARTMENT'S RESPONSE. Noted.

National Trust welcomes the Bill's aim to reduce complexity of environmental legislation, lessen regulatory burdens on businesses and strengthen the protection of our environment and it will be the detail of the Regulations that will follow the Bill that will ensure the aims are met and an appropriate balance is found between risk based regulation and strengthening environmental protection.

23. DEPARTMENT'S RESPONSE. Noted.

ASDA suggested any improvements secured should not be lost due to the introduction of future additional regulations being introduced and suggested that the Department should adopt a one-in-one-out approach, a concept which has already been adopted in other sectors of Government. Also, reward for businesses going beyond compliance is an important principle. Further, it suggests that better regulation should apply across government, i.e. not just in the environment.

24. DEPARTMENT'S RESPONSE. Noted.

Northern Ireland Environment Link suggested that Prosperity Agreements should be included in the Bill.

25. DEPARTMENT'S RESPONSE. Prosperity agreements are entirely voluntary in nature and as such do not need to be covered by legislation.

ARC 21 stated that legislation covered by the Better Regulation programme should consider the following issues: (a) interaction with the planning regime; (b) interaction with producer responsibility regulations; (c) other bodies involved in environmental regulation that will be directly affected eg. councils; (d) development of an appropriate fees and charges scheme; (e) potential rationalisation of NIEA structures and operations; (f) consolidation of key performance indicators.

26. DEPARTMENT'S RESPONSE. All of the issues identified by Arc 21 are valid but they need to be considered in detail in the context of the policy development work in respect of the subordinate legislation programme coming forward under the Bill.

RSPB NI indicated that for the Bill to promote better regulation it must facilitate the right balance between simplification and effective environmental protection. It advises that the European Commission is under pressure to extend an Action Programme for Reducing Administrative Burdens in the EU to include targets for the reduction of policy (compliance) costs, putting regulatory standards at risk. RSPBNI believe that the distinction must remain between compliance costs and administrative costs. A further consideration for simplification and devolving powers of inspection relates to the use of voluntary approaches to policy and enforcement. The measures in this Bill could conceivably have implications for the way legislation is enforced for monitored. There has been much enthusiasm across some European jurisdictions for the enhanced use of voluntary approaches in preference to mandatory approaches to both policy delivery and enforcement. They believe that the Bill should not be used to replace mandatory inspection regimes with voluntary

approaches unless the voluntary schemes are properly designed with effective oversight, targets and governance.

27. DEPARTMENT'S RESPONSE. The important points made by RSPB NI are noted but again these are matters to be considered in the context of the subordinate legislation programme coming forward under the Bill in respect of new permitting regulations and the review of powers of entry.

Friends of the Earth Northern Ireland states that it remains unconvinced that this is the right Bill at the right time. While it is an acceptable aim to provide a more streamlined and effective regulatory system for business and regulators, there are other aims for regulation – to create fairness and consistency in competitive markets and to protect and enhance the environment. The Bill's EFM does not acknowledge the environment, and therefore FOENI considers the Bill to be fundamentally flawed. The result of good environmental regulation should be good environmental outcomes but this is not the policy objective of the Bill. FOENI states that the Bill may simplify and harmonise processes but until the structural constraints to effective performance around governance and enforcement are resolved, the environmental outcomes will not be achieved. Outcomes for some businesses may be achieved (which they state is the policy driver for the Bill) but the long term economic prosperity will be undermined.

28. DEPARTMENT'S RESPONSE. The Bill's E&FM makes clear that the Bill is a key element of the Department's Regulatory Transformation Programme and that the overall aim of the Programme is to provide for a more streamlined and effective regulatory system for businesses and regulators. The main enabling power in the Bill is to bring forward regulations for protecting and improving the environment and it is designed to enhance protection of the environment through more effective regulation and at the same time to reduce regulatory burdens on businesses.

NILGA would encourage the potential for development of a single environmental permitting scheme, to overcome what is currently a much fractured provision of regulation in Northern Ireland.

29. DEPARTMENT'S RESPONSE. Noted.

Theme: Powers of Entry

National Trust agrees that any changes relating to powers of entry and associated powers regarding environmental protection should not result in a weakening of the law. Where powers of entry and associated powers are needed to ensure proper compliance and avoid or mitigate environmental damage they should be retained.

30. DEPARTMENT'S RESPONSE. The Department agrees that the law on environmental protection should not be weakened as a result of the Bill.

Theme: Implications of planning and departmental reform

National Trust has concerns that at this time of major reform in NI (new planning regime and new departmental structures underway) that there are no assurances as to the ability of the DOE to adequately resource the associated permitting and compliance and communication requirements. In particular, it has concerns about the lack of independence in the current DOE / NIEA structures, as having the regulator and policy maker under the one department and Minister does not reflect the hallmarks of good environmental governance.

31. DEPARTMENT'S RESPONSE. A full and robust Regulatory Impact Assessment will be developed to accompany the subordinate legislation programme coming forward under the Bill. This will cover in detail the costs, benefits and impacts of the new environmental permitting regime.

Theme: Regulatory Impact Assessment

Arc 21 raised concerns that the proposed Bill's Regulatory Impact Assessment (RIA) could only be obtained via a request to the Department and it only contains some very basic financial estimation which suggests that there is very significant uncertainty associated with the estimate. As the Better Regulation Programme goes forward, it is important that robust regulatory impact assessments accompany the various bits of legislation that will come in front of the Committee.

32. DEPARTMENT'S RESPONSE. The Department accepts the need to bring forward robust regulatory impact assessments to accompany the future subordinate legislation programme.

Theme: Human Rights

Northern Ireland Human Rights Commission advises the Committee to ask the Department to set out the basis for the statement of compatibility. It also advises that departments consider the applicability of the advice given by the Joint Committee on Human Rights. This would assist committees in their scrutiny function.

33. DEPARTMENT'S RESPONSE. The Department asked the Departmental Solicitor's Office for confirmation that the Bill is within the legislative competence of the Assembly. The Departmental Solicitor's Office considered a wide range of matters, including the provisions of the Northern Ireland Act 1998, and legal issues in reaching a decision on legislative competence including compatibility with the European Convention on Human Rights. The Department also obtained clearance from the Attorney General on legislative competence prior to introducing the Bill.

I look forward to hearing from you.

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