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**[The Enforcement of Waste Law in Northern Ireland: Deterrence,  
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# **THE ENFORCEMENT OF WASTE LAW IN NORTHERN IRELAND: DETERRENCE, DUMPING AND THE DYNAMICS OF DEVOLUTION**

## **ABSTRACT**

This article examines the enforcement of waste law in Northern Ireland. It considers how a legacy of historical failures to enforce legislation in conjunction with inadequate arrangements for the delivery of environmental regulation continues to frustrate environmental protection efforts in this jurisdiction. The article demonstrates that challenges associated with delivering waste regulation faced by other UK environmental regulators are more acute in Northern Ireland due to a range of distinctive circumstances and the response of the devolved government in addressing these issues has so far achieved only limited success. The article concludes that a significant shift in enforcement culture and practice in Northern Ireland is necessary in order to ensure enforcement action against waste criminals is effective, but that ultimately fundamental structural changes to the architecture of environmental regulation are required.

**KEYWORDS:** waste law, environmental crime, enforcement, deterrence, illegal dumping, Northern Ireland

## **1. Introduction**

The enforcement of waste law is a notoriously challenging branch of environmental regulation. On the one hand, the task of regulating the legitimate waste industry is expensive, labour intensive and demanding in terms of its administration. It involves not only the

dedication of significant resources for monitoring and enforcement efforts, but also the successful navigation of a bewildering (and constantly evolving) array of rules and regulations by both the regulator and the regulated community.<sup>1</sup> On the other hand, the costs associated with responsible waste management have created significant financial incentives for unscrupulous operators to dispose of waste illegally.<sup>2</sup> The process of dealing with this particular brand of environmental non-compliance has thus brought environment agencies across the UK and throughout Europe face to face with organised criminal networks operating increasingly sophisticated illegal disposal operations.<sup>3</sup> As a result, regulators have been forced

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<sup>1</sup> While some consolidation has occurred in the context of waste law the legislative framework remains complex and with potential for further consolidation and integration. See, Eloise Scotford and Jonathan Robinson, 'UK Environmental Legislation and Its Administration in 2013 - Achievements, Challenges and Prospects' (2013) JEL 25(3) 393, 407. and UKELA, *The State of UK Environmental Law in 2011-2012 – Is there a case for legislative reform?* (2012) <<http://www.ukela.org/content/page/3006/Final%20report%20UK%20Environmental%20Law%20in%202011-2012.pdf>> accessed 15 February 2016.

<sup>2</sup> In the UK it has been estimated that waste crime costs the economy upwards of £500 million per year. See. Environmental Services Association Education Trust, *Waste Crime: Tackling Britain's Dirty Secret* (2014) <[http://www.esauk.org/esa\\_reports/ESAET\\_Waste\\_Crime\\_Tackling\\_Britains\\_Dirty\\_Secret\\_LIVE.pdf](http://www.esauk.org/esa_reports/ESAET_Waste_Crime_Tackling_Britains_Dirty_Secret_LIVE.pdf)> accessed 15 February 2016, 4-8; Barry Webb, Ben Marshall, Sarah Czarnomski and Nick Tilley, *Fly-Tipping: Causes, Incentives and Solutions* (Jill Dando Institute of Crime Science UCL, 2006); Michael Watson, 'Environmental offences: The reality of environmental crime' (2005) *Env Law Rev* 7(3) 190.

<sup>3</sup> This issue has been the subject of significant press attention in recent years in the UK, e.g. Paul Peachey, 'The British gangs running waste rackets to launder money' *The Independent* (London, 11 January 2015) <<http://www.independent.co.uk/news/uk/crime/the-british-gangs-running-waste-rackets-to-launder-money-9970348.html>> accessed 15 February 2016; Jon Henley, 'Waste Crime: Britain's war on illegal dumping' *The Guardian* (London, 11 November 2012) <<http://www.theguardian.com/environment/2012/nov/11/waste-crime-britains-war-illegal-dumping>> accessed 15 February 2016. In Europe illegal waste trafficking has recently been identified as being an emerging criminal threat by Europol: Europol, *EU Serious and Organised Crime Threat Assessment 2013*, available at <[https://www.europol.europa.eu/latest\\_publications/31](https://www.europol.europa.eu/latest_publications/31)> accessed 15 February 2016, 30. See also Stijn Van Daele, Tom

to dedicate more resources to tackling serious waste crime, cooperate with a range of other law enforcement bodies, expand their use of existing criminal sanctions and develop much more ‘deterrence’ orientated approaches than have traditionally been adopted in the context of UK environmental regulation.<sup>4</sup> Despite a manifest need for investment in enhancing the success of waste enforcement, the squeezing of the budgets afforded to environmental protection in recent years<sup>5</sup> has resulted in a scenario where the capacity of environment agencies in the UK to deliver effective enforcement of waste law has been called into question and the strategies adopted to respond to waste crime have been placed under significant public scrutiny.

The difficulties associated with waste enforcement have been graphically illustrated in Northern Ireland, where an historically fraught approach to environmental protection<sup>6</sup> coupled

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Vander Beken, and Nicholas Dorn, ‘Waste management and crime: regulatory, business and product vulnerabilities’ (2007) *Env Policy and Law* 37 (1).

<sup>4</sup> As noted by Gunningham, ‘Regulatory agencies have considerable administrative discretion with their enforcement task. In broad terms they can choose between, or incorporate some mixture of, two very different enforcement styles or strategies: deterrence or ‘advise and persuade’ (sometimes referred to as ‘compliance’)’ in Neil Gunningham, ‘Strategizing compliance and enforcement: responsive regulation and beyond’ in Christine Parker and Vibeke Lehmann Nielsen, *Explaining compliance: Business responses to Regulation* (Edward Elgar Publishing 2011) 201. Although overall approaches to regulation adopted by UK environmental regulators have varied over time, it is generally accepted that a ‘compliance orientated’ or ‘advise and persuade’ strategy has predominantly characterised UK environmental enforcement. This can be compared to the strongly ‘deterrence’ orientated enforcement strategies adopted by environment agencies in other jurisdictions, notably by the US EPA at various points in its history, see Joel Mintz, *Enforcement in the EPA: High Stakes and Hard Choices* (University of Texas Press 2012).

<sup>5</sup> The budgets of environment agencies across the UK have been subject to significant reductions in recent years. For example, the EA have had to reduce staffing levels by 15% since 2014, in addition to previous reductions in 2010 and 2011. See Alex Marshall, ‘Environment Agency cuts: surviving the surgeon’s knife’ (ENDS Report 3 January 2014) <<http://www.endsreport.com/41653/environment-agency-cuts-surviving-the-surgeons-knife>> accessed 15 February 2015.

<sup>6</sup> See Sharon Turner, ‘Transforming Environmental Governance in Northern Ireland Part Two: The Case of Environmental Regulation’ (2006) 18 JEL 245 and Sharon Turner and Ciara Brennan, ‘Modernising Environmental Regulation in Northern Ireland: A Case Study in Devolved Decision Making’ (2012) 63(4) NILQ 509.

with a distinctly challenging regulatory context have exacerbated the difficulties associated with waste regulation. The scale of the problem was thrown into sharp resolution when in June 2013 local press reported that officials of Northern Ireland's environmental regulator (the Northern Ireland Environment Agency, hereafter NIEA) had discovered evidence of hundreds of thousands of tonnes of illegally dumped waste adjacent to a licensed waste disposal facility near Mobuoy in Derry.<sup>7</sup> This discovery gave Northern Ireland the unwelcome honour of playing host to one of the most extensive illegal dump sites in Europe and provided evidence of widespread, organised offending on a commercial scale in the sphere of waste crime.<sup>8</sup> Resolution of the enforcement response to the Mobuoy offending and the clean-up of the site in question will undoubtedly take some years, but has already resulted in two arrests, the revocation of a waste management licence and promises from the NIEA and consecutive

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<sup>7</sup> Hereafter 'the Mobuoy site'.

<sup>8</sup> BBC, 'Immense illegal waste dump found outside Londonderry' (5 June 2013) <<http://www.bbc.co.uk/news/uk-northern-ireland-foyle-west-22784738>> accessed 15 February 2016; Brendan McDaid, 'Festering cache of illegally dumped rubbish beneath Derry countryside' *Belfast Telegraph* (8 June 2013)

<<http://www.belfasttelegraph.co.uk/news/environment/festering-cache-of-illegallydumped-rubbish-beneath-derry-countryside-29327258.html>> accessed 15 February 2016; I Cullen, 'Facility shut in appalling waste crime probe' *Derry Journal* (5 June 2013) <<http://www.derryjournal.com/news/facility-shut-in-appalling-waste-crime-probe-1-5160932>> accessed 15 February 2016; Northern Ireland Executive, 'Attwood moves decisively against serious waste criminality in Derry/Londonderry' (5 June 2013) <<http://www.northernireland.gov.uk/news-doe-050613-attwood-moves-decisively>> accessed 15 February 2016.

environment ministers<sup>9</sup> that those responsible would be held accountable.<sup>10</sup> However, the protracted nature of the offending that occurred at this particular site and the blatant disregard for the rule of environmental law thus displayed raises important questions as to how and why its perpetrators were able to undertake illegal activities on such an extensive scale with apparent impunity for so long, and what sanctioning response can create an effective deterrent against future commission of this type of environmental crime. These questions are not only relevant in the Northern Irish context where the quality of environmental regulation has been the subject of sustained and repeated criticism for decades, but also resonate across the UK where the enforcement efforts of environmental regulators in relation to waste have also come under significant scrutiny.<sup>11</sup>

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<sup>9</sup> The current Environment Minister in Northern Ireland is Mark H Durkan (Social Democratic and Labour Party, SDLP). Durkan was preceded by Alex Attwood (SDLP) who held the office from May 2011 until July 2013. When devolution was restored in 2007 the Democratic Unionist Party (DUP) held the environment portfolio until May 2011 when the SDLP took over. DUP Environment Ministers during this period were Edwin Poots (July 2009 – May 2011), Sammy Wilson (June 2008 – June 2009) and Arlene Foster (May 2007 – June 2008). Uniquely in the UK, Northern Ireland's environmental regulator is an executive agency currently located within the central government Department of the Environment (DOE). In 2016 the functions of the DOE will be divided amongst a number of other government departments as part of a reorganisation of central government. The NIEA is due to retain its executive agency status but will be located within the new Department of Agriculture, Environment and Rural Affairs. See, <<http://www.bbc.co.uk/news/uk-northern-ireland-31696252>> accessed 22 March 2016.

<sup>10</sup> DOE, 'Action continues in Operation Sycamore' (5 June 2013) <<http://www.northernireland.gov.uk/index/media-centre/news-departments/news-doe/news-doe-july-2013/news-doe-250713-action-continues-in.htm>> accessed 15 February 2016; BBC, 'Waste firm says 80 jobs under threat after shutdown' (6 June 2013) <<http://www.bbc.co.uk/news/uk-northern-ireland-foyle-west-22795255>> accessed 16 February 2016. The first court hearings relating to the offending at Mobuoy began in early 2015, <<http://www.belfasttelegraph.co.uk/news/northern-ireland/three-directors-in-court-over-41m-waste-tax-dodging-and-disposal-scam-31006571.html>> accessed 15 February 2016.

<sup>11</sup> For Northern Ireland see Turner (n 6) and Turner and Brennan (n 6), for other parts of the UK see for example: DEFRA, *Government response to consultation on enhanced enforcement powers and other measures to tackle waste crime and entrenched poor performance in the waste management industry* (October 2015)

This article will firstly consider the creation of a scenario in Northern Ireland where historical regulatory failures generated a weakened deterrent to compliance with waste legislation. Particular attention will be paid to the findings of a series of highly critical scrutiny reports published over the last 25 years that have expressed almost constant dissatisfaction with the delivery of waste regulation in Northern but also highlight a number of distinctive features of the regional context that have aggravated the difficulties associated with enforcing waste law in this jurisdiction. Secondly, the article will examine attempts made by the NIEA to tailor enforcement strategies to respond to the unique problems facing regulators in the devolved context. It will evaluate a programme of reform that began in 2008, and the impact of an accompanying shift in enforcement strategy on the delivery of waste regulation in practice. A key issue that will be explored is the lack of an overarching strategy relating to waste enforcement and the negative impact of fractured structural arrangements for delivering waste regulation. Finally, the article will consider the implications of recent reports that have linked the large-scale illegal dumping discovered in 2013 to wider regulatory problems. It is argued that these discoveries not only provide compelling evidence of graphic failures in waste regulation, but also demonstrate the urgent need for more far-reaching reforms in how the environment is protected in this jurisdiction. In the face of renewed public and political concern about the quality of environmental regulation delivered in Northern Ireland, this article will ultimately consider the options now available to the NIEA and the devolved government in terms of responding to complaints of systemic failure in enforcing the rule of environmental law.

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<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/466879/waste-crime-consult-sum-resp.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/466879/waste-crime-consult-sum-resp.pdf)>

accessed 15 February 2016; Katherine Simpson and Frans P. de Vries, *An Economic Assessment of Waste Crime Enforcement in Scotland* (University of Stirling, November 2014)

<<http://www.environment.scotland.gov.uk/media/100365/waste-crime-in-scotland.pdf>> accessed 15 February 2016.

## 2. The Creation of a Weakened Deterrent

In Northern Ireland environmental regulation has proven to be a problematic endeavour for some decades, occurring within a complex and shifting political arena where until relatively recently security concerns and attempts to negotiate and maintain a lasting peace settlement have eclipsed all other government priorities. Not only has the legislative framework designed to protect the environment been the subject of delayed modernisation,<sup>12</sup> but the location of the environmental regulator within central government has also raised well-documented questions about accountability, transparency and the risk of political interference in environmental decision-making.<sup>13</sup> In addition, a series of highly critical scrutiny reports published in the 1990s and early 2000s provided evidence of lax, fragmented, inconsistent and non-transparent regulation characterised by a particularly problematic approach to enforcing the rule of environmental law.<sup>14</sup> The reports catalogued repeated failures on the part of the Department of the Environment (DOE) to respond appropriately to criticism, a lack of proper enforcement policy and procedures, inequitable treatment of polluters, understaffing and resource issues, a lack of clarity in terms of enforcement roles and unsatisfactory levels of collaboration between

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<sup>12</sup> Sharon Turner, 'Transforming Environmental Governance in Northern Ireland: Part One: The Process of Policy Renewal' (2006) 18 JEL 55.

<sup>13</sup> The implications of this controversial arrangement are discussed in Sharon Turner, 'The Review of Environmental Governance in Northern Ireland' (2009) 2 Env Law Rev 10-16; Turner (n 6) and Turner and Brennan (n 6).

<sup>14</sup> Northern Ireland Audit Office (NIAO), *Control of River Pollution in Northern Ireland*, (HC 1997–1998, 693); Northern Ireland Assembly Public Accounts Committee, *Third Report, Control of River Pollution in Northern Ireland* (2001) <[www.niassembly.gov.uk/public/reports/report3-00r.htm](http://www.niassembly.gov.uk/public/reports/report3-00r.htm)>; NIAO, *Areas of Special Scientific Interest*, (HC 2003–2004, 499); House of Commons Northern Ireland Affairs Committee (NIAC), *Waste Management Strategy in Northern Ireland*, (HC 2004–2005, 349-I); House of Commons Committee of Public Accounts, *Northern Ireland's Waste Management Strategy*, (HC 2005–2006, 74); NIAO, *Northern Ireland's Waste Management Strategy*, (HC 2005–2006, 88). See also Turner (n 6).

internal teams and with partner organisations.<sup>15</sup> The same reports also seemingly indicated that the problems with sentencing in environmental prosecutions that had been the source of decades of dissatisfaction in other parts of the UK<sup>16</sup> might have been experienced more acutely in Northern Ireland.<sup>17</sup> However, while the scrutiny analysis highlighted serious overarching problems with the delivery of regulation across all environmental media, regulatory activities relating to waste disposal attracted particular concern.

A report produced by the House of Commons Select Committee on the Environment in 1990 (known as the Rossi report)<sup>18</sup> gave the first glimpse into the scale of the delay in transposing European waste directives, as well as into the serious problems associated with the enforcement of existing waste legislation and the failure to introduce a modern waste licensing system.<sup>19</sup> At this time, enforcement difficulties were exacerbated by the fact that district

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<sup>15</sup> *ibid.*

<sup>16</sup> This issue has been discussed by numerous commentators over the last thirty years, e.g. William Howarth, 'Water Pollution: Improving the Legal Controls' (1989) JEL 1(1) 25; Andrea Ross and Jeremy Rowan-Robinson, 'Enforcement of Environmental Regulation in Britain: Strengthening the Link' (1994) J of Plan and Env Law 200; Claire Dupont and Paul Zakkour, *Trends in Environmental Sentencing in England and Wales* (Environmental Resource Management Ltd, 2003); House of Commons Environmental Audit Committee, *Environmental Crime and the Courts*, (6<sup>th</sup> Report of Session 2003-04, The Stationary Office Ltd, London); ELF, Leigh Day & Co, WWF (Environmental Justice Project, EJP) *Environmental Justice. A Report by The Environmental Justice Project* (2004); Anthony Ogus and Carolyn Abbot, 'Sanctions for Pollution: Do we have the right regime?' (2002) JEL 14(3) 283; Michael Woods and Richard Macrory, *Environmental Civil Penalties: A more Proportionate Response to Regulatory Breach* (Centre for Law and the Environment, University College London 2003); Rosalind Malcolm 'Prosecuting for Environmental Crime: Does Crime Pay?' (2002) Env Law and Management 14(5) 289; Michael Watson, 'Offences against the Environment: the Economics of Crime and Punishment' (2004) Env Law and Management 16(4).

<sup>17</sup> Tom Burke, Gordon Bell and Sharon Turner, *Foundations for the Future: The Review of Environmental Governance* (2007) <<http://www.ukela.org/content/doclib/135.pdf>> accessed 15 February 9.10—9.20.

<sup>18</sup> House of Commons Environment Committee, 'Environmental Issues in Northern Ireland' (1990-91 HC 39) (London: HMSO).

<sup>19</sup> *ibid* para 61.

councils held responsibility for both operational and regulatory functions associated with waste management, creating a ‘poacher-gamekeeper’ situation where the ‘capacity for neutrality in operating the regulatory regime [was] eroded by a conflict of interest’.<sup>20</sup> This issue persisted until the Waste and Contaminated Land (NI) Order 1997 rectified the problem by transferring regulatory authority over the waste licensing system from local councils to Northern Ireland’s environmental regulator (then called the Environment and Heritage Service, EHS),<sup>21</sup> although it was not until 2003 that a commencement order actually facilitated this change.<sup>22</sup> However, while these changes ultimately removed the problematic ‘poacher-gamekeeper’ arrangements that had undermined regulatory credibility for some years and important legislative modernisation had to a large degree occurred,<sup>23</sup> wider political developments during this period were combining to create a scenario where deficits in waste regulation would soon be thrust into the public and political spotlight. In the wake of devolution, Northern Irish politicians began to realise that alongside their new powers also came the devolution of political - and potentially financial - responsibility for the years of regulatory neglect that had blighted the environment in Northern Ireland.<sup>24</sup> The situation was intensified as successive scandals

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<sup>20</sup> Sharon Turner and Karen Morrow, *Northern Ireland Environmental Law* (Gill and MacMillan 1997), ch 6, s 1.

<sup>21</sup> The EHS was rebranded as the NIEA in May 2008 when the then Environment Minister Arlene Foster controversially rejected calls for an independent environment agency but launched a programme of reform aimed at improving the performance of the existing arrangements. For a detailed discussion of this process see Turner and Brennan (n 6).

<sup>22</sup> Waste and Contaminated Land (Northern Ireland) Order (Commencement No 7) Order (Northern Ireland) 2003.

<sup>23</sup> For example, the introduction of waste management licensing. For a detailed discussion of the legislative renewal that took place during this era see Turner (n 12).

<sup>24</sup> As a function of the Memorandum of Understanding and Supplementary Agreements relating to devolution, Northern Ireland is liable for payment of any infraction fines imposed by the European Commission on the UK for failure to implement European Directives that fall within the responsibility of the Northern Ireland Assembly. Office of the Deputy Prime Minister, Memorandum of Understanding and Supplementary Agreements: Between the United Kingdom Government Scottish Ministers and the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee (Cm 5420, 2001) para B4.25.

emerged in the local press surrounding cross border illegal dumping,<sup>25</sup> the illegal export of Northern Irish waste to other parts of the UK<sup>26</sup> and allegations that councils themselves had become embroiled in illegal dumping and in breaching the terms of their own licenses.<sup>27</sup> Concerted political attention became inevitable when cross border dumping began to be linked to serious organised criminals with potential paramilitary links,<sup>28</sup> catapulting the issue into the realms of more traditional Northern Irish criminal justice concerns. The resulting escalation in press attention, as well as mounting political and public concern<sup>29</sup> about waste disposal issues

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<sup>25</sup> \_\_\_ ‘Dublin Criminals Dumping on Us’ *Belfast Telegraph* (23 March 2003); Brian Hutton, ‘Donegal rubbish ‘defacing Derry’ – Tougher penalties demanded’ *Belfast Telegraph* (14 March 2003); \_\_\_ ‘Province ‘dumping ground for Republic’s waste’ *Belfast Telegraph* (9 March 2003); Jonathan McCambridge, ‘Animal bodies dumped in Ulster – Fears as offal from the south is sent here’ *Belfast Telegraph* (24 July 2003); David Gordon, ‘Tyrone waste boss hit by £18k fines - Rubbish from south illegally dumped’ *Belfast Telegraph* (12 December 2003).

<sup>26</sup> David Gordon, ‘Green group anger at waste ‘tidal wave’’ *Belfast Telegraph* (11 May 2002); ‘Waste Shipments anger campaigners’ BBC News (11 May 2002) <<http://news.bbc.co.uk/1/hi/scotland/1980361.stm>> accessed 16 February 2016; David Gordon, ‘Fresh Twist in Scottish Dumping Wrangle – Ulster Firm was not licensed to tip refuse in Ayrshire’ *Belfast Telegraph* (22 July 2002).

<sup>27</sup> Marie Foy, ‘Larne Council Dumps Waste ‘Illegally’’ *Belfast Telegraph* (3 May 1996); David Gordon, ‘Former Mayor loses waste skip appeal’ *Belfast Telegraph* (21 September 2001); David Gordon, ‘‘Clarity’ called for in dump dispute’ *Belfast Telegraph* (28 September 2001).

<sup>28</sup> Organised Crime Task Force, *Serious and Organised Crime in Northern Ireland* (Annual Report 2005), 34. House of Commons Northern Ireland Affairs Committee, *Organised Crime in Northern Ireland: Government Response to the Committee’s Third Report of Session 2005-06*. (Ninth Special Report of Session 2005-06), 19. The media also began reporting on links between paramilitary organisation and waste crime, see David Lister and Sean O’Neill ‘IRA plc turns from terror into the biggest crime gang in Europe’ *The Times* (February 25th 2005).

<sup>29</sup> \_\_\_ ‘Safety Fears over Dumping at Hazelbank’ *Belfast Telegraph* (8 March, 2000); Marie Foy, ‘Dumping causes a stink’ *Belfast Telegraph* (3 April 2000); Maureen Coleman, ‘Judicial Review sought over dump’ *Belfast Telegraph* (7 April 2000) \_\_\_ ‘Creggan being used as a dump’ *Belfast Telegraph* (3 December 2001) Ciaran O’Neill, ‘Counting the cost of dumped ‘bangers’’ *Belfast Telegraph* (17 January 2002); Ciaran O’Neill, ‘Dumping Signs are blasted with guns – attacks by people angry with crackdown’ *Belfast Telegraph* (23 April 2002); \_\_\_ ‘Illegal Animal Dumping Slammed’ *Belfast Telegraph*, (6 May 2002); \_\_\_ ‘Stop this beauty spot dumping’ *Belfast Telegraph* (26 September 2002); \_\_\_ ‘Concern over illegal dumping’,

precipitated heightened campaigning from environmental NGOs in the province, in turn drawing more and more attention to the performance of official structures charged with waste regulation and enforcement. This coalescence of increasing attention on the problem of waste crime with the very real threat of infraction proceedings for a failure to transpose and implement elements of the EU Waste Framework Directive, meant that the handling of waste regulation was under an unprecedented level of scrutiny when responsibility for the delivery of this key function finally passed from District Councils to the EHS in November 2003.

In the years subsequent to the transfer of enforcement powers to the EHS, reports from the Northern Ireland Affairs Committee (NIAC),<sup>30</sup> the Northern Ireland Audit Office (NIAO)<sup>31</sup> and House of Commons Public Accounts Committee<sup>32</sup> unveiled continued dysfunction in the context of waste regulation. The reports expressed concerns about the risk of EU infraction fines if urgent action was not taken to improve the implementation of EU standards of waste regulation,<sup>33</sup> the serious problem with cross-border dumping attributed to the financial incentives created by differences in landfill tax either side of the border,<sup>34</sup> ‘disparities in control’ north and south of the border resulting in an influx of waste from the Republic of Ireland to both legal and illegal dump sites<sup>35</sup> and the significant loss of tax revenue as a result of illegal waste disposal.<sup>36</sup> However one recurring theme that prompted particular concern was

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*Belfast Telegraph* (25 April 2003); Brian Hutton, ‘Residents’ fury at waste dump’ *Belfast Telegraph* (17 May 2003) Michael McHugh, ‘Newry Ratepayers foot £1.25m clean-up costs – Council promises litter clampdown’ *Belfast Telegraph* (23 September 2003).

<sup>30</sup> NIAC (n 14).

<sup>31</sup> NIAO (n 14).

<sup>32</sup> PAC (n 14).

<sup>33</sup> NIAC (n 14) 3.

<sup>34</sup> *ibid* 4.

<sup>35</sup> NIAO (n 14) 12 para 5.

<sup>36</sup> NIAC (n 14) para 1.5-1.6.

the persistent failure of the environmental regulator to properly enforce waste law. This failure was characterised by a number of problems with the approach to enforcement adopted by the regulator, many of which have persisted to the present day. Particular problems included a lack of resources within DOE<sup>37</sup> that had forced prioritisation of a small number of high profile cases,<sup>38</sup> the slow establishment of enforcement proceedings,<sup>39</sup> and the lack of a formal enforcement policy.<sup>40</sup> The issue of equity in the treatment of polluters was also raised, with the Northern Ireland Audit Office stressing the need for the EHS to target both public bodies and private businesses with the same rigorous compliance activities.<sup>41</sup> A resource deficit highlighted the fact that the rush to introduce legislation by DOE policy makers in order to avoid EU infraction proceedings appeared entirely at odds with the ability of EHS to effectively enforce and implement the legislation within the necessary timeframe.<sup>42</sup> Ultimately the reports concluded that by the mid-2000s waste ‘crime [could] pay—in that the penalty is not commensurate with the financial gain or the environmental impact, either in terms of the larger commercially driven incidents, or smaller household and commercial fly tipping cases not being enforced’.<sup>43</sup>

Growing disquiet surrounding the performance of the regulator eventually led to a detailed, year-long investigation of the DOE’s enforcement function by the Criminal Justice

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<sup>37</sup> NIAO (n 14) 9, para 9.

<sup>38</sup> NIAO (n 14) para 88 and Q75.

<sup>39</sup> *ibid* para 3.21-3.23. Notably Waste Management Licensing Regulations (NI) 2003 (operative from December 2003), Integrated Pollution Prevention and Control Regulations (NI) 2003 (operative from March 2003), and the Landfill Regulations (NI) 2003 (operative from January 2004).

<sup>40</sup> *ibid*.

<sup>41</sup> *ibid* 30.

<sup>42</sup> PAC (n 14).

<sup>43</sup> *ibid* Ev 6.

Inspectorate of Northern Ireland (CJI) in 2007.<sup>44</sup> While the CJI's investigation examined the delivery of enforcement across the whole of DOE's remit (which included planning, vehicle licensing and the enforcement of a range of other environmental legislation), the delivery of waste regulation was discussed in particular detail. The CJI inspectors found that there was a tendency to set unrealistic or irrelevant targets for waste enforcement.<sup>45</sup> They also highlighted the fact that 'partnerships between the EHS and the Planning Service were not as advanced as the inspectors would have expected'<sup>46</sup> and that this had led to problems in relation to enforcement of waste management sites and waste licensing, in particular with regards to waste sites operating without planning permission and in contravention of waste licensing regulations.<sup>47</sup> This issue in particular would be graphically illustrated years later when the offending at the Mobuoy Road site was discovered. Further issues raised by the inspectors included 'tensions' between the regulator and some council authorities relating to a lack of clarity in responsibilities,<sup>48</sup> and that there was a need to 'step-up' joint cross border enforcement actions and coordination in order to deter potential criminals.<sup>49</sup> The broader ramifications of ineffective enforcement of waste law were also underlined, with inspectors emphasising that weak enforcement would provide illegal operators with a competitive

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<sup>44</sup> Criminal Justice Inspectorate *Enforcement in the Department of the Environment* (2007)

<<http://www.cjini.org/CJNI/files/6e/6e35e56d-68e5-41d3-b099-c33586abf0dd.pdf>> accessed 16 February 2016. The CJI is an independent inspectorate tasked with examining the criminal justice roles of various government bodies and limited companies in Northern Ireland. Since the devolution of policing and justice powers in April 2010 the CJI reports to the Minister for Justice, who cannot alter or influence the content of the CJI's reports. See <<http://www.cjini.org/AboutUs/Our-Remit.aspx>> accessed 16 February 2016.

<sup>45</sup> *ibid* 7, 17.

<sup>46</sup> *ibid* 9 para 2.22.

<sup>47</sup> *ibid* 2.23.

<sup>48</sup> *ibid* 11, para 2.30.

<sup>49</sup> *ibid* 12, para 2.33.

advantage over legitimate business, thus distorting the waste market and damaging the environment at the same time.<sup>50</sup> Although the focus of the 2007 CJI report was on DOE criminal justice policy and practice, the perception of problematic handling of environmental prosecutions by Northern Ireland's judiciary was also highlighted, alongside a number of other issues associated with the operation of the wider criminal justice system such as 'inexperienced prosecutors, court adjournments, levels of fines etc'.<sup>51</sup> The CJI considered that these wider issues had impeded enforcement efforts, and that there was a need for 'specialist legal jurisdiction' for environmental crime in order to 'strike a balance between the real costs of crime and the outcomes (in terms of sentences and the recovery of costs)'.<sup>52</sup>

### 3. A Challenging Regulatory Context

The cumulative analysis of the scrutiny reports discussed above indicates that the experience of enforcing waste regulation has historically been highly problematic in Northern Ireland. However, what also became increasingly clear throughout the 2000s was that regulators attempting to enforce waste law in this jurisdiction were contending with a distinctively challenging regulatory context. Three interlinked features arguably characterise this context, and have come to dominate discussions surrounding the enforcement of waste law in recent years. Firstly, the border with the Republic of Ireland has presented well-documented opportunities for operators engaged in illegal transfrontier waste activity to monopolise disparities in control north and south of the border.<sup>53</sup> These disparities related not only to

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<sup>50</sup> *ibid* 14, para 2.40.

<sup>51</sup> *ibid* 20-21.

<sup>52</sup> *ibid*.

<sup>53</sup> While it is almost impossible to estimate the true extent of illegal cross border dumping between the Republic of Ireland and Northern Ireland during the 2000s, the 2007 CJI Report (n 44, 12) pointed to the government's response to additional questions raised subsequent to a Northern Ireland Affairs Committee investigation in 2006 (n 14) for some guidance. This

divergent landfill tax and associated charges, but also to weak or inconsistent approaches to policing the border in terms of preventing illegal waste flows.<sup>54</sup> The extent of this problem became particularly evident when both the UK and Ireland narrowly avoided being made subject to EU infraction proceedings in the mid-2000s for failing to respond to the development of an illegal black market in transfrontier waste shipments.<sup>55</sup> In addition, the physical challenges of policing the border, which has 273 recognised crossing points (of which only 150 are on main roads) has also been cited by the DOE as aggravating the problems associated with combating cross border illegal dumping.<sup>56</sup>

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response indicated that at least 250,000 tonnes of household rubbish from the Republic of Ireland had been illegally disposed of in Northern Ireland by the end of 2004, and that the costs associated with the removal of this waste would amount to at least £30million. The government's full response is available at <<http://www.parliament.the-stationery-office.co.uk/pa/cm200506/cmselect/cmniaf/928/92811.htm>> accessed 16 February 2016.

<sup>54</sup> It is widely accepted that the market for this illegal waste stream arose when the Republic of Ireland introduced a landfill levy in June 2002 under the Waste Management (Landfill Levy) Regulations 2002. While initially the levy was set at €15 per tonne of waste, landfill operators steadily increased gate charges and by 2004 landfill charges throughout the Republic of Ireland had reached around €200 per tonne on average. At the same time charges in Northern Ireland were only around €50 per tonne and thus significant profits could be made from cross border trade in waste, prohibited by EU regulations on the transfrontier shipment of waste. See Karl Hanlon, 'Waste from Dublin dumped illegally in North' *Irish Times*, (10 February 2003); Liam Reid, 'Gardai to investigate unlawful dumping in the North' *Irish Times* (27 March 2004).

<sup>55</sup> By 2006 the EU Commission had commenced enforcement proceedings against the UK and Ireland due to their mutual failure to adequately control illegal transfrontier shipments of waste. IMPEL UPDATE (European Network for Implementation and Enforcement), June 2007 at <<http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/brochures/2007/08/01/newsletter-enforcement-actions-third-edition/w986.pdf>> accessed 16 February 2016. A Road Map agreed by the governments of both the Republic and Northern Ireland formed the basis of a successful defence to this litigation. Under a formal bilateral framework agreement signed two years later by the two Environment Ministers the Republic of Ireland formally accepted total responsibility for the cost of disposing of illegally dumped waste and 80% of the cost of excavation, remediation and removal. See <<http://www.northernireland.gov.uk/news/news-doe/news-doe-120609-minister-announces-agreement.htm>> accessed 16 February 2016.

<sup>56</sup> In evidence to the Northern Ireland Affairs Committee in 2005, DOE representatives noted that in relation to cross-border dumping 'The geography itself also creates a logistical headache for enforcement bodies North and South. There are 360

Secondly, while factors associated with the border have undoubtedly created a market for the development of a trade between the Northern Ireland and the Republic in illegal waste (peaking in the early 2000s); the presence of sophisticated organised criminal networks, potentially associated with paramilitary groups represents an additional distinctive facet of Northern Ireland's waste crime problem. Despite the ceasefire and cessation of violence by the larger paramilitary organisations post-1998, remnants of the criminal networks linked to these groups as well as emerging dissident groups have continued to be associated with other illegal activities such as cigarette and alcohol smuggling, counterfeiting and extortion, fuel smuggling and money laundering.<sup>57</sup> More recently, waste crime has seemingly entered into the repertoire of these groups.<sup>58</sup> Not only does this potentially add an increased level of sophistication to the commission of waste offences, but it also presents very real security risks for regulatory staff as well as increased scrutiny of their investigative policies and practices.<sup>59</sup> Furthermore, it diminishes the likelihood of public reporting of activities of waste criminals for fear of retribution, an issue highlighted by the Northern Ireland Affairs Committee in 2012.<sup>60</sup>

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kms of border, with 273 recognised crossing points, of which only around 150 are on major roads. The border areas are under the jurisdiction of a total of 10 Local Authorities, each with a slightly different approach to the problem.' NIAC (n 14) ev 115.

<sup>57</sup> Organised Crime Task Force, '2012 Annual Report and Threat Assessment' (2012)

<<http://www.octf.gov.uk/Publications/OCTF-Annual-Report-And-Threat-Assessment/Annual-Report-Threat-Assessment-2103>> accessed 16 February 2016.

<sup>58</sup> NIAO (2010) *Memorandum to the Committee of Public Accounts from the Comptroller and Auditor General for Northern Ireland: Combating Organised Crime*

<[http://www.niauditoffice.gov.uk/index/publications/report\\_archive\\_home/reports\\_archive\\_2010/combating\\_organised\\_crime.pdf](http://www.niauditoffice.gov.uk/index/publications/report_archive_home/reports_archive_2010/combating_organised_crime.pdf)> accessed 16 February 2016.

<sup>59</sup> CJI (n 44) 14.

<sup>60</sup> Evidence to NIAC inquiry into fuel laundering and smuggling, January 2012. Minutes available at

<<http://www.publications.parliament.uk/pa/cm201012/cmselect/cmniaf/uc1504-vii/uc150401.htm>> accessed 16 February 2016, Q433.

Thirdly, structural deficiencies have added to the difficulties faced by enforcement staff operating within the DOE. There are two aspects to this issue, firstly the problems associated with the location of the regulatory body as an executive agency operating within the central government and secondly the fragmented arrangements for the actual delivery of waste regulation in practice. In relation to the overarching structural problems, the ramifications of a ‘captured’ regulator are particularly relevant in the context of waste - most notably in terms of the risk of political interference with enforcement activity. On the one hand this could involve political interference in particular cases that may influence decisions surrounding the commencement or pursuit of enforcement action – an issue explicitly raised by the CJI.<sup>61</sup> On the other hand, the fact that Northern Ireland’s environmental regulator is located within central government and not under the auspices of an independent environmental protection agency (an arrangement unique within the UK) means that regulatory strategies are arguably at risk of being influenced by the political agenda of the party that is responsible for host department at any given time.<sup>62</sup> Finally, and as an extension of the previous factors, the very distinctive context within which regulators are operating has itself resulted in particularly fragmented arrangements for dealing with waste and the creation of a so-called ‘silo’ approach to enforcement.<sup>63</sup> In other words, there are essentially multiple bodies with responsibility for discrete categories of waste regulation operating within the regulator as a whole, an arrangement complicated further by the fact that some regulatory functions relating to waste continue to rest with district councils. This has created a scenario where certain types of waste crime can ‘slip through the cracks’ in regulatory effort. These cracks relate not only to the

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<sup>61</sup> CJI (n 44) ix, 48. The CJI recommended that clear procedures be put in place to ensure that DOE staff members were not subject to political, internal or other external pressures.

<sup>62</sup> This issue is discussed in detail in Turner and Brennan (n 6).

<sup>63</sup> CJI (n 44) 5, 50.

boundaries in regulatory effort between the district councils and the NIEA but also within NIEA itself, an issue that became particularly evident in the wake of the Mobuoy scandal. Furthermore, the resource pressure placed on all government bodies as a result of the economic downturn led to a growing sense that different enforcement units within the agency were struggling with their workload and as a consequence were drawing increasingly constricted lines around what fell within their remit. This had the effect of creating a ‘blinkered’, compartmentalised approach to enforcement that had significant implications in cases where offences occurred across multiple statutory regimes.

#### 4. Efforts to Reform Enforcement Practice

The failure of Northern Ireland's environmental agency to respond effectively to either its clearly challenging regulatory context or to the criticism levelled at its enforcement performance by numerous public scrutiny bodies was a key impetus behind NGO demands for a new independent environmental protection agency in the mid-2000s.<sup>64</sup> The findings of a Review of Environmental Governance<sup>65</sup> undertaken in 2006 in response to these demands provided further confirmation that there were serious problems in how environmental

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<sup>64</sup> Mounting evidence of regulatory dysfunction, combined with the failure of the DOE to respond to persistent criticisms of its performance and develop a meaningful reform agenda led Friends of the Earth (NI) to instigate the formation of a coalition of the region's nine largest ENGOs for the purposes of launching a united public campaign seeking a review of environmental governance arrangements in 2003. Fundamentally, the ENGO coalition argued that credible environmental regulation required the externalisation of responsibility to an independent environmental protection agency akin to those already established in the UK and Ireland. The campaign for an EPA and Review of Environmental Governance are discussed in detail in Sharon Turner, 'Laying the Foundations for a Sustainable Northern Ireland: The Review of Environmental Governance' (2007) NILQ (58) 422; Sharon Turner, 'Devolution as a Barrier to Environmental Reform: Assessing the Response to the Review of Environmental Governance in Northern Ireland' (2009) *Env Law Rev* 11(3) 150 and Turner and Brennan (n 6).

<sup>65</sup> Burke, Bell and Turner (n 17).

regulation was delivered in Northern Ireland and this view was affirmed by the results of the CJI investigation published a year later.<sup>66</sup> Ultimately, proposals for an independent environmental regulator were rejected amidst considerable controversy.<sup>67</sup> However, the almost complete collapse in public confidence in the ability of the regulator to discharge its enforcement function, the constant spectre of EU infraction fines for failure to implement environmental directives and alarming revelations that waste crime had been identified as a revenue stream for paramilitary groups<sup>68</sup> persuaded Northern Ireland's newly devolved government to commit to a long-overdue programme of reform in May 2008.<sup>69</sup> On the one hand, this agenda for reform centred on the adoption of an approach based on principles of 'better regulation', to include the introduction of a new suite of regulatory sanctions paralleling those about to be introduced in England and Wales through the Regulatory Enforcement and Sanctions Act 2008.<sup>70</sup> On the other hand, the Environment Minister promised an enhanced approach to enforcement delivered via a range of reforms to enforcement structures, practice and policy.<sup>71</sup>

Enforcement structures within Northern Ireland's environmental regulator have been (and remain) complex and fragmented. In 2008 when the programme of reform was announced, the NIEA was divided into four directorates (Natural Heritage, Built Heritage, Environmental

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<sup>66</sup> CJI (n 44).

<sup>67</sup> Turner and Brennan, (n 6).

<sup>68</sup> Lister and O'Neill (n 28).

<sup>69</sup> The new devolved Minister for the Environment (then Arlene Foster, Democratic Unionist Party) announced a reform agenda designed to deliver a 'more proportionate, risk-based, accountable, consistent, transparent and targeted' system of environmental regulation in her statement from 27<sup>th</sup> May 2008, Full Ministerial Statement on Environmental Governance <[www.northernireland.gov.uk/news/newsdoe/news-doe-may-2008/news-doe-270508-environment-minister-cuts.htm](http://www.northernireland.gov.uk/news/newsdoe/news-doe-may-2008/news-doe-270508-environment-minister-cuts.htm)> accessed 16 February 2016.

<sup>70</sup> Regulatory Enforcement and Sanctions Act 2008 c 13.

<sup>71</sup> Ministerial Statement, (n 69).

Protection and Corporate Services). The Environmental Protection Directorate (EPD) was then subdivided into a number of operational ‘units’, each of which had responsibility for enforcement in a discreet area of pollution control (i.e. regulation of waste, water and industrial installations). At the core of the operational changes that occurred at this time was the annexation of a section of the Unit responsible for waste regulation (the Land and Resource Management Unit, LRMU) into what has evolved in the intervening years into the Environmental Crime Unit (ECU). After 2008, the ECU was relocated to a position outside the scope of the EPD and answered directly to the Chief Executive of NIEA until restructuring in early 2014.<sup>72</sup> The 2008 announcement of the reform agenda indicated that this unit would offer the integrated approach to enforcement that had previously been missing in Northern Ireland and that it would act as a resource for the whole of NIEA in dealing with serious environmental crime of all descriptions.<sup>73</sup> Although the ECU had been in development for some years prior to 2008, its status was elevated by the announcement in which the Minister also committed to a substantial programme of investment to support recruitment and training to develop its capacity.<sup>74</sup> While this promised investment was never ultimately realised as a result of government cuts during the economic downturn,<sup>75</sup> the creation of the ECU has not only

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<sup>72</sup> The current structure of the NIEA is available at <<https://www.doeni.gov.uk/publications/niea-organisational-chart>> accessed 16 February 2016.

<sup>73</sup> Ministerial Statement, (n 69).

<sup>74</sup> *ibid* at 3. It should be noted Foster did not disaggregate between the investment directed towards better regulation and that directed towards the Environmental Crime Unit, but committed to a total investment of £0.77 million in 2008-09 and £1.98 million in 2010-11.

<sup>75</sup> While the ECU was designed to operate with a staff of 41, in December 2011 only 25 staff were employed by the Unit and the majority of vacancies existed at senior levels, in early 2012 the new Minister for the Environment, Alex Attwood (SDLP) committed to hiring a further 11 staff although it would be some years before additional staff were actually in post. See BBC News Online, ‘Northern Ireland environmental crime unit in recruitment drive’ (23 December 2011) at <<http://www.bbc.co.uk/news/uk-northern-ireland-16321099>> accessed 16 February 2016.

fundamentally shaped the NIEA's response to waste offending in the years subsequent to 2008 but has also had wider implications for the delivery of environmental regulation by the NIEA as a whole – manifested in two significant shifts in enforcement practice.

Firstly, there was a move towards focusing resources on the most severe breaches of waste law, an approach that was designed to mirror that of other agencies who handle serious crime, such as HMRC.<sup>76</sup> This was demonstrated by a pronounced narrowing of 'traditional' enforcement activity and a change in how different types of sanction were used by the Agency. Like other environmental regulators, the NIEA has access to a number of potential options when confronted with waste offending.<sup>77</sup> These include a range of administrative sanctions (i.e. the issuing of warning letters, the issuing of enforcement notices, the suspension or revocation of a waste management license) or referral for criminal prosecution to the Public Prosecution Service (PPS).<sup>78</sup> In terms of administrative sanctions, the use of both warning letters and enforcement notices by the NIEA in the context of waste reduced dramatically between 2008

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<sup>76</sup> NIEA Response to Home Office consultation on Regulation of Investigatory Powers Act, October 2010. See, <<https://www.gov.uk/government/consultations/regulation-of-investigatory-powers-act-2000-proposed-amendments-affecting-lawful-interception>> accessed 16 February 2016. Information relating to the number of suspected breaches of waste law is sparse. The CJI reported in 2015 that data relating to the number of incidents referred to the ECU indicated significant annual fluctuations but that it was not possible to accurately assess the reasons for these fluctuations. See Criminal Justice Inspection Northern Ireland, A Review of the Northern Ireland Environment Agency's Environmental Crime Unit, 2015 <<http://www.cjini.org/CJNI/files/77/776ee5fc-b3c0-4759-8fbc-18a72a8f31e5.pdf>> accessed 16 February 2016, 35.

<sup>77</sup> Contained primarily in the Waste and Contaminated Land (Northern Ireland) Order 1997 as amended but also in the Environmental Liability (Prevention and Remediation) Regulations (Northern Ireland) 2009.

<sup>78</sup> NIEA do not have a specific enforcement policy for responding to waste offences but rely on the NIEA's general (11 page long) enforcement policy. This is in contrast to other UK regulators who have far more detailed enforcement policy guidance. NIEA, *Enforcement Policy* (2011) <<https://www.doeni.gov.uk/sites/default/files/publications/doe/niea-enforcement-document-2011.pdf>> accessed 16 February 2016.

and 2011.<sup>79</sup> The number of warning letters fell from a high of 85 in 2008, to only 10 in 2011 and the number of enforcement notices issued fell from a high of 153 in 2008 to 30 in 2011.<sup>80</sup> The decline in the NIEA's use of both warning letters and enforcement notices during this period was paralleled by an equally dramatic reduction in the number of cases being prosecuted,<sup>81</sup> falling from a high of 116 in 2006 to only 24 by 2012.<sup>82</sup> This trend has continued and (according to press reports from January 2016) there have only been 14 successful waste prosecutions in the last four years.<sup>83</sup> In addition to a significant reduction in the number of prosecutions occurring there was also a change in the type of waste crime being prosecuted, with an increased emphasis on prosecuting only very serious waste crime and with less activity against the licensed waste industry.<sup>84</sup> Notably, there were no prosecutions for breaches of waste management licences between April 2009 and March 2010, with internal auditors

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<sup>79</sup> For a detailed examination of sanctioning responses used by the NIEA between 2004 and 2012 see Ciara Brennan, 'The Enforcement of Environmental Regulation in Northern Ireland: A Story of Politics, Penalties and Paradigm Shifts' (PhD thesis, Queens University Belfast 2014),174-180.

<sup>80</sup> *ibid.*

<sup>81</sup> The most common waste offences relate to the unauthorised or harmful treatment or disposal of waste and contravention of a waste management licence (Article 4), and offences relating to duty of care with respect to waste (Article 5). Upon summary conviction of an offence under Article 4 of the Waste and Contaminated Land (NI) Order (as amended) 1997, the maximum fine that can be imposed is currently £50,000 and/or a term of imprisonment not exceeding 6 months, increased from the previous maximum of £20,000 in 2007. Upon conviction on indictment, an unlimited fine can be imposed and/or a term of imprisonment of up to five years.

<sup>82</sup> Email from the NIEA to author (31 July 2013).

<sup>83</sup> Although the same article indicates a further very recent reversal in the NIEA's approach to prosecuting waste crime, with 31 cases due before the courts in the near future See, <<http://www.irishnews.com/news/2015/07/21/news/dozens-of-illegal-dump-cases-due-before-courts-198722/>> accessed 16 February 2016 and a similar recent increase in the number of enforcement notices issued, see DOE, *Compliance and Enforcement Statistics 2012/13* (2013) <<http://www.northernireland.gov.uk/news-doe-141113-new-doe-compliance>> accessed 16 February 2016.

<sup>84</sup> Email to author in response to Freedom of Information request (21 September 2011). Between 2003 and 2010 there were only 13 prosecutions brought by the NIEA involving the charge of breach of licence under Art. 4(6) of the WCLO 1997.

acknowledging that prosecution may have been the best course of action on several occasions during this period.<sup>85</sup>

The second shift in the enforcement behaviour of the NIEA was a move towards using more novel sanctioning tools in response to waste crime. In addition to administrative and criminal sanctions set out in waste legislation, NIEA also has the power to pursue assets recovery proceedings such as criminal confiscation orders or referral to the National Crime Agency<sup>86</sup> for civil recovery proceedings. The pronounced reliance on these tools since 2008 demonstrated a clear policy focus on undertaking criminal confiscation and assets recovery procedures in response to serious waste offending. This was set out explicitly in 2008 when the NI executive set a Public Service Agreement to ‘reduce the annual tonnage of waste illegally disposed of’ and ‘financially investigate a minimum of ten cases under the Proceeds of Crime Act 2002, with a view to confiscation of financial benefits obtained from waste crime by March 2011’.<sup>87</sup> In order to deliver these ambitious targets, the ECU drafted in experienced officers

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<sup>85</sup> Criminal Justice Inspectorate, Enforcement in the Department of the Environment Northern Ireland: A follow up review of inspection recommendations 2011. Available at < <http://www.cjini.org/CJNI/files/d7/d71473bc-2dc9-4ff5-b957-d410ff851852.pdf>> accessed 16 February 2016, 9.

<sup>86</sup> In Northern Ireland the Assets Recovery Agency operated until 2007, when its functions were transferred to the Serious Organised Crime Agency (SOCA), see <<http://news.bbc.co.uk/1/hi/uk/6251339.stm>> accessed 16 February 2016. SOCA was abolished in 2013 and some of its powers transferred to the new UK-wide National Crime Agency. However not all the powers available to the NCA in England, Wales and Scotland were transferred to the NCA in Northern Ireland because of concerns expressed by nationalist parties relating to accountability measures. After a protracted period of political negotiations, in February 2015 Northern Ireland’s Assembly agreed that the full remit of powers of the National Crime Agency would be extended to Northern Ireland, see <<http://www.bbc.co.uk/news/uk-northern-ireland-31115866>> accessed 16 February 2016.

<sup>87</sup> Northern Ireland Executive, *Programme for Government 2008-2011, Building a Better Future* <<http://www.northernireland.gov.uk/pfgfinal.pdf>> accessed 16 February 2016, Annex 1. However, the CJI (n 44), 6-7 noted that the approach to achieving this target was unclear to the inspectors and that percentage based targets are meaningless in the absence of an actual baseline.

with a background in investigation, and the team was trained in PACE, proceeds of crime and assets recovery legislation.<sup>88</sup> The NIEA have also referred additional financial investigations to the PSNI (Police Service of Northern Ireland), SOCA (Serious Organised Crime Agency) and HMRC (Her Majesty's Revenue and Customs) in instances where they have not been able to secure a Crown Court conviction and confiscation proceedings.<sup>89</sup> These agencies can then pursue civil recovery or criminal taxation proceedings against the perpetrator.<sup>90</sup> Through the use of POCA and associated assets recovery procedures, the ECU successfully retrieved nearly £1.7 million from waste criminals between its first use of the tools in 2007 and mid-2012.<sup>91</sup> In addition to developing its internal capacity to confiscate the proceeds of waste crime, the ECU also began to liaise more formally with a number of expert taskforce groups in areas such as financial investigation, cross border fuel laundering and heritage crime<sup>92</sup> and developed a very

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<sup>88</sup> In 2005, the Proceeds of Crime Act 2002 (References to Financial Investigators) Amendment Order enabled investigators from the DOE to become accredited financial investigators and utilise powers under the POCA. Subsequent to a period of training by the Assets Recovery Agency (ARA), by spring 2008 seven higher scientific officers from the ECU were accredited by ARA as financial investigators.

<sup>89</sup> Email from NIEA to author in response to Freedom of Information request (25 May 2012). A Crown Court conviction is required before a confiscation order can be sought, Proceeds of Crime Act 2002 156 (2)(b).

<sup>90</sup> NIEA Response to Home Office consultation on Regulation of Investigatory Powers Act, received by author in hard copy from the NIEA, (October 2010).

<sup>91</sup> The confiscation regime was applied to environmental crime for the first time in Scotland in May 2013. See, <[http://www.sepa.org.uk/about\\_us/news/2013/borders\\_company\\_handed\\_first.aspx](http://www.sepa.org.uk/about_us/news/2013/borders_company_handed_first.aspx)> accessed 13<sup>th</sup> August, 2013). Though the Environment Agency (EA) in England and Wales has also made use of these powers, they were initially used to a relatively lesser extent than in Northern Ireland. Information provided by the EA in March 2012 indicates that from 2006-2011, 38 confiscation orders have been made subsequent to EA waste prosecutions, but the vast majority (22) of these were in 2011 and 10 of those cases were for significantly smaller sums of under £5000. Email from NIEA to the author in response to Freedom of Information request (25 May 2012) and email from the EA to the author in response to Freedom of Information request (28 March 2012).

<sup>92</sup> Northern Ireland Environment Agency, 'Compliance and Enforcement Report' (Belfast, 2011).

successful strategic partnership with the PSNI.<sup>93</sup> In 2008 the NIEA's Chief Executive signed a partnership agreement with SOCA that enabled their accredited financial investigators to access Suspicious Activity Reports submitted by the regulated sector.<sup>94</sup> All Environmental Crime Unit staff are now vetted to Counter Terrorism Check level and operate their developing intelligence database at confidential level.<sup>95</sup> Finally, the ECU is represented on the Organised Crime Task Force Criminal Finance sub-group in recognition of the substantial economic drivers associated with waste crime.<sup>96</sup>

## 5. The Impact of a Shifting Enforcement Strategy

It is clear that the development of the ECU fundamentally changed the approach to handling serious waste crime within the agency. In practice this has been manifested in a narrowing of enforcement efforts and a tangible shift away from attaining 'traditional' criminal sanctions towards a focus on assets recovery and the use of criminal confiscation orders. It is also reflected in the clear alignment of the ECU approach to enforcement with more deterrence orientated law enforcement cultures such as those of the PSNI, HMRC and through its limited cooperation with SOCA. However, the developments within ECU have also had quite profound wider structural impacts within the NIEA and more recently the CJJ have questioned the

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<sup>93</sup> See <<http://www.northernireland.gov.uk/index/media-centre/news-departments/news-doe/news-releases-archive-doe-december-2011/news-doe-061211-attwood-announces-partnership.htm>> accessed 16 February 2016. See also, Ciara Brennan, *Evaluating the strategic partnership between the NIEA Environmental Crime Unit and the PSNI* (Queens University, Belfast 2013).

<sup>94</sup> NIEA Response to Home Office consultation on Regulation of Investigatory Powers Act, received by author in hard copy from the NIEA, October 2010.

<sup>95</sup> For example, ECU recruited an Intelligence Manager in June 2012, see <<https://irecruit-ext.hrconnect.nigov.net/resources/documents/i/t/c/irc116096---cib-final.pdf>> accessed 16 February 2016.

<sup>96</sup> NIEA, *Annual Report 2011-2012* <<https://www.doeni.gov.uk/publications/northern-ireland-environment-agency-annual-report-and-accounts-2011-2012>> accessed 16 February 2016.

approach to enforcement adopted within this unit.<sup>97</sup> Notwithstanding the very obvious expertise that developed within the ECU in terms of dealing with serious waste crime since its formal establishment in 2008, the net result of the internal structural reforms means that today, responsibility for waste enforcement in Northern Ireland remains fairly complex and fragmented – even more so than when the CJI undertook its investigation in 2007. In the context of waste, the enforcement role continues to be shared between the NIEA and District Councils, with the NIEA taking a leading role where larger quantities of waste are involved and local councils bearing responsibility for small scale illegal dumping, fly-tipping and littering.<sup>98</sup> However, as discussed by a number of the aforementioned scrutiny reports, there has been a protracted dispute as to exactly where the delineation of responsibilities falls in terms of the quantity of waste being dealt with, and no formal ‘fly-tipping protocol’ exists to parallel those produced in other parts of the UK that clearly establishes the boundaries of enforcement responsibilities across the whole jurisdiction.<sup>99</sup>

Responsibility for waste enforcement is further subdivided within NIEA itself, where it is split between the ECU and the LRMU.<sup>100</sup> Although the programme of reform announced in 2008 advertised the ECU as an integrated enforcement resource for the whole agency,<sup>101</sup> in

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<sup>97</sup> CJI (n 76).

<sup>98</sup> This is common practice across the UK, with the environment agencies (EA and SEPA) in England, Wales and Scotland undertaking enforcement related to illegal dumping and local government handling smaller scale ‘flytipping’ and littering.

<sup>99</sup> For the flytipping protocol in England and Wales see, England and Wales Environment Agency and Local Government Association/Welsh Local Government Association, ‘Flytipping and Illegal Waste Activities’ Working Better Together Protocol Series, Protocol 6 <<http://kb.keepbritaintidy.org/flytipping/Content/Publications/Fly-tipping%20Protocol.pdf>> accessed 16 February 2016. For the Scottish protocol see Scottish Fly-tipping Forum, ‘Flytipping in Scotland: A Guide to Prevention and Enforcement’ (December 2010), 34 and Appendix 7 <<http://dumbdumpers.org/wp-content/uploads/2014/07/Flytipping-in-Scotland-A-Guide-to-Prevention-and-Enforcement.pdf>> accessed 16 February 2016.

<sup>100</sup> See NIEA (n 92) 2—3 for the respective roles of these units.

<sup>101</sup> Full Ministerial Statement (n 69).

reality resource constraints and internal resistance to any major structural changes within the wider agency have resulted in the ECU dealing almost exclusively with very serious waste crime. As a consequence, instead of delivering the promised integration recent years have actually intensified the fragmentation of enforcement efforts, a problem raised as a serious weakness by the CJI only a year earlier<sup>102</sup> and acknowledged by the DOE.<sup>103</sup> In 2011, the CJI published a follow-up to its 2007 report, which expressed concern about the pronounced narrowing of waste enforcement effort that had resulted from the creation of the ECU.<sup>104</sup> While it acknowledged the Unit's improved investigative approach to serious waste crime, the CJI also expressed concern that the concentration on using resource-intensive confiscation of assets powers as the primary approach to sanctioning meant it could only handle 16 live cases at any one time.<sup>105</sup> The CJI also raised important concerns about the negative collateral impacts of this strategy on the rest of the agency's enforcement capacity, particularly on enforcement concerning the regulated waste industry. The report highlighted not only that most of the LRMU's enforcement staff had been transferred to the new ECU,<sup>106</sup> but also that this diminution of enforcement capacity has forced what remained of the LRMU to rely excessively on a compliance-based approach to regulation, characterised by a failure to prosecute even where this was acknowledged to be the most appropriate regulatory response.<sup>107</sup> The consequences of this lack of enforcement action came under the public spotlight in a dramatic way with the discovery of the massive illegal Mobuoy dump in 2013, which had been operated

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<sup>102</sup> CJI (n 44), 5, para 2.3.

<sup>103</sup> DOE, *Action Plan in Response to Criminal Justice Inspectorate Report on Enforcement within DOE* (2008), <<http://www.cjini.org/CJINI/files/b1/b169ceda-4e37-4448-b4a4-40e23b3f2419.pdf>> accessed 16 February 2016.

<sup>104</sup> CJI (n 85).

<sup>105</sup> *ibid* para 2.15–16.

<sup>106</sup> These included the staff previously working on financial investigation and asset recovery litigation.

<sup>107</sup> CJI (n 85) para 2.15.

behind a facade of legitimacy by a licensed waste management company. More recently, the NIEA have attempted to redress this imbalance through a programme of investment in the LRMU, the creation of an enforcement team within the LRMU, the development of protocols between the ECU and the LRMU and a widening of the ECU's spectrum of activities.<sup>108</sup>

The falling levels of enforcement action post-2008 coupled with persistent fragmentation of enforcement efforts ultimately led to a scenario where the deterrent effect of enforcement action undertaken by the NIEA in relation to waste has been substantially undermined. In order to create a meaningful deterrent sanctions must be certain in their imposition and severe to the extent that they outweigh the potential benefits that can be derived from non-compliance.<sup>109</sup> Recent research has confirmed that in the UK 'it is possible to make significant profits from waste crime, the perceived risk of enforcement action being taken is low [and] the perceived

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<sup>108</sup> *ibid.*

<sup>109</sup> Classic deterrence theory stemming from the work of Becker (G Becker, 'Crime and punishment: An economic approach', in *Essays in the Economics of Crime and Punishment* (UMI, 1974) 1—54) and other economists has been applied in the context of environmental regulation by numerous authors over the last three decades, e.g. Keith Hawkins, 'Bargain and bluff: compliance strategy and deterrence in the enforcement of regulation' (1983) *Law and Policy* 5(1) 35; Dennis Epple and Michael Visscher, 'Environmental pollution: Modelling occurrence, detection, and deterrence' (1984) *Journal of Law and Economics* 27(1) 29; Anthony Ogus and Carolyn Abbot, 'Sanctions for Pollution: Do we have the right regime?' (2002) *JEL* 14(3) 283; Clifford Rechtschaffen, 'Deterrence vs. cooperation and the evolving theory of environmental enforcement' (1997) *Southern California Law Rev* (71)1181; Anthony Heyes, 'Making things stick: Enforcement and compliance' (1998) *Oxford Review of Economic Policy* 14(4) 50; Dorothy Thornton, Neil Gunningham and Robert Kagan 'General deterrence and corporate environmental behavior'. (2005) 27(2) *Law & Policy* 262-288; Michael G Faure and Goran Skogh, *The economic analysis of environmental policy and law: an introduction* (Edward Elgar Publishing 2003); Roger Bowles, Michael Faure and Nuno Garoupa, 'The scope of criminal law and criminal sanctions: An economic view and policy implications' (2008) *Journal of Law and Society* 35(3) 389; Wayne Gray and Jay Shimshack, 'The effectiveness of environmental monitoring and enforcement: A review of the empirical evidence' (2011) *Review of Environmental Economics and Policy*, 5(1) 3; Carolyn Abbot, *Enforcing Pollution Control Regulation: Strengthening Sanctions and Improving Deterrence* (Hart Publishing, Oxford 2009).

consequences of enforcement action being taken do not outweigh the profits to be made.’<sup>110</sup> This has been clearly demonstrated in Northern Ireland, where both the certainty and the severity of enforcement action have been compromised. The narrowing of enforcement activity that has occurred has reduced the likelihood that any sanction will be imposed at all. While this constricted approach to enforcement has led to improvements in how some types of serious waste crime have been handled, the corresponding reduction in enforcement activity levelled at low and mid-range offenders has created a gap in the overall enforcement response. This has been exacerbated by further fragmentation of enforcement efforts and a failure to utilise the expertise in criminal justice enforcement developed within the ECU across the enforcement activities of the agency as a whole. In terms of the severity of sanctions imposed, while the use of confiscation proceedings creates a deterrent for some illegal operators at the serious end of the waste crime spectrum, other enforcement outcomes (notably fines imposed as a result of ‘traditional’ criminal prosecutions) have been inadequate in terms of outweighing the financial benefits that can be gained from engaging in waste crime.<sup>111</sup> Furthermore, while the increased application for confiscation orders in recent years by the NIEA has most certainly deprived some convicted waste criminals of the benefit of their criminal conduct, in order to create a deterrent the sanction must actually exceed the benefit gained. If this is the case then there is a need for the NIEA and the courts to impose a portfolio of sanctions that not only remove the profit gained from environmental criminal activity, but also deliver a penalty for the criminality in excess of any financial advantage gained. Failure to do so will encourage criminals to take

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<sup>110</sup> Waste Crime: Tackling Britain’s dirty secret, Environmental Services Association Education Trust, London, March 2014, available at <[http://www.esauk.org/esa\\_reports/ESAET\\_Waste\\_Crime\\_Tackling\\_Britains\\_Dirty\\_Secret\\_LIVE.pdf](http://www.esauk.org/esa_reports/ESAET_Waste_Crime_Tackling_Britains_Dirty_Secret_LIVE.pdf)> accessed 16 February 2016.

<sup>111</sup> Where criminal prosecutions do occur, fines are the most common sanction imposed by the courts and have been criticised for being too low. For a detailed analysis of fines in environmental prosecutions across the UK between 2004 and 2012 see Brennan, (n 79).

the risks associated with offending as in reality upon conviction they will lose only what they would have gained from their crimes (presuming the fine actually reflects the financial gain made). Ultimately, the net effect of an eroded deterrent has been to send a message to criminals who have the capacity to engage in waste crime for profit that they face a reduced chance of being apprehended, a reduced chance of actually facing any enforcement action and a reduced chance of receiving a sanction that exceeds any profit gained from their illicit activities.

## 6. Implications of an Eroded Deterrent

Despite attempts since 2008 by the NIEA to create a deterrent to non-compliance in the context of waste regulation as discussed above, in 2013 the discovery of the massive illegal dump in Mobuoy once more placed the performance of the NIEA's waste enforcement units under significant public and political scrutiny. While the discovery of the dump itself was the result of an intricate criminal justice investigation led by the ECU,<sup>112</sup> as details of the case emerged it served not to highlight the strengths and successes of the Agency's improved approach to serious waste crime, but rather to throw into sharp resolution the implications of an eroded deterrent and the legacy of a fragmented and inconsistent approach to enforcing the rule of environmental law in general. The Mobuoy site was by no means the first large illegal waste deposit discovered in Northern Ireland.<sup>113</sup> However, the extent of the criminality and the

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<sup>112</sup> A referral from the Planning Service to the ECU in February 2012 led to 'Operation Sycamore', which uncovered the full extent of illegal activity at the Mobuoy site.

<sup>113</sup> In 2011 an illegal dump comprising in excess of 100,000 tonnes of waste was discovered at the Ballytoag Road outside Belfast, see <<http://www.belfasttelegraph.co.uk/news/environment/northern-ireland-illegal-dumping-case-biggest-ever-28650543.html>> accessed 16 February 2016. Another well-publicised example involved the illegal dumping of over 250,000 tonnes of waste from the Republic of Ireland at 14 sites in Northern Ireland in the early 2000s, a revelation that almost resulted in European infraction proceedings against the UK and Ireland and for which repatriation procedures are still ongoing. See, <<http://www.belfasttelegraph.co.uk/news/environment/republic-of-irelands-illegal-waste-sent-back-28649887.html>> accessed 16 February 2016.

litany of ineffective regulatory interventions associated with this particular location seemed to represent not only a very clear example of significant failures in the regulation of waste, but also seemingly systemic failures across the whole spectrum of environmental controls. As the incident quickly spiralled into the realm of public controversy,<sup>114</sup> BBC Northern Ireland launched a ‘Spotlight’ investigation into the DOE’s response to activities at the Mobuoy site, drawing even wider attention to the incident and for the first time linking local government tendering decisions to the criminality occurring at the site in question.<sup>115</sup> Under growing pressure to respond, in June 2013 the then Minister for the Environment (Alex Attwood, SDLP) commissioned Christopher Mills to review the handling of waste regulation by the NIEA with a particular focus on the extent of the regulatory activity that had occurred in relation to the increasingly embarrassing discoveries in Derry.<sup>116</sup>

The Mills report was published in December 2013,<sup>117</sup> and although commissioned by the DOE itself rather than an independent scrutiny body its findings can be added to the substantial body of critique levelled at the performance of the DOE in delivering its enforcement function over the past 30 years. However, unlike many of the previous reports which were fairly general in nature, the focus of the Mills report on one particular incident provided a far more detailed insight into the practical consequences of a failure to undertake meaningful enforcement action – especially where the offending transcended regulatory regimes. Many of the report’s findings are reminiscent of past criticisms that have clearly remained unaddressed, including the problems derived from a so-called ‘silo’ approach to working and the consequent lack of

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<sup>114</sup> See local press reports, (n 2).

<sup>115</sup> Local councils had awarded the tender for managing recycling waste to the company at the centre of the dumping allegations. Spotlight <<http://www.bbc.co.uk/programmes/b006v04h>> accessed 16 February 2016.

<sup>116</sup> The Review was undertaken by Christopher Mills, former head of the Environment Agency in Wales.

<sup>117</sup> Christopher Mills, ‘A review of waste disposal at the Mobuoy site and the lessons learnt for the future regulation of the waste industry in Northern Ireland’ (DOE, 2013).

integration between regulatory regimes, as well as persistent concerns about low fines imposed in environmental prosecutions. The Mills report also unveiled a number of serious problems that had not been highlighted in the previous scrutiny analysis. Firstly, the emphasis of the investigation on the NIEA's response to non-compliance at one particular site not only laid bare the failure of the NIEA to respond to complaints about breaches of environmental law,<sup>118</sup> but also revealed a tendency to attempt to 'pass the buck' when internal investigations revealed potential incidents of non-compliance. The very high number of referrals and communications regarding non-compliance at the site between various units within the Department of the Environment graphically illustrated this problem.<sup>119</sup> Ultimately, Mills concluded that there was no overarching accountability procedure in place for dealing with issues of non-compliance at the Mobuoy site and a lack of clarity in terms of which units within NIEA had responsibility for dealing with particular compliance issues.<sup>120</sup>

A second and related issue that emerged was the apparent reluctance within the NIEA to escalate enforcement responses when faced with repeat incidents of non-compliance. The list of low-level enforcement activities related to activities at the Mobuoy site is striking in its extent and includes not only pollution control regulation, but also development control<sup>121</sup> and

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<sup>118</sup> Mills alleges that if the response to complaints had been more robust the illegal dumping at the Mobuoy site could have been discovered as early as 2007. Mills (n 117) 15-16.

<sup>119</sup> *ibid* 9-16.

<sup>120</sup> *ibid* 36-37.

<sup>121</sup> Development control during the period of illegal activity at the Mobuoy site fell under the remit of the Planning Service (then located within the DOE), who reported 18 enforcement cases relating to the site between 2004 and 2013.

Responsibility for planning functions (including enforcement) transferred to local councils in April 2015 as part of a process of local government reform as set out in the Planning (NI) Act 2011. See, <<http://www.planningni.gov.uk/index/about/about-reform.htm>> accessed 16 February 2016.

environmental health.<sup>122</sup> In the context of pollution control alone however, Mills reported that a number of units within NIEA had regulatory roles at the site and that each of these units undertook its own enforcement action relating to various breaches of environmental legislation.<sup>123</sup> Despite numerous compliance issues investigated by the Environmental Crime Unit, the Land and Resource Management Unit, the Water Management Unit and the Conservation Designation and Protection Team (who reported damage to a nearby ASSI caused by activities at the site) and stretching back to the 1980s, it was 2013 before the waste management licence issued to the operators of the site was finally revoked. The failure to escalate enforcement responses may have been a result of organisational culture, resource issues or simply mismanagement of information – Mills highlights the fact that there was no centralised mechanism to record incidents of non-compliance and that each of the different units within the NIEA recorded issues relating to the site separately.<sup>124</sup> The result of this practice was that information relating to overall compliance levels was fragmented in direct reflection of the fragmented arrangements for delivering regulation, making it essentially impossible for the agency to generate a clear overall picture of the scale of the problem at this complex site. Finally, Mills reported a number of deficiencies in existing waste legislation, and concluded that certain elements of legislative regime governing waste related activities were simply not working. Mills highlighted the rules surrounding the application of the ‘fit and

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<sup>122</sup> Derry City Council had responsibility for regulating the site until November 2004 when responsibility passed to the EHS (predecessor of the NIEA located within the DOE), but has residual regulatory responsibilities as the Local Authority Environmental Health Regulator. In this capacity the council investigated a number of complaints relating to the site, including noise from traffic on access roads, plant noise, odour, a fire on the site and a fly infestation. Mills reports that these complaints were referred to the NIEA who held primary responsibility for regulation of the waste activities at the site, see Mills (n 117) 14.

<sup>123</sup> These responses are listed in detail in Mills (n 117) 9-16.

<sup>124</sup> Mills (n 117) 11.

proper person' test and exemptions as being in particular need of reform.<sup>125</sup> However an annex to the report also provides a long list of powers available to the NIEA under existing legislation that were either being underused or not used at all.<sup>126</sup> Considering that the need for legislative reform and the lack of appropriate sanctioning tools have been repeatedly cited as reasons for regulatory problems at the agency, and that processes of legislative reform have repeatedly been used as a response to criticisms of regulatory performance in recent years, the fact that considerable powers are available but are reportedly being ignored or underused seems remarkable.

The immediate regulatory response to the public outcry over the failure to undertake enforcement action at the Mobuoy site has resulted in the revocation of a waste management licence and a referral of the file to the PPS with a view to prosecution of a number of individuals connected with the site in question, with the first court hearings beginning in mid-2015.<sup>127</sup> The ECU also instigated a new criminal investigation operation named Operation Toothfish to investigate links between sand and gravel extraction and illegal dumping that emerged during the Mobuoy investigation. This has already resulted in the discovery of a number of additional illegal dumping sites across Northern Ireland.<sup>128</sup> However, aside from the (long overdue) enforcement action being undertaken by the NIEA itself, the main government response to the Mobuoy scandal has essentially been limited to a series of announcements detailing intentions

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<sup>125</sup> New legislation to update the rules relating to financial provision for waste management activities was being consulted on in mid-2015. See, <<https://www.doeni.gov.uk/consultations/environmental-protection-waste-and-contaminated-land-ni-order-1997-financial-provision>> accessed 15 February 2016.

<sup>126</sup> *ibid* 22, Appendix 3.

<sup>127</sup> George Jackson, 'Three waste company directors in court over alleged £40m landfill tax evasion' *Irish Times* (19 February 2015) <<http://www.irishtimes.com/news/crime-and-law/three-waste-company-directors-in-court-over-alleged-40m-landfill-tax-evasion-1.2109926>> accessed 16 Feb 2016.

<sup>128</sup> See, <<http://www.northernireland.gov.uk/news-doe-160913-doe-takes-action>> accessed 16 February 2016.

to reform practice and pronouncing the need for additional reviews and inquiries. In response to the more general criticisms relating to the performance of the various units within the DOE in relation to waste crime (in particular the findings of the Mills report), the Minister for the Environment Mark Durkan announced in February 2014 that he would be undertaking a ‘root and branch review’ of ‘the agency, its structures, how it operates, how it responds to concerns raised by the public’.<sup>129</sup> Repeated commitments from the Minister to a fundamental shift in how waste activity was regulated in Northern Ireland were not sufficient to stave off a call for a public inquiry into the regulation of waste from Sinn Fein, who tabled a motion in the Northern Ireland Assembly to that effect on 11<sup>th</sup> March 2014.<sup>130</sup> To date no such inquiry has occurred.<sup>131</sup> In April 2014 it was announced that the root and branch review had been completed and was in fact comprised of the Mills report itself coupled with a series of reforms.<sup>132</sup> DOE has published no formal written report on the results of the ‘root and branch review’ to date, but the Minister has elaborated on his proposed reforms which include a ‘full Operational Strategy with a detailed action plan; the creation of a new Resource Efficiency Directorate staffed by officers with appropriate skills within the Northern Ireland Environment Agency (NIEA); [and] a review of the current legislative framework for waste management’.<sup>133</sup> Durkan also anticipated that the new Better Regulation Bill (which as of February 2016 was being considered by the assembly and is the eventual outcome of the sanctioning reform

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<sup>129</sup> See, <<http://www.bbc.co.uk/news/uk-northern-ireland-26297565>> accessed 16 Feb 2016.

<sup>130</sup> NI Assembly Debate 8 April 2014, Vol 94 No 4, 1-7.

<sup>131</sup> At the time of writing, February 2016.

<sup>132</sup> Written answers to Ministerial Questions, 10<sup>th</sup> April 2014, AQW 32954/11-15. Available at <<http://aims.niassembly.gov.uk/questions/PrintResults.aspx?se=&so=Ascending&sc=pAGPILcq%20pkk1yVNj9Gci8QvfDOLezHKe3w/%207hIpVU2tytIJGRA5w==&pi=0&m=All%20Ministers&qfv=1&t=pAGPILcq%20pkk1yVNj9Gci8QvfDOLezHKe3w/%207hIpVU2tytIJGRA5w==&qt=0&qtt=4&qti=All%20Ministers&r=s>> accessed 16 February 2016.

<sup>133</sup> See, <<http://www.northernireland.gov.uk/news-doe-080414-durkan-takes-action>> accessed 16 Feb 2016.

announced back in 2008) would improve the NIEA's operations<sup>134</sup> and recruited Christopher Mills (the author of the Mills report) to lead his new Resource Efficiency Directorate.<sup>135</sup>

Despite its commitments to improvement, the NIEA faced yet another knock to its already brittle reputation when the Criminal Justice Inspectorate published its report into the agency's approach to dealing with waste crime in May 2015.<sup>136</sup> While DOE had been the subject of previous investigations by the CJI in 2007 and 2011, this time the inspectors focused more closely on the structure, staffing, operations and ultimately the success of the ECU. To some degree this CJI report represented a departure from the inspectors' previous conclusions with respect to the ECU, as in the past the Unit's approach had been considered by the inspectors to be relatively progressive within the NIEA in relation to criminal investigations.<sup>137</sup> However, although the CJI acknowledged that the ECU has 'delivered considerable gains with evidence of capability and capacity, positive outputs in terms of convictions and financial confiscations'<sup>138</sup> and had developed an effective partnership with the PSNI,<sup>139</sup> the inspectors expressed significant concerns about a number of areas of the ECU's professional practice. Particular problems related to the absence of any strategic assessment relating to the risk of unauthorised waste activity,<sup>140</sup> an inefficient staffing structure and an unbalanced staffing skillset,<sup>141</sup> problematic working relationships between the ECU and other parts of the

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<sup>134</sup> *ibid* and <<https://www.doeni.gov.uk/news/better-regulation-bill-means-less-red-tape-businesses-durkan>> accessed 15

Feb 2016. For a discussion of issues related to the reform of sanctions see Turner and Brennan (n 6).

<sup>135</sup> See, <<http://www.northernireland.gov.uk/index/media-centre/news-departments/news-doe/news-doe-211014-durkan-radically-rethinks.htm>> accessed 16 Feb 2016.

<sup>136</sup> CJI (n 76).

<sup>137</sup> For example the ECU's use of confiscation proceedings in the context of waste crime. See, CJI (n 44).

<sup>138</sup> CJI (n 76), 6.

<sup>139</sup> *ibid* 32.

<sup>140</sup> *ibid* 14.

<sup>141</sup> *ibid* 22-24.

NIEA,<sup>142</sup>an ambiguous enforcement policy<sup>143</sup> and an unclear rationale for prioritising and inconsistent approach to managing cases.<sup>144</sup> Unsurprisingly, many problems identified by the CJI in 2015 had also been raised by the inspectors in their 2007 report and remain unresolved today.<sup>145</sup>

## 7. Conclusions

Two key problems persist in preventing an effective approach to waste regulation in Northern Ireland. Firstly, weak enforcement has led to the continued absence of a deterrent to non-compliance with waste law. This has been demonstrated in an eroded certainty of apprehension of waste criminals and compounded by the imposition of penalties that are not sufficiently severe to outweigh the potential benefits of engaging in illegal waste activity. This scenario, in conjunction with other factors, has created opportunities for waste criminals to engage in highly profitable illegal dumping activity across Northern Ireland despite efforts from parts of the NIEA to establish a robust response to serious waste crime. In order to increase the likelihood of apprehending and imposing a sanction on waste criminals, a shift in enforcement culture and practice across the NIEA is required. At the least this should include the establishment and adherence to a clear enforcement policy, the delivery of a risk-based waste enforcement strategy and the creation of a single enforcement unit within the agency to ensure that there are no gaps in the enforcement response that can be taken advantage of by criminals. There is some indication that the NIEA has recently made some improvements in this regard. Recent enforcement figures published by the DOE indicate there has been a significant increase in the amount of waste enforcement action being undertaken in the wake

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<sup>142</sup> *ibid* 16, 26-27.

<sup>143</sup> *ibid* 18-19.

<sup>144</sup> *ibid* 21, 32.

<sup>145</sup> CJI (n 44).

of the Mobuoy scandal,<sup>146</sup> although as yet it is unclear whether this is as a result of realigned internal organisational structures post-2014, a new approach to enforcement or whether it is merely a knee-jerk response to the heightened scrutiny placed on the NIEA in recent months. Once an offence has been identified it is important that any sanction imposed exceeds the benefit derived from the criminal activity. This will require the judiciary to take cognisance of sentencing guidelines produced in 2012,<sup>147</sup> the application of a more consistent approach to prosecuting environmental crime by the NIEA in conjunction with the Public Prosecution Service and the NIEA to make full use of the extensive suite of sanctions already at its disposal.

The second problem that has prevented effective enforcement of waste law in Northern Ireland is that regulatory structures and arrangements for responding to illegal dumping do not appear to be designed in a way that can facilitate a robust response to breaches of waste law. In addition, the NIEA has appeared resistant to implementing meaningful reform of enforcement structures despite decades of criticism. Although commitments to improving the handling of waste regulation and enforcement of environmental law in general have been made on multiple occasions, the NIEA have seemingly resisted any shift towards integration of enforcement efforts – identified by numerous commentators and scrutiny bodies as central to

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<sup>146</sup> The latest NIEA enforcement and compliance figures are available at <<http://www.northernireland.gov.uk/news-doe-141113-new-doe-compliance>> accessed 16 February 2016.

<sup>147</sup> The guidelines can be viewed at <<http://www.jsbni.com/Publications/sentencing-guides-magistrates-court/Pages/Environment-Offences.aspx>> accessed 21 February 2016. Under the Waste and Contaminated Land (NI) Order 1997 Art4(11) (as amended) in Northern Ireland the court must also have regard to the financial benefit of offending when setting the level of fine. Other initiatives have been suggested, including for example the introduction of ‘profit orders’, see Richard Macrory, *Regulatory Justice: Making Sanctions Effective: Final Report* (Cabinet Office, 2006), 74-75.

the improvement of its enforcement function.<sup>148</sup> Rebranding, internal reorganisation of existing enforcement units and the transfer of staff operating within the confines of the fragmented structures preserved by successive environment ministers is unlikely to result in the radical reforms required to regain public confidence in the regulator.

Aside from reorganising the organisational structures of enforcement within the NIEA, it has become evident that more fundamental changes to the architecture of environmental regulation in Northern Ireland are now clearly required. To date, wider issues associated with preserving the stability of the devolved government have prevented any radical changes to regulatory structures.<sup>149</sup> However, a key development looming on the horizon is the relocation of the NIEA from the Department of the Environment (due to be dissolved in 2016 as part of a reorganisation of devolved government departments) to a new Department of Agriculture, Environment and Rural Affairs (DAERA).<sup>150</sup> The decision to transfer the environmental regulator to within this new department has been met with concerns about the ability of the NIEA to effectively regulate agricultural pollution. Two years of negotiations to develop a memorandum of understanding (MOU) between the NIEA and the Ulster Farmers Union (UFU) designed to enhance cooperation and the effective regulation of farmers who fail to comply with environmental standards broke down in late 2015. Following consultation with the European Commission, Minister Durkan vetoed the proposed MOU which would have breached a range of environmental regulations (not least the requirement for sanctions to be

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<sup>148</sup> An integrated enforcement body was suggested by the Review of Environmental Governance panel in 2006 (Burke, Bell and Turner (n 17) 62); advocated by the Criminal Justice Inspectorate in 2007 (CJI (n 44) 47); promised by the incumbent Minister for the Environment in 2008 (n 69) and again reiterated by the CJI in 2011 (n 85) 9).

<sup>149</sup> Turner and Brennan (n 6).

<sup>150</sup> BBC, 'NI Executive: First minister announces new department names' 2 March 2015 <<http://www.bbc.co.uk/news/uk-northern-ireland-31696252>> accessed 21 February 2016.

‘effective, proportionate and dissuasive’)<sup>151</sup> to the extent that European funding would have been in jeopardy.<sup>152</sup> Although the UFU expressed anger at the scuttling of the MOU, environmental groups in Northern Ireland welcomed any move that would have essentially forced the NIEA to treat agricultural polluters with more leniency than other categories of polluters.<sup>153</sup> Given that a former president of the UFU was convicted of illegal dumping while actually representing the organisation on the NIEA’s better regulation board in 2011,<sup>154</sup> any agreement with the organisation would need to ensure the NIEA retained the option to undertake robust enforcement in order for the Agency to retain any sense of credibility. Ultimately the removal of the NIEA to the new department has not alleviated persistent concerns about the ‘captured’ nature of the regulator, but rather has reignited calls for an independent environmental protection agency.<sup>155</sup> With local elections due in mid-2016, the

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<sup>151</sup> Directive 2008/99/EC on the protection of the environment through criminal law, Art 5. For a full discussion of the implications of this requirement and relevant case law see, Ricardo Pereira, *Environmental criminal liability and enforcement in European and international law* (Brill, 2015), Ch 4 and 5 and Michael Faure, ‘Effective, Proportional and Dissuasive Penalties in the Implementation of the Environmental Crime and Shipment Pollution Directives: Questions and Challenges’ (2010) *European Energy and Environmental Law Review*, 256-278.

<sup>152</sup> Linda Stewart, ‘Fury at deal to let farmers escape fines for pollution’ *Belfast Telegraph* (6 April 2015) <<http://www.belfasttelegraph.co.uk/news/environment/fury-at-deal-to-let-farmers-escape-fines-for-pollution-31119738.html>> and John Manley, ‘Durkan blocks farm proposal ‘leniency’ proposal’ *Irish News* (24 October 2015) <<http://www.irishnews.com/news/2015/10/24/news/durkan-blocks-farm-pollution-leniency-proposal-303807/>> accessed 21 October 2016.

<sup>153</sup> Manley, *ibid*.

<sup>154</sup> BBC, ‘Graham Furey, former Ulster Farmer’s Union Boss, fined for illegal dumping’ 22 September 2011 <<http://www.bbc.co.uk/news/uk-northern-ireland-16305114>> accessed 8 September 2013.

<sup>155</sup> The Minister for the Environment himself called for a revisit to the independent environmental protection agency debate in September 2015. See, <<https://www.doeni.gov.uk/news/durkan-opens-debate-independent-environment-protection-agency>> accessed 9 Feb 2016.

planned reorganisation of government departments,<sup>156</sup> the recent illegal dumping discoveries, renewed threats of EU infraction proceedings and overwhelming evidence that radical change is required – the timing for calls for an independent body charged with regulating Northern Ireland’s environment might finally be politically opportune.

In conclusion, issues associated with the border, the involvement of organised criminal networks in illegal dumping and legacy issues related to the structures and delivery of environmental regulation discussed above have all acted as barriers to the effective enforcement of waste law in Northern Ireland. In addition, constant financial pressure and the cutting of the Agency’s budgets provide a pressurised context for an already challenging situation. However, the financial problems experienced by the NIEA pale in comparison to the consequences of a failure to deal effectively with illegal waste disposal. With estimates suggesting that the Mobuoy dump alone could cost the Northern Irish tax payer anything up to £100 million to remediate<sup>157</sup> and concerns that a failure to do so could result in infraction fines that could essentially bankrupt the country,<sup>158</sup> the ramifications of historic failures to properly

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<sup>156</sup> One of the primary reasons why proposals for an independent agency were politically untenable in the past centered around the fact that if the environmental regulator were removed from the DOE, then DOE would essentially become too small to be viable as a government department. This in turn would have forced an already incredibly unstable administration to renegotiate the carving up of key policy areas. For a full discussion of this issue see, Turner and Brennan (n 6) 521.

<sup>157</sup> It has already cost £1.2 million and DOE are currently developing a site remediation plan. See, <<https://www.doeni.gov.uk/news/no-threat-derry%E2%80%99s-drinking-water-mobuoy-illegal-dump-durkan>> accessed 16 Feb 2016.

<sup>158</sup> Recent proposals seem to indicate plans to leave the illegally dumped material where it is rather than remove it due to potential interference in road infrastructure upgrade plans. See, <<http://www.belfasttelegraph.co.uk/news/northern-ireland/eu-fines-over-failure-to-clean-up-illegal-dump-could-leave-us-bankrupt-campaigners-warn-31009118.html>> accessed 15 February 2016. This a strategy was deemed insufficient to fulfil EU Waste directive obligations in December 2014, costing Italy over €40 million in EU infraction fines subsequent to the European Court’s decision in Case C-196/13.

enforce waste law in Northern Ireland seem set to rumble on for some years to come. With continued scandal enveloping the site itself and any associated attempts (or non-attempts) to clean it up, Northern Ireland's efforts to deliver modern and effective waste regulation continue to remain tethered to its historical failures, wider issues associated with preserving the devolved government and a persistent culture of non-compliance with environmental law.<sup>159</sup>

ALL INCLUSIVE WORD COUNT: 13,988

DATE OF MANUSCRIPT: 04/04/16

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<sup>159</sup> Recent reports indicate fears that drinking water supplies will be contaminated by run-off from the site (although this risk was rejected by the environment minister in February 2016) <<https://www.doeni.gov.uk/news/no-threat-derry%E2%80%99s-drinking-water-mobuoy-illegal-dump-durkan>> accessed 16 February 2016; Conor Macauley, 'Illegal landfill: Environment officials 'closer' to dealing with Londonderry waste site' 25 November 2015 <<http://www.bbc.co.uk/news/uk-northern-ireland-34919937>> accessed 15 February 2016.