

THE ESTABLISHMENT OF AN ENVIRONMENTAL REGULATORY AUTHORITY (ERA)

Consistent with the Government of Jamaica policy commitment to improve the Planning and Environmental Framework, this Green Paper is being tabled in the House.

The Cabinet Office through its Public Sector Modernization Division, under the guidance of Professor Anthony Clayton of the University of the West Indies, spearheaded the development of a Concept Paper for the establishment of an Environmental Regulatory Authority (ERA). The ERA will effectively address environmental, social and economical issues that will contribute to sustainable development and national growth.

A series of consultations with public and private sector stakeholders served to inform the recommendations contained in the Green Paper. It is expected that this Green Paper will generate enthusiastic and constructive dialogue from the wider public.



Bruce Golding, MP

Prime Minister

November 26, 2010

Establishment of an Environmental Regulatory Authority

Green Paper

Public Sector Modernisation Division, Office of the Cabinet

Environmental Regulatory Authority

Contents

List of Acronyms.....	3
1 Executive Summary	4
2 Preamble.....	8
3 The current position.....	9
3.2 The National Environmental and Planning Agency (NEPA).....	10
3.3 NEPA's complex environment: legislation, plans, policies and agencies.....	12
3.4 NEPA's caseload.....	14
3.5 Enforcement problems.....	17
3.6 Failing to plan is planning to fail.....	18
3.7 The case for reform in Jamaica	23
4 The National Spatial Plan.....	25
4.1 The basis for integrated planning	25
4.2 A fully modernized planning system.....	28
4.3 Responding to changing priorities.....	30
5 The Environmental Regulatory Authority.....	31
5.1 Viable and non-viable combinations of functions and roles	31
5.2 The roles and responsibilities of the lead agencies	35
5.3 OPM - Strategy and Policy.....	35
5.4 NEPA - Planning and permitting.....	36
5.5 NEPA – Advisory, Outreach and Training.....	38
5.6 ERA - Monitoring and enforcement.....	40
5.7 Cross-cutting regulatory functions	41
5.8 The objectives of the ERA	42
5.9 Specific subject matters to be placed under the ERA.....	44
5.10 Legal Implications	44
5.11 Institutional and Reporting Arrangements	45
5.12 Management structure	45
5.13 Specialist skills	46
5.14 Organizational reviews	47
5.15 Financial considerations	47
5.16 Implementation plan	48
6 Conclusions and Recommendations.....	50
6.1 Full integration	51
Appendix 2 - ERA.....	62
Appendix 3 – Finances	63
Appendix 4 – Implementation strategy	65
Appendix 5 – Steering Committee	67
Appendix 6 - References	68

Environmental Regulatory Authority

List of Acronyms

NEPA	National Environment and Planning Agency
ERA	Environmental Regulatory Authority
NRCA	National Resources Conservation Authority
TPD	Town Planning Department
LDUC	Land Development and Utilization Commission
TCPA	Town and Country Planning Authority
RIA	Regulatory Impact Assessment
TRC	Technical Review Committee
IRC	Internal Review Committee
WLPA	Wildlife Protection Act
ISCF	Island Special Constabulary Force
NWC	National Water Commission
ODPEM	Office of Disaster Preparedness & Emergency Management
RSS	Regional Spatial Strategy
LDC	Local Development Scheme
SEA	Strategic Environmental Assessment
EMD	Environmental Management Division
SME	Small and Medium Enterprises
MoU	Memorandum of Understanding
OUR	Office of Utilities Regulation
JANEAP	Jamaica National Environmental Action Plan
UDC	Urban Development Corporation
WRA	Water Resources Authority
RPPD	Rural Physical Planning Division
LPA	Local Planning Authorities
JIS	Jamaica Information Service

Environmental Regulatory Authority

1 Executive Summary

Some significant problems in the current arrangements for planning and environmental regulation in Jamaica are impeding investment and development, whilst also failing to give the environment adequate protection. There have been past attempts to solve these problems, but most of these left the more dysfunctional elements of the previous system intact, as they have resulted in an accretion of legislation, rather than a replacement of outdated laws, and an overlay of additional regulations on top of an out-of-date planning system.

This paper outlines three key reforms aimed at removing the underlying causes of these long-running failures and provide by giving Jamaica with a modern, fully integrated planning and regulatory system. This will deliver multiple goals: robust protection for sensitive or vulnerable sites, clear delineation of no-built zones, prompt approval for developments in non-sensitive sites, a more transparent and low-risk environment for developers, and a more focused and efficient use of government resources.

The three key steps recommended in this report are as follows:

1. To establish an **Environmental Regulatory Authority**, and to transfer NEPA's responsibility for environmental monitoring and enforcement to this new agency.
2. To develop a **National Spatial Plan**, to include 'no-build' zones and to give NEPA the primary responsibility for developing, maintaining and updating this plan.
3. To give NEPA the lead role in helping to **solve environmental problems**, via education, outreach, advisory assistance and training workshops.

1) The **Environmental Regulatory Authority** (ERA) will have primary responsibility for environmental policing, compliance monitoring and enforcement. It will monitor and protect Jamaica's natural environment and biodiversity, and protect public health from environmental pollution. It will regulate both the private and public sector with regard to all projects with significant environmental implications. It will be independent and impartial. Accordingly, it will:

Environmental Regulatory Authority

- Establish and maintain consistent standards for the management and regulation of the environment in accordance with international best practice in these areas.
- Monitor the performance of both public and private sector organizations to ensure compliance with these standards.
- Respond to complaints regarding environmental breaches perpetrated by individuals, developers, other firms or state agencies.
- Impose sanctions as appropriate. The ERA will have the authority to deploy a range of measures, including prosecution, charges for remediation/restoration and, when appropriate, punitive fines for individuals or organizations that deliberately, or through gross negligence, cause serious environmental damage.

2) NEPA would be given the responsibility for developing and maintaining a new **National Spatial Plan**. A national spatial plan reflects the developmental goals for the nation, and translates this vision into a set of clear guidelines for action at both national and local level. The plan establishes clear priorities, identifies areas in which particular types of land use would be encouraged and others prohibited (e.g. - 'no-build' zones), and guides the development of transport routes, residential accommodation and industrial development, conservation of the built and natural environment, and so on. Each individual application can then be compared against the plan; applications that meet the criteria set out in the plan can be immediately approved, so that it is only necessary to undertake a more detailed review of those applications that do not meet one or more of the criteria in the plan. This greatly simplifies and streamlines the entire planning approval process. Another very significant benefit is that all Ministries, government agencies and local governments use the same spatial plan, which ensures that their projects and programmes no longer conflict with each other. Finally, this system establishes a clear and logical planning hierarchy, as local authorities would have a clear role in controlling the mix of housing, industry, retail, schools, clinics, recreation parks and so on, working within the broad parameters of the national spatial plan.

3) NEPA would have a significantly strengthened role in assisting private and public sector organizations to **solve their environmental problems**. For example, NEPA will organize

Environmental Regulatory Authority

exchanges of information as to environmental best practice, and work with sectors of business and industry to help firms to comply with environmental standards, both in Jamaica and in their export markets. This new emphasis on outreach, advice and training is needed for a number of reasons:

- Many businesses are not aware of much of the applicable environmental legislation that could affect their business. NEPA will therefore ensure that businesses understand both the problems and the solutions.
- Few businesses in Jamaica have the capacity to keep abreast of pending changes to environmental regulations and standards in key export markets. NEPA will therefore ensure that exporters are aware of such changes.
- There are some relatively new concepts, such as cleaner technology and industrial symbiosis, which can help businesses to become more competitive and environmentally cleaner by eliminating waste. NEPA will ensure that Jamaican firms learn about these new solutions and can implement them.
- It is important to ensure that good environmental solutions are both developed and disseminated. To that end, NEPA will organize exchanges of information on environmental best practice, environmental management, quality control systems, energy efficiency and environmental impact assessment. For example, NEPA will work with the construction industry to ensure that they are in compliance with the building codes and standards that will be embodied in the development approval process.

NEPA's role in monitoring and enforcement would be transferred to the ERA. As a specialised, skilled agency, focused primarily on the most serious offenders, the ERA is likely to be significantly more effective in this regard. This would allow NEPA to focus on its expanded roles in planning and in resolving environmental problems. The efforts of the two agencies will therefore complement each other. As the ERA becomes increasingly effective, more businesses are likely to turn to NEPA's advisory section to request assistance in solving their environmental problems, while NEPA's new role in managing the national spatial plan is going to start to reduce the number of environmental problems in the most cost-effective way; i.e. by good planning.

Environmental Regulatory Authority

Finally, the following two important points are to be noted:

- This study has identified several serious problems in the current system of planning and environmental regulation in Jamaica, and has proposed solutions. If the system is to work properly, **all** of the problems have to be resolved. Solving just one or more of them, in isolation, will not have the desired result. A comprehensive approach is required.
- This is a **concept** paper. If the recommendations in this paper are approved in principle, there would have to be a further study to resolve a number of detailed technical issues, such as the precise demarcation of responsibilities for environmental standard-setting, monitoring, management and protection between the agencies, the identification of roles when dealing with problems such as illegal squatting, which represent both a planning failure and a serious environmental problem, and the integration of tasks in order to ensure that all functions can be delivered through the new 'one-stop shop' system of access to government services.

Environmental Regulatory Authority

2 Preamble

Some stages of economic development often coincide with a decline in environmental quality. This can be seen clearly in countries such as China today, where their rapid economic development has resulted in an equally rapid deterioration in air and water quality. As a result, many people assume that there is an inherent trade-off, and that some environmental quality must be sacrificed for the sake of economic development. Public debate can then become confrontational, with environmentalists being accused of being anti-development and, by extension, against poverty alleviation, and developers being accused of plundering the inheritance of future generations.

However, the assumption that there is an inevitable trade-off between economic and environmental goals is no longer correct; it has become clear in recent years that economic restructuring, good planning and regulation, better management and more advanced technology can deliver a combination of economic development and growth with rising environmental quality¹ (Clayton et al, 1999ⁱ, Clayton, 2005ⁱⁱ). Failure in this regard is now more likely to be the result of policy incoherence, poor planning, regulation or enforcement, bad management and a lack of awareness of available technological solutions. Many of these problems can be seen in Jamaica today.

We must therefore improve our planning and regulatory systems if we are to achieve sustainable development, which is defined here as a combination of economic development and growth, rising incomes, high environmental standards, strong protection for important ecosystems, good management of natural resources and an improved quality of life. This can be translated into specific policy goals, such as energy and resource-efficient buildings, cities, industries and transport systems, good water and resource management, waste minimization and recovery, a reducing rate of environmental damage, with environmental remediation and enhancement where appropriate, greater resilience and reduced vulnerability to storm surge, flood, earthquake and other disasters, and urban systems that contribute to physical and social well-being and thereby help to reduce conflict and crime.

¹ Norway, for example, is a small country (population 4.6 million) with a large industrial sector, including oil, gas and chemicals, high environmental standards and a high quality of life.

3 The current position

3.1 Multiple problems

It is clear that there are certain problems associated with the current arrangements for planning and the management of the environment in Jamaica:

- Many people are concerned that there appears to be inadequate protection for important ecological sensitive sites which, in some cases, do not have clearly defined boundaries, insufficient resources to safeguard protected areas, and a lack of clarity about the procedures for permitting or prohibiting particular developments, which means that they have to be contested on a case-by-case basis.
- There are grounds for particular concern about encroachment into wetland areas, damage to reefs, deforestation, land degradation and water pollution, with the associated loss of biodiversity, air quality in some urban areas, and the apparent ease and impunity with which serious abuses (such as large-scale illegal sand-mining) can be perpetrated.
- Developers have complained about confused and overlapping rules, regulations, procedures and agency remits, which can oblige them to deal with a number of separate government agencies with inconsistent demands and requirements (this is usually with larger developments). This lack of clarity gives rise to policy conflicts, with one government agency inadvertently undoing the work of another, and results in costly delays which discourage investment.
- There is a significant number of illegal developments, where people have proceeded with construction without submitting any application, breaching planning laws and, in some cases, environmental laws as well. The extent of the problem is hard to gauge, but it is clear that a significant portion of society does not believe in the planning system, have no commitment to its purpose or appreciation of its benefits. Some of the illegal developments oblige respectable businesses to compete against less scrupulous rivals (who may be reducing their costs by evading taxes and regulation) and fosters a culture of non-compliance, where illegal behaviour is seen as both normal and advantageous.

Environmental Regulatory Authority

- There is relatively little public awareness of the real cost of inadequate enforcement. For example, failure to control over-fishing has been one of the main factors contributing to the death of the coral reefs (see Haley and Clayton, 2003ⁱⁱⁱ) which has, in turn, both contributed to beach erosion and seriously reduced the potential economic contribution of the fishing industry, whilst failure to adequately enforce air quality standards has contributed to the rise in asthma and other respiratory diseases (see Note 1 in Appendix 1). Thus inadequate environmental enforcement incurs substantial health, social and economic costs.

There have been attempts to resolve these issues², but these have had limited success, and many of the problems still remain. Some of the problems stem from defects in the **regulatory** system, others stem from gaps in the **planning** system. It is clearly in the national interest that these problems are comprehensively resolved.

Problems in the regulatory system³

3.2 The National Environmental and Planning Agency (NEPA)

NEPA was formed in 2001 through the merger of three agencies; the Natural Resources Conservation Authority (NRCA), the Town Planning Department (TPD) and the Land Development and Utilization Commission (LDUC). The creation of NEPA was partly in response to complaints about lengthy delays in development permitting by the Parish Councils, TCPA and NRCA. For example, the McCalla report (2007)^{iv} cites a 1996 study of the development approval process commissioned by the Ministry of Industry and Commerce. This recommended a number of legislative and procedural changes with the aim of reducing the average processing time for subdivision and development applications from 9–18 months to just 3 months, and the processing time for high priority applications to 6 weeks (i.e. a six to twelve-fold increase in processing speed). The McCalla report also cites a study by the Ministry of Local Government and the Environment that estimated that

² For example, the establishment of the environmental warden service was a response to the rising cost of the lack of effective enforcement with regard to issues such as watershed protection.

³ This review draws on a number of earlier studies; full details are given in the references (Appendix 6).

Environmental Regulatory Authority

there was some \$3.5 billion worth of investment capital for local development pending, awaiting approval for applications submitted.

One of the most important reasons for the establishment of NEPA as a single agency, therefore, was to solve the problem of slow and cumbersome development approval and thereby increase the flow of investment, as well as to foster a more integrated approach to planning and environmental protection.

Although NEPA was intended to bring about a significant improvement in the situation, a regulatory impact assessment (RIA) in 2006^v found that NEPA had actually been "problematic and dysfunctional since its creation". The study found that the agencies had only been partially merged, and that the different agency functions were still governed by separate legislation. NEPA was set up as an Executive Agency prior to The Executive Agencies Act, which meant that NEPA was not given some of the instruments granted to other agencies. This obliged NEPA's executive agency structure to operate in parallel with the three separate legal entities over which it exercised administrative responsibility after the merger, each of which still had to have its own board (this was effectively reduced to two boards, at least temporarily, as the Land Development and Utilization Commission (LDUC) was absorbed and remained 'silent' on applications. Each of these boards then met and adjudicated separately on issues, including applications that had to be approved by more than one of the boards, which created the possibility that an application might conceivably be approved by one part of NEPA and rejected by another. So the merger process itself had created a number of serious organizational problems.

Environmental Regulatory Authority

3.3 NEPA's complex environment: legislation, plans, policies and agencies

To add to this internal complexity, the RIA found that NEPA was operating under a number of separate legal Acts, of which three were considered core:

- The Natural Resources Conservation Authority Act
- The Town and Country Planning Act
- The Land Development and Utilization Act.

The other acts were:

- The Wildlife Protection Act
- The Beach Control Act
- The Watersheds Protection Act
- The Endangered Species (Protection, Conservation and Regulation of Trade) Act
- The Local Improvements Act.

The McCalla report noted that in addition to its statutory framework, the work of NEPA was further guided by over a dozen other policies and plans (see Note 2 in Appendix 1).

At the time of the RIA study in 2006, NEPA also had multiple divisions and allegiances, with five divisions and twenty branches, and affiliations to a large number of other Government agencies. For example, the McCalla report noted that the NRCA's Technical Review Committee (TRC), along with the other agencies that might have to be consulted on particular issues, comprised a total of sixteen agencies of government with responsibility for particular aspects of various matters related to environmental management (see Note 3 in Appendix 1).

The RIA study concluded that NEPA's structure, legislative framework, policy commitments and inter-organizational arrangements were relatively unusual and complex, that the desired simplification, efficiency gains and reduced cost had not been achieved, and that it was hardly surprising that this hampered NEPA's operations.

Environmental Regulatory Authority

It is important to note that NEPA's structure was **not** supposed to be a permanent arrangement. The McCalla report notes that the National Land Policy of 1996 set out three stages for the creation of NEPA:

- An interim merger. The merger process was originally scheduled to start in 1998, but became operational in 2001 **before** the necessary legislative reforms were completed. This was done because the necessary legislative reform process was expected to be lengthy, and there was a perceived need to resolve uncertainty and allow NEPA to begin operations⁴.
- Legislative housekeeping. This was supposed to include relatively minor changes to regulations and legislation over the following two years to improve efficiency.
- The final phase was the legislative regularization of the arrangements for NEPA. It was expected that this would include substantial legislative reform in order to modernize land planning, environmental regulation and administrative processes, and reconcile conflicting legislation.

Phase 1 was completed, and some work was undertaken under phase 2. Unfortunately, the crucial phase 3, which would have made sense of the whole process, has still not been completed.

The merger might have also had a better chance of success if other, parallel reforms had succeeded. The McCalla report points out, for example, that the Town and Country Planning Bill, which was drafted in 1999 to replace the existing Town and Country Planning Act, would have introduced a number of important reforms (including a General Development Order to cover the entire island, and a specific clause to ensure that the Act would bind the Crown), but that since the merger no further action had been taken in this regard⁵. This is unfortunate, because these two reforms would have summed to a much more comprehensive and mutually supportive set of necessary changes, whilst the reform

⁴ It is important to avoid making the same mistake with the creation of the proposed ERA.

⁵ This was partly because there was a lack of agreement as to whether the draft bill should go forward on its own or be part of a larger NEPA bill. The local authorities advocated a separate bill.

Environmental Regulatory Authority

of the TCPA would have greatly reduced the administrative load on NEPA and perhaps allowed NEPA time to complete its transformation.

As noted above, one of the reasons for the establishment of NEPA was to streamline and accelerate the approval process, but this did not succeed. NEPA's complicated structure and the fact that a number of other agencies still had to be involved in the process for obtaining planning and environmental permits undid much of the point of the exercise. NEPA's inheritance of cumbersome institutional arrangements and parallel tracks resulted in continuing lengthy delays and poor customer service (see Note 4 in Appendix 1). NEPA's merger also did not result in the intended integration of environment, land use and development planning considerations. As the McCalla report put it, "Town and Country Planning and environment exist together in the name of a division but the respective operations are separate, being joined only by the word 'and'.

3.4 NEPA's caseload

Under the NRCA Act, the Authority was mandated to take such steps as were necessary for the effective management of the physical environment of Jamaica so as to ensure the conservation, protection and proper use of the natural resources. After the merger, this agenda had broadened to include the following tasks:

- To monitor the natural resource assets and the state of Jamaica's environment.
- To prepare national environmental, planning and development strategies and action plans and monitor the implementation of programmes and initiatives.
- To prepare Town and Parish Development Plans and Parish Development Orders.
- To prepare Subject Development Orders (such as the Telecommunications Development Order).
- To advise Local Authorities, private sector, TCPA and Government of Jamaica on Land Use Planning and Development.
- To advise the LDUC on change of Agricultural Land Use.
- To enforce environmental and planning laws and regulations and approvals in the areas covered by the Development Orders.

Environmental Regulatory Authority

- To provide Environmental and Land Use Database Systems.
- To provide analysis of the change in NEPA's functions compared to the NRCA.
- To process Applications for Environmental Permits and Licences for:
 - Beach use
 - The Construction and Operation of Industrial Facilities listed on the Prescribed Categories Project List (NRCA Permit and Licence Regulations 1996 & 2004) Amendment)
 - Discharge of sewage
 - Discharge of industrial waste
 - The export of Wildlife Species (such as Conch)

This is a large set of complex, demanding tasks, and NEPA was at no point given a fully commensurate complement of staff or other resources. The increasing flow of applications was a particularly heavy load on NEPA's relatively slender resources, with both the volume and the complexity of the applications increasing markedly. With this increasing workload, it is not surprising that NEPA was obliged to focus more on development permitting and less on planning and environmental management, and was also unable to deliver the anticipated increase in speed.

There were several other reasons for the continued slow processing of applications for planning and environmental permission. For example, the Environmental Permit and Licence procedure, which was supposed to be much simpler and faster after the merger, still involved multiple tracks and several agencies. Applications would be lodged at NEPA, then pass from the Applications Secretariat through the Applications Processing Branch to an officer in the relevant professional field. The application would also be circulated to NEPA's Internal Review Committee (IRC), which determined if it required further processing (such as an EIA or some other consideration). The applicant would then be notified of the requirements to be fulfilled for further processing of the application. Another problem was that planning applications under the TCP Act would be lodged with the Parish Council where the land was located, but some selected applications would then be sent to NEPA for advice or for processing, and the basis for referral was not always entirely clear

Environmental Regulatory Authority

or consistent, which created uncertainty. A third complication is that while the Permits and Licences Regulations under the NRCA Act (Prescribed Areas Order) apply to the entire island, NEPA also has the responsibility to review development applications and subdivisions against the provisions of development orders, but not all areas have development orders. Where there is no development order, NEPA uses a Manual for Development. This was developed by TPD in 1982 and was only revised as recently as 2006. This created two more different tracks for environmental and planning permitting; one for 2/3rds of the island, another for the remainder.

Other problems have become apparent since the merger. For example, the RIA report noted that NEPA had been left with important gaps in its mandate (for example, the current legislation with which they operate makes no reference to the more sophisticated and cost-effective market-oriented regulatory instruments used elsewhere⁶, which might have allowed them to achieve results at less cost⁷), while the McCalla report pointed out that NEPA was given a set of wide and sometimes conflicting roles, including:

- Regulator
- Policy maker
- Advisor
- Manager
- Planner

Experience elsewhere suggests that some of these functions can be successfully combined, but some must be kept separate (see Clayton et al, 1999, and also the discussion below). There does not appear to have been an explicit consideration of which functions should – and should not – be bundled into NEPA, which may well have caused

⁶ Countries such as the Netherlands, for example, have a land-fill tax with an escalator, so that the charges are set to increment automatically each year. This allows companies to know exactly how much it will cost them to send a ton to landfill in ten years time, which then allows them to calculate the Return on Investment (RoI) on waste minimization technologies. There are also pollution pricing models, such as carbon trading, which are supposed to allow pollution reduction in the most cost-effective manner.

⁷ The main exception here was the development of the air quality regulations, which included a regulatory impact assessment to determine the likely impact of the regulations on business and industry.

Environmental Regulatory Authority

problems subsequently for NEPA (or, more likely, resulted in the effective dropping of some functions).

3.5 Enforcement problems

Most studies agree that NEPA was given insufficient capacity, resources and institutional support to fulfill all its obligations. For example, the RIA report noted that NEPA had a limited ability to perform investigative monitoring, while its ability to enforce was limited both by a lack of capacity and by the paltry fines levied for environmental breaches under the NRCA Act⁸. The situation is not consistent, however. One of the more recent pieces of legislation, the Endangered Species Act (2000) does allow for more serious penalties, and there are provisions for penalties to be increased by order subject to affirmative resolution in the Houses. The penalties under the WLP and the Beach Control Amendment Act (2004) have also been increased. Thus the problem is in part a lack of consistency, and in part the lack of mechanisms to allow penalties to increment automatically. Another part of the enforcement problem reflects the generally low level of awareness in both the police and the judiciary of the true seriousness and economic cost of these crimes⁹. The McHardy report (2003)^{vi} pointed out that controls to prevent illegal or damaging land development were rarely enforced, as a result of a lack of enforcement capacity in local government, a reluctance on the part of the police and the judiciary to use the full range of powers available to them, failure to serve enforcement notices properly, and to some extent the public's lack of understanding of the planning system¹⁰. The McCalla report noted that it was intended that enforcement should be carried out by NEPA's enforcement officers and the Island Special Constabulary Force (ISCF), but that most ISCF officers were not aware of their responsibility over environmental offences or did not see them as a priority, got little information from the environmental authorities, and were generally

⁸ There were proposed increases in the levels of fines, and the necessary Bill was drafted but not enacted, because it was overtaken by this more general discussion of deeper failings in the system for planning and environmental protection.

⁹ An ENACT programme attempted to address this problem by improving multi-agency enforcement. There were also three symposia aimed at sensitizing the judiciary as to the importance of environmental issues, although there was no evaluation to see whether these had had any effect in terms of sentencing.

¹⁰ As this suggests, there is a serious problem with regard to enforcement of planning breaches. It may be necessary to support a major programme of public education to explain the planning process, as well as strengthening the capacity to inspect and enforce.

Environmental Regulatory Authority

unaware of illegal activities taking place (such as housing being constructed without permits).

This lack of support was also reflected in several confidential interviews given during the RIA study that indicated that there could also be serious disincentives to pursue some individuals. There were accounts of politicians intervening on behalf of friends or constituents, for example, and placing officers under severe pressure.

This was a daunting combination of problems, which affected NEPA's effectiveness and reputation (see Note 5 in Appendix 1). Both the RIA and the McCalla report therefore recommended that the unfinished business of rationalizing and strengthening NEPA be concluded as quickly as possible, and noted that this would involve repealing and replacing several existing, outmoded and largely disconnected items of legislation with a coherent and improved legal framework (see Note 6 in Appendix 1).

Problems in the planning system

3.6 Failing to plan is planning to fail

Many of the most serious problems, however, did **not** originate with NEPA (although NEPA was often blamed), but fundamental deficiencies in the planning system. For example, a review by KPMG Consulting in 2002^{vii} noted various problems, including:

- That there was little real planning, as this had been largely replaced by development control, and development control was largely managed by central government, leaving little real role for local government.
- The planning system was unwieldy and did not address modern planning issues.
- Many planning outcomes did not have public participation or support.
- There was a lack of adequate capacity at all jurisdictional levels.

Environmental Regulatory Authority

- The long time taken for development approvals, which had a negative impact on development and investment¹¹.

The KPMG report noted that by 2002 there had already been a plethora of planning, institutional development, and local government capacity building initiatives, all of which attempted to address some aspect of the various concerns with the Jamaica planning system (see Note 7 in Appendix 1), but that many of the problems remained in spite of these initiatives. The KPMG assessment of these attempts at reform was that they were not coordinated or based on a consensus as to the way forward. The report noted that “this, more than any single other issue, must be addressed in order to establish a measured, deliberate and integrated approach to modernization – a national directive appears to be the only way to ensure this”¹².

The report concluded that the fundamental problem was that planning legislation in Jamaica was outdated. In particular, the report noted that:

- Planning control was largely at the national level, and the Minister had the authority to intervene in individual cases and over-rule decisions made by a parish council, which raised concerns about due process, while local communities were not empowered to develop their own plans.
- The Town and Country Planning Act was outdated, and provided for regulation through the development order mechanism, which “appears to be a curious mix of planning and regulatory components, and not succeeding well at either”.
- NEPA planners were responsible for preparing and updating the national physical development plan, but the plan management and updating process was onerous and under-resourced. The plans were not coordinated with the planning and budgeting cycle of the agencies charged with delivering components of the plan, and quickly became out-of-date, and the NEPA planners were struggling with an

¹¹ At the time of the study, 55% of these approvals had been waiting for 1–2 years, 28% had been waiting for 3–5 years, 7% had been waiting for 6–10 years and 9% had been waiting for over 10 years.

¹² Current attempts to address this problem include the 2030 plan and the 'Legs and Regs' committee, both of which represent attempts to improve policy coherence and harmonization.

Environmental Regulatory Authority

outdated planning system that placed most of the emphasis on processing development control matters and very little on actual planning.

- There was no effective mechanism to support integrated planning, and that all programs were effectively uncoordinated, as they were operating in the absence of a clear national planning framework.
- NEPA's planning activity was dominated by development control matters, and the task of processing an estimated 4,000 applications (over 75 per week in 2002) was straining NEPA's planning resources. The KPMG report pointed out, however, that much of this overload was really unnecessary, as many of the applications did not require an equal level of scrutiny or circulation to other agencies. KPMG suggested, for example, that instead of circulating applications to the Fire Department, it would be much more efficient to have the Fire Department provide a map of the community denoting areas where applications can be automatically approved by the Fire Department, as well as the areas where more detailed reviews must take place¹³.
- There was no time limit imposed on the reviewing agencies, and NEPA was not empowered to conclude that if no response had been received by a given date, that the agency had no objection.
- There was little or no planning taking place at local level, nor was any local-level planning authorized under the Town and Country Planning Act, so the primary function of planners at the local level was simply processing applications.
- There were significant numbers of illegal developments, where people had proceeded with construction without submitting an application. Estimates of the level of this activity varied from relatively insignificant to about half of all development applications, so the true extent of the problem was hard to gauge, but it was clear that a significant portion of society did not believe in the planning system, had no commitment to its purpose or appreciation of its benefits.

¹³ This is part of the value of a spatial plan, as all valid concerns and constraints can be mapped onto the same plan, thereby making the task of approving or rejecting applications much easier and therefore faster. So, for example, the NWC would identify its concerns (pipelines, aquifers and so on), the ODPEM would identify the areas liable to flooding or landslide, and so on. These would all be set out on the same GIS map, allowing everyone to see where development should and should not be permitted.

Environmental Regulatory Authority

Other studies also support the conclusion that the most fundamental problems lie in the planning system. For example, the McHardy report noted that development plans were supposed to be long-term and be concerned with the best use of land in an orderly and progressive manner, but that they did not have proper recognition in law, and that their main use was as the basis for preparing development orders. The report also noted that the process for the preparation of development plans was extremely slow, mainly because of a lack of adequate financial and human resources, and that, as a result of the lack of development plans and the lengthy process involved in converting them into regulatory tools, many areas of the country did not have development orders, and that many of the ones that did exist were out of date. The report further pointed out that the Town Country Planning Act did not provide for a national physical plan or the basis for a comprehensive policy for the use and development of land in Jamaica, and noted that two National Physical Plans had been prepared but never adopted.

The McCalla report agreed, noting that with the sole exception of the St. Ann Development Order (2000)¹⁴, the Development Orders issued by TCPA were decades old¹⁵. The report recommended a comprehensive updating of all the development orders and plans for every parish, an enhanced role for local government in environmental management, and a significant improvement in coordination and streamlining of administrative procedures. The report concluded that NEPA's focus on the permitting process should be replaced by integrated development planning and permitting.

It is clear that the lack of a proper planning framework is one of the main factors causing delays in the processing of applications. The reason is simple; a good planning framework sets out the rules, principles and zoning parameters that guide development. Each individual application can then be compared against the plan; applications that meet the criteria set out in the plan can be immediately approved, so that it is only necessary to

¹⁴ The report suggested that St. Ann's modern development order was probably a factor in its relatively rapid economic development as the hub of north coast tourism.

¹⁵ Some more Development Orders have been drafted in the interim since the McCalla report.

Environmental Regulatory Authority

undertake a more detailed review of those applications that do not meet one or more of the criteria in the plan¹⁶.

This idea would have to be developed in more detail, of course, with several case studies (such as the Canoe Valley area) used to test this proposed new approach.

However, some substantial reform in this regard is essential, as the current system is seriously dysfunctional. For example, the McHardy report notes that the Ministry of Local Government estimated in 2002 that less than 5% of applications were completed in less than one year and over 50% of applications had been outstanding for 1-2 years, but added that the data was probably skewed by the number applications which had been dormant for years, noted that in some cases, this was because the applicants had not provided complete information, and concluded that one of the major limiting factors was therefore the lack of proper plans and guidelines¹⁷.

These deficiencies in the planning process have created significant ambiguity, uncertainty and delays, which are likely to have hampered a number of legitimate applications from respectable businesses. As the KPMG report suggests, the gaps and inefficiencies are also likely to have created both incentives and opportunities for people to evade effective regulation.

A particularly tragic consequence of the absence of a proper planning framework is the development of settlements in areas that are highly vulnerable to storm surge, flooding and landslides, which can then cost people their property, livelihoods or lives. Some of these settlements are illegal, which reflects the lack of consistent enforcement, while others are

¹⁶ Some similar ideas have been discussed in the 'Legs and Regs' project.

¹⁷ Dormant applications can also occur when an applicant is told, for example, that they must wait for improved water service before proceeding. The application file is kept open, so that this would also contribute to the apparent slow completion rate. NEPA also has a 'delisting' process to remove certain applications from the pending file.

Environmental Regulatory Authority

legal, but still sited in unsafe areas, which reflects the lack of a hazard map or proper spatial plan (see below).

It is crucially important, therefore, to develop a proper planning system for Jamaica, and to ensure that there is a government agency with the strength and integrity needed to develop and maintain the plan and to ensure compliance.

3.7 The case for reform in Jamaica

The current situation is clearly not in the national interest. The environment is not being properly valued or adequately protected, potential risks to human health are not sufficiently taken into account, development is delayed, investment is lost and officials are left unsupported.

3.7 Repair or replace?

There are several initiatives to redress some of the current gaps. For example, legislation is in process for the approval of cellular towers, and an attempt is being made to update the development plan/orders for the various parishes. It is also important to note that there have been some very significant successes. The legislation that created the national parks, for example, is impressive, and superior in some respects to similar legislation adopted elsewhere (including the UK), although this success was somewhat undermined by the lack of resources needed to properly protect and police the parks. The important point, however, is that the current unsatisfactory situation is partly the result of a number of previous attempts to reform and repair the system, which suggests that a more fundamental re-think is now required.

Most of the previous attempts at reform were addressed to specific failures, rather than the underlying systemic problems, and therefore left some of the most dysfunctional elements of the previous system intact. This process typically resulted in an accretion of legislation,

Environmental Regulatory Authority

rather than a replacement of outdated laws, and an overlay of additional regulations on top of an out-of-date planning system. Partly as a result of these various defects in the planning and regulatory systems, Jamaica has experienced a seriously dysfunctional combination of low economic growth with continuing environmental degradation, the opposite of the desired outcome.

It is unlikely, therefore, that the fundamental problems in the system can be significantly improved by yet further tinkering and piecemeal reform. This report therefore proposes a more comprehensive alternative; that Jamaica adopt an integrated approach to planning and regulation that will deliver multiple goals; robust protection for the most sensitive sites, rapid approval for developments in non-sensitive sites, and a more focused and efficient use of government resources. This will require greater policy coherence, the development of a national spatial plan, clarity about the roles of the lead agencies and the creation of one new agency, an Environmental Regulatory Authority (ERA), with responsibility for environmental monitoring, management and enforcement.

This new approach has several goals. One is to strengthen environmental enforcement and thereby encourage compliance by organizations and institutions. Another is to clarify the roles of the various government agencies involved in planning and environmental regulation. In particular, it will help to streamline NEPA's operations by reassigning the responsibility for enforcement, thereby allowing NEPA to focus on good spatial planning, on delivering an efficient development approval process and on helping firms come into compliance.

It would be helpful to change NEPA's name in order to make the distinction (between the old version of NEPA and the new ERA) clear. For example, NEPA might become the National Planning Agency or the National Planning and Development Agency. For the purposes of this report, however, it is still referred to as NEPA.

4 The National Spatial Plan

4.1 The basis for integrated planning

The essence of a spatial plan is that it represents a clear statement of the overall vision and goals for a nation, and translates this vision into a set of clear guidelines for action at both national and local level. The McHardy report defines spatial planning as a high level planning process that is inherently integrative and strategic, that takes into account a wide range of factors and concerns and addresses the uniquely spatial aspects of those concerns. This broad concept can include capital expenditure programmes as well as the management and regulation of land-use change and land development.

The spatial plan then guides the development of transport routes, residential accommodation and industrial development, conservation of the built and natural environment and so on. The plan establishes clear priorities, and identifies areas in which particular types of land use would be encouraged and others discouraged. All Ministries, government agencies, local government councils and so on then use the same spatial plan, which means that their projects and programmes do not then conflict.

This concept is supported by the UN Habitat Agenda, in the Istanbul Declaration on Human Settlements, 1996, which states that urban problems can only be resolved with a comprehensive approach that will address a wide range of social, economic, demographic and environmental factors, including "homelessness; increasing poverty; unemployment; social exclusion; family instability; inadequate resources; lack of basic infrastructure and services; lack of adequate planning; growing insecurity and violence; environmental degradation; and increased vulnerability to disasters"^{viii}.

One example is the Regional Spatial Strategy (RSS) model used in the UK. Each UK region develops a RSS as its main strategic planning document. This will include, for example, targets for housing, development and employment. Each sub-district will then have its own Local Development Scheme (LDS), a three-year development plan for the

Environmental Regulatory Authority

local community. These RSS and LDS planning frameworks also include a Strategic Environmental Assessment (SEA), which is a requirement under European Union law.

Jamaica is already committed to introducing this idea in principle. Chapter 10 of Agenda 21, to which the Government of Jamaica is a signatory, states that governments should “establish a general framework for land-use and physical planning within which specialized and more detailed sectoral plans (e.g., for protected areas, agriculture, forests, human settlements, rural development) can be developed.”

The KPMG report agreed that the key step to a resolution of the planning and regulatory problems in Jamaica would be to set out a clear definition of national interests and priorities with regard to transport systems, health care, housing and so on, and to embed these policy commitments in a modernized planning framework. The KPMG report specifically noted that the solution to the cumbersome development process was to rationalize the planning system, not to add more staff to handle development control. The KPMG report also recommended that more responsibility for planning should be decentralized to local level, but pointed out that this would only work in the context of a clear national policy framework. The McHardy report agrees, noting that the local government reform programme in Jamaica is based on the principles of subsidiarity (which states that functional authority and expenditure responsibility should be assigned to the lowest level of government that is capable of effectively implementing a service), but that this must be properly coordinated with national strategic priorities if it is to be effective, and actually achieve the desired results. This in turn requires a flexible but robust mechanism, which is the role of a national spatial plan.

The KPMG report made the important distinction that it was not recommending a static physical development plan, but rather to establish national policies that would provide guidance for local governments within their jurisdictions. The KPMG report pointed out that the traditional system of national physical development plans is too static and does not provide the necessary policy context and flexibility to allow for changes in land use as circumstances require.

Environmental Regulatory Authority

As this suggests, a good spatial plan is dynamic. The McHardy report recommended that a spatial plan should be reviewed every five years, but the use of a GIS system makes this unnecessary, as the plan itself is continuously updated. It is still important to review the underlying set of priorities from time-to-time of course; to ensure that they are still relevant to the national needs (see the example below).

The KPMG report therefore recommended a single Planning Act that that would provide transparency, accountability and due process, and that would be independent of political influence (this would involve removing Ministerial discretion on individual development matters, the creation of an independent appeal board process and provision for public participation). This would be accompanied by a clear statement of national priorities, which should incorporate principles of sustainability, coupled with a significant delegation of planning to the local level (see Note 8 in Appendix 1). At the core of this process would be what the KPMG report called a 'dynamic Future Land Use Map', which would include any Special Development Areas. The Future Land Use Map would set out zones, which would define the kinds of uses permitted in each zone, and the kinds of proposals that would have to be more carefully reviewed.

The zoning would control development in each area by regulating the use of land, buildings and structures. This regulation, in addition to other standards, could include such things as prohibited or permitted uses, environmentally sensitive areas, the location, height and density of buildings, residential or traffic requirements, architectural design standards and so on. Thus the development of a national spatial plan would permit real decentralization of planning, as every local authority would be able to develop its own development plan within the parameters of the national spatial plan. The current system of development orders would be replaced by zoning bylaws.

The KPMG report argued that this kind of sound planning system, with transparency, accountability and certainty, would encourage investment, and concluded that there should

Environmental Regulatory Authority

be a single national planning agency, which would set out the statement of national interest and ensure that local governments adhere to the provisions of the planning act.

4.2 A fully modernized planning system – improving and regulating land development

The earlier sections of this report explain why it is important to ensure that the processes of planning, development and environmental protection are far more coherent in future. This requires that Jamaica adopt a modern planning system. It is recommended here that this should be based on a national spatial plan (GIS-based). This would allow all important features to be overlaid, with each relevant agency responsible for the data layer that corresponds to its jurisdiction.

For example, the Water Resources Authority and the National Water Commission would be responsible for maintaining the data layer that mapped Jamaica's water resources and infrastructure, such as aquifers, pipes and pumping stations. The ODPEM would manage the data layer that would identify the areas liable to flooding, landslide, and so on. Local governments would be responsible for maintaining and updating the data layer that showed the local development plan, with both current and planned roads, buildings and so on¹⁸.

These would all be layers in the national GIS map, which would be maintained by NEPA. Only approved agencies would be allowed to alter the data for which they were responsible. The public would be able to read (but not alter) the map, accessing it via a website that would also be maintained by NEPA, thereby allowing everyone to see where development should and should not be permitted.

¹⁸ It would be helpful if the various arms of government would adopt the same planning divisions. At present, police, health and local government boundaries, for example, do not necessarily coincide, which makes cross-agency planning more complicated. There is also an issue as to the number of agencies required. For example, it would help to solve capacity problems and also reduce overheads if there were fewer, larger parishes. However, the proposals set out in this paper do not depend on these reforms. The converse, however, is true; any programme of local government reform is more likely to succeed if all local and national government services are properly knitted together with a national spatial plan.

Environmental Regulatory Authority

With regard to physical development, land could be categorized (initially) under three main headings.

Areas Zoned for Development

Some areas of land would be zoned for development. This might include, for example, areas where there are no known hazards, which are not protected areas or have no historical buildings, and which already had adequate water, power and transport infrastructure and so on. These areas would offer a fast-track for proposals¹⁹, with minimal processing and delays²⁰.

'No-build' Zones

Other areas would be put completely off-limits to any permanent development (on the grounds of environmental importance, geological instability, proximity to aquifers, threats to public health, vulnerability to storm surge and so on).

Areas Zoned for Development with conditions

The third category of area would permit development, with certain reasonable conditions. All proposals to develop in these areas would be examined to ensure that they complied with the pertinent conditions. Some of the conditions (such as height restrictions in flight paths) would be determined nationally, others (such as the need to blend in with existing buildings) would be determined locally. These conditions would also be mapped as a data layer.

This system could then be extended into more than three categories, if that would be useful, once the basic framework had been established.

¹⁹ It would be necessary to pre-define the kind of development that would be permitted. For the purposes of this report, it is assumed that this would include all routine requests for housing, light industry, tourism and leisure developments; any exceptional or very large development proposal might still have to go to review.

²⁰ The decision would then be based on the presumption of development, so that developers only need to show that their proposal fits with the zoned land use and any conditions to be automatically granted permission.

Environmental Regulatory Authority

The advantage of this approach is that it would achieve multiple objectives. It would ensure that valuable or vulnerable areas were strictly demarcated and protected, allow limited government resources to be focused to best effect, permit better monitoring and enforcement, simplify the application process and accelerate the processing of applications for permits and licensing of developments, and thereby offer a far more transparent and low-risk environment for developers.

It would also clarify the function of the different tiers and arms of government, as all would operate with the same national spatial plan, with a clear hierarchy of planning levels. Primary land zoning and the location of national infrastructure (such as highways, ports and airports) would be planned and determined at national level. Parishes²¹ will develop their own detailed local plans within the parameters of the national spatial plan, and then submit their local plans for approval by NEPA before they can become operational. After the local plan is approved, the Parish Council will be responsible for managing subsequent developments in their jurisdiction, and will provide annual reports to NEPA as to their progress. These reforms would give local government a full role in the planning process, which would be properly institutionalized and regularly monitored. Sector planning (such as water and sewage) will operate within the parameters of both the national spatial plan and the local development plan, and all operators will be obliged to notify NEPA as to any significant changes.

4.3 Responding to changing priorities

One advantage of this approach is that it makes it relatively easy to implement national developmental objectives, and also to respond to significant changes in priorities. For example, a future Government might decide to make 'adapting to climate change' a new policy priority. This would then be translated into guidelines to discourage any further building in areas likely to be threatened by rising sea level. It would also require, therefore, the identification of alternative sites for housing and development. Additional criteria (such as zero-carbon houses) could be simultaneously built in to the permitting process, and

²¹ Some parishes do not have strong planning capacity. In such cases, it might be necessary to coordinate activities at county level.

Environmental Regulatory Authority

further amendments (such as mixed residential and light industrial developments to minimize the need for transport) adopted at the local planning level. So the national spatial plan could be rapidly amended at multiple levels to reflect the new priorities. As this suggests, a spatial plan is dynamic and flexible, unlike the traditional physical plan which is more rigid and harder to amend.

5 The Environmental Regulatory Authority

The purpose of this section is to identify and set out the aims, functions and operations of the proposed Environmental Regulatory Authority (ERA) for approval and implementation. It will define the working relationships between the regulatory agencies and other agencies of government that have responsibility for the environment in order to ensure that there are no duplications, gaps and uncertainties between the various roles and functions. The following areas will be discussed in respect to the establishment of the ERA:

- Viable and non-viable combinations of roles.
- The assigned roles and responsibilities of the lead agencies.
- The objectives of the ERA.
- The organizational design.
- Financial, logistical and implementation considerations.

5.1 Viable and non-viable combinations of functions and roles

The general area of planning and environmental regulation resolves into a number of necessary functions. Some of these can be bundled together, and given to one agency, while others must be kept separate. For example, it is possible for one agency to be in charge of both planning and the issuing of permits and licenses, as there is no conflict between these roles, and it would increase the speed and efficiency of operations if one agency can issue permits on the basis of its own planning guidelines. However, it is not good practice for one agency to both operate and regulate, as otherwise an agency that

Environmental Regulatory Authority

breached its own standards would have to fine itself (or lower the standards to the level that it was capable of achieving)²².

It is therefore important to first identify the functions, then to determine which of these can be bundled together. It is also desirable, of course, to create as few separate organizations as possible in order to reduce costs and overlaps²³. The main functions are as follows:

- Policy
- Planning
- Issuing permits and licenses
- Administration
- Advisory
- Public consultation
- Environmental management
- Education and outreach
- Management (of national parks, protected areas and species)
- Operation (of environmental facilities)
- Standard-setting (for air and water quality etc.)
- Inspection and compliance monitoring
- Enforcement
- Prosecution

The important **divisions** between these functions are as follows:

- Policy and operations. It is an important principle that Ministers and elected members of Parliament should set policy, but should not interfere in operational decisions. This is to ensure that operational decisions are made on a basis that is technically sound and politically neutral, and helps to prevent corruption.

²² This mistake was made in the UK; where it was temporarily possible for one organization to operate water and sewage treatment plants and set the water quality standards to which it had to adhere; this has now been corrected with the proper separation of these functions.

²³ This is also to ensure that these reforms are congruent with the Government's 'one stop shop' project, where all government services are to be properly integrated and made available through one access point (office or website).

Environmental Regulatory Authority

- Operation and regulation. As explained above, it is not good practice for one organization to both operate and regulate.
- Advisory and regulation. An organization that gives advice (on environmental management, for example) to firms can only be effective if firms feel that they can discuss their problems honestly. This is unlikely to happen, however, if the firms suspect that the information will be handed over to the enforcement arm and used to prosecute them. So these functions must also be kept separate²⁴.

This still leaves several possible groupings into which these functions can be organized.

For example:

- Policy
- Planning, issuing permits and licenses, administration, education and outreach, public consultation
- Management (of national parks, protected areas and species)
- Enforcement, prosecution

There are several functions that could be located in more than one place. For example:

- Standard-setting (could go with either planning or enforcement)²⁵
- Inspection and monitoring (could go with either planning or enforcement)
- It is also possible that the management of national parks, protected areas and species might be subsumed under the same agency that controlled planning, although there is a risk that this might make the agency's remit too broad.

There are also some functions that could be supplied by the private sector, or with an appropriate division between public and private sector organizations. For example, the

²⁴ In Danish regions, such as Storstrøms Amt, these functions are carried out by different divisions inside one body, but there are 'Chinese wall' rules and procedures to prevent information being transferred between the two divisions.

²⁵ Note, however, that there several points at which there is a need to set standards. For example, there are standards for urban design and building control, which are embodied in the planning consent system. There are also technical environmental standards, such as the permitted pollution levels in air and water quality, and process standards, such as BS EN 14001 or EMAS, that measure environmental performance. A number of different agencies will therefore be involved in 'setting standards'. The reference here is to technical environmental standards.