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Environmental
Protection Agency

31 MAR 2006

OUR REFERENCE

BNS/NMcH/CO19159.3
Direct Dial : 618 0422

YOUR REFERENCE

47-2

29th March 2006

BY POST & FAX - 053 9169699

For the attention of Yvonne Clooney, Programme Officer
Office of Licensing and Guidance
Environmental Protection Agency
Headquarters, PO Box 3000
Johnstown Castle Estate
Co. Wexford

c.c. Mr. Padraic Larkin, Director of Licensing and Guidance, Environmental Protection Agency
Dr. Jonathan Derham, Office of Licensing and Guidance, Environmental Protection Agency
Mr. Dara Lynnott, Director of the Enforcement, Environmental Protection Agency

Re: Waste Licence Review Application by Neiphin Trading Limited, in respect of a facility at Kerdiffstown, Co. Kildare, Reg. No. 47-2

Dear Sirs,

We refer to your letter dated 23rd March 2006 to Mr. Brendan Slattery stating that our objection is not valid because it does not comply with section 42(4)(b) of the Waste Management Acts, 1996 to 2005.

For the reasons outlined below, we do not accept that our objection is invalid and we request the Agency to reconsider the matter, withdraw your letter dated 23rd March and reinstate our objection.

1. **The name and address of the objector has been clearly stated.**

The objection clearly states the name and address of the objector: Arthur Cox of Earlsfort Centre, Earlsfort Terrace, Dublin 2. Where the name and address of an agent for an undisclosed principle is given, it is the agent who must be considered the objector for the purposes of the Waste Management Acts, 1996 to 2005.

JAMES O'DWYER DANIEL E. O'CONNOR ROBERT BOLTON JOHN V. O'DWYER RONAN WALSH DONOGH CROWLEY JOHN S. WALSH MICHAEL MEGHEN JOSEPH LEYDEN
WILLIAM JOHNSTON EUGENE MCCAGUE NICHOLAS G. MOORE DECLAN HAYES DAVID O'DONOHUE COLM DUGGAN CARL O'SULLIVAN ISABEL FOLEY JOHN MEADE CONOR McDONNELL
PATRICK MCGOVERN GRAINNE HENNESSY SEAMUS GIVEN COLIN BYRNE CAROLINE DEVLIN CIARAN BOLGER GREGORY GLYNN DAVID FOLEY STEPHEN HEGARTY
DECLAN DRISLANE SARAH CUNNIFF KATHLEEN GARRETT PADRAIG O RIORDAIN ELIZABETH BOTHWELL WILLIAM DAY ANDREW LIENY JOHN MENTON PATRICK O'BRIEN
ORLA O'CONNOR BRIAN O'GORMAN MARK SAUNDERS MARK BARR JOHN MATSON DEBORAH SPENCE MARGARET MULDOWNNEY NIAH CAFFREY KEVIN MURPHY
CORMAC KISSANE LIAM CARNEY RAYMOND HURLEY KEVIN LANGFORD EVE MULCONRY SIONA RAFFERTY PHILIP SMITH KENNETH EGAN JOHN GLACKIN BRYAN STRAHAN
HUGH O'DONNELL CONOR HURLEY TED WILLIAMS ALEX McLEAN GLENN BUTT NIAV O'HIGGINS

CONSULTANTS: PAUL McLAUGHLIN IAN A. SCOTT JOHN G. FISH PETER McLAUGHLIN DR. MARY REDMOND DR. YVONNE SCANNELL DR. ROBERT CLARK

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This contrasts with the Planning and Development Acts, 2000 to 2004, which clearly require two names to be given when an agent is acting. Specifically, section 127(1)(b) of the Planning and Development Acts, 2000 to 2004 require an appeal to:

“State the name and address of the appellant or person making the referral and other person, if any, acting on his or her behalf”.

The Waste Management Acts, 1996 to 2005 does not make any distinction between agent and client. Section 42(4)(b) requires only one name and address, that is, the name and the address of the objector. If the legislative intent was that a solicitor’s firm could not, acting on the instructions of its client, be an objector, it is submitted that the Waste Management Acts, 1996 to 2005 would have been drafted so that both the name of the agent and the principal were required.

You will note that our objection includes the following material references: “we make this objection”, “our third party objection to this proposed decision”, “our request for an oral hearing”, “we respectfully submit” and “we request”. Having regard to the express terms of our objection, there is no basis upon which the Agency may conclude that this firm is not the objector whose name and address must be stated.

2. **The Agency represented that an objection made in this manner would be accepted as valid.**

On 28th February 2006, Ms. Eve O’Sullivan of the Office of Licensing and Guidance confirmed to Mr. Brendan Slattery of this office that the Agency would accept as valid an objection made by this firm, without disclosing the name and address of our client. Specifically, Mr. Slattery contacted the Agency by telephone and asked to speak with a person having responsibility for waste licensing. Mr. Slattery was directed to Ms O’Sullivan and explained to her that our client wished to remain anonymous for the time being and that this firm proposed to make an objection on behalf of the client, without disclosing their name and address. We have no doubt that Ms O’Sullivan appreciated the meaning of the question asked.

Ms. O’Sullivan confirmed that an objection made by this firm, on behalf of an anonymous client, would be accepted as valid. This firm (and, indeed, our client) relied upon this representation, in making the objection in this manner and foregoing the opportunity to make an objection in some different manner.

We respectfully submit that the Agency is bound by this representation and is *estopped* from denying it. Both this firm and our client are entitled to the benefit of a legitimate or reasonable expectation that our objection would be accepted as valid. Accordingly, the Agency is precluded from denying the validity of our objection. Both this firm and our client have been misled by the Agency and it would be unjust to treat our objection as invalid for failure to state the name and address of our client.

The Courts have acknowledged that a regulatory authority, such as the Agency, may bind itself in this manner. For example, with both planning appeals and applications for a taxi licence, the Courts have concluded that the regulatory authority is bound to representations it has made waiving the strict requirements for the payment of prescribed fees. (See *Maher v. An Bord Pleanála* [1993] 1 IR 439 and *Mulhearn v. Bundoran Urban District Council*, High Court, unreported, 30th January 1998.)

Neither the applicant nor any third party can suffer prejudice by the Agency complying with the representation it made and accepting our objection as valid. The terms of our objection have been circulated to the applicant and all other objectors for comment. These persons have the opportunity to comment on the substance of our objection. As there are multiple objections, the applicant is not yet entitled to receive a grant of waste licence: the applicant must await the outcome of the assessment of the objections that have been made and the further consideration of the proposed decision that must be undertaken by the Agency.

The decision of the Agency to reject our objection frustrates public participation in the licensing process, a requirement that is long established to be fundamental to basic fairness and protected under the Constitution.

3. **The Agency has made a decision that our objection is valid.**

The Agency has confirmed in writing on two separate occasions that our objection had been accepted as valid.

Specifically, by letter to Arthur Cox dated 3rd March 2006, the Agency acknowledged receipt of our objection and expressly acknowledged Arthur Cox as the objector, stating:

“As a party to the objection, you are entitled, but not required, to make a submission in writing to the Agency on the other objection/s...”

In the same letter, the Agency invited this firm to make a submission in writing on the four other objections that it received. This power to circulate and invite submissions relates only to parties to an objection, which is defined to include any objector and the applicant for the waste licence.

By letter to Arthur Cox dated 13th March 2006, the Agency informed this firm of its decision not to hold an oral hearing into the objections made. This letter to Arthur Cox refers to “your objection” and states expressly that:

“The Board of the Agency will consider your objection together with the report and recommendations of the Technical Committee before making a final decision”.

It is clear that the Agency had formed the view and made a decision that our objection was a valid one. This is consistent with the representations made to this firm before the objection was made. We respectfully submit that the Agency is not entitled to validly contradict itself and effectively change its mind upon reflection motivated by what appears to be (as yet uncirculated and unseen) concerns expressed by the applicant for the waste licence.

4. **The Agency may have had regard to irrelevant considerations.**

We are concerned that the decision to reject our objection (and implicitly to revoke the earlier decision to accept our objection as valid) has been made after receipt of and having regard to submissions from the applicant for the waste licence. We respectfully submit that the Agency is not entitled to have regard to the submission

made by the applicant and make a decision that would prejudice our objection, without first affording this firm an opportunity to respond. We request the Agency to confirm whether or not regard was had to any submission made by the applicant in the decision to reject our objection as invalid.

5. **The Agency has already accepted submissions on this very application that were made by a solicitor on behalf of an anonymous client.**

On or about 16th March 2005, Mr Niall P. O'Neill, Solicitor made submissions to the Agency on the application for a waste licence. The submission was made on behalf of clients whose name and address is not disclosed. It would appear from the public file for the application for a waste licence that the Agency did not reject these submissions in advance of making the proposed decision.

It would seem contrary to basic fairness for the Agency to parse some distinction between the letter from Mr. Niall P. O'Neill and the letter from this firm. If the name and address of the anonymous client is important to the decision making process of the Agency, it should have been required of Mr. Niall P. O'Neill. The fact that it was not can only mean one of two things: either the requirement is not fundamental and our objection is valid; or, the requirement is fundamental and it logically follows that the proposed decision in this case is compromised.

We respectfully submit that the Agency must choose between either accepting our objection as valid or rejecting the proposed decision to be invalid. In the latter respect, we would expect that the current proposed decision might be withdrawn, the submission of Mr Niall P. O'Neill rejected and the proposed decision made a second time.

For the reasons outlined above, we request the Agency to reconsider this matter, withdraw your letter dated 23rd March and reinstate our objection.

We confirm safe receipt of your cheque for €300, returning to us the appropriate fee that accompanied our objection. Pending reinstatement of our objection, we propose hold this amount and any interest accruing on trust for and to the account of the Agency.

We should be obliged to hear from you by return.

Yours faithfully,


ARTHUR COX