

Subobj (3)

Ann Kehoe

From: cshellshear@cewepireland.com
Sent: 13 January 2009 16:31
To: Licensing Staff
Cc: jkeaney@cewepireland.com
Subject: Re: Response to Submissions re Drehid W0201-02

Attachments: CEWEP response to Drehid objections_Jan09_Final.pdf



CEWEP response to
Drehid objec...

To whom it may concern,

Following a letter dated 5 December 2008, we have prepared a response to submissions received regarding the Drehid Waste Licence PD W0201-02. Please find attached this response for your consideration.

Should you have any queries or comments please do not hesitate to contact me on 01 271 8702.

Kind Regards

Claire Downey
CEWEP Ireland

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Sub on obj (3)



**Objections to the Proposed Decision of the Environmental Protection Agency
on a recent Licence Application by Bord na Mona plc in respect of the Drehid
Waste Management Facility**

Response of CEWEP Ireland to objections made in relation to condition 8.1.2.

1. Introduction

CEWEP Ireland refers to the letter received from the Environmental Protection Agency ("the Agency") dated 5 December 2008 attaching objections received, and makes this submission in response to those objections insofar as they relate to condition 8.1.2 only. In essence CEWEP Ireland believes that the imposition of condition 8.1.2 is in no way premature, but rather is necessary and urgently required. The rationale behind its imposition is clear and justified. There is no legal impediment to the inclusion of condition 8.1.2, rather it is a well thought out method of assisting Ireland in meeting the environmental waste targets prescribed by the Landfill Directive.

CEWEP Ireland sets out its detailed response to issues raised below.

2. The imposition of Condition 8.1.2 is required and is not premature.

2.1. CEWEP Ireland rejects any suggestion that the imposition of condition 8.1.2 is premature.

From 19 July 2009, no landfill operator can accept untreated waste pursuant to Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste (the "Landfill Directive"), implemented in Ireland by Section 49 of the Waste Management (Licensing) Regulations 2004 (the "2004 Regulations"). Even more importantly in the context of the current objection, Article 5 of the Landfill Directive sets out certain targets, the first of which must be implemented by 1 January 2010. The imposition of Condition 8.1.2 represents a crucial step by the Agency, as an emanation of the State, in ensuring that the amount of biodegradable municipal solid waste (MSW) going to landfill is reduced to meet the limits set in the Landfill Directive. A decision to postpone the imposition of this condition would require a postponement by the Agency of its responsibilities pursuant to the Landfill Directive, and would be yet another example of the postponement of compliance with targets for which derogations have

already been obtained. Such a postponement would also render Ireland vulnerable to enforcement action by the European Commission.

- 2.2. It has been argued that the Agency cannot rely on the Consultation Draft EPA Technical Guidance Document on Municipal Solid Waste – Pre-Treatment and Residuals Management (September 2008) (the “Guidance Document”), as the stakeholder consultation has only recently concluded. CEWEP Ireland submits that there is no basis in law for such a contention. The Agency has a statutorily provided discretion to grant a waste licence with such conditions as it considers appropriate, and its discretion cannot be fettered by the fact that stakeholder consultation has only recently concluded. Neither can it be constrained in imposing such a condition by the fact that the Guidance Document is only draft. Indeed, the current *BAT Guidance Notes for the Waste Sector: Landfill Activities* as published on the EPA website is a draft version dated April 2003, and yet we understand that the Agency relies on many of the provisions of this Guidance Document. In any event, the stakeholder consultation concluded almost 3 months ago, which is sufficient time for the Agency to have been able to consider stakeholder submissions.
- 2.3. It has been claimed that the Guidance Document should have been subject to a strategic environmental assessment pursuant to Article 9 of the European Communities (Environmental Assessment of Certain Plans and Programmes) Regulations 2004 (the “2004 Regulations”). CEWEP Ireland submits that this is not correct. The Guidance Document is not a plan or programme for waste management but rather is simply guidance to assist the Agency in the discharge of its functions, and to assist landfill operators in the operation of their facilities, in line with best practice. Whereas CEWEP Ireland accepts that the Guidance Document is subject to preparation by the authority at a national level, it is not required by legislative, regulatory or administrative provision. Furthermore, it is far from clear that the Guidance Note sets the framework for future development consent. CEWEP Ireland considers that the Guidance Document does not fall within the ambit of the 2004 Regulations.
- 2.4. Furthermore, as stated above, the Agency has the power to impose such a condition pursuant to the Waste Management Acts 1996 to 2008 and Article 35(2) of the 2004 Regulations irrespective of whether the Guidance Document has been finalised, and as such the argument as to strategic environmental assessment is of little relevance to the present application. This is without prejudice to CEWEP Ireland’s contention that the Guidance Document does not

require such assessment in the first place.

- 2.5. Finally, contrary to any argument otherwise, the Agency cannot be prohibited from imposing a condition that has not been imposed before. Indeed, best practice in waste management is constantly evolving so that by necessity the Agency may have to impose novel conditions. The Agency may and indeed should review existing licences to ensure equivalent conditions are imposed on all landfills.

3. **The underlying approach to Condition 8.1.2 is legally sound**

- 3.1. CEWEP Ireland fully approves of the approach being taken in the Guidance Document, as previously indicated to the Agency, and disagrees with any contention that the approach manifested in condition 8.1.2 is flawed in either fact or law.
- 3.2. The Landfill Directive sets out a requirement in article 6 of the Landfill Directive for pre-treatment of all waste destined for landfill. It also sets out targets in Article 5(2) for reduction of biodegradable waste going to landfill. Any EU directive, including the Landfill Directive, sets out certain obligations on member states which are mandatory. The method which a member state uses to meet an obligation – in this instance the attainment of the targets and requirements set out in Articles 5(2) and 6 – are at the discretion of the member state. The Landfill Directive does not set out a precise mechanism for the attainment of targets, and clearly does not prohibit a member state from meeting targets by imposing pre-treatment acceptance criteria for MSW.
- 3.3. In relation to the specific wording of condition 8.1.2, the words “(including diversion)” appear in line with the definition of pre-treatment in the Landfill Directive which includes “sorting” as a type of treatment. As pointed out in page 12 of the Guidance Document, pre-treatment can include source separation, separate collections and manual sorting i.e., diversion. It is also understood that the words “biological pre-treatment” refer to the treatment of the biological element of the waste by any of the range of treatment methods given on page 12 of the Guidance Document.
- 3.4. In practice, the landfill operator will have to ensure that 50% of the biological element of the waste it accepts annually is pre-treated, to include treatment by way of sorting or other diversion methods. This is a matter for the landfill operator to establish, in conjunction with the suppliers to the landfill. The landfill operator is obliged under its licence to know the characteristics of the waste it is accepting.

- 3.5. Another argument that has been made is the Agency is delegating compliance with national targets to landfill operators but this argument is rejected by CEWEP Ireland. It is clear that it is Ireland that is bound by the targets set out in Article 5 the Landfill Directive. However, measures taken to achieve that target must by necessity impact on individual landfill operators, as Ireland must restrict and control the amount of waste going to landfill. This cannot be done without affecting landfill operators. It is often inevitable that compliance by a member state with obligations imposed under EU law will impose a burden on individuals, whether that is by restrictions on trade, impositions of bans, or otherwise. For example, in Flanders, there is an annual cap on landfill capacity which inevitably restricts landfill operators, as well as a total landfill ban for certain types of waste.
- 3.6. CEWEP Ireland accepts that an approach should be taken at a national level in relation to policy. However, this does not prevent action being taken by the Agency to ensure that biologically untreated waste is not landfilled. CEWEP Ireland accepts totally that national limits cannot be achieved without delivery of new waste treatment/management infrastructure. However, the current landfilling regime is inhibiting the delivery of such new waste treatment/management infrastructure as biological MSW that should be treated by infrastructure higher up the waste management hierarchy is being sent for landfill. As landfilling is cheaper in many instances than waste to energy or other pre-treatment, the consequence is that investment in new waste treatment infrastructure is disincentivised. Ireland to date has planned for excess landfill capacity and allowed waste to be accepted in landfill in order to compensate for the lack of alternatives. However, this is a vicious circle, since the provision of such capacity prevents alternatives from developing. A constant surplus of landfill capacity for biologically untreated waste removes any market incentive for the much needed alternative infrastructure, and in the absence of other legislative or economic drivers, the landfill of biologically untreated waste will continue to dominate the market. This is totally unacceptable in light of the Landfill Directive. CEWEP Ireland contends that the imposition of condition 8.1.2 will assist in incentivising the necessary investment in alternative infrastructure.
- 3.7. The challenge imposed by the targets set in Article 5 of the Landfill Directive requires an immediate and effective response. There is an urgent need to impose adequate pre-treatment requirements on waste going to landfill, and there is an urgent need to restrict the amounts of biological waste being landfilled in order for Ireland to meet the targets

under Article 5. A question has been raised as to the flexibility of the current approach, but in CEWEP Ireland's opinion effectiveness is a more immediate priority. If waste output changes, waste infrastructure develops, and the amount of waste going to landfill varies such that Condition 8.1.2 is no longer necessary from an environmental perspective, either the landfill operator or the Agency may institute a review of the Waste Licence pursuant to the Waste Management Acts 1996 to 2008 and Waste Management (Licensing) Regulations 2004. Furthermore the imposition of Condition 8.1.2 does not preclude the Agency from commencing market based initiatives as have been suggested, and the successful outcome of any such initiatives could lead to licence review as mentioned.

- 3.8. An argument has been made that as the Landfill Directive does not require delegation, the imposition of Condition 8.1.2 is unconstitutional. Such an argument does not bear analysis. Any interference in the way that the landfill operator carries out its business is clearly justified by the overriding need for environmental protection, compliance with the targets set out in the Landfill Directive, and the need to direct waste up the waste hierarchy away from disposal. Delegation of the power to impose such conditions to the Agency is not unconstitutional.
- 3.9. It has been argued that legal issues of *vires* and competition arise but little explanation has been made for such a contention. It is extremely difficult to see how the imposition of this condition could be considered to create an issue of *vires*, in circumstances where Section 41(2) of the Waste Management Act, 1996 as amended not only gives the Agency the power, but contains an obligation to attach conditions to a waste licence where appropriate, specifying the type, nature and composition of the waste permitted to be recovered or disposed of. No competition issues are raised by the imposition of Condition 8.1.2.
- 3.10. Finally, it has been argued that no comparable wording has been imposed on any other European Landfill licence. It must be borne in mind that Ireland has a disproportionately large reliance on landfill, which must be reduced in order to comply with Article 5 of the Landfill Directive, and it is therefore not surprising that the Agency must impose conditions that may not be in Landfill Licences in other Member States, where very different circumstances apply. In addition, other member states have different drivers in place, for example, most have landfill bans and/or, high landfill taxes which are not in place in Ireland.

4. Clarity of the Language used in Condition 8.1.2

- 4.1. Certain points have been made in relation to the clarity of language use in condition 8.1.2. CEWEP Ireland has the following comments in relation to this issue.
- 4.2. Diversion is a form of pre-treatment according to the definition under the Landfill Directive (that is, sorting is defined as treatment). In line with this, diversion can be considered a form of pre-treatment even for specific waste streams e.g. biological waste streams since different diversion activities will affect different streams. CEWEP Ireland would have no objection to the wording referring to diversion being clarified so that it is clear that it refers to sorting and the other methods referred to at page 12 of the Guidance Document, if the Agency deemed it necessary. Furthermore, CEWEP Ireland would have no objection to the wording referring to biological pre-treatment being clarified so that it is clear that it refers to any of the pre-treatment methods given on page 12 of the Guidance Document, if the Agency deemed it necessary.
- 4.3. It is argued that the condition is based on unverified projected waste growth. However, CEWEP Ireland understands that the EPA has the most comprehensive dataset available on waste growth. The EPA has monitoring responsibilities, has been monitoring waste growth for years and is working with the ESRI on waste forecasting. Thus in CEWEP Ireland's opinion, it is the body best placed to provide accurate waste forecasting.
- 4.4. It is difficult to understand the reference to "credit" made in objection to condition 8.2.1. Credit is allocated to waste activities higher in the waste hierarchy by removing the threat of competition with landfill. CEWEP Ireland understands that credit does not accrue to the landfill operator, rather such landfill operator must ensure, by way of audit, that at least 50% of the landfills annual acceptance of waste has been subjected to biological pre-treatment.
- 4.5. Compliance with the impugned condition would not be frustrated by failure to deliver the necessary alternative waste treatment/management infrastructure. If such infrastructure is not developed on time, the waste which cannot be sent to this landfill could be stored until appropriate waste treatment infrastructure is put in place. The consideration of storage, together with a case study on Germany's experiences, was set out in CEWEP Ireland's submission in relation to the Guidance Document, and we refer the Agency to this document. The restriction on biologically untreated waste would

incentivise the rapid development of such management infrastructure, whereas the removal of this Condition and the failure to impose similar conditions in other landfill licences would result in a situation where biologically untreated waste would continue to be landfilled in unlimited amounts.

- 4.6. In relation to the expression “by 1 January” this can easily be changed to “from 1 January”. Furthermore, the wording “shall be biologically pre-treated” could be changed to “shall have been biologically pre-treated”.

5. Objective of the Review

- 5.1. CEWEP Ireland would not agree with statements that there is a pressing need for additional capacity, particularly not for landfill capacity for biologically untreated MSW. CEWEP Ireland notes also that it is not within the Agency’s remit to consider the objectives behind the application.

6. Conclusion

For the reasons set out above, CEWEP Ireland believes that the imposition of condition 8.1.2 is utterly justified in the circumstances. CEWEP Ireland fully supports the approach being taken by the Agency in relation to the pre-treatment of MSW for landfilling. It further notes that the failure to take urgent action to reduce the volumes of waste going to landfill, which is now required both through policy and through the actions of the Agency in its capacity as the licensing authority for landfills, could result in enforcement action being taken against Ireland and the imposition of large fines. CEWEP Ireland rejects the arguments made by third parties against condition 8.1.2 and submits that the condition should be included in the final waste licence for the Drehid landfill.

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