

**APPLICATION FOR A WASTE LICENCE – FINGAL LAND**

**OUTLINE SUBMISSION**

**Legislative Background**

The preamble to the **Waste Management Act** of 1996 says that it is

*“an Act to make provision in relation to the prevention, management and control of waste; to give effect to provisions of certain Acts adopted by institutions of the European Communities in respect of those matters; to amend the Environmental Protection Agency Act, 1992 and to repeal certain enactments and to provide for related matters”.*

The community Acts given effect by the 1996 Act, referred to at **Section 2** of that Act, include **Council Directive 75/442/EEC** on Waste and **Council Directive 91/156/EEC** amending the 1975 Directive.

**The Waste Management (Amendment) Act, 2001** was also for the purposes of giving effect to **Council Directive 1999/31/EC** on the landfill of waste.

**Note:** In relation to **Council Directive 1999/31/EC** on the landfill of waste, this has been followed up by **Council Decision of the 19<sup>th</sup> December 2002** [2003/33/EC] establishing criteria and procedures for the acceptance of waste at landfills pursuant to **Article 16 of and Annex II to Directive 1999/31/EC**.

**Council Directive 99/31/EC on the landfill of waste.**

**Article 1** of the Directive provides as its overall objective to provide for measures, procedures and guidance to prevent or reduce as far as possible negative effects on the environment from landfilling of waste by way of stringent operational and technical requirements on the waste and landfills.

**Annex I to the 1999 Landfill Directive** under the heading ‘Location’ provides that:

*“The location of a landfill must take into consideration requirements relating to:*

- (a) *the distances from the boundary of the site to residential land recreational areas, waterways, water bodies and other agricultural or urban sites;*
- (b) *the existence of groundwater, coastal water or nature protection zones in the area;*

- (c) *the geological and hydrogeological conditions in the area;*
- (d) *the risk of flooding, subsidence, landslides or avalanches on the site;*
- (e) *the protection of the natural or cultural patrimony in the area."*

(paragraph 1.1 of Annex I)

**Paragraph 1.2 of Annex I** provides that:

*"The landfill can be authorised only if the characteristics of the site with respect to the above-mentioned requirements, or the corrective measures to be taken, indicate that the landfill does not pose a serious environmental risk."*

Requirements in relation to water control / leachate management / protection of soil and water are identified at **Paragraphs 1 and 3 of Annex I of the Landfill Directive**.

### **Background to the Oral Hearing**

Fingal County Council ("the Council") made an application for a Waste Licence in July 2006. Following requests for additional information under Article 14 of the Waste Management (Licensing) Regulations 2004, the Agency wrote to the Council by letter dated 22 May 2007 informing the Council that a valid application was before it pursuant to Article 14(2) of the 2004 Regulations. During the course of the exchange of information between the Agency and the Council, there were extensive Submissions/Observations by third parties.

Following the issuing of a Proposed Decision on 20 September 2007, there were further submissions by third parties by way of objection to the Proposed Decision (PD). The Council also raised objections to the PD in respect of which two of those specific objections have been withdrawn.

An Oral Hearing has been convened by the Agency having regard to the provisions of Section 40(3) and Section 40(9) of the Waste Management Acts (WMA).

#### **Legislative Background - EIA**

The proposed development is one in respect of which environmental impact assessment is required.

#### **The relevant legislation finds its genesis in Council Directive 85/337/EEC (as amended) – Environment Impact Assessment**

**The preamble to the Articles in the Directive provides, inter alia, that:**

*Whereas development consent for public and private projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects conducted on the basis of the appropriate information supplied by the developer which may be supplemented by the authorities and by the people who may be concerned by the project in question*

**Art 8 of the Directive required that:**

*The results of consultations and the information gathered pursuant to Articles 5, 6 and 7 must be taken into consideration in the development consent procedure*

The contents of an Environmental Impact Statement are provided for in Article 94 of and Schedule 6 to the Planning and Development Regulations, 2001.

The PD is one in respect of which approval is also required pursuant to Section 175 of the Planning and Development Act, 2000 (and the Regulations made thereunder).

Section 175 of the 2000 Planning Act provides that where a waste disposal activity is licensable by the Agency, An Bord Pleánála is prohibited from imposing conditions which are for the purpose of : -

- (a) Controlling emissions from the operation of the activity, including the prevention, limitation, elimination, abatement or reduction of those emissions; or
- (b) Controlling the emissions related to or following the cessation of the operation of the activity.

Section 175(10) (a) of the PDA provides that:

*Where an application under this section relates to proposed development which comprises or is for the purposes of an activity for which an integrated pollution control licence or a waste licence is required, the Board shall not, where it decides to approve the proposed development, subject that approval to conditions which are for the purposes of—*

- (i) controlling emissions from the operation of the activity, including the prevention, limitation, elimination, abatement or reduction of those emissions, or*
- (ii) controlling emissions related to or following the cessation of the operation of the activity.*

The proposed development, the subject of the PD, is exempted development under Section 4 of the PDA (Planning and Development Act, 2000).

The requirement for environmental impact assessment (EIA) provides for both public consultation and independent approval of the PD which is otherwise exempt from Planning Permission. The manner in which an Environmental Impact Statement is to be construed within the overall context of the waste licence decision-making process is enshrined in the WMA and the Waste Management (Licensing) Regulations, 1994 – see Article 3(d) of the 2004 Regulations which provide that the purpose of the Regulations is to give effect, inter alia, to the EIA Directives.

As stated in Environmental and Land Use Law by Yvonne Scannell at page 450/451:

*Section 40(2)(ii) of the Waste Management Act 1996 as amended states that the EPA in making its decision on a licence application is obliged to have regard to all the information properly submitted in the EIA process in so far as it relate to the risk of environmental pollution from the waste activity concerned*

The Agency may only grant a waste licence in certain circumstances – see Section 40(4) of the WMA. In summary, a licence may only be granted where:

- 1- emissions will not contravene any standard;
- 2- the activity will not cause environmental pollution;
- 3- the activity, with conditions attached, complies with the Landfill Directive;
- 4- BAT to prevent, eliminate or where not practicable to limit abate or reduce an emission – [note the similarity with Schedule 6, paragraph 1(b) of the Planning & Development Regulations, 2001;
- 5- The activity is consistent with the objectives of and not prejudice the implementation of the waste plan.

The adequacy of the EIS, as part of the overall information contained in the application for the waste licence under the 2004 licensing regulations, as supplemented by the further information sought, disseminated and elicited during the consultation process, ought to ensure that the Agency can perform its functions under Section 40(4).

It is submitted that the information contained in the EIS and subsequently developed during the consultation process meets this test. This is confirmed by the acknowledgment of receipt of a valid application on 22 May 2007.

### **The Proposed Decision**

As appears from the PD, the Agency has set out requirements pursuant to the requirements of Section 40(4) summarised above. The measures enshrined in the PD set the parameters under which the mitigation can be further developed, which measures have been proposed in the application for a licence.

It is not the situation that the control of emissions has been 'left over' for further determination, as suggested in some of the Objections. The emission controls apply to the entirety of the site, that is the landfill and buffer zone which includes the historical landfill area. Thus, for example, the excavation, remediation and restoration of the historical landfill must take place within the context of the

emissions controls enshrined in the PD, or such emission controls with amendment arising from this oral hearing and the report and recommendations of the Inspectorate, should a licence be granted. This applies equally to Condition 3.11 (C & D waste storage area and Schedule A.1(vi) (the storage of waste including temporary storage of unacceptable waste in the quarantine area).

In respect of the historical landfill, Mr. Cullen has confirmed the appropriateness of the mitigation strategy proposed by the Council for the capping of the historical landfill area to protect the water receptor.

That the Agency sought information on the likely significant effects of removal of the historical waste must be seen as a measure adopted not as a mitigation requirement of itself, but as requirement imposed in an abundance of caution. Whether the material remained in site or was excavated, the emission controls apply to all of the site bounded by the application.

Thus, it cannot be contended that there has been an abdication of responsibility by the Agency, before the decision making process has concluded or that the EIS has been inadequate, for the purpose of the discharge by the Agency of its functions under Section 40(4).

The obligation for public participation in the decision-making process, contemplated by the EIA Directive, is fully respected. Superimposed on this is the requirement that the stringent technical requirements of the Landfill Directive are met.

In addition to the emission controls contained in the Schedules A-F inclusive to the PD, it is submitted that the following Conditions of the PD, at the very least, are applicable to the historical landfill: 1.1, 1.2, 1.3, 1.4, 2.2, 3.1, 3.4, 3.5, 3.6, 3.9, 3.11, 3.12, 3.13, 3.14, 3.16, 3.17, 3.19, 3.21, 3.23, 3.24, 3.26, 3.28, 4.3, 4.5, 4.6, 5.1, 5.2, 5.5, 5.11, 6.2, 6.5, 6.6, 6.7, 6.8, 6.13, 6.15, 6.16, 6.17, 6.18, 6.19, 6.24, 6.26, 6.27, 6.28, 6.29, 6.32, 6.33, 6.35, 8.1, 8.2, 8.4, 8.5, 8.6, 8.7, 8.8, 8.11, 9.1, 9.2, 9.3, 10.1, 10.7, 10.8, 11.1, 11.2, 11.4, 11.6, 11.7, 11.8, 11.9, 11.10, 11.12, 11.14, 12.3, 12.5 [74 Conditions]

It is not the position that there is only one condition relating to the historical landfill.

### **Adequacy of the EIS**

Much of the caselaw as to the adequacy of the EIS is confined to planning decisions, rather than the decision of the Agency responsible for ensuring that Environmental Pollution does not take place. In addition, much of the caselaw is based on a factual matrix where no EIA had taken place due to a screening decision.

Therefore, a brief discussion relating to planning decisions ensues because of the division of responsibilities.

In addressing the adequacy of an Environmental Impact Statement, in the planning context, the Court has held that what has to be examined is not just the initial documentation submitted at the start of the application process but also the supplementary information furnished. In R (Blewett) -v- Derbyshire County Council (2004) JPL 751 at paragraph 41 it is stated: -

“In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant’s environmental statement will also contain the “full information” about the environmental impact of a project. The regulations are not based upon such an unrealistic expectation. They recognise that an environmental impact statement may well be deficient and made provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting “environmental information” provides the local planning authority with as full a picture as possible”.

In the instant case, the Agency were satisfied that the Environmental Impact Statement was adequate and so found in acknowledging receipt of a valid application on the 22<sup>nd</sup> May 2007.

Objectors contend that the manner in which the Council and the manner in which the Agency addressed the issue in relation to the historical landfill fails to comply with

the requirements for EIA. This is rejected for a number of reasons. The waste type to be received at the facility includes that material contained in the historical landfill (page 47 of the EIS). The reference to this material was identified in the EIS particularly in the trial pits and borehole logs and photographs in Volume 5 and specific textual references (Volume 5 appendix H paragraph 3.3.2; Volume 5 Appendix I. paragraph 3.1.3, Appendix I, Volume 5 paragraph 4.2.) Appendix I, Volume 5 at paragraph 7.1 at item 10 also indicates that any unsuitable material excavated such as the body of made ground will be disposed of in accordance with relevant legislation.

In the Council's response to further information (RFI) in December 2006 at page 49 thereof, the likely significant effects of removing this historical landfill material were considered and assessed under the five source headings of surface water, ground water, archaeology, air and noise, at the invitation of the Agency. This is part of the material before the Agency for the purposes of its decision.

The PD identified emission control limits and a monitoring regime having regard to mitigation measures proposed in the EIS for the overall development. These measures are technically well understood and easily achievable. This is acknowledged in the cross-examination of the witnesses on behalf of Greenstar. Whilst Greenstar may differ with the interpretation of the Council of the data and the recommended measures, they cannot contend that the information of the investigation of the historical landfill area was not included in the EIS. In discharging its functions, the Agency took the view that the waste be excavated and set appropriate conditions taking into account the applicability of all the other conditions in the context of the overall development.

These measures are contemplated by Article 12(1)(l) and (m) and (t) of the 2004 Regulations.

Sub Article (1) provides that the application shall give details and assessment of the effects of any existing or proposed emissions on the environment including any environmental medium other than that into which the emissions are, or are to be,



made, and of proposed measures to prevent or eliminate or, where that is not practicable, to eliminate or abate such emissions.

Sub Article (m) requires the application to provide information to identify monitoring and sampling points and indicate proposed arrangements for the monitoring of emissions and the environmental consequences of any such emissions.

The overall obligation in terms of environmental impact statement is that third parties, including members of the public have an opportunity to express their opinions on the likely effects on the environment before development consent is granted.

An extensive public consultation process to date, the information for which is all before the Agency for the purposes of ensuring that the Agency, in the event that it is satisfied that a Licence should be granted, is issued in such a manner as to prevent environmental pollution.

### **Compliance with Legislative Requirements**

**Section 22 12 of the 1996 Act** provides that:

*"A local authority shall take such steps as are appropriate and necessary to attain in relationship to its functional area the objectives in a waste management plan made by the authority (whether such plan has been made by the authority or jointly by the authority with another local authority or other local authorities)".*

**Section 38(1) of the 1996 Act** provides that:

*"A local authority shall provide and operate, or arrange for the provision and operation of, such facilities as may be necessary for the recovery and disposal of household waste arising within its functional area".*

The Council rejects the contention of Greenstar that there has been a failure on behalf of the Council to comply either with the Ministerial Direction under Section 60 of the WMA or the Code of Practise under Section 76 of the EPA Act.

Section 60 provides, inter alia, that:

60.—(1) *The Minister may, whenever he or she thinks proper, give general directions in writing to the Agency or each local authority as to policy in relation to, as appropriate—*

(a) *the making or review of the hazardous waste management plan or a waste management plan,*

(b) *the management of waste recovery or disposal activities carried on otherwise than under a waste licence,*

(c) *the granting of waste licences,*

(d) *the performance by the Agency or local authority of its functions under this Act with respect to movements of waste,*

(e) *matters related to matters aforesaid.*

(2) *In performing its functions under this Act, the Agency or each local authority concerned, as the case may be, shall have regard to any directions given to it by the Minister under this section.*

(3) *Save as respects the matters referred to in paragraph (a) thereof, subsection (1) shall not be construed as enabling the Minister to exercise any power or control in relation to the performance in particular circumstances by the Agency or a local authority of a function conferred on it by or under this Act.*

The Ministerial Circular was issued in May 2005 at a time when the site had already been identified for the proposed development of a landfill. The obligation under Section 60 is “to have regard” to the ministerial direction. The legal test has ‘to have regard’ does not mean slavish adherence. See McEvoy -v- Meath County Council

Objectors have compared the site with that in Blessington where the purpose of that application was remediation in its own right. In this application, the proposed development is for a landfill and buffer zone on a site selected and identified for which EIA is being carried out for the entirety of the site, including the historical landfill for the purposes of environmental protection.

Section 76 of the EPA Act provides that:

76.—(1) *The Agency may—*

(a) *prepare and publish codes of practice, or*

(b) *approve of a code of practice or any part of a code of practice drawn up by any other body,*

*for the purpose of providing practical guidance with respect to compliance with any enactment or otherwise for the purposes of environmental protection.*

It is also the case that the Code of Practise was brought into being subsequent to the Waste Licence application. The core obligation under that Code of Practise is to ensure that there is no environmental pollution following remediation measures. That is the position in the present case.

There is no breach of Section 60 of the WMA or Section 76 of the EPA as suggested.

### **Summary**

The PD is one which complies with the obligations imposed by Council Directive 99/31/EC on the landfill of waste and the subsequent Directives.

The characteristics of the site mean that there will not be any risk to the ground water as suggested. This position is endorsed by the evidence of Mr. Kevin Cullen, in cross examination. There will be no breach of the Water Framework Directive as there will be no deterioration in the quality of the ground water and there will be no direct discharge to the ground water by reason of the presence of the low permeability clay.

As affirmed by the Geological Survey of Ireland, the site of the proposed landfill is classified as R1 in the matrix for resource protection. It is not the case that the area where the proposed landfill is to be located is a source protection area within the GSI matrix. It is established by the GSI that it is resource protection according to that matrix that is relevant for the purposes of the proposed development.

The proposed restoration of the historical landfill must be seen in the overall context of the construction and operation of the development involving the movement and processing of nearly 5,000,000 cubic metres of material. That movement and processing of material has been the subject of environmental impact assessment for the purposes of the decision of the Agency of which the material contained in the historical landfill forms part [4 hectares of 210 hectares overall].

When the Inspectors considers the file referable to the Blessington site referred to by Greenstar, it will be manifestly clear that the characteristics of that location are

different to the site at Nevitt. In Blessington, there was an unconfined aquifer and a GSI Matrix response of R3(1). In addition, there were houses less than 30 metres from part of the waste deposit with a significant and evident gas danger to these receptors.

This confirms the "case by case" assessment that requires to be done for the purposes of the grant of a waste licence. There is no such concept as a precedent for the purposes of the grant of a waste licence.

It is respectfully submitted that in those circumstances, the PD with the conditions contained therein and the Schedule setting out emission limit values and ongoing monitoring constitute appropriate conditions for the purpose of the discharge of the Agency's functions – see Section 40 and 41 of the WMA

In addition, the evidence of Ms. Heavey on behalf of Greenstar establishes the considerable difference between the material referred to in the historical landfill and that at Blessington.

Mr. Cullen considered that the capping of the material in the historical landfill would be sufficient for the purposes of the protection of ground water. This is the proposal for dealing with this historical landfill waste contained in the EIS.

The treatment of the historical landfill must also be seen in the overall context of the development proposal as distinct from the sites specific remediation for the Blessington site.

The PD identifies the waste processes which include land filling, the use of inert waste in landfill operation and the storage of waste including temporary storage of unacceptable waste in a quarantine area - Condition 3.11 and Condition 6.35 in the overall context.

The position of Indaver is one that is not consistent with the objectives of the Waste Plan for the Dublin region, in effect Mr. Ahern's contention if it were accepted, would be to hand over control of landfill capacity primarily to the private sector in breach of

the integrated plan for the region. It is submitted that this is no basis for the refusal of a waste licence. It is the position that the facilities referred to by Mr. Ahern outside the Dublin region cannot accept the quantities or types of waste suggested. Furthermore, the transfer stations referred to by Mr. Ahern are not in a position to accept certain of the waste quantities and types for onward transmission to the facilities as suggested. Mr Ahern is asking the Region to abdicate its responsibilities with respect to the stated objectives of the Plan and to put its reliance on meeting those objectives in the hands of private operators in other Regions.

In so much as reliance is placed by the NLAG on the document entitled "Programme for Government", it is submitted that this does not and cannot constitute Government policy. Government policy in relation to waste management is primarily reflected in the Waste Management Plans at regional level as so provided for in the 1998 Government Policy document and endorsed in subsequent policy documents since then. Notwithstanding this, the objectives within various policy and strategy documents referred to by the objectors including 'Changing our Ways', the 'National Biodegradable Waste Strategy' and the EU Landfill Directive with regard to prevention and minimisation of waste, recycling of waste and diversion of biodegradable waste from landfill are all enshrined in the Dublin Waste Management Plan which still identifies the need for residual landfill within the Region.

This must also be seen having regard to the obligation of the Agency under Section 52(1)(a) to keep itself informed of Policies and Objectives of public authorities. This is relevant in the context of the complaint by Mr. Cullen of a failure to have regard to sustainable development of ground water in the vicinity of the proposed development. It is abundantly clear that it is the policy of Fingal County Council as the relevant authority and as the relevant water authority not to engage in the development of any further public water supply in the area. Aside from this, the GSI Response Matrix is a risk assessment approach which ensures the protection of groundwater for future use, thereby being entirely consistent with the principles of sustainability.

The mitigation strategies identified in the PD for the control of emissions are ones where established techniques, easily understood and easily achievable are enshrined

therein incorporating a suite of measures to ensure there is no linkage from source to receptor in accordance with the Code of Practice.

There is no basis for precedent to be applied to the assessment by the Agency in respect of the PD.

Greenstar accept that the information has been provided in the EIS and subsequent RFI in relation to the historical landfill but do not agree with the technical assessment. This is a matter for the judgment of the Agency in the overall context of the emission limit values enshrined in the PD in the discharge of its functions.

### **Clarification of Objection**

By way of clarification, the Council's objection to Condition 8.1.1 only relates to amending the first line of that Condition i.e. the subheadings (i) and (ii) should remain in place. The Council's objection to Condition 8.1.2 remains.

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## Conclusions

It is submitted that: -

1. The GSI have affirmed the Resource Protection Matrix R1 for the proposed development;
2. The proposed development has been designed in accordance with the technical requirements of the Landfill Directive and the technical requirements of the EPA Guidance Document on landfill design;
3. The evidence overwhelmingly establishes that the proposed development so designed, does not pose a risk of pollution to the Ground Water. This evidence is supported by Mr. Kevin Cullen;
4. The presence of low permeability clays between the landfill and the ground water protects the ground water resources;
5. The proposed development is consistent with the Objectives and Policies of the Waste Plan;
6. Appropriate emission conditions, limits, controls and monitoring proposals have been enshrined in the PD [subject to minor technical adjustment as sought by the Council]. Any subsequent compliance measures within the context of Section 40(4) are to be construed within the parameters enshrined in the PD.

DERMOT FLANAGAN

13 MARCH 2008

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