

**OBJECTION TO THE PROPOSED DECISION
ISSUED IN RESPECT OF THE
WASTE LICENCE REVIEW APPLICATION
FOR THE
DREHID WASTE MANAGEMENT FACILITY
(WASTE LICENCE REGISTER NO. W0201-02)**

2nd December 2008

1.0 INTRODUCTION

This objection is made by Bord na Móna Plc, the applicant, and addresses separately each condition of the Proposed Decision to which the objection relates. In a number of instances the purpose of the objection is to provide for clarification of the condition.

As set out below, the condition or schedule to which the objection relates is stated. The grounds of the objection are stated in full including the reasons, considerations and arguments on which they are based.

2.0 CONDITIONS TO WHICH OBJECTION RELATES

Glossary of Terms

Incident

The following shall constitute as incident for the purposes of this licence:

- (i) an emergency;*
- (ii) any emission which does not comply with the requirements of this licence;*
- (iii) any exceedance of the daily duty capacity of the waste handling equipment;*
- (iv) any trigger level specified in this licence which is attained or exceeded;*
- (v) any indication that environmental pollution has, or may have, taken place; and,*
- (vi) cessation of flare operation (following commissioning).*

Grounds for the Objection

The Glossary of terms sets out that the 'cessation of flare operation (following commissioning)' constitutes an incident. In terms of this wording the operator requires clarification of the term 'cessation'. Can the agency provide a timeframe for what would constitute a cessation in order for the operator to incorporate such into facility operation procedures?

Condition

1.5 *Waste Acceptance Hours and Hours of Operation*
Waste may be accepted at the facility for disposal at the landfill only between the hours of 0800 and 1800 Monday (Public Holidays excluded) to Saturday inclusive. The hours of operation are limited to between the hours of 0800 and 1830 Monday (Public Holidays excluded) to Saturday inclusive.

Grounds for the Objection

This condition would have impacts on the flexibility of acceptance of waste at the facility. The current Waste Licence (W0201-01) does not state the hours of operation and this allowed for, in part, late or broken down trucks to be accepted, as provided for in Section 3.13.1 of the EIS. There is also a concern with respect to the proposed new requirement to close the facility on Public Holidays. This is not the case currently and its proposed introduction is unwarranted. For instance, should Christmas day fall on a Monday, there would be 3 consecutive days when the Facility would be unable to accept waste. The impact would also extend to waste collection.

Condition

3.3 *The licensee shall install on all emission points such sampling points or equipment, including any data-logging or other electronic communication equipment, as may be required by the Agency. All such equipment shall be consistent with the safe operation of all sampling and monitoring systems.*

3.9 *The licensee shall install on all emission points such sampling points or equipment, including any data-logging or other electronic communication equipment, as may be required by the Agency. All such equipment shall be consistent with the safe operation of all sampling and monitoring systems.*

Grounds for the Objection

It has been noted that Condition 3.3 and 3.9 are identical. We suggest deletion of one of these conditions for the purpose of clarity.

Condition

5.2 *No emissions, including odours, from the activities carried on at the site shall result in an impairment of, or an interference with amenities or the environment beyond the facility boundary or any other legitimate uses of the environment beyond the facility boundary.*

Grounds for the Objection

Clarification is requested on this issue as the terms impairment and interference are subjective. It is suggested that rewording of this condition to *-No emissions, including odours, from the activities carried on at the site shall result in significant impairment of, or significant interference with amenities or the environment beyond the facility boundary or any other legitimate uses of the environment beyond the facility boundary.* This rewording is similar to the wording outlined in Waste Licence W0201-01

Condition

5.4 The licensee shall ensure that all or any of the following:

- Vermin,
- Birds,
- Flies,
- Mud,
- Dust,
- Litter,

associated with the activity do not result in an impairment of, or an interference with, amenities or the environment at the facility or beyond the facility boundary or any other legitimate uses of the environment beyond the facility boundary. Any method used by the licensee to control or prevent any such impairment/interference shall not cause environmental pollution.

Grounds for the Objection

Clarification on this issue is required as the terms impairment and interference are subjective. It is suggested that the condition be reworded to,

'The licensee shall ensure that all or any of the following:

- Vermin,
- Birds,
- Flies,
- Mud,
- Dust,
- Litter,

associated with the activity do not result in significant impairment of, or significant interference with, amenities or the environment at the facility or beyond the facility boundary or any other legitimate uses of the environment beyond the facility boundary. Any method used by the licensee to control or prevent any such impairment/interference shall not cause environmental pollution.'

This rewording is similar to the wording suggested for Condition 5.2 above.

Condition

8.1.1 *Only residual waste that has been subject to adequate pre-treatment is permitted to be accepted for disposal at the landfill facility after 16th July 2009.*

- (i) *Treatment shall, as a minimum, reflect any published EPA guidance.*
- (ii) *This requirement may, subject to the agreement of the Agency, not apply to:*
 - *inert wastes for which treatment is not technically feasible;*
 - *other waste for which such treatment does not contribute to the objectives of the Landfill Directive as set out in Article 1 of the Directive by reducing the quantity of the waste or the hazards to human health or the environment.*

Grounds for the Objection

The potential for the definition of treatment and/or pre-treatment to be changed with reference to published EPA guidance gives rise to uncertainty regarding the meaning and effect of this condition.

The referenced guidance is, as yet, unpublished and it is impossible for a landfill operator to measure, consider and commit to compliance and assume an unlimited risk of enforcement. The necessary obligation is more clearly stated in condition 8.1.1 of the existing waste licence (Ref. W0201-01).

Further, the reference to 16 July 2009 is confusing, where the facility is one that commenced after 16 July 2001. It appears that the provisions of Article 14 of the Landfill Directive (1999/31/EC) do not apply to this facility.

In all the circumstances, the Agency is requested to reinstate the language in condition 8.1.1 of the existing waste licence.

Condition

8.1.2 For Biodegradable Municipal Waste (BMW) the following pre-treatment requirements must be demonstrated:-

- (i) By 1st January 2010 a minimum of 50% of all BMW accepted at the facility shall be biologically pre-treated (including diversion).
- (ii) By 1st January 2013 a minimum of 70% of all BMW accepted at the facility shall be biologically pre-treated (including diversion).
- (iii) By 1st January 2016 a minimum of 90% of all BMW accepted at the facility shall be biologically pre-treated (including diversion).

Grounds for the Objection

The objections to this condition are set out in turn below in four parts:

Part I. The Condition is Premature

The Agency is premature in imposing a condition of this kind and effect.

If the Agency must impose such a condition, there will be further opportunity to review the matter at the same time and in the same manner as for other landfill operators. A decision to postpone consideration to that time would not prejudice the Agency from revisiting these issues.

The basis for this complaint is outlined below.

a) Consultation Draft

This condition reflects verbatim the language from Figure 6 of the Consultation Draft EPA Technical Guidance Document on Municipal Solid Waste – Pre-treatment & Residuals Management (September 2008). There can be no doubt that the Agency has had regard to and relied upon the draft guidance in making the decision to attach this condition.

The stakeholder consultation on this draft technical guidance document has only recently concluded (13th October 2008). It is understood that the Agency has not completed its review and assessment of the submissions and observations received or, for that matter, considered what modifications ought to be made, if any, to the draft guidance before it may be considered final.

Put simply, it is too soon for the Agency to rely on the draft guidance and copy its recommendations into waste licences.

b) Strategic Environmental Assessment

More fundamentally, it is now clear that article 9 of the European Communities (Environmental Assessment of Certain Plans and Programmes)

Regulations, 2004 (SI No. 435 of 2004) (“SEA Regulations”) applies to the draft guidance.

Specifically, the draft guidance is a plan or programme for waste management “which set the framework for future development consent of projects” that require environmental impact assessment. The draft guidance is clearly subject to preparation by an authority at a national level – the Agency. It is required by legislative, regulatory or administrative provisions, to give effect to certain European law obligations. It plainly relates to waste management and it is now clear that it sets the framework for future waste licences, which are one kind of development consent. Clearly, the projects to which it is relevant are subject to the requirements of the EIA Directives (85/337/EEC, 97/11/EC and 2003/35/EC).

For this reason, the draft guidance cannot be effected without observing the requirements of the SEA Regulations and properly assessing the likely significant effects on the environment (both positive and negative) of implementing the draft guidance.

It would be unlawful for the Agency to give effect to the draft guidance before subjecting that draft guidance to the necessary strategic environmental assessment.

c) Novel

No condition of this kind, import and effect has ever before been imposed in a waste licence in Ireland.

It would be inappropriate for the Agency to single out Bord na Móna and the Drehid Waste Management Facility, subject them to operational limits and expose them to a risk of criminal enforcement that no other landfill operator or waste management facility must satisfy or endure.

In the interests of fairness and equality between all persons that operate in the competitive market for waste management services, a common approach should be adopted to the review of waste licences – both in substance and in time.

Part II. The Approach is Flawed in Principle

Regardless of timing, there are fundamental objections to the approach contemplated for compliance with, in particular, Article 5 of the Landfill Directive that was first revealed in the draft guidance and is now manifested in Condition 8.1.2.

The submission made by Bord na Móna¹ on the draft guidance outlines the main concerns and it is not proposed to repeat them here. That is a matter for the, as yet,

¹ Email sent by John Connolly, Bord na Móna dated the 13th of October 2008.

incomplete consultation and strategic environmental assessment process for the draft guidance.

However, at this time, it is proposed to set out the most elementary objections to the Agency's approach in Condition 8.1.2.

a) Treatment and Diversion Merged

Article 5(2) of the Landfill Directive describes targets for Member States. These targets are sometimes colloquially labelled "diversion targets", but this merely serves to confuse matters. Properly understood, the targets are limitations on the annual amount of biodegradable municipal waste that may go to landfills in each Member State. For convenience, these are referred to as the national limits.²

Article 6 of the Landfill Directive requires Member States to take measures in order that "only waste that has been subject to treatment is landfilled". This obligation is sometimes colloquially labelled a requirement for pre-treatment.

The two are very different. Condition 8.1.2 merges them.

With Condition 8.1.2, what might be understood as an attempt to give effect to the national limits, takes effect as a target for biological pre-treatment.

The bias for biological pre-treatment over any other kind of treatment has no basis under the Landfill Directive. Where is the legal or policy basis for 90% biological pre-treatment within seven years from now? It appears to be the unintended consequence of conflating these discrete issues.

The addition of the expression "including diversion" serves to confuse matters further. The only implication is that diversion is a form of biological pre-treatment? This cannot be the case. The decision to merge is confusing.³

In the interest of clarity, the Agency should separate the approach to pre-treatment from the approach to national limits.

b) National Limits Misapplied

The national limits in Article 5(2)(a) through (c) have been recast. In effect, they have been flipped or reversed from national limits to local diversion targets.

² The expression "go to landfills" is our attempt to phrase in the appropriate tense the language of the Landfill Directive – "going to landfills". We consider the expressions "consignment to" or "disposal to" are also appropriate.

³ In ease of further analysis, it is presumed that Condition 8.1.2 was intended to describe diversion targets.

Quite apart from the change from national to local, which is considered below, the decision to flip or reverse from an acceptable limit to a diversion target is problematic.

There are practical issues: how should credit for waste prevention and minimisation be allocated; how should credit for home composting and other existing recycling/recovery operations be allocated; how should credit for waste-to-energy be allocated; and, how is the gross or parent waste to be defined? While there is potential for double-counting, more importantly, there are impossible challenges for any landfill operator attempting to demonstrate compliance.

Also, rather than describe limits calculated by reference to 1995 Eurostat data, the Agency has described a target that appears to be derived from current waste growth trends. The decision to abandon data that is simple, certain and transparent in favour of unverified projections undermines the enforceability of the condition.

It does not make sense to change from the language of the Landfill Directive.

c) National Limits Delegated

Perhaps the most fundamental difficulty with the Agency's approach is the decision to delegate national limits to the landfill operator.

In essence, the Agency appears intent on taking the national annual limit for consignment of biodegradable waste to landfill and carving that burden for distribution proportionately among current landfill operators.⁴

That approach may be superficially attractive, in particular, where a Member State may wish to demonstrate a path to compliance with its obligation under European law. However, it is too unsophisticated, inflexible and crude a mechanism for the challenging target in issue, for the following reasons.

(i) The Challenge requires a National Response

The Agency should understand that the national limits imposed on Ireland cannot be achieved without delivery of new waste treatment/management infrastructure.

Earlier this year, the Agency acknowledged "that many obstacles remain and further active policy intervention is required if targets set for diversion of biodegradable municipal waste from landfill

⁴ As noted, the language does not actually deliver that object, but this is understood to be the purpose of Condition 8.1.2.

are to be achieved”⁵. Furthermore, the draft guidance recites the public policy interventions required to deliver alternative waste management infrastructure and practices.

The European Union has recognised that each Member State must encourage the use of treatment processes to ensure that landfill is compatible with the objectives of the Landfill Directive.⁶

Indeed, it is accepted internationally that diversion depends primarily on the provision of alternative waste treatment /management infrastructure.⁷

It follows clearly that these national limits demand a national response. Condition 8.1.2, as written, does not contribute to delivering the necessary response.

(ii) The Challenge requires a Flexible Response

Having regard to the practical difficulties of measuring compliance with Condition 8.1.2 and the obstacles to enforcement that follow, there is little doubt that a more flexible response is required.

Condition 8.1.2 does not allow for potential co-operative achievement of the relevant limits. Similarly, it does not allow compliance with the national target to be achieved by those persons best placed technically and economically to achieve it. Such flexibility would deliver compliance with the least possible harm to economic development and employment and without any distortion to competition.

The Agency might draw inspiration from market-based and other collective initiatives, e.g., for greenhouse gases or packaging waste. The landfill allowance trading scheme in the United Kingdom illustrates how these market-based approaches can be applied to the national targets.

The command and control model of environmental regulation is too crude. Put simply, the condition is an inefficient tool for this challenge.

⁵ EPA discussion paper *Hitting the Targets for Biodegradable Municipal Waste: Ten Options for Change* (January 2008).

⁶ Recital (8) of the Landfill Directive.

⁷ European Environmental Agency report *Europe's Environment – The Fourth Assessment* (October 2007).

(iii) The Landfill Directive does not require Delegation

As the Landfill Directive does not require Member States to impose this obligation on landfill operators, the Constitutional protection for measures “which are necessitated by the obligations of membership of the European Union or of the Communities”⁸ is unavailable.

The legal basis for the imposition of this kind of condition is not founded on primary legislation. Instead, reliance is placed on secondary legislation to underpin draft administrative guidance. However, that secondary legislation does not require delegation. Even if it did, this would offend the provisions of the Constitution that vest in the Oireachtas the sole and exclusive power of making laws for the State. This is because no relevant principles and policies have been included in primary legislation to effect delegation of the kind now proposed.

There is no legal basis for imposing conditions of this kind.

Part III. The Language used is Unclear

The condition, as drafted, is simply unworkable and unenforceable. The following difficulties have already been described:

- a) The condition confuses pre-treatment/treatment and diversion;
- b) The condition suggests that diversion is a form of biological pre-treatment;
- c) The condition is based on unverified projected waste growth and not simple, certain and transparent Eurostat data;
- d) The condition appears to allow credit for waste prevention and minimisation, home composting, other recycling/recovery operations, waste-to-energy, without any mechanism for allocating such credit;
- e) The condition appears based on the notion of parent or gross waste, without any mechanism for defining that fraction; and,
- f) Compliance with the condition may be frustrated by failure to deliver the necessary alternative waste treatment/management infrastructure, whether on time or at all.

⁸ Under Article 29.4.10^o of the Constitution.

There are other difficulties with the language used:

- (i) The expression “by 1st January” (meaning “before”) requires compliance at some point in time sooner than strictly required by the Landfill Directive;
- (ii) Strictly, the condition requires further biological pre-treatment of waste that has already been accepted at the facility. This is because the targets are described with reference to waste accepted at the facility; and,
- (iii) Having accepted the waste, how can diversion be relevant to compliance with the condition. Diversion and acceptance are mutually exclusive alternatives.

Part IV. The Condition defeats the Objective of the Review

The application for review comprises a request to increase waste intake from 120,000 tonnes per annum to 360,000 tonnes per annum for a period of seven years only.

This application would not have been made to the Agency, were it not for a pressing need for additional capacity in the area served by this landfill. There has been unforeseen delay to infrastructure contemplated by relevant regional waste management plans, including to projects that had been expected to assist compliance with the requirements of the Landfill Directive.

The Agency appears not to have taken this fact into account.

It is nonsensical to impose targets that are premised upon the delivery of infrastructure, where the application has been made because that very infrastructure has been delayed.

Conclusion

For all of these reasons, the Agency is requested to remove Condition 8.1.2 from the proposed decision.

Having regard to the limited time for which this application is useful and relevant and the fact that planning permission for the increase will cease to have effect in five years,⁹ the Agency is requested to give the matter priority and urgent attention.

⁹ Strategic Infrastructure Consent from An Bord Pleanála dated 31 October 2008 (Ref. PL09.PA0004)

Condition

8.1.3 Stabilised waste accepted at the facility must achieve a biological stability standard published, or agreed, by the EPA.

Grounds for the Objection

Similar to Condition 8.1.1, the potential for the definition of biological stability standard to be changed with reference to published EPA standards gives rise to uncertainty regarding the meaning and effect of this condition.

The standard quoted in the Glossary to the proposed decision is not final. The draft guidance makes reference to the proposed standard (at page 19). For reasons outlined above, it would be unlawful and inappropriate to give effect to this draft guidance at this time. Further, the EU Working Document, to which both the proposed decision and the draft guidance make reference is itself also draft.

In these circumstances, it is impossible for a landfill operator to measure, consider and commit to compliance and assume an unlimited risk of enforcement.

In addition, sensibly, if a standard for the output from processes for the treatment of biodegradable waste is to be imposed, it should be imposed on those processes directly. The condition is too indirect a means of achieving an objective that is more properly targeted at those carrying out composting, anaerobic digestion and other technologies. With respect to timing, it appears unlikely that test methods will be available to give any, or sufficient, comfort to potential developers of the necessary biological pre-treatment infrastructure, in time to meet the first target date in 2010.

Many of the complaints already made above for Condition 8.1.2, including that the condition is premature and novel, apply here also.

For these reasons, the Agency is requested to remove Condition 8.1.3 from the proposed decision.

Condition

8.1.4 *The licensee is required to maintain on-site as part of their waste acceptance procedures and associated documentation, evidence to demonstrate compliance with the obligations of Condition 8.1.1, 8.1.2 & 8.1.3, which shall be available for inspection on request by Agency personnel.*

8.1.5 *The licensee shall as part of the Annual Environmental Report for the site submit a statement on the achievement of the waste acceptance and pre-treatment obligations articulated in Conditions 8.1.1 and 8.1.2, and as otherwise may be specified in national or EU policy.*

Grounds for the Objection

Pending resolution of the objections made to Condition nos. 8.1.1, 8.1.2 and 8.1.3, compliance with these two related conditions is impossible.

For this reason, the Agency is requested to remove Condition nos. 8.1.4 and 8.1.5 from the proposed decision.

Condition

8.1.15 *The licensee shall, in writing, notify the Agency without delay of any waste received at the facility that does not meet the waste acceptance criteria.*

Grounds for Objection

Clarification of this condition is required. Currently waste received at the facility that does not meet the waste acceptance criteria is logged on site (i.e. tyres, batteries, WEEE etc). Notifying the agency of each occurrence would be an onerous task, as this happens on a daily basis. It may be more prudent to have available the data on site for inspection as is currently the case.

Condition

8.8 *The loading and unloading of materials shall be carried out in designated areas protected against spillage and leachate run-off.*

Grounds for Objection

Clarification on the wording of this condition is required. It is respectfully suggested that the term 'materials' is ambiguous and may need to be defined. For instance paper being delivered to the Administration building could be covered by this condition.

Condition

8.9 *Waste shall be stored in designated areas, protected as may be appropriate against spillage and leachate run-off. The waste shall be clearly labelled and appropriately segregated.*

Grounds for Objection

It is suggested that this condition be reworded to '*Waste destined for off-site disposal/recovery shall be stored in designated areas, protected as may be appropriate against spillage and leachate run-off. The waste shall be clearly labelled and appropriately segregated.*' This rewording is in keeping with Waste Licence W0201-01 and provides clarity on the type of waste.

Condition

8.11 *Waste for disposal/recovery off-site shall be analysed in accordance with Schedule C: Control & Monitoring of this licence.*

Grounds for Objection

This condition is not clear to the applicant, particularly in respect of how it will be implemented. Schedule C: Control and Monitoring does not appear to be relevant.

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3.0 SCHEDULES TO WHICH OBJECTION RELATES

Schedule

Schedule A.2 Waste Acceptance

Table A.2.2 Total Permitted Landfill Capacity

Total quantity of waste permitted to be disposed in the landfill facility (over authorised life of facility)	4,080,000 m ³
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Grounds for the Objection

Clarification is required on Schedule A.2 as this figure should be 4,080,000 tonnes rather than m³.

Schedule

Schedule C.3 Ambient Monitoring

Receiving Water Monitoring

Location: Cushaling River d/s of any discharge from the landfill.

Parameter	Monitoring Frequency	Analysis Method/Technique
Biological Quality (Q) Rating/Q Index	Annually Note 1	To be agreed by the Agency
Parameters in Table C 2.2	Visual Inspection Daily All others parameters Quarterly unless specified as Annually in Table C 2.2	Standard Methods

Note 1: Monitoring period - June to September.

Grounds for the Objection

Visual Inspection is currently required to be carried out weekly. The proposal to increase the frequency to daily is unnecessary as the surface water is already inspected daily further upstream, at the outlet from the sedimentation lagoons, as provided for in schedule C.2.2.

Schedule

Schedule C.2.2. Monitoring of Emissions to Water

It is respectfully suggested that Schedule C.2.2 does not provide a location reference for the monitoring of emissions to water and that a location reference should be provided for the purpose of clarity.