This report has bee cleared for submission to the board by:
Frank Clintion, Programme Manager

Signed: Grainne Dyleaby Date: 2/12/10

epa Environmental Protection Agency
An Ghníomhaireacht um Chaomhnú Comhshaoil

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ADDENDUM NO. 2 TO INSPECTORS REPORT ON A WASTE LICENCE APPLICATION

To:	Directors
From:	Aoife Loughnane - **Environmental Licensing Programme**
Date:	1st December 2010
RE:	Application for a review of Waste Licence from Indaver Ireland (Branch of Indaver NV), 4 Haddington Terrace, Dun Laoghaire, Co. Dublin. Licence Reg. W0167-02.

This memo aims to clarify a number of items raised at the Board meeting on 23rd November in relation to waste licence review application W0167-02 from Indaver Ireland. This memo should be read in conjunction with my Inspector's Report dated 22nd September, and the Addendum to my Inspector's Report, dated 4th October 2010.

1. Dioxin Levels in the Carranstown Area

Carranstown, Co. Meath is included in the EPA's national dioxin survey (based on levels in cow's milk) as sampling station B17, an area of perceived potential risk. I have consulted with Dr. Colman Concannon, OEA, who has provided recent monitoring results, as presented in the following table.

Table 1. Dioxin & PCB monitoring results at Carranstown, Co. Meath (station B17), 2008 & 2009

Year	Sample	Dioxins	PCBs	Dioxins and PCBs
		WHO-TEQ incl. LOQ pg/g milk fat	WHO-TEQ incl. LOQ pg/g milk fat	Total WHO-TEQ incl. LOQ pg/g milk fat
2008	B17: Carranstown	0.370	0.388	0.758
	Analysis of data from all 13 "B sample" stations	Minimum 0.196 Maximum 0.673 Mean 0.317	Minimum 0.111 Maximum 0.388 Mean 0.188	Minimum 0.307 Maximum 0.835 Mean 0.505
2009	B17: Carranstown	0.236	0.122	0.358
	Analysis of data from all 13 "B sample" stations	Minimum 0.18 Maximum 0.3 Mean 0.216	Minimum 0.102 Maximum 0.597 Mean 0.192	Minimum 0.301 Maximum 0.897 Mean 0.409
EU Limit value		**3.0**	--	**6.0**
EU Action level		**2.0**	**2.0**	--

In 2008 and 2009, the monitoring results for (i) dioxins and (ii) PCBs were both less than 20% of the EU action level of 2.0 pg WHO-TEQ/g, and the sum of dioxins and PCBs was less than 13% of the EU limit value of 6.0 pg WHO-TEQ/g.

In 2008, the Carranstown result for dioxins and PCBs of 0.758 pg WHO-TEQ/g was the second highest of the 13 "B sample" stations, behind the Askeaton area. In 2009, the Carranstown result of 0.358 pg WHO-TEQ/g was below the average value of 0.409 pg WHO-TEQ/g for all 13 "B sample" stations.

As a point of clarification, I can confirm that P. Carney Limited scrap metal processing installation (Licence P0402-02) is located approximately 42 km west of Carranstown, at Crossakiel, Kells, Co. Meath. Therefore, the impact of dioxin emissions from the scrap metal processing installation would not be represented in the monitoring results at station B17 (Carranstown), but rather in the monitoring results at station B15 (Crossakiel, Kells), which is also identified as an area of perceived potential risk.

2. Types of waste (and associated EWC codes) to be accepted for Incineration

I have reviewed the list of EWC codes which the applicant has applied to accept for incineration. I recommend some minor amendments to the table and footnotes in *Schedule A: Limitations*, as presented below. The amendments include:-

(i) Inclusion of clarification text immediately above the table;
(ii) Revision of text in footnotes 1, 2 and 3; and
(iii) Application of footnote 2 to a broader range of waste types, i.e., EWC codes in chapters 15, 17, 19 and 20 of the EWC catalogue.

SCHEDULE A: Limitations

A.1 Waste Categories and Quantities for Acceptance for Incineration

Only waste falling within the descriptions in the first column (subject to the notes at the end of the table), bearing the waste codes in the second column, and being of the types of waste listed in the third column may be accepted. The maximum tonnage of any type of waste which may be accepted is as listed in the fourth column, subject to the proviso that the total quantity of all wastes must not exceed the overall limit at the bottom of that column.

Waste Type	European Waste Catalogue (EWC) Code	Description	Maximum Quantity (Tonnes per annum)
Non-hazardous Residual Municipal Waste. Note 1	20 03 01	Mixed Municipal Waste	200,000
	20 03 02	Waste from Markets	
	20 03 03	Street Cleaning Residues	
	20 03 07	Bulky Waste	
	20 03 99	Municipal wastes not otherwise specified	
	02 01 02, 02 01 03, 02 01 04, 02 01 06, 02 01 07, 02 01 09, 02 01 99, 02 02 02, 02 02 03, 02 02 99, 02 03 02, 02 03 03, 02 03 04, 02 03 99, 02 04 99, 02 05 01, 02 05 99, 02 06 01, 02 06 02, 02 06 99, 02 07 01, 02 07 02, 02 07 03, 02 07 04, 02 07 99	Wastes from rendering plants, slaughterhouses, veterinarians, farms, horse stables, food factories, warehouse distributors, manufacturers, restaurants.	
	03 01 01, 03 01 05, 03 01 99, 03 02 99, 03 03 01, 03 03 07, 03 03 08, 03 03 99	Wastes from furniture production, carpentry, forestry.	
	04 01 01, 04 01 02, 04 01 05, 04 01 09, 04 01 99, 04 02 09, 04 02 10, 04 02 15, 04 02 17, 04 02 21, 04 02 22, 04 02 99	Wastes from leather, fur and textile industries.	

Commercial & Industrial non-hazardous Waste	05 01 99, 05 06 99, 05 07 02, 05 07 99	Wastes from petroleum refining, natural gas purification and pyrolysis of coal.	50,000
	06 01 99, 06 02 99, 06 03 99, 06 04 99, 06 06 03, 06 06 99, 06 07 99, 06 08 99, 06 09 04, 06 09 99, 06 10 99, 06 11 01, 06 11 99, 06 13 03, 06 13 99	Wastes from inorganic chemical processes.	
	07 01 99, 07 02 13, 07 02 15, 07 02 17, 07 02 99, 07 03 99, 07 04 99, 07 05 14, 07 05 99, 07 06 99, 07 07 99	Wastes from organic chemical processes.	
	08 01 12, 08 01 18, 08 01 99, 08 02 01, 08 02 99, 08 03 13, 08 03 18, 08 03 99, 08 04 10, 08 04 99	Wastes from paint/varnish/coating/glue manufacturers, painting companies, householders, printers waste, general maintenance contractors.	
	09 01 07, 09 01 08, 09 01 10, 09 01 99	Wastes from photographers, pharmacists, schools and colleges.	
	10 01 25, 10 01 99, 10 03 99, 10 04 99, 10 05 99, 10 06 99, 10 07 99, 10 08 99, 10 09 99, 10 10 99, 10 11 99, 10 12 99, 10 13 99	Wastes from thermal processes.	
	11 01 14, 11 01 99, 11 02 03, 11 02 06, 11 02 99, 11 05 99	Wastes from metal plating, engineering firms.	
	12 01 01, 12 01 03, 12 01 05, 12 01 13, 12 01 99	Wastes from crane companies, jewellers, car manufacturers, engineering firms.	
	Note 2 15 01 01, 15 01 02, 15 01 03, 15 01 04, 15 01 05, 15 01 06, 15 01 07, 15 01 09, 15 02 03	Packaging wastes from manufacturing companies, schools, hospitals, chemical industry, local authorities, householders.	
	16 01 03, 16 01 06, 16 01 15, 16 01 17, 16 01 18, 16 01 19, 16 01 20, 16 01 22, 16 01 99, 16 02 16, 16 03 04, 16 03 06, 16 05 09, 16 07 99, 16 11 02, 16 11 04, 16 11 06	Wastes from garages, maintenance of vehicles, farming, warehouse distributors, companies who produce a product/batch, e.g. pharmaceutical, chemical, food manufacturing (off-specification products), schools, universities, hospitals.	

	18 01 01, 18 01 02, 18 01 04, 18 01 07, 18 01 09, 18 02 01, 18 02 03, 18 02 06, 18 02 08	Wastes from healthcare/hospitals, universities, veterinarians.	
	Note 2 19 02 03, 19 02 10, 19 02 99, 19 05 01, 19 05 02, 19 05 03, 19 05 99, 19 06 04, 19 06 06, 19 06 99, 19 08 01, 19 08 02, 19 08 09, 19 08 99, 19 09 01, 19 09 04, 19 09 05, 19 09 99, 19 10 01, 19 10 02, 19 10 04, 19 10 06, 19 11 99, 19 12 01, 19 12 02, 19 12 03, 19 12 04, 19 12 05, 19 12 07, 19 12 08, 19 12 10, 19 12 12, 19 13 02	Wastes from waste management facilities, transfer stations, water treatment facilities (e.g. local authorities, pharma industry), mechanical-biological treatment plants, landfills.	
	Note 2 20 01 01, 20 01 08, 20 01 10, 20 01 11, 20 01 25, 20 01 30, 20 01 32, 20 01 38, 20 01 39, 20 01 40, 20 01 41, 20 01 99, 20 02 01, 20 02 03, 20 03 06	Wastes from waste management facilities, transfer stations, waste collectors, local authorities, septic tank companies.	
Sewage & Industrial Sludges	02 01 01, 02 02 01, 02 02 04, 02 03 01, 02 03 05, 02 04 03, 02 05 02, 02 06 03, 02 07 05, 03 03 02, 03 03 05, 03 03 10, 03 03 11, 04 01 07, 04 02 20, 05 01 10, 05 01 13, 06 05 03, 07 01 12, 07 02 12, 07 03 12, 07 04 12, 07 05 12, 07 06 12, 07 07 12, 08 01 14, 08 01 16, 08 02 02, 08 03 07, 08 03 15, 08 04 12, 08 04 14, 10 01 21, 10 02 15, 10 11 18, 10 12 13, 11 01 10, 12 01 15, 19 02 06, 19 08 05, 19 08 12, 19 08 14, 19 09 02, 19 09 03, 19 09 06, 19 11 06, 19 13 04, 19 13 06, 20 03 04	Wastes from industrial and municipal wastewater treatment plants, washing and cleaning at commercial and industrial sites.	20,000
Non-hazardous Aqueous Wastes	08 01 20, 08 02 03, 08 03 08, 08 04 16, 11 01 12, 16 10 02, 16 10 04, 19 04 04, 19 06 03, 19 06 05, 19 07 03, 19 13 08	Wastes from pharmaceutical industry, paint/varnish/coating/glue manufacturers, painting companies, engineering firms, printers waste, general maintenance contractors, metal plating.	10,000
Construction & Demolition Waste	Notes 2 & 3 17 02 01, 17 02 02, 17 02 03, 17 03 02, 17 05 04, 17 05 08, 17 06 04		50,000
Total			**200,000**

Note 1: Household waste (as well as commercial and other waste, that, because of its nature or composition, is similar to household waste) that has been pre-sorted or segregated to remove reusable and recyclable materials.

Note 2: **Non-contaminated and separately collected recyclable waste shall only be accepted for incineration subject to the prior agreement of the Agency.**

Note 3: **While the specified C&D wastes may not have a significant energy content, they may be accepted for incineration to treat and remove organic contamination from non-hazardous bulk inorganic materials.**

3. Analysis of Arthur Cox Document

Having taken legal advice on the written opinion by Arthur Cox solicitors on behalf of Indaver, regarding municipal waste pre-treatment requirements in the waste licence review application, the following are the views of the Office of Climate, Licensing and Resource Use (OCLR):

The Introduction

The Cox document notes that the Guidance document *"is principally directed to providing a framework within which compliance with features of the Landfill Directive ... can be achieved by landfill operators."* This is incorrect. It is directed at providing a framework within which the State can comply with the Landfill Directive, in particular the obligation to reduce the fraction of waste ultimately going to landfill. The Guidance document therefore deals, as it must, with the entire life cycle of waste, with a view to minimising the amount of waste going to landfill. It does so within the context of the waste hierarchy and BAT. It states:

> This guidance note will bring greater clarity as to what is expected in relation to waste pretreatment obligations for landfill and incineration. The implementation of this guidance will reduce the environmental burden of landfills and will act to assist delivery of Ireland's obligations under EU legislative obligations.

It notes that residual waste ends up in landfill after all forms of treatment, including waste-to-energy (WtE), and examines the measures which can be adopted to reduce the final fraction of waste requiring landfilling. It is not a framework for landfill operators; it is a framework for the State. It does not relate only to landfill, but to all waste which might end up in landfill. This point is significant, because it is this false premise at the outset which leads to the consequent erroneous conclusions in the Cox document.

In its second paragraph the Cox document notes that there is no equivalent diversion target or pre-treatment obligation for any other waste activity. This is true in itself, but not conclusive. Landfill is the ultimate destination of waste which cannot be treated in any other way. Increased recycling prior to incineration will reduce the amount of waste incinerated, reducing the ash produced, and indirectly reducing the waste to be landfilled. Quite apart from this, the obligation to use best available techniques, and to respect the waste hierarchy, together justify a requirement that waste should be separated prior to incineration. Incineration (WtE) is an option for waste that cannot be reused or recycled; but the preferred option under the hierarchy is reuse or recycling. It is a better technique for dealing with the waste.

The Cox document then notes that incineration helps to meet the target of diverting waste from landfill. It undoubtedly does; but it is not the sole means of doing so. Separation of reusables and recyclables prior to incineration reduces the amount of waste needing incineration, and thereby reduces the amount of incinerator ash ultimately requiring landfill. It thereby contributes to achieving the State's target.

The Cox document, however, claims that this conclusion in the Agency Guidance is "irreconcileable with all of the foregoing." It claims that a policy of source separation and diversion of biowaste from WtE facilities, and mechanical treatment of incinerator residues, breaches Irish and European law. This is the argument which is set out in detail in the rest of the document. For the reasons already stated, this argument appears to be misconceived. The details of the argument are addressed below.

"1. It has no basis in domestic or EU law."

The Cox document maintains that there is no basis for saying that "'principles established in BAT as well as in EU legislation and policy obligations' require a WTE operator to 'demonstrate to the EPA that what is accepted for combustion has been appropriately pre-treated'..."

A legal basis is in fact to be found in the Waste Framework Directive (2008/98). Recitals (7) and (8) provide:

> "(7) In its Resolution of 24 February 1997 on a Community strategy for waste management (1), the Council confirmed that waste prevention should be the first priority of waste management, and that re-use and material recycling should be preferred to energy recovery from waste, where and insofar as they are the best ecological options.
>
> "(8) It is therefore necessary to revise Directive 2006/12/EC in order to clarify key concepts such as the definitions of waste, recovery and disposal, to strengthen the measures that must be taken in regard to waste prevention, to introduce an approach that takes into account the whole life-cycle of products and materials and not only the waste phase, and to focus on reducing the environmental impacts of waste generation and waste management, thereby strengthening the economic value of waste. Furthermore, the recovery of waste and the use of recovered materials should be encouraged in order to conserve natural resources...."

Recital (28) provides:

> "(28) This Directive should help move the EU closer to a 'recycling society', seeking to avoid waste generation and to use waste as a resource. In particular, the Sixth Community Environment Action Programme calls for measures aimed at ensuring the source separation, collection and recycling of priority waste streams. In line with that objective and as a means to facilitating or improving its recovery potential, waste should be separately collected if technically, environmentally and economically practicable, before undergoing recovery operations that deliver the best overall environmental outcome. Member States should encourage the separation of hazardous compounds from waste streams if necessary to achieve environmentally sound management."

Recital (31) provides:

> "(31) The waste hierarchy generally lays down a priority order of what constitutes the best overall environmental option in waste legislation and policy, while departing from such hierarchy may be necessary for specific waste streams when justified for reasons of, inter alia, technical feasibility, economic viability and environmental protection."

Article 4 sets out the waste hierarchy:

> "1. The following waste hierarchy shall apply as a priority order in waste prevention and management legislation and policy:
>
> "(a) prevention;
>
> "(b) preparing for re-use;
>
> "(c) recycling;
>
> "(d) other recovery, e.g. energy recovery; and
>
> "(e) disposal.
>
> "2. When applying the waste hierarchy referred to in paragraph 1, Member States shall take measures to encourage the options that deliver the best overall environmental outcome. This may require specific waste streams departing from the hierarchy where this is justified by life-cycle thinking on the overall impacts of the generation and management of such waste."

Hence, there is a legal basis for the hierarchy recited in the Guidance. Implementation of the hierarchy is binding on the State. The Agency is the designated competent authority appointed by the State, and is required to give effect to the hierarchy. The hierarchy informs thinking on what waste should be incinerated, and is given effect to through licensing. Licences are granted for facilities which are required to use the best available techniques. Article 16 provides:

> "1. Member States shall take appropriate measures... to establish an integrated and adequate network of waste disposal installations and of installations for the recovery of mixed municipal waste collected from private households... taking into account best available techniques."

Best available techniques are defined in the WFD by reference to the IPPC Directive (2008/1) which applies to waste incineration. Article 2(12) of the latter Directive provides:

> "12. 'best available techniques' means the most effective and advanced stage in the development of activities and their methods of operation which indicate the practical suitability of particular techniques for providing in principle the basis for emission limit values designed to prevent and, where that is not practicable, generally to reduce emissions and the impact on the environment as a whole:"

Whilst this appears to be aimed at emission limit values, Annex IV clarifies what matters are to be taken into consideration in determining what constitutes best available techniques:

> "Considerations to be taken into account generally or in specific cases when determining best available techniques, as defined in Article 2(12), bearing in mind the likely costs and benefits of a measure and the principles of precaution and prevention:
>
> "3. the furthering of recovery and recycling of substances generated and used in the process and of waste, where appropriate;"

Thus, recovering and recycling of substances used in the process is a relevant consideration.

Article 3 provides:

> "1. Member States shall take the necessary measures to provide that the competent authorities ensure that installations are operated in such a way that:
>
> "(a) all the appropriate preventive measures are taken against pollution, in particular through application of the best available techniques;"

Hence, the State is obliged to ensure that installations take <u>all</u> appropriate preventive measures against pollution, <u>in particular</u> by using BAT.

Returning to the WFD, Article 23 provides for what should be included in a licence:

> "1. Member States shall require any establishment or undertaking intending to carry out waste treatment to obtain a permit from the competent authority.
>
> "Such permits shall specify at least the following:
>
> "(a) the types and quantities of waste that may be treated;"

Hence, the first thing to be decided in any licence is what wastes may be treated at the site. This decision should be informed by the waste hierarchy and the best available techniques. If recyclables should not be treated, this should be stated. The same applies under Irish law to licences granted by the Agency, Section 41(1) of the Waste Management Act (WMA) providing that the conditions included in a licence:

> "(a) shall, as appropriate—
>
> "(i) specify the waste recovery or disposal activity, as the case may be, to which the licence relates ("the activity concerned") and the types, nature, composition and

quantity of waste permitted to be recovered or disposed of during specified periods or otherwise,"

It is not correct, in our opinion, to state that there is no legal basis for the statements in the Guidance note. Should the applicable Directive be Directive 2006/12 (the previous iteration of the Waste Framework Directive) rather than Directive 2008/98, the position should be no different. Article 3 contains an earlier version of the waste hierarchy, while Article 5 of the earlier Directive provides for preventive measures through application of best available technology not entailing excessive cost (updated to best available techniques under the Protection of the Environment Act 2003):

1. Member States shall take appropriate measures... to establish an integrated and adequate network of disposal installations, taking account of the best available technology not involving excessive costs.

The Cox document appears to favour application of the 2008 Directive, although at times it seems to prefer the 2006 version.

The OCRL believes that the Agency has adequate powers under Irish law to do as proposed in the Recommended Licence. There is power to specify the "types, nature, composition and quantity" of waste which may be accepted (Section 41(2)(a)(i)) and an obligation not to grant a licence unless best available techniques will be used to prevent, limit or reduce an emission from an activity (Section 40 (4)(c)). It is the view of this Office that the language is broad enough to allow the Agency to require that emissions from the incineration of recyclables should be prevented, whilst emissions from incineration of non-recyclables would be allowed subject to limits. Section 52(2) of the EPA Act identifies objectives the Agency should pursue when granting licences:

(2) In carrying out its functions, the Agency shall-

(a) keep itself informed of the policies and objectives of public authorities whose functions have, or may have, a bearing on matters with which the Agency is concerned,

(b) have regard to the need for a high standard of environmental protection and the need to promote sustainable and environmentally sound development, processes or operations,

(c) have regard to the need for precaution in relation to the potentially harmful effect of emissions, where there are, in the opinion of the Agency, reasonable grounds for believing that such emissions could cause significant environmental pollution,

These objectives would all justify a requirement for pre-treatment, and a stipulation that only residual waste may be accepted for incineration.

The Cox document next refers to the BREF note on waste incineration which states that "it is BAT to pretreat incoming wastes to the degree required to meet the design specification." The Cox document then argues that source separation is only relevant insofar as it is required by the design specification of the incinerator, but is not relevant to source separated collection systems. This argument does not appear to follow from the statement in the note. Page 21 of the BREF document specifically states:

> "Although beyond the immediate scope of this BREF document, it is important to recognise that the local collection and pretreatment applied to MSW can influence the nature of the material received at the incineration plant. The requirements concerning the pretreatment and other operations should therefore be consistent with the collection system in place."

The BREF note therefore identifies that pre-treatment and prior separation are matters which should be addressed, even if not covered by the note itself.

"2. It is premature"

The Cox document argues that it is premature to require Indaver to respect an obligation that does not exist: because there is no general obligation to separate waste, Indaver cannot, it is argued, be required only to accept separated waste.

Indaver seeks to omit the previously authorised materials recovery facility on the basis that separate collection has been introduced in the North-East Region. It argues that, therefore, there is no need for the recovery facility. At the same time, it wants to accept waste which has not been separated. The EIS was prepared on the basis that the facility would be accepting segregated waste.

The imposition of the requirement only to accept segregated waste is not considered to be premature. A licence will not, at this stage, be issued before 16 December, the deadline for implementation of Directive 2008/98/EC. Even if it were, there is an obligation on the State prior to the deadline not to take steps which would actively undermine compliance with European law. (**C-117/03 Dragaggi**, and **C-129/96 Inter-Environnement Wallonie** cited in the Cox letter). Therefore, it is considered to be open to the Agency to give effect to the provisions of the Directive, noting that Indaver is clearly aware of the Directive and aware that it will apply before it can begin to operate, and the Cox document argues in Item 3 that the 2008 Directive applies.

The Cox argument is based on Article 22 of the 2008 Directive which provides:

> "Bio-waste
>
> "Member States shall take measures, as appropriate, and in accordance with Articles 4 and 13, to encourage:
>
> "(a) the separate collection of bio-waste with a view to the composting and digestion of bio-waste;
>
> "(b) the treatment of bio-waste in a way that fulfils a high level of environmental protection;
>
> "(c) the use of environmentally safe materials produced from bio-waste.
>
> "The Commission shall carry out an assessment on the management of bio-waste with a view to submitting a proposal if appropriate. The assessment shall examine the opportunity of setting minimum requirements for bio-waste management and quality criteria for compost and digestate from bio-waste, in order to guarantee a high level of protection for human health and the environment."

The Cox document argues that Article 22 "does not provide the EPA with an obligation to impose (or, for that matter, a basis for imposing) a pre-treatment obligation or diversion target for WTE." It identifies six supposed reasons for this. Whilst Article 22 does not oblige the State to require separate collection of bio-waste, it does oblige it to take steps to encourage it. It specifically requires that measures should be taken to encourage separate collection. If recipients are required only to accept separated waste, this will encourage them to ensure that only separated waste is presented. The chances of bio-waste being composted must be increased if outlets for its incineration or landfilling are closed off. The Directive certainly, in our view, contemplates that this may be done, and Irish law should be read in the context of that requirement.

1. Turning now to the specific Cox arguments, it is argued, **first**, that action prior to 12 December is premature. On the contrary, it is suggested that failure to act prior to 12 December could undermine the effectiveness of European law because, if an obligation to separate came into being on that date, the Agency would, immediately before that date, have granted a licence which would undermine the achievement of that objective, and which would need to be reviewed to give effect to the new obligation. In fact, given the

time allowed to object to a proposed decision, the licence could not issue until after the new obligation (if such it is) comes into being.

2. Second, it is argued that Article 22 imposes a reciprocal obligation on the European Commission to carry out an assessment of the management of biowaste which must examine "the opportunity of setting minimum requirements for bio-waste management." It is argued that it is therefore premature to impose a requirement to take separated waste in advance of legislation requiring that separation be carried out. This appears to be a minsinterpretation of the the final paragraph of the Article, taking it as meaning that the Commission should set quotas for the amount of bio-waste to be separated. In fact what the paragraph appears to requires, is that the Commission should consider introducing requirements for the quality of management of biowaste. Separation is to be promoted insofar as possible; then, given that there will be more bio-waste treatment going on, the Commission should set down the minimum treatment standards. It is also noted that this paragraph relates only to bio-waste, and not to general recyclables.

3. Third, it is argued, the Guidance document offends against the waste hierarchy, and is therefore contrary to Article 22 which respects the hierarchy. The argument appears to be that, as WtE incineration is preferred over landfill, the same separation requirement cannot be applied to both. This is not accepted: as the objective is to ensure recycling of recyclables, which is a preferred option in the hierarchy, it makes sense to ensure that they do not fall into waste destined for the lower options. It is our view that the Guidance does not offend against the waste hierarchy.

4. Fourth, it is argued, Article 22 requires a balance between separate collection and a high level of environmental protection. This is a misstatement of what the Article requires, namely the promotion of separate collection followed by treatment of the waste in such a manner as to achieve a high level of protection. The two concepts are not set up in opposition to one another; they are complementary. It appears to be argued that because WtE can achieve a high level of protection, it must be allowed; but the simple fact that waste may be burnt safely does not mean it is preferred over, or equivalent to, recycling. Moreover, this argument in the Cox document ignores the third limb of the first part of Article 22, which envisages that there should be environmentally safe products resulting from the treatment. Incineration is simply not contemplated as a treatment for bio-waste.

5. The **fifth** argument is based on the same misreading of Article 22 as the second, arguing that the Agency is pre-empting the Commission's action. Again the Cox document confuses minimum management requirements with minimum quantities.

6. The **sixth** argument is that the achievement of the objectives of Article 22 would not be prejudiced by ignoring them now, as the licence could be reviewed later. Given that the deadline for implementation of 16 December 2010 is less than a month away, and would almost certainly expire in the interval between the issue of a PD and the issue of a final licence (even if no objection were lodged), this argument seems rather empty of substance.

Even if Directive 2006/12/EC were to apply instead of Directive 2008/98/EC, the waste hierarchy, which also features as a key feature of that Directive, and the requirement in Directive 2008/1/EC that incinerators should use best available techniques, would justify a requirement that only separated waste should be accepted.

"3. It does not differentiate between landfill and WTE."

This argument is based on a selective reading of the waste hierarchy which notes that incineration (WtE) is preferred to landfill, but ignores the preference for reuse, recycling and composting over incineration. It is considered legitimate for the Agency to prefer options which are higher up the hierarchy than the two lowest. It is not disputed that, when these higher options have been exhausted, the residue should be incinerated and the incineration residue landfilled. The table in the Agency Guidance makes this clear.

"4. It represents an unlawful and unjustified barrier to entry to, and will prevent, restrict or distort competition in, the market for waste infrastructure."

It is argued that, as Indaver does not have its own collection network and all the landfill operators do, it faces an insurmountable practical difficulty if it cannot accept unseparated waste. Reference is made to the Greenstar/Panda case, judgment of McKechnie J, as authority for the principle that a public authority is prohibited from exercising regulatory powers to distort competition, and the argument is advanced that that is what the Agency is proposing to do here.

It appears to the OCRL that Greenstar/Panda was a case where a number of local authorities were exercising powers they did not have in order to give themselves an effective monopoly in the market for the collection of waste. We understand there is no principle that a market cannot be regulated, provided the regulation is objectively justifiable and non-discriminatory in application.

"5. It is impractical, unclear and incapable of meaningful enforcement."

Following on from item 4, the Cox document argues that Indaver cannot supervise the carrying out of separation, since the waste will be supplied by other operators who will have separated it (or will have collected it in a separated form.) If the waste comes from a transfer station where there is a separation line in operation, Indaver can send the waste back if it arrives unseparated. If landfills and incinerators are only allowed to accept separated waste, this will push waste towards facilities which have the ability to carry out separation, and it can then be sent on for incineration and ultimately landfilling.

"6. It is unnecessary."

The final argument advanced is that primary regulation of producers, requiring them to separate waste, or of collectors, requiring separate collection, would achieve the same end. Producers are encouraged to separate by a system of differential charges, where recyclables are free while mixed waste has to be paid for, and that this system is being extended to cover separate presentation of bio-waste. Separate collection is increasingly the norm. There appears to be no legal objection to an additional layer of control requiring the recipient to accept only separated waste.

In conclusion, the OCRL recommends that the Agency should reject the Arthur Cox submission for the following reasons:

> Having regard to the written opinion in the waste licence review application by Arthur Cox solicitors on behalf of Indaver, regarding municipal waste pre-treatment requirements, it is considered that Sections 40 and 41 of the Waste Management Acts 1996 to 2010, and Section 52 of the Environmental Protection Agency Acts 1992 to 2007, read in the light of Council Directives 2008/98/EC, 2006/12/EC and 2008/1/EC provide ample legal basis for a condition requiring that only separated residual waste be accepted at the facility. It is considered that the application of a requirement that only separated waste be accepted is not premature, and that Article 22 of Directive 2008/98/EC does not have the meanings contended for: in particular, it does not postpone the obligation to encourage waste separation. It is considered that, while waste-to-energy incineration is preferred over landfill, recycling is preferred over waste-to-energy incineration, and the Agency is required to take steps to promote the waste hierarchy. It is noted that the requirement to accept only separated waste is being included as part of an objective and non-discriminatory system of interlinked obligations to maximise recycling, promote incineration and reduce landfilling of waste. Insofar as Indaver may put itself at a commercial disadvantage if it elects to eliminate its licensed waste recovery facility at the site, this is a commercial decision for it alone.

Signed:

Aoife Loughnane
Inspector
Environmental Licensing Programme