

**Donal Brady
Aughafad
Longford.**

Patrick Byrne
Senior Inspector
Environmental Licensing Programme
Office of Climate, Licensing Resource and Research
EPA Headquarters,
PO Box 3000
Johnstown Castle Estate
County Wexford

And to:

Patrick Byrne
Senior Inspector
Environmental Licensing Programme
Office of Climate, Licensing Resource and Research
Environmental Protection Agency
Regional Inspectorate
McCumiskey House
Richview
Clonskeagh Road
Dublin 14

26th January 2015

Submission in accordance with Regulation 12(3) of the EPA (Industrial Emissions)(Licensing) Regulations 2013 (SI 137 of 2013)
Donal Brady, Carrickboy Farms, Ballyglassin, Edgeworthstown, County Longford.

Dear Sir,

I refer to your letter dated the 18th December 2014 requesting the submission of information in relation to *inter alia* an updated non-technical summary of the activity and associated emissions, the identification of any changes to the activity and emissions, up-dated site boundary map, details of the management and control of organic fertiliser on site, records in respect of movement of organic fertiliser, baseline reports and BAT conclusions together with other specified information including a Stage One Appropriate Assessment etc., by the 12th February 2015 in respect of a proposed review of Licence Number P0408-01.

In addition your letter provides that a submission may be made relating to the review itself on or before 5pm on the 26th January 2015 and notwithstanding that such a submission is not obligatory (as outlined in bold and in capital letters in the table on page 3 of the letter).

The following submission is made in relation to the appropriateness of that review.

You will be aware that the licence the subject matter of the proposed review is currently also the subject matter of legal proceedings which seek a range of reliefs in respect of that licence under Supreme Court Record Number 143/2007 and in addition a reference having been made by the Supreme Court to the Court of Justice of the European Union in Case C-113/12. I am the applicant in those legal proceedings (and adopt the word 'applicant' in this submission).

Many of the grounds in these legal proceedings which identify inappropriate procedures adopted by the Agency during the course of consideration and determination of the application have been conceded and the Agency now adopts a very different approach in respect of the determination of these types of licences from that which was applied to the licence the subject matter of the proposed review.

The applicant has at all material times asserted that the decision by the Agency to characterise and categorise this material as waste was fundamentally incorrect both as a matter of law and as a matter of practice. Its characterisation as waste by the Agency provided for a licence which required the Applicant to be responsible for the spreading of this material on third party lands and this would have had the consequence of rendering the Applicant criminally liable for the activities of persons and on lands over which he had no control. These matters are set out in detail in the documentation grounding the judicial review proceedings and when they came before the Supreme Court it was considered that they raised issues of such importance that they were referred to the Court of Justice of the European Union, the Supreme Court having formulated a number of questions relating to the characterisation of pig manure and the appropriateness of the manner in which it was characterised by the Agency in that licence.

In these proceedings the applicant stated that the slurry at issue was not 'waste' within the meaning of Directive 75/442 and the Waste Management Act 1996 but rather a by-product of the applicant's farm which he sells as fertiliser and therefore the Agency did not have the power to regulate the disposal or the recovery of that slurry in the manner laid down in the said licence.

Therefore the Agency erred in imposing upon the applicant the obligation – enforceable by criminal sanction and impossible to satisfy – of controlling how the slurry he sells to other farmers was used by them, in particular as the European Union has enacted specific legislation intended to apply to the spreading of livestock effluent as fertiliser, namely Directive 91/676.

Arising from the reference made by the Supreme Court, the Court of Justice of the European Union ('the CJEU') has now inter alia held that slurry produced in an intensive pig farm and stored pending delivery to farmers in order to be used by them as fertiliser on their land constitutes not 'waste' within the meaning of that provision but a by-product when that producer intends to market the slurry on terms economically advantageous to himself in a subsequent process, provided that such reuse is not a mere possibility but a certainty, without any further processing prior to reuse and as part of the continuing process of production.

Arising from the decision and judgment of the Court of Justice of the European Union, it is submitted that the Agency previously erred in law in classifying the slurry produced on the

applicant's farm as waste and further erred in imposing, as part of the licence which it has granted to him, conditions requiring him to control spreading activities carried out by third parties on land owned by them and to be liable for those activities.

I am concerned that consequent upon the decision of the CJEU and while the matter is pending before the Supreme Court for final determination that the Agency has initiated this review. I submit that this approach is incorrect for the reasons stated and for the following reasons:

- (a) The Agency is unilaterally engaging in a process to review a licence the validity of which is currently before the Supreme Court and this is impermissible in respect of a matter with which the Court is seized of jurisdiction. This also offends the principles which have been set out in *Buckley v. AG* [1950] IR 67 and in *The State (Divito) v. Arklow UDC* [1986] ILRM 123;
- (b) The issues which have been identified and which form a central part of the proposed review, namely the nature of pig manure, appears to be a central issue in that proposed review and in the legal proceedings before the Supreme Court and it is not clear as to whether the Agency is proposing to adopt the approach in the original licence or whether to characterise this material as a fertiliser and this has a significance which permeates the whole of the review process;
- (c) The Applicant should not be required to participate in a review of a licence which it considers is fundamentally invalid, which has fundamental errors of law on its face, which can have no practical application. To start a review on the basis of such a document is clearly unreasonable. As a matter of principle the applicant contends that the appropriate approach which should now be adopted is to have an order of certiorari made in respect of the licence together with an order directing that the licence application be remitted to the Agency.

Consequently, it is for the national court (in this case the Supreme Court) to now determine the matter. I respectfully suggest that the appropriate course of action is for the Agency to consent to the reliefs sought by the applicant in the application for judicial review including an order that the licence application be remitted back to the Agency so that it can be determined in accordance with law and in accordance with the decision of the CJEU in this case.

Yours sincerely,



Donal Brady

26th January 2015