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# Environmental Law

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# CONTENTS

# TABLE OF CASES

# TABLE OF STATUTES

# TABLE OF STATUTORY INSTRUMENTS

# TABLE OF EUROPEAN LEGISLATION

## Treaties



## Decisions



## Directives

## Regulations

CHAPTER 1

# INTERNATIONAL ENVIRONMENTAL LAW: THE GLOBAL VILLAGE

*Anne-Marie Mooney Cotter*

## 1.1 Introduction

This chapter will examine the important area of International Environmental Law. Over the years, several seminal environmental agreements have been signed by the international community, having an obvious and direct impact on the world as a whole. We will begin by examining the United Nations Conference on the Human Environment as well as the Montreal Protocol on Substances that Deplete the Ozone Layer, then we will go on to look at the United Nations Conference on Environment and Development (Rio), the United Nations Framework Convention on Climate Change (Kyoto Protocol) and the United Nations Millennium Declaration, and finally, we will examine the World Summit on Sustainable Development (Rio+10).

## 1.2 The initial agreements

In 1972, the United Nations Conference on the Human Environment was held in Stockholm, Sweden. This was the first international environmental conference of its kind, and it stimulated the creation of environmental ministries throughout the world and the establishment of the United Nations Environment Programme. Further progress was achieved in Montreal, Quebec with the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, a landmark international environmental agreement. In the early 1970s, evidence had accumulated showing that chlorofluorocarbons (CFCs) were damaging the ozone layer in the stratosphere and increasing the amount of ultraviolet B (UV-B) radiation reaching Earth's surface. As a result of the Protocol, however, production of the most damaging ozone-depleting substances was eliminated by 1996 in 'developed' countries and should be phased out by 2010 in 'developing' countries. Without the Protocol, the levels of ozone-depleting substances would have been five times higher than they are today, and surface UV-B radiation levels would have doubled in the northern hemisphere. On current estimates, the CFC concentration in the ozone layer is expected to recover to pre-1980 levels by the year 2050, a major achievement for environmental concerns.

## 1.3 The United Nations Conference on Environment and Development (Rio)

The United Nations Conference on Environment and Development (UNCED), known commonly as 'Rio', was held in Rio de Janeiro, Brazil in 1992. It saw the adoption of an indicative policy framework intended to help achieve the goal of sustainable development in rich and poor countries alike, and afforded the foundations for agreements on climate change, forests and biodiversity. Among the most important accomplishments of the Conference were the Rio Declaration on Environment and Development, a set of 27 principles on the environment and development designed to promote international co-operation for sustainable development, and Agenda 21, a comprehensive programme of action covering all areas of the environment.

In examining the Rio Declaration, its goal is the establishment of a new and equitable global partnership through the creation of new levels of co-operation among States, key sectors of societies and peoples, working towards international agreements that respect the interests of all and that protect the integrity of the global environmental and developmental system.

There are several key principles to the Declaration. The concepts of sovereignty and responsibility are guaranteed in Principle 2, which holds:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

The integral role of environmental protection is established in Principle 4, which states that in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it. Further, the necessity for co-operation is recognised in Principle 7, which holds that States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities.

In examining the importance of the activities of companies, whether local or multinational, on the environment, emphasis is placed on production and consumption in Principle 8, which states that to achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies.

Furthermore, international trade policies are of paramount importance, as outlined in Principle 12:

> States should co-operate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not

> constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade … Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.

Principle 13 establishes the concepts of liability and compensation in that States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage, and States shall also co-operate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.

The 'polluter pays' principle is emphasised in Principle 16, which holds:

> National authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

The importance of impact assessments is outlined in Principle 17, which states that:

> Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.

Finally, women, youth and indigenous peoples are seen as key parties in the Declaration in Principles 20, 21 and 22 respectively, which state that women have a vital role in environmental management and development, and their full participation is therefore essential to achieve sustainable development. Further, the creativity, ideals and courage of the youth of the world should be mobilised to forge a global partnership in order to achieve sustainable development and ensure a better future for all. Finally, indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices, and States should recognise and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

Further, in examining Agenda 21, it is stressed:

> Humanity stands at a defining moment in history. We are confronted with a perpetuation of disparities between and within nations, a worsening of poverty, hunger, ill health and illiteracy, and the continuing deterioration of the ecosystems on which we depend for our well-being. However, integration of environment and development concerns and greater attention to them will lead to the fulfilment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future. No nation can achieve this on its own; but together we can – in a global partnership for sustainable development.

In essence, Agenda 21 is a comprehensive plan of action that is global, national and local for United Nations organisations, governments and major interest groups such as Environmental Non-Governmental Organisations (ENGOs) in every area impacting both humans and the environment. Overall, the United Nations Conference on Environment and Development has been a major accomplishment for the environment.

## 1.4 The United Nations Framework Convention on Climate Change (Kyoto Protocol)

The United Nations Framework Convention on Climate Change, known commonly as the 'Kyoto Protocol', was adopted by the United Nations on 9 May 1992, and entered into force on 21 March 1994. In terms of the agreement, climate change is defined as:

> a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.

As such, the objective of the Convention is to achieve, in accordance with the relevant provisions of the Convention, stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system, and such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.

The preamble states:

> The Parties to the Convention:
>
> 1. Stressed 'that human activities have been substantially increasing the atmospheric concentrations of greenhouse gases, that these increases enhance the natural greenhouse effect, and that this will result on average in an additional warming of the Earth's surface and atmosphere and may adversely affect natural ecosystems and humankind';
> 2. Acknowledged 'that the global nature of climate change calls for the widest possible co-operation by all countries and their participation in an effective and appropriate international response, in accordance with their … respective capabilities and their social and economic conditions'; and
> 3. Recognised 'that various actions to address climate change can be justified economically in their own right and can also help in solving other environmental problems'.

Recognising the economic roots of the climate change problem, the Protocol seeks to engage the private sector, and does so by the use of market mechanisms which provide incentives for cutting emissions, and which stimulate investment and technology flows to developing countries that will help them achieve more sustainable patterns of industrialisation. Taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, as well as the

importance of environmental programmes to mitigate damages, the pivotal role of business sectors on the environment and the necessity for impact assessments, parties shall have, under sections (b), (c) and (f):

> (b) a duty to formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change;
>
> (c) a duty to promote and co-operate in the development, application and diffusion, including transfer, of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases not controlled by the Montreal Protocol in all relevant sectors, including the energy, transport, industry, agriculture, forestry and waste management sectors; and
>
> (f) a duty to take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, eg impact assessments, formulated and determined nationally, with a view to minimising adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change.

Finally, the Protocol emphasises the necessity for exchange of information and public awareness, in Art 4(1)(h) and (i), which impose a duty to promote and co-operate in the full, open and prompt exchange of relevant scientific, technological, technical, socio-economic and legal information related to the climate system and climate change, and to the economic and social consequences of various response strategies; and promote and co-operate in education, training and public awareness related to climate change and encourage the widest participation in this process, including that of non-governmental organisations (NGOs).

However, although the United Nations Framework Convention on Climate Change is a crucial agreement for international environmental concerns, it is important to note that the largest share of historical and current global emissions of greenhouse gases has originated in 'developed' countries. As such, there is one major drawback: although most nations have signed up to the agreement, the United States, as the largest economy in the world, and hence arguably the largest polluter in the world, has failed to ratify it.

## 1.5 The United Nations Millennium Declaration

The United Nations Millennium Declaration, entitled 'We The Peoples', sets the stage for an environmental agenda for the planet. At its inception, the United Nations set out to promote social progress and better standards of life in rela-

tion to freedom from want and freedom from fear. Today, according to Kofi Annan, Secretary General to the United Nations, there is an urgent need for another kind of freedom, the freedom of future generations to sustain their lives on this planet. In the last century alone, the natural environment has borne the stresses imposed by a four-fold increase in human numbers and an 18-fold growth in world economic output. With the world population projected to increase from the current 6 billion to nearly 9 billion by 2050, the potential for doing irreparable environmental harm is obvious. The one-fifth of the world's population living in the industrialised countries accounts for nearly 60 per cent of the world's total consumption of energy, and the developing world's share is rising rapidly. The goal must be to meet the economic needs of the present generation without compromising the ability of the planet to provide for the needs of future generations.

In the hopes of a sustainable future and the adoption of a new ethic of conservation and stewardship, several challenges persist, discussed below.

### 1.5.1 Challenges

#### *1.5.1.1 Coping with climate change*

Implementing the Kyoto Protocol would mark a significant advance by binding the industrialised countries to verifiable emission limitation and reduction targets. Stabilising levels of carbon dioxide in the atmosphere to a range that is considered safe will require overall reductions in the emission of the 'greenhouse gases' that are responsible for global warming. In using economic incentives to reduce global warming and promote investment in developing countries, cleaner and more efficient technologies in all sectors, especially energy, transport and industry, will be required. In engaging the private sector through the Clean Development Mechanism (CDM), the prospect of gaining emission credit provides incentives for rich countries to make energy-saving investments in poor countries, building on sustainable development.

#### *1.5.1.2 Confronting the water crisis*

As about one-third of the world's population lives in countries considered to be 'water stressed', the most serious immediate challenge is that more than 1 billion people lack access to safe drinking water, and 3 billion lack adequate sanitation. To arrest the unsustainable exploitation of water resources, water management strategies are required at all levels, which include pricing structures that promote both equity and efficiency.

#### *1.5.1.3 Defending the soil and preserving forests, fisheries and biodiversity*

Worldwide, nearly 2 billion hectares of land, an area about the combined size of Canada and the United States, is affected by human-induced degradation of soils, due to irrigation-induced salinisation, soil erosion caused by overgrazing and deforestation, and biodiversity depletion. In terms of annual income forgone, the direct cost, alone, has been estimated at more than €40 billion a year. In addition, a more sustainable and equitable ocean governance regime is needed in the area of fisheries. Further, recycling is of vital concern, as well as

reforestation which provides for future timber needs and helps to absorb carbon from the atmosphere, thus reducing global warming. As long as deforestation, land and water degradation, and monoculture cropping continue to increase, the threats to biodiversity will continue to grow. The importance of conservation is increasingly recognised, but it can flourish only if governments and industry work co-operatively to support it.

### 1.5.2 Priorities

The United Nations has set out several priorities for the earth:

(a) Major efforts in public education are needed. Companies, NGOs, schools and universities, and governments have a critical role to play in raising public consciousness while at the same time increasing their contributions to a safer global environment.

(b) Environmental issues must be fundamentally repositioned in the policy-making process. The environment must become better integrated into mainstream economic policy, by way of modifying systems of national accounts so that they begin to reflect true environmental costs and benefits for 'green' accounting.

(c) Governments need to enforce environmental regulations based on 'green taxes' and the 'polluter pays' principle, and devise incentives for market response by way of energy efficiency and other environment-friendly practices. The private sector must play a positive role in promoting environmental change.

(d) Finally, building a new ethic of global stewardship and governance is required. Given the extraordinary risks humanity confronts, with the start of the new century and the new millennium, we must commit ourselves, peoples, companies, governments, to a new ethic of conservation and stewardship.

## 1.6 World Summit on Sustainable Development (Rio+10)

The World Summit on Sustainable Development, known commonly as 'Rio+10', was held in Johannesburg in September 2002. Several key outcomes were achieved, namely:

(a) sustainable development was reaffirmed as a central element of the international agenda, giving new impetus to global action in protecting the environment; and

(b) the concept of sustainable development was broadened and strengthened, in the understanding of the important linkages among poverty, the environment and natural resources. To this end, partnerships continue to be promoted among governments, businesses and civil society as a whole.

In looking at the World Summit Plan of Implementation, a commitment was shown in reaffirming the Rio principles and Agenda 21, as well as the United Nations Millennium Declaration by way of international co-operation. All

these efforts are aimed at promoting at the local, national, regional and global levels, the integration of the three components of sustainable development, ie economic development, social development, and environmental protection, as interdependent and mutually reinforcing pillars. Changing unsustainable patterns of production and consumption, eradicating poverty, and protecting and managing the natural resource base of economic and social development are essential requirements for sustainable development. Promoting co-operation in the five priority areas of Water and sanitation, Energy, Health, Agriculture, and Biodiversity (WEHAB) is key.

Good governance at both the national level and the international level is essential for sustainable development. Sound environmental, social and economic policies, democratic institutions responsive to the needs of the people, the rule of law, anti-corruption measures, equality and an enabling environment for investment are the basis for sustainable development. The gap between developed and developing countries points to the continued need for a dynamic and enabling international economic environment supportive of international co-operation. There is an overwhelming necessity for the enhancement of corporate environmental and social responsibility coupled with accountability. We must encourage industry to improve social and environmental performance through voluntary initiatives, such as environmental management systems, codes of conduct, certification and public reporting on environmental and social issues. We must also encourage financial institutions to incorporate sustainable development considerations into their decision-making processes.

As such, globalisation offers opportunities and challenges for sustainable development, such as trade, investment and capital flows, as well as advances in overall technology for the growth of the world economy. Further, globalisation has added a new dimension to these challenges, with the rapid integration of markets, the mobility of capital, and the significant increases in investment flows around the world, presenting new challenges and opportunities for the pursuit of sustainable development. However, there are two overriding global developmental trends:

(a) the global ecosystem is threatened by grave imbalances in the production and distribution of goods and services, and an unsustainable progression of extremes of wealth and poverty, which threatens the stability of society as a whole and the global environment; and

(b) the world is undergoing accelerating change, with environmental stewardship lagging behind economic and social development, and environmental gains from new technology being overtaken by population growth and economic development (Environmental Protection Agency, *Ireland, Ireland's Environment – A Millennium Report*).

Eco-efficiency aims at de-coupling economic activity from resource use and pollutant release; in other words, getting more from less and breaking the link between economic growth and environmental damage. International co-operation is particularly important in addressing transboundary and global environmental challenges beyond the control of any individual nation. Increasing international economic integration and growth reinforce the need for sound environmental policies at both a national and an international level.

## 1.7 Conclusion

International acceptance of the concept of sustainable development has represented a major step forward. However, making this concept a reality will require many further shifts in thinking, attitudes and behaviours. Both quantity, in terms of materials and energy used and products purchased, and quality, in terms of the preferred use of renewable energy resources and safe and recyclable materials, have a role to play. Bringing mankind and nature back into alignment will require more than just improved environmental management systems leading to increased eco-efficiency. There remains an underlying assumption that nature and mankind are two separate systems, man versus nature, where one side always has to lose.

CHAPTER 2

# THE UNITED NATIONS ENVIRONMENT PROGRAMME

*John Darby*

## 2.1 Function

The mission of the United Nations Environment Programme (UNEP) is to provide leadership and encourage partnership in caring for the environment. UNEP, established in 1972, is the section of the United Nations that deals with the environment. It works with a wide range of partners, including other United Nations entities, national governments, international organisations, non-governmental organisations, the private sector and civil society.

UNEP's work encompasses:

(a) assessing global, regional and national environmental conditions and trends;

(b) developing international and national environmental instruments;

(c) strengthening institutions for the management of the environment;

(d) facilitating transfer of knowledge and technology for sustainable development; and

(e) encouraging new partnerships within civil society and the private sector.

UNEP is based in Nairobi. It also supports six regional offices and a network of centres of excellence including the Global Resource Information Database centres and the UNEP World Conservation Marketing Centre.

UNEP also hosts several environmental convention Secretariats, including the Ozone Secretariat and the Montreal Protocol's Multilateral Fund, CITES (the Convention on International Trade in Endangered Species of Wild Fauna and Flora), the Convention on Biological Diversity, the Convention on Migratory Species and chemical-related agreements, including the Basel Convention on the Movement of Hazardous Wastes and the Shackelton Convention on Persistent Organic Pollutants.

## 2.2 Governance

### 2.2.1 The Secretariat for Governing Bodies

UNEP has a Secretariat for Governing Bodies, the role of which is to discharge the Executive Director's responsibilities at meetings of the UNEP Governing

Council and its subsidiary organs. The Secretariat for Governing Bodies is also responsible for enhancing the relationship of UNEP with governments, other United Nations agencies and intergovernmental and non-governmental organisations (NGOs).

### 2.2.2 The Governing Council

The Governing Council was established in accordance with General Assembly Resolution 2997 (Institutional and financial arrangements for international environmental co-operation). The Governing Council reports to the United Nations General Assembly through the Economic and Social Council. Fifty-eight members of the Governing Council are elected by the United Nations General Assembly for four-year terms, taking into account the principle of equitable regional representation. The main functions and responsibilities of the Governing Council are provided by United Nations General Assembly Resolution 2997 as follows:

> to promote international co-operation in the field of the environment and to recommend, as appropriate, policies to this end;
>
> to provide general policy guidance for the direction and co-ordination of environmental programmes within the United Nations system;
>
> to keep under review the world environmental situation in order to ensure that emerging environmental problems of wide international significance receive appropriate and adequate consideration by governments;
>
> to receive and review the periodic reports of the Executive Director of UNEP on the implementation of environmental programmes within the United Nations system;
>
> to promote the contribution of the relevant international scientific and other professional communities to the acquisition, assessment and exchange of environmental knowledge and information and, as appropriate, to the technical aspects of the formulation and implementation of environmental programmes within the United Nations system;
>
> to maintain under continuing review the impact of national and international environmental policies and measures on developing countries, as well as the problem of additional costs that may be incurred by developing countries in the implementation of environmental programmes and projects, and to ensure that such programmes and projects shall be compatible with the development plans and priorities of those countries; and
>
> to review and approve the programme of utilisation of resources of the Environmental Fund.

### 2.2.3 Scientific advisory groups

UNEP's work, a great proportion being scientific and technical in nature, has contributed to the establishment of a number of scientific advisory groups for which UNEP acts as the convenor.

#### *2.2.3.1 The Ecosystem Conservation Group (ECG)*

The ECG was established in 1974 to advise its member organisations on the development and implementation of relevant ecosystems and genetic resources conservation activities. It strives to promote the concept of sustainable use of the earth's biosphere, its ecosystems and their biotic resources.

#### *2.2.3.2 The Scientific and Technical Advisory Panel (STAP)*

The STAP is an advisory body to the Global Environmental Facility (GEF). The GEF promotes international co-operation and fosters actions to protect the global environment. It provides funding to developing countries, and those with economies in transition, for projects and activities targeting global benefits in one or more of four focal areas: biological diversity, climate change, international waters and the ozone layer. UNEP provides the STAP Secretariat and performs liaison functions between the GEF and the STAP. The STAP comprises 12 persons appointed by the Executive Director of UNEP.

The STAP mandate, as approved by the GEF Council in October 1995, includes:

(a) strategic advice as a means to a better understanding of issues of the global environment and how to address them;

(b) the development and maintenance of a roster of experts;

(c) selective review of projects;

(d) co-operation and co-ordination with scientific and technical bodies; and

(e) providing a forum for integrating science and technology as well as providing a conduit between GEF and the wider scientific and technical community.

#### *2.2.3.3 The Intergovernmental Panel on Climate Change (IPCC)*

The IPCC was established in 1988 to assess the state of existing knowledge about climate change. It has three working groups:

(a) Working Group I concentrates on the climate system;

(b) Working Group II addresses response options and environmental and socio-economic imports;

(c) Working Group III assesses economic and social dimensions.

## 2.3 Convention Secretariats

UNEP hosts a number of Convention Secretariats.

### 2.3.1 The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

CITES is an international treaty between governments which entered into force on 1 July 1975. Its aim is to ensure that international trade in specimens of wild animals and plants does not threaten their survival. It accords varying degrees of protection to more than 30,000 species of animals and plants.

### 2.3.2 The Ozone Secretariat

The Ozone Secretariat is the Secretariat for the Vienna Convention for the Protection of the Ozone layer (the Convention) and for the Montreal Protocol on Substances that Deplete the Ozone Layer (the Protocol). Its main duties include:

(a) arranging for and servicing the conference of the parties, meetings of the parties, their committees, bureaux, working groups and assessment panels;
(b) arranging for implementation of the decisions from these meetings;
(c) monitoring the implementation of the Convention and the Protocol;
(d) representing the Convention and the Protocol in international bodies; and
(e) receiving and analysing data and information on the production and consumption of ozone-depleting substances.

### 2.3.3 The Secretariat of the Multilateral Fund for the Implementation of the Montreal Protocol (the Multilateral Fund)

The Multilateral Fund began its operations in 1991. Its main objective is to assist developing country policies to the Montreal Protocol whose annual per capita consumption and production of ozone depleting substances is less than 0.3 kg to comply with the control measures of the Protocol. The Multilateral Fund is managed by an executive committee assisted by the Fund Secretariat. Projects and activities supplied by the Multilateral Fund are implemented by four international implementing agencies. The functions of the executive committee include the development of operational policies and approval of business plans and work programmes of implementing agencies, as well as approval of expenditure for investment projects and other activities.

The Secretariat assists the executive committee in the discharge of its functions. Its activities include the development of a three-year plan and budget and a system for fund disbursement and management of the business planning cycle of the Multilateral Fund.

CHAPTER 3

# THE EUROPEAN ENVIRONMENTAL AGENCY

*Deirdre Ní Fhloinn and Richard Hammond*

## 3.1 Overview

Since its establishment in 1990, the European Environment Agency (EEA) has developed from a primarily EU entity to a body consisting of 31 members from the EU and its neighbours, with further members contemplated. Its function is to collect and assess environmental information to assist in the development of policy at EU level, and to inform the public. To this end, it has collated an extensive database of information, in a harmonised and accessible format, on areas from water, air and waste, to biodiversity and climate change.

The description of the EEA from its website is instructive:

> The EEA aims to support sustainable development and to help achieve significant and measurable improvement in Europe's environment through the provision of timely, targeted, relevant and reliable information to policy-making agents and the public.

The EEA has produced numerous reports, case studies and other publications, and in doing so has drawn upon sources of information from the European Environment Information and Observation Network, which operates between the EEA member countries, and an extensive network of similar bodies throughout the world. The result is an ongoing work programme focusing on key factors influencing the environment (such as transport), and a database of environmental information which is invaluable to policy-makers, researchers, and the general public.

## 3.2 Historical background and development

### 3.2.1 EU Treaty provisions

Environmental protection as a policy and objective did not feature in the original Treaty of Rome, which was characterised by provisions relating to economic objectives such as competition policy, common agricultural policy, and the establishment of a common customs tariff. Amendments to the Treaty have introduced, first, competence in the area of environmental policy-making, and, secondly, responsibility for the implementation of key objectives such as environmental protection and sustainable development.

Although the Community had published a number of environmental action programmes from 1973 onwards, the substantive legislative basis for action by the Community, and for the gathering of information necessary to develop policy in the area, did not develop until the 1980s.

The Single European Act of 1987 (SEA) was a critical development in environmental policy-making in the Community. The SEA inserted Art 130r into the Treaty, which provided that action by the Community relating to the environment should have the objectives of preserving, protecting and improving the quality of the environment, contributing to human health and ensuring a prudent and rational utilisation of natural resources.

Article 130r(2), as inserted by the SEA, provided as follows:

> Action by the Community relating to the environment shall be based on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source, and that the polluter should pay. Environmental protection requirements shall be a component of the Community's other policies.

Article 130r(3) provided that, in order to achieve the above objectives:

> the Community shall take account of [*inter alia*] the available scientific and technical data.

The Rhodes Declaration of 1988, following the European Council summit of that year, referred to the need for action in the area of environmental protection. The Declaration recognised:

> the urgent need to find solutions to global issues such as the depletion of the ozone layer, the rise in the temperature of the earth's atmosphere, threats to the natural environment …

and stated that:

> effective action will in many cases require better scientific research and understanding.

The Declaration went on to state that, although the goals of environmental protection had been defined by the SEA, it was essential to increase efforts to protect the environment directly, and 'to ensure that such protection becomes an integral component of other policies'. In addition, it stated that:

> sustainable development must be one of the overriding objectives of all Community policies.

Greater integration of environmental considerations into policy-making, and

> a leading role for the Community and the Member States in the action needed to protect the world's environment

was specifically contemplated by the Declaration.

The proposal for the creation of the EEA followed in 1989. The Commissioner in charge of the Environment, in presenting the proposal, opined that the purpose of the Agency was:

> to aid the Member States in meeting the environmental protection and restoration goals, as defined in the Treaty and in the different environmental programmes of the Community.

The Treaty on European Union of 1992 (TEU) amended Art 3 of the Treaty to specify that a policy in the sphere of the environment would be included as an activity of the Community for the purposes set out in Art 2 of the Treaty. Article 2 was amended by the TEU to include, as a task of the Community, the promotion of sustainable and non-inflationary growth respecting the environment.

In addition, Art 130r was amended by the TEU to enhance the position of environmental policy in Community actions. The promotion of measures at international level to deal with regional or worldwide environmental problems was added as an additional objective of Community policy on the environment, at Art 130r(1). In addition, Art 130r(2) was amended to provide that:

> Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community ... Environmental protection requirements *must be integrated into* the Community's other policies.

The italicised text replaced the less prescriptive formula from the original Art 130r, which had provided that environmental protection requirements should 'be a component of' the Community's other policies.

The Amsterdam Treaty of 1997 inserted a new Art 3c (now Art 6) into the Treaty, as follows:

> Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development.

Accordingly, the scheme of the Treaty is now such that environmental objectives are integrated into EU policy-making generally. The availability of comprehensive, objective and reliable source information, and the harmonisation throughout the Community of the format of such information, is of critical importance to environmental decision-making, not only at EU level but also for Member States.

### 3.2.2 Council Decision 85/338/EEC

The purpose of Council Decision 85/338/EEC was to set up a project for the collection and co-ordination of environmental data in the Community, and to ensure the consistency of information on the environment and natural resources in the Community. It was recognised in the recitals to the Decision that the implementation of the Community environmental action programmes necessitated:

> consistent and comparable information on the state of the environment and natural resources in the Community.

The objective of the Decision is elaborated in its recitals, stating that its aims were to assemble the basic information on the state of the environment in the Community in respect of measures in specified fields, and to facilitate implementation of environmental policies at Community, national or regional levels.

Since the Treaty had not provided the powers for gathering, co-ordinating and ensuring the consistency of the information to be gathered, the Decision was based on Art 235 of the Treaty. Article 235 (now Art 308) enables the Council to take appropriate measures where the Treaty has not provided the necessary powers for action by the Community which is necessary to attain one of its objectives.

Article 1 of the Decision provided that the Commission work programme 'consisting of an experimental project for gathering, co-ordinating and ensuring the consistency of information on the state of the environment and natural resources in the Community' was adopted for a period of four years from 1985. The objective of the programme, as articulated in the Annex to the Decision, was to:

> provide results which will be of direct use in implementing the Community's environmental policy and make it possible to judge the advisability of going ahead with the establishment of an information system on the state of the environment in the Community.

The Decision is no longer in force, but the EEA was specifically assigned responsibility for continuing the work started under the Decision by Art 2(i) of the 1990 Regulation (see section 3.4.1 below).

## 3.3 Contextual framework – the EEA in context

### 3.3.1 Role in informing policy-making

The quality of information relating to the environment is an essential element of policy-making in this area. Environmental protection legislation is highly specific and depends to a large extent on the specification of standards and thresholds, or the assessment of effects on the environment, which trigger the application of an extensive body of rules.

The EEA's Executive Director stated in its 1999 brochure that considerable efforts were being made to ensure that its publications were directly relevant to the current and emerging European political agenda, given that:

> environmental information will be vital in supporting progress towards the new goal of sustainable development established under the Amsterdam Treaty.

The EEA's mission, as articulated in its brochure, is:

> to deliver timely, targeted, relevant and reliable information to policy-makers and the public for the development and implementation of sound environmental policies in the European Union and other EEA member countries.

In addition, the identification of warning signs and analysis of trends is of critical importance in policy-making. The EEA seeks to identify and respond to trends that may exert negative influences on the environment in the future, and

to ensure that the EU is equipped to formulate the appropriate response to such dynamics.

In addition, the availability of an accurate and authoritative source of environmental data is essential to ensure consistency of policy-making between the EU and the Member States.

### 3.3.2 Autonomy and objectivity

The EEA enjoys separate legal personality from the EU institutions, and was specifically established as a legally autonomous body. This reflects the nature of the EEA as a high-level body for the generation of objective data relating to the environment. The recitals to the 1990 Regulation state that:

> … the status and structure of the Agency should correspond to the objective character of the results it is intended to produce and allow it to carry out its functions in close co-operation with existing national and international facilities.

Article 2(iii) of the 1990 Regulation provides that amongst the tasks of the EEA shall be the provision of 'uniform assessment criteria for environmental data to be applied in all Member States', and the further development of 'a reference centre of information on the environment'. Information sharing based on common technical platforms is also an important aspect of the operation of the EEA's network.

### 3.3.3 Provision of information to public

The recitals to Council Decision 85/338 EEC refer to the role of the information-gathering exercise contemplated by that Decision in terms of informing public opinion. The 1990 Regulation provides at Art 1(2) that one of the objectives of the EEA shall be to ensure that the public is properly informed about the state of the environment.

The EEA achieves this aspect of its mandate through a number of channels, including its website at www.eea.eu.int, its newsletter published quarterly, its library and information centre, and other initiatives such as the Green Spider Network consisting of information officers in the environmental field.

## 3.4 Legal basis and evolution

The legal basis of the EEA is derived from the EU Treaty provisions discussed above, and from the 1990 and 1999 Regulations.

### 3.4.1 Regulation 1210/90/EEC (the 1990 Regulation)

Article 1 provides that:

> This Regulation establishes the European Environment Agency and aims at the setting-up of a European environment information and observation network.

The recitals to the Regulation give useful background as to the reasoning for the establishment of the Agency:

> Whereas collection, processing and analysis of environmental data at European level are necessary in order to provide objective, reliable and comparable information which will enable the Community and the Member States to take the requisite measures to protect the environment, to assess the results of such measures and to ensure that the public is properly informed about the state of the environment.

Accordingly, the Regulation recognises that an accurate information system is required not only for the purpose of proper decision-making, but also to keep the public properly informed as to the condition of the environment.

The objectives of the EEA are set out at Art 1(2), and include the following:

(a) to provide objective, reliable and comparable information at European level enabling the Community and the Member States to take the requisite measures to protect the environment, and to assess the results of such measures;

(b) to ensure that the public is properly informed about the state of the environment; and

(c) to provide the necessary technical and scientific support to achieve the above objectives.

The objectives are designed with the following aims in mind:

(a) to achieve the aims of environmental protection and improvement laid down by the Treaty and by successive Community action programmes on the environment;

(b) to achieve the aim of sustainable development (inserted by the 1999 Regulation).

The tasks of the EEA are set out at Art 2. Its principal task is to establish and coordinate a network for information and observation of the environment. The EEA was also assigned responsibility 'for continuing the work started under Decision 85/338/EEC'.

The other tasks assigned to the EEA included the following:

(a) to provide the Community and Member States with the objective information necessary for the formulation and implementation of environmental policies;

(b) to record, collate and assess data on the state of the environment;

(c) to help ensure comparability of environmental data at European level;

(d) to stimulate the development and application of environmental forecasting;

(e) to stimulate information exchange on the best technologies available for preventing or reducing environmental damage.

Article 3 clarified the scope of the areas of activity of the EEA by providing that the principal areas of activity of the EEA should include all elements necessary

in order to describe both the current and future position in terms of the quality and sensitivity of the environment, and the pressures on the environment. Priority areas are specified in Art 3(2), including air quality and atmospheric emissions, water quality, waste management, and noise emissions.

The educational role of the EEA is highlighted by the provision in Art 6 that environmental data supplied to or emanating from the Agency may, subject to specified exceptions, be published and shall be made accessible to the public. It is notable that the Regulation specifically contemplated that the EEA might include members from non-EU countries, in circumstances where such countries shared the concern of the Communities and of the Member States for the objectives of the EEA.

### 3.4.2 Regulation 933/99/EC (the 1999 Regulation)

The 1999 Regulation recites that the EEA:

> has made good progress in achieving its objectives and completing its tasks, including the establishment of the European environment information and observation network.

The recitals also addressed areas of concern, such as the fact that the organisation and structure of the EEA needed improvement and clarification, and the geographical distribution of topic centres in the Community.

The 1999 Regulation specifically integrates the principle of sustainable development into the work of the EEA, by including the principle amongst the aims of the EEA set out at Art 1(2). The principle is also included as an area of activity of the EEA. As a result, in addition to its original activity of describing the present and foreseeable state of the environment from the point of view of quality, pressures on the environment and sensitivity of the environment, the EEA must also place each of these elements in the context of sustainable development.

The 1999 Regulation also reorganised the EEA management board by providing that each country participating in the EEA should have a representative on the board. Hitherto, the composition of the management board, in addition to two representatives of the Commission, and two scientific personalities qualified in the area of environmental protection (nominated by the European Parliament) had been confined to representatives of Member States.

## 3.5 Organisational framework

### 3.5.1 Membership

In the beginning, membership of the EEA, as a Community agency, was the preserve of the members of the EC. Community enlargement to the 15-member EU and the continuing process of enlargement to incorporate eastern European countries, coupled with a pragmatic realisation that environmental factors affecting the EU are not confined to its geo-political borders, has seen the membership of the EEA increase substantially. In essence, the EEA is the first EU body to constitute and organise itself in a post-enlargement mode.

The current membership of 31 countries comprises:

(a) the 15 EU Member States;
(b) the accession countries: Bulgaria, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovenia, the Slovak Republic, and Turkey;
(c) from the European Economic Area: Iceland, Liechtenstein and Norway.

Membership negotiations are underway for further expansion. The EEA is continually developing links with the environmental monitoring bodies of other countries. Consequently the membership of the EEA will continue to grow even after the conclusion of the current phase of enlargement.

Though the membership of the EEA has increased, the breadth of the monitoring and reporting undertaken by the EEA has extended even further, so that relevant environmental data can be obtained and collated from the widest possible range of sources. Links exist under the Technical Assistance to the Commonwealth of Independent States Initiative of the EU (TACIS), with several former soviet republics that spread the EEA's access to environmental indicators through, *inter alia*, Georgia, Belarus and Russia, as far eastward as Mongolia. The EEA also extends its work and information sources by working through the EU PHARE initiative, which is designed to facilitate and accelerate the preparation for future accession of central and eastern European countries that are not part of the EEA or TACIS. The monitoring and reporting remit of the EEA can now be described as pan-European to cover from the Atlantic Ocean to the Ural Mountains and from the Arctic to the Mediterranean Sea.

### 3.5.2 Governance

The influence and control of these members is exercised through the EEA Management Board (the Board). Each of the members has one seat on the Board, the European Commission holds two seats, and the European Parliament nominates two members with a scientific background in environmental protection. Accordingly there are 35 voting representatives on the Board, each of whom may be replaced by an alternate representative. Also in attendance at Board meetings are the Executive Director of the EEA and the Chairperson of the EEA Scientific Committee. A two-thirds majority of the representatives of the Board is required for all decisions.

The representatives nominated generally come from within the central government department responsible for the environment or the governmental agency tasked with environmental monitoring, protection and enforcement. The current Irish representative is the Assistant Secretary General responsible for the Environment Division at the Department of the Environment and the alternate representative is the Director of the Environmental Protection Agency.

The Board is aided in its work by the EEA Scientific Committee (the Committee). This Committee is mandated by the founding Regulation and comprises experts in environmental issues nominated for a four-year term, which may be renewed once. The work of the Committee consists of providing scientific advice to the Board so that the Board may carry out its functions fully informed of the implications of scientific requirements and limitations. In par-

ticular, ongoing work of the Committee includes scientific assessment of the EEA's long-term ecological and environmental health monitoring. The Board has increased the number of members of the Committee in response to the overall growth in membership of the EEA. At present there are 14 members, all of whom are members of the academic community, who teach and research in fields relevant to environmental protection. The Board has set the maximum of the Committee membership at 20.

### 3.5.3 Financial resources

The EEA requires a substantial budget to maintain its extensive activities. The expenditure of the EEA for 2003 was narrowly over €30.5M. This figure would need to be increased significantly for the EEA to fulfil the entirety of its mandate. However, the 2003 budget is over 50% greater than that of 2000 in recognition of the increasingly important role that the EEA performs in the scheme of attaining the environmental objectives of the EU.

The budget of the EEA is resourced from two main sources: allocation of funds from the EU, and membership subventions from countries outside of the EU. The EU contributed over €21M to the EEA budget in 2003, while membership subventions generated almost €6M. The remainder of its budget is made up of miscellaneous income generated by the provision of EEA products and services, a subvention from the European Free Trade Association, and allocations under EU programmes for co-operation with Balkan countries. The budget of the EEA is primarily spent on staffing and administration costs, which account for almost 60% of total expenditure. Further sources of expenditure are the maintenance of the European Topic Centres, including monitoring, reporting, assessment and the operation of the EIONET information dissemination system.

### 3.5.4 Management

The Board formulates the agendas and strategies of the EEA in response to the needs and requirements of the members and the European Commission and develops annual and multi-annual work programmes. The day-to-day administration of these programmes and execution of the EEA functions and activities is controlled and managed by an Executive Director appointed by the Board. Domingo Jiménez Beltrán, who was the first Executive Director, oversaw the progress of the EEA from its initial establishment in Copenhagen in 1993 to its contemporary 31-member prominence. Professor Jacqueline McGlade, a renowned environmental scientist, who takes up the post for a five-year term, succeeded him in June 2003.

The Executive Director manages a streamlined organisational structure designed to be efficient and responsive. The input of the Board and the Committee is processed thorough the Executive Director and applied through five internal programme divisions. The five divisions of the EEA are:

(a) administration;

(b) strategic development and international co-operation;

(c) environmental assessment;
(d) reporting and networking co-ordination;
(e) information technology and services.

Project teams comprising members of all divisions carry out the fundamental work of the EEA, to process, monitor and report on environmental indicators. In this way, the EEA achieves a level of efficiency which allows it to undertake a disproportionately larger workload.

## 3.6 Mandates and approach

### 3.6.1 Foundation

The determination of the extent of the EEA mandate, and the resources to be applied in carrying it out, was a key issue for the EU. In particular, the EU recognised that providing a strong panoply of environmental protection legislation was inadequate without extensive study of the condition of Europe's environment. In considering the proposed mandate of the EEA, it was also recognised that data on the domestic implementation of these environmental provisions was equally crucial. However, the effort to introduce a system for monitoring the extent and adequacy of domestic legal implementation was successfully opposed by Member States. This task was ultimately adopted by the Implementation and Enforcement of Environmental Law Network (IMPEL) supported by the Environment Directorate-General of the European Commission.

Because scrutiny of domestic legal implementation was resisted and because policy formulation is the responsibility of the Environment Directorate-General, the remit of the EEA, accordingly, became the collection and analysis of environmental information to be used as a cornerstone for the development of future environmental policy. To effect this mandate, the EEA organised itself into three main activity areas: networking; national monitoring and reporting; and acting as a reference centre.

### 3.6.2 Networking

For the EEA individually to collect environmental data throughout the pan-European region would require a phenomenal level of human and fiscal resources. It would also entail a substantial amount of unnecessary duplication of work already undertaken by a variety of national and local governmental departments and agencies and work done by private interest groups and non-governmental organisations. Consequently, it is more efficient for the EEA to utilise and support existing data collection schemes and to act as a central processor and distributor of information.

To achieve this, the EEA established the Environment Information and Observation Network (EIONET) of which the EEA is itself the central hub. EIONET is the primary mechanism by which the EEA achieves its goal of assessing the condition of Europe's environment to enable the EU and Member States to develop appropriate and effective policies and legislation.

To operate such a vast network requires efficient use of modern telecommunications and information technology. In addition to its environmental speciality, the EEA has considerable expertise in these fields, having developed one of the original ground-breaking EXTRANET systems under the Interchange of Data between Administrations programme of the Enterprise Directorate-General.

Feeding into the EEA as the core of EIONET are over 600 environmental bodies, agencies and research centres. The most significant information sources in the network can be viewed in three main classes: the European Topic Centres (and PHARE Topic Links); National Focal Points; and National Reference Centres.

The European Topic Centres (ETCs) play a fundamental role for the EEA by co-ordinating research activities in designated focus areas. This work is undertaken in the PHARE countries for and in conjunction with the ETCs by Phare Topic Links. The ETCs operate as an outsourcing of elements of the EEA's study programme under contract. The contemporary work and development of the ETCs is treated further below.

All of the EEA members have a National Focal Point (NFP). This is a division of a governmental department or agency, which organises the monitoring and reporting within that country for its own purposes and for the benefit of the EEA. The NFP has responsibility for collecting and submitting the data sought by the EEA as part of the annual and multi-annual work programmes in respect of that country. The NFP will also make submissions to EEA publications, including the European State of the Environment Report, EEA Technical Reports, and EEA proposal documents. The NFPs contribute to the information infrastructure of the EEA by their participation in the Information Technology and Telematics Advisory Group (ITTAG). This group is made up of experts nominated by the NFPs to work with the EEA in co-ordinating the technical issues of reporting and disseminating the collected data.

Each NFP is assisted by the work of National Reference Centres (NRCs). These are public or private bodies with a specific expertise in areas chosen for indicator monitoring. A large portion of the NFP monitoring workload is subcontracted to the NRC, though remaining directed by the NFP under the overarching framework of the EEA and EIONET. The NRCs also contribute to the specialist work of a particular ETC to which it has a thematic affinity.

The information collected by the ETCs, NFPs, and NRCs in conjunction with other smaller participants provides the EEA, through the EIONET programme, with an extensive database of environmental indication and record. This information is made available to special interest groups, and to the public at large, through numerous EEA printed and online publications. This allows private interest groups, researchers, students and academics to be equipped with accurate, detailed and current environmental assessments, which, when viewed over time, chart the progression or regression of environmental affairs, without the need for costly and intensive research. Given the modern emergence of environmental litigation, this ease of access to information may be of immense assistance to parties and lawyers in environmental court actions.

### 3.6.3 Monitoring and reporting

As mentioned above, the essence of the EEA's activity is the collection and assimilation of data submitted by national reporting agencies into a harmonised and accessible format. Over 400 recent national reports (since 1997), pertaining to over 50 countries, are available to the public through the State of the Environment Reports Information System (SERIS). SERIS is a database containing the national environmental reports and other key documents produced by the NFPs and other organisations that contribute to the EEA European State of the Environment Report. The SERIS database is based on the Internet.

The NFP for Ireland is the Environmental Protection Agency. It contributes to the work of the EEA by preparing a report on the condition of Ireland's environment at least once every five years in tandem with the publication of the European State of the Environment Report. The EPA undertakes comprehensive studies of environmental indicators in Ireland's inland and coastal waterways and assesses the national air quality. The waterway reporting involves ongoing inspection of the physico-chemical water condition and biological traits of rivers and lakes and assessment of levels and changes of overall water volume and toxicity. Coastal waterway monitoring gauges the quality of bathing water for coastal swimming, and the monitoring of estuary waterways to assess compliance as regards the EU Urban Waste Water treatment Directive. An air quality report is produced annually. This report records pollution in the air, noting, in particular, smoke, sulphur dioxide, lead, nitrous oxides, and carbon monoxide levels, while also studying greenhouse gas emissions.

The EPA is assisted in its contributions to EIONET and the EEA by a number of NRCs which study and monitor environmental issues within their own specialist purview. At present there are five NRCs in Ireland. The Marine Institute, the national agency for the promotion of marine research and development, acts as the NRC for marine and coastal monitoring. Teagasc, the Irish Agriculture and Food Development Authority, monitors and reports on soil quality as an NRC. Dúchas, the agency of the Department of Arts, Heritage, Gaeltacht and the Islands tasked with conserving Ireland's natural and built heritage, is the NRC for nature conservation. The NRC for forests is the Forest Service of the Department of Agriculture. The final NRC is Ordnance Survey Ireland, which has responsibility for land cover.

### 3.6.4 Reference centre

Following the successful establishment of a network of effective environmental monitoring and reporting and the development of EIONET, the Commission, in its first review of the EEA in 1997, assigned to it the task of becoming the seminal electronic reference centre for environmental information. Furthermore, the founding regulation requires that the EEA ensure that the populace of the EU is educated and aware of the state of the environment. These compatible aims caused the EEA to utilise the convenience of modern information technology to develop a colossal compilation of environmental research materials on the internet and to compile the SERIS database men-

tioned above. Between 1995 and 2002 the EEA published over three hundred documents reporting environmental conditions. The most significant of these are the *Dobris Assessment* (1995), the first all-encompassing report on the condition of Europe's environment, and its successor reports *Europe's Environment: The Second Assessment* (1998); and *Europe's Environment: The Third Assessment* (2003). Thus the EEA has developed a reference centre unsurpassed in the provision of environmental information services.

## 3.7 Work programmes

### 3.7.1 Rubric

A clear focus for the monitoring and reporting activities described above is fundamental to the efficiency of the EEA. Despite the vast network of indicator reporting and monitoring, there is a limit to how much any agency can undertake within its resources. Critically, the research of the EEA must be guided by the contemporary policy and legislative framework envisioned by the Environment Directorate-General and the members, as the primary clients of the EEA. Consequently, though the studies of the EEA are extensive, they are still targeted at selected sectors in response to the existing or expected information needs for developing environmental policy and implementing legislation.

### 3.7.2 Multi-Annual Work Programmes (MAWP)

This selected concentration is embodied in the Multi-Annual Work Programmes (MAWP). The MAWP sets out the work schedule of the EEA in macro terms over a five-year period. Following consultation with a wide range of stakeholders including the Committee and the NFPs, the members of the Board will draft an MAWP. The draft MAWP is submitted to the Committee and the Commission for consideration. Each of these will publish an opinion on the draft MAWP containing suggested amendments that will be incorporated by the Board. The Committee opinion concentrates on scientific needs and requirements while the Commission opinion will detail changes necessary to ensure that the data collated is pertinent to the forthcoming policy platform.

The 2nd MAWP (1999–2003) is grounded in the requirement of environmental information for promoting sustainable development policies. This is in line with the regulatory charge of the EEA to inform the framing of environmentally sound policies. Sustainable development as a concept had a long life in flowery rhetoric before real steps were taken to make the notion visibly tangible in the EU. The development of the priorities of the 2nd MAWP can be traced through various conferences, research papers and debates to the 5th European Environmental Action Programme 'Towards Sustainability' (1998).

Framing the 2nd MAWP in light of these developments led to the adoption of a clear focus to report on the conditions and movement of environmental indicators illuminating progress in sustainable development. Thus, from 1999–2003, the mission statement of the EEA has been:

> to support sustainable development and to help achieve significant and measurable improvement in Europe's environment through the provision of timely, targeted, relevant and reliable information to policy making agents and the public.

Hence the broad research headings designated related to monitoring the pollutant pressures of waste, chemicals, water discharges, releases to soil/land, and atmospheric emission in concert with assessment of the quality of air, water, soil, biotypes, and the coastal and marine environment. Studying these areas on their own would encapsulate environmental conditions and progress but shed limited light on sustainable development. To address this point the EEA was tasked with co-ordinating liaison between socio-economic data compilers in supplementing the EEA Reference Centre with the requisite information from these sources to allow for broad reports scrutinising the state of sustainable development objectives.

Utilising the MAWP for medium term strategic planning is advantageous for the EEA's own development as well as beneficial for the ultimate clients of the EEA products. It allows the EEA to assess the infrastructural needs and costs while compelling budgetary commitments in advance to implement the programme. This facet of the 2nd MAWP has allowed the EEA to advance a great deal since 1999 to achieve the structural targets assigned. Amongst these was the expansion of EIONET, which by 1999 was in need of streamlining and enabling greater public access to materials generated through the network. The development of the reference centre even beyond the growth required to monitor sustainable development was another core target. Identifying emerging issues of environmental significance, allowing the agency greater scope for influencing the environmental policy agenda at the input stage was set as a key challenge. The achievement of the 2nd MAWP targets for the structural development of the EEA is the primary reason why both the workload and the budget of the agency has increased so dramatically in recent years. The 3rd MAWP will apply from 2004–2008 during which time the EEA will become almost unrecognisable from the fledgling agency founded in Copenhagen in 1993. The 3rd MAWP will further enhance the scope of data indicator collection and promote stronger external co-operation. As a development from the sustainable development focus of its predecessor, the 3rd MAWP will orchestrate sweeping assessment of health impacts from an ecosystem analysis perspective. Substantial economic evaluation of the impacts of sustainable development policies detailing in particular cost-benefit evaluations has been identified as especially important in the continuing development of these measures. The other major growth area in the workload of the EEA under the 3rd MAWP will be multi-scale assessment of environmental indicators as a contribution to the international collaborative assessment of environmental trends at regional and global levels.

### 3.7.3 Annual Work Programmes (AWPs)

At a micro level the work of the EEA is scheduled in AWPs. Each AWP sets work schemes in pursuit of the requirements set by the MAWP. Additionally, the AWP is more flexible, allowing the EEA scope to be responsive in its work

to immediate trends and pressures. These include the requirements of the EEA report publication regime; acknowledging the impact of updates in the European Environmental Action Programme; focus changes within the Environment Directorate-General and the Council of Ministers; and work in support of the environmental agenda of the alternating Presidency of the Council of the EU.

The broad research headings allocated in the MAWP are revisited in more detail in the AWP. In particular, each of the ETCs is assigned tasks and targets relating to monitoring and data collation; developing information and future projections based on indicators; and submitting assessment reports in each field.

In response to prevailing influences not in existence at the formulation of the 2nd MAWP, the AWP 2003 accounts for work necessitated by a number of new factors. Chief amongst these is EU enlargement where the EEA plays a lead role in assisting in the development of the environmental structures of candidate countries in preparation for harmonisation. Candidate countries benefit from the experiences of the EEA regarding sustainable development and the conservation of environmental assets. Climate change issues are now of serious import within the EU and the EEA works to ensure that co-operation in climate change is solidified. The EEA also plays an important part in assisting candidate countries to prepare their general population, in general, and their transport and energy sectors, in particular, for the environmental impacts of integration into the EU. Alongside these assistance arrangements, the EEA is tasked with extended environmental assessment obligations incorporating new geographic areas, with particular emphasis on the River Danube and the Black Sea.

Another new development is the extended co-operation on environmental issues consequential to the 2nd Euro-Mediterranean Ministerial Conference on the Environment in July 2002, which resolved to improve implementation of the Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean and to strengthen the environmental dimension of European-Mediterranean relations. Communication of EU environmental protection policies and activities regarding the non-EEA Mediterranean countries is now the responsibility of the EEA. Moreover, the EEA is harmonising its indicator sets for the region with those of other non-EEA monitors and carrying out an intensive sustainable development review of the region.

Through these new activities, and the detailed enforcement of the MAWP targets, the AWP ensures substantive implementation of the MAWP, while also allowing the EEA to grow and respond to changing needs in a swift manner.

## 3.8 Beyond Copenhagen

### 3.8.1 Broad view

Attaining the environmental information so seminal to the purpose of the EEA necessitates extensive relations and co-operation with environmentally focused entities throughout the world. The more significant associations and

partnerships are with the European Topic Centres, the United Nations Environmental Programme, the United States Environmental Protection Agency and the European Commission's Joint Research Centre.

### 3.8.2 European Topic Centres (ETCs)

Selected by the Board, after competitive tender on the basis of their expertise and capacity, ETCs are entities who contract with the EEA to carry out projects in specific subject areas designated in the MAWP. The number of ETCs is not constant or prescribed but dependent on organisational research requirements. At present there are five ETCs in operation.

#### *3.8.2.1 European Topic Centre on Air and Climate Change (ETC/ACC)*

The National Institute of Public Health and the Environment of the Netherlands is the lead institute of 13 who collectively operate the ETC/ACC for a three-year tenure from 2001 to 2004. The ETC/ACC builds on the air emissions and quality monitoring of prior ETCs but the addition of climate change to the topic is a crucial broadening of scope. In particular the ETC/ACC monitors and assesses climate change and air pollution, providing integrated analysis reports. The Report on Climate Change provides an assessment of state and impact indicators applicable to Europe. Greenhouse gas emissions are important in assessing climate change. Another ETC/ACC activity is the production of topic reports on current and future greenhouse gas emissions that scrutinise the application of both EU and national policies and measures to reduce levels. These reports indicate the progress that each member and the EU overall is making in meeting its committed targets under the Kyoto Protocol to the UN Framework Convention on Climate Change. The ETC/ACC also evaluates and reports on policies for the preservation and improvement of air quality, referencing past assessments and projecting future trends on the basis of current pollution levels, and studies the incidental impact of air pollution on climate change. As part of the ongoing effort to heighten awareness levels regarding environmental matters, the ETC/ACC, through its website and publications, offers relevant useful information to the public relating to air quality and climate change.

#### *3.8.2.2 European Topic Centre on Waste and Material Flows (ETC/WMF)*

The primary purpose of the ETC/WMF is to collect and report accurate information on waste and material flows in Europe. The ETC/WMF is operated by a consortium of eight bodies, including the Irish EPA, and was established in 1997. It is based in Copenhagen under the auspices of its joint lead agencies, the Environmental Protection Agency of the City of Copenhagen and the Danish Environmental Protection Agency. In addition to contributing to EIONET and EEA publications the ETC/WMF distributes the results of its observations and analysis of waste and material flows through a number of topic and technical reports. These reports examine crucial areas for the future sustainable development of Europe. Compliance of EU Member States with performance targets set by the Directive on the Landfill of Waste, integrated with an evaluation of the instruments and treatment systems used to attain these targets, and studies

on the collection, treatment and movement in waste disposal, are among the more significant of these reports. By providing information on waste management and material flows and projected future trends the ETC/WMF assists in the development of EU policies to control the relationship between waste generation and resource consumption, thereby promoting sustainable economic growth.

#### *3.8.2.3 European Topic Centre on Water (ETC/Water)*

Water has been part of the topic centre research of the EEA since its foundation in 1993. At that time, the ETC was referable to inland waterways. The same contractor, Water Research Centre plc, has led the water-related topic centres continually and in its current guise as the ETC/Water, a 12-group consortium co-ordinated by WRC, operates the topic centre from its base in Swindon, UK. The core activity of the ETC/Water involves assessing the effectiveness of policies on water quality. In particular, the judging impact of the Water Framework Directive involves massive co-ordination of resources managed through the EUROWATERNET established by the ETC/Water. The sheer volume of waterways to be monitored as regards the Water Framework Directive makes this task one of the more monumental projects undertaken under the patronage of the EEA. Furthermore, the implications for some Member States are revolutionary with respect to their management of water. The ETC/Water provides fundamental support to NFPs and national agencies implementing the directive in their development of an administration system for water catchments, including the monitoring and assessing of water quality and the processes for measuring and levying fees for water usage. Among the other responsibilities of the ETC/Water is the compilation and production of topic updates and reports on water quality.

#### *3.8.2.4 European Topic Centre on the Terrestrial Environment (ETC/TE)*

ETC/TE is a newer topic centre based in Spain under the lead body of a consortium comprising 10 organisations at the Autonomous University of Barcelona. Monitoring the terrestrial environment requires analysis of the interplay between the biosphere and the geosphere in the integrated context of the interface with socio-economic factors rooted in each particular locale. This work involves evaluation of a wide range of areas from the relationship between economic growth and population or the effect of developing and maintaining the road infrastructure to the assessment of changes in soil quality. The ETC/TE studies are the bedrock of policy initiatives by the Commission to recognise the fundamental nature of soil and land and preserve soil from erosion and pollution. The initial soil-monitoring objective of the ETC/TE is to assess the dangers posed by soil contamination, soil sealing and soil erosion and the impact of soil degradation on Europe's environment.

#### *3.8.2.5 European Topic Centre on Nature Protection and Biodiversity (ETC/NPB)*

The topic centre on Nature Conservation that existed from 1995 to 2000 has been replaced by the ETC/NPB. Based in France and lead by the Musée National d'Histoire Naturelle, the ETC/NPB is a collaboration of nine institu-

tions. The addition of the biodiversity mandate represented a further broadening of the overall EEA research base. The data compiled by the ETC/NPB is employed for the development of policy initiatives implemented through legislative instruments such as the Habitat Directive and the Birds Directive. Other studies and reports cover a range of areas from creation of a core set of biodiversity indicators to assessing the relationship between climate change and biodiversity and producing a feasibility study on the potential to use data from bird ringing schemes to indicate environmental changes.

### 3.8.3 United Nations Environmental Programme (UNEP)

Sustainable development is promoted by the United Nations through UNEP. The goal of UNEP is to lead and foster environmental protection while aiding the improvement of people's quality of life and preserving resources to the same end for future generations, through the provision of information and inspiration. Clearly, this mandate is very compatible with that of the EEA, and, as a consequence, the two organisations co-operate closely. This co-operation embraces many activities including the harmonisation of the disparate data collection endeavours and network structures to expand each entity's access to environmental data. In recognition of coinciding mutual interests, a Memorandum of Understanding was signed in 1996 providing for co-operation. The EEA has made submissions to a number of the UNEP monitoring publication GEO Reports. Other collaborations include a study of the environmental conditions of the Arctic environment and the implications of Arctic climate changes on Europe's environment, and an assessment of the influence Europe has had on the state of the Arctic environment.

The Memorandum of Understanding has been overtaken by a series of annexes providing for even more extensive mutual assistance. The annexes are reviewed annually to accommodate partnership projects between the EEA and UNEP. These include:

(a) the improved environmental monitoring of the Arctic and Mediterranean regions;
(b) adopting a joint approach to agro-biodiversity;
(c) establishing joint projects to predict future environmental developments; and
(d) input support facilitating the eastward expansion of the EEA's pan-European reporting framework.

### 3.8.4 United States Environmental Protection Agency (USEPA)

As part of the wider framework of transatlantic co-operation, the EEA works closely with USEPA. Both organisations engage in similar activities and actively trade expertise and experiences, while developing a common understanding and outlook to practices in the realm of environmental information.

### 3.8.5 Joint Research Centre (JRC)

The European Commission resources the JRC to provide scientific support for the development, implementation and monitoring of EU policies. This function for the entire Commission is analogous to that which the EEA performs for the Environment Directorate-General. Consequently there is broad scope for mutual co-operation in relation to the ever-expanding research mandate of the EEA beyond prime environmental indicators. A Memorandum of Understanding is in place between the two bodies in relation to technical and scientific co-operation. Areas of mutual activity include protection of natural resources, monitoring climate change, and assessing spatial strategies. These take the form of substantive joint projects as part of the overarching sustainable development agenda.

## 3.9 European Environmental Agency outputs

### 3.9.1 Range

As a consequence of undertaking such a broad range of researching and networking activities the EEA is able to provide its clients, the members and the Commission, and also the general public, with a massive range of environmental information resources and products. Three of the most significant of these are summarised below.

### 3.9.2 Europe's environment: the Third Assessment

This is the current and most extensive evaluation of environmental issues in the pan-European region. The geographical scope of the report extends from Europe to cover Eastern Europe, Russia, and the Caucasus and Central Asian States. The Third Assessment considers in detail the negative influences of economic forces on the European environment and the correlation between economic recession and environmental improvements, and between economic growth and environmental degradation. Economic pressures on the environment are assessed in relation to natural resources, transport, fisheries, energy, tourism, forestry, industry and agriculture. Emerging trends in the condition of the environment are exposed by indicators in biodiversity, air pollution, climate change, soil, chemicals, ozone depletion, waste, technological and natural hazards, and human health. An appendix giving a statistical summary of the socio-economic and environmental indicators for all the countries surveyed enables the comparative condition of Ireland's environment to be summarised at a glance.

### 3.9.3 The website

The EEA website is a veritable treasure trove of environmental information and has been developed to raise public awareness of environmental matters through providing easy and efficient access to countless environmental documents. The website stores details of all the relevant environmental indicators

and reports. Access to the SERIS database affords convenient access to the national reporting documentation for the countries of the pan-European region. Detailed information can be accessed by country and by topic, providing optimum research flexibility. Feeding into the website are a number of environmental networks, the most prominent being EIONET. These network sites also display information on thematic indicators and monitoring in detail. Perhaps the most innovative feature of the website is the provision of an online environmental glossary. Environmental language can be very technical and scientific and the glossary defines over 700 phrases in ordinary layman's vocabulary in 23 languages, accompanied by definition sources and options for further research on the chosen phrase.

### 3.9.4 Environmental Signals Report

The current report, *Environmental Signals 2002 – Benchmarking the Millennium*, is the third in an ongoing series of reports. Though accessible to the general public, the tone of the report is targeted at the key environmental policy-makers in EEA countries. While the five-yearly state of the environment reports contain exhaustive analysis of the environment as an elongated snapshot in time and may show dramatic transformations, the Signals Report focuses on trends and indications as a guide to the future prospects of the environment. The Signals Report examines indicators for each of the countries and assesses them against the various targets set in each area over a specific timeframe. These are graded on a scale of:

(a) positive trend, moving towards target;
(b) some positive development, but either insufficient to reach target or mixed trends within the indicator; and
(c) unfavourable trend.

In this manner the report enables governments and agencies to identify sources of potential difficulty and take appropriate steps to address the issues in the area. The report will also indicate the positive developments and enable agencies to determine and distinguish between effective and defective implementation processes, resulting in an overall improvement in the national environmental promotion expertise and superior environmental conditions.

## 3.10 Conclusion

The EEA as a source of environmental information is invaluable to the European policy-makers, at both EU and Member State level, and to the public generally. It is also extremely relevant to researchers, both academic and professional. One could readily imagine a situation where, for example, a complex environmental case would necessitate a consideration of some of the issues that have been investigated and reported by the EEA. With the development of environmental litigation in this jurisdiction, there is no doubt that the resources available through the EEA could be of great assistance to Irish lawyers dealing with these issues.

CHAPTER 4

# THE ENVIRONMENTAL PROTECTION AGENCY

*John Darby*

## 4.1 Introduction

The Environmental Protection Agency Act 1992 (the Act) provided for the establishment of the Environmental Protection Agency (the Agency). The Act was amended by the Protection of the Environment Act 2003 (the 2003 Act).

## 4.2 Definitions

Section 3(1) of the Act (as amended by the 2003 Act) contains a number of important definitions, including the following:

An 'activity' means:

> any process, development or operation specified in the First Schedule and carried out in an installation.

An 'authorised person' is:

> (a) a person who is appointed in writing by a Minister, a local authority, the Agency, or by such other person as may be prescribed to be an authorised person for the purposes of [the] Act or any Part or section thereof.

'Development' has the meaning assigned to it by s 3 of the Planning and Development Act 2000 (the 2000 Act). 'Disposal' has the meaning assigned to it in the Waste Management Act 1996 (the 1996 Act). An 'emission' includes:

> (a) an emission into the atmosphere of a pollutant within the meaning of the Air Pollution Act 1987,
>
> (b) the release of a greenhouse gas or a precursor of a greenhouse gas into the atmosphere,
>
> (c) a discharge of polluting matter, sewage effluent or trade effluent within the meaning of the Local Government (Water Pollution) Act 1977 (the 'Water Pollution Act 1977') to waters or sewers within the meaning of that Act, or
>
> (d) waste.

'Environmental protection' is defined as including:

(a) the prevention, limitation, elimination, abatement or reduction of environmental pollution, and

(b) the preservation of the quality of the environment as a whole.

'Environmental pollution' includes:

(a) 'air pollution' for the purposes of the Air Pollution Act 1987,

(b) the condition of waters after the entry of polluting matter within the meaning of the Water Pollution Act 1977;

(c) in relation to waste, the holding, transport, recovery or disposal of waste in a manner which would, to a significant extent, endanger human health or harm the environment and, in particular:

(i) create a risk to the atmosphere, waters, land, soil, plants or animals,

(ii) create a nuisance through noise, odours or litter, or

(iii) adversely affect the countryside or places of special interest, or

(d) noise which is a nuisance, or would endanger human health or damage property or harm the environment.

'Environmental medium' is defined as including:

the atmosphere, waters and land.

An 'established activity' means:

(a) an activity which on 29 October 1999, or such other date as may be prescribed in relation to the activity, was being carried on and did not involve or have an association with unauthorised development within the meaning of the 2000 Act, or

(b) an activity–

(i) in respect of which permission under section 34 of the 2000 Act has been granted, or an application for such permission had been made, before 30 October 1999, or such other date as may be prescribed in relation to the activity, and

(ii) which on 29 October 2000, or such other date as may be prescribed in relation to that activity, was being carried on and did not involve or have an association with unauthorised development within the meaning of the 2000 Act.

The 'Minister' is defined as meaning the Minister for the Environment, Heritage and Local Government.

An 'occupier' for the purposes of the Act, in relation to any premises includes:

the owner, a lessee, any person entitled to occupy the installation or premises and any other person having, for the time being, control of the installation or premises.

The 'person in charge' includes:

> an occupier of an installation or premises or a manager, supervisor or operator of an activity.

'Plant' includes:

> any equipment, appliance, apparatus, machinery, works, building or other structure or any land or any part of any land which is used for the purposes of, or incidental to, any activity specified in the First Schedule.

'Premises' includes:

> any messuage, building, vessel, structure or land (whether or not there are any structures on the land or whether or not the land is covered with water) or any hereditament of any tenure, together with any out-buildings and curtilage.

A 'public authority' means:

(1) a Minister of the Government;

(2) the Commissioners of Public Works in Ireland;

(3) a local authority for the purposes of the Local Government Act 2001;

(4) a harbour authority within the meaning of the Harbours Act 1946;

(5) a health board, the Eastern Region Health Authority or an Area Health Board established under the Health (Eastern Regional Health Authority) Act 1999;

(6) a board or other body (but not including a company under the Companies Acts 1963 to 2001) established by or under statute;

(7) a company under the Companies Acts 1963 to 2001, in which all the shares are held–

  (i) by or on behalf of a Minister of the Government,

  (ii) by directors appointed by a Minister of the Government, or

  (iii) by a board or other body referred to in paragraph (6) or by a company to which subparagraph (i) or (ii) applies;

(8) such other body as may be prescribed for the purposes of any provision of [this] Act.

A 'sanitary authority' means:

> a sanitary authority for the purposes of the Local Government (Sanitary Services) Acts 1948 to 2001.

A 'waste management plan' means a waste management plan or a hazardous waste management plan within the meaning of the 1996 Act, which is for the time being in force.

## 4.3 Definition of 'best available techniques'

Section 5(1) of the Act, as amended by s 7 of the 2003 Act, provides that a reference to 'best available techniques' shall be construed as a reference to the most effective and advanced stage in the development of an activity and its methods of operation, which indicate the practical sustainability of particular techniques for providing, in principle, the basis for emission limit values designed to prevent or eliminate or, when that is not practicable, generally to reduce an emission and its impact on the environment as a whole.

Section 5(3)(a) of the Act provides that the Agency may, from time to time as occasion requires and shall in accordance with any regulations made by the Minister, specify the best available techniques to provide, in principle, the basis for emission limit values for an activity or activities of a particular class or description, and regard shall be had to the administration of the Act to any such specifications.

## 4.4 Offences

Section 8(1) of the Act provides that any person who contravenes any provision of the Act, or any regulation or order made under the Act, or any notice served under it, shall be guilty of an offence.

According to s 8(2), where an offence under the Act is committed by a body corporate, or by a person acting on behalf of a body corporate, and is proved to have been so committed with the consent, connivance or approval of, or to be facilitated by any neglect on the part of any director, manager, secretary or any other officer of such body corporate, that person shall also be guilty of an offence.

### 4.4.1 Prosecution of offences

According to s 11(1) of the Act, an offence under the Act may be prosecuted summarily by the Agency.

By virtue of s 11(2), the Minister may, by regulations, provide that an offence under the Act, specified in the regulations, may be prosecuted summarily by such person (including the Minister) as may be so specified.

Section 11(3) states that summary proceedings for an offence under this Act, may be commenced:

(a) at any time within 12 months from the date on which the offence was committed; or

(b) at any time within six months from the date on which evidence sufficient, in the opinion of the person by whom the proceedings are initiated, to justify the proceedings, comes to that person's knowledge,

whichever is the later.

However, no such proceedings shall be initiated later than five years from the date on which the offence in question was committed.

### 4.4.2 Costs of prosecutions

Section 12 of the Act provides that where a person is convicted of an offence under the Act committed after the commencement of the section, the court shall, unless it is satisfied that there are special and substantial reasons for not doing so, order the person to pay to the Agency the costs and expenses, measured by the court, incurred by the Agency in relation to the investigation, detection and prosecution of the offence.

## 4.5 Establishment of the Agency

Part II of the Act deals with the establishment of the Agency and deals with matters such as its staff, consultants and advisors and its funding.

Section 19(1) states that the Agency shall be established to perform the functions assigned to it by or under the Act. Section 19(2) provides that the Agency shall stand established on such day as the Minister appoints by order. According to s 19(3), the Agency shall consist of a Director General and four other directors.

## 4.6 Establishment of regional environmental units

The Agency is required by s 43(1) of the Act to establish such a number of regional environmental units as may be approved by the Minister and shall, as far as is practicable, arrange for the performance of its functions or particular functions through such units.

## 4.7 Agreements between the Agency and other public authorities

By virtue of s 45(1) of the Act, where the Agency is of the opinion that any function or any service which may be exercised or performed by it should be exercised or performed on its behalf, whether generally or in a particular case, by a public authority, and the public authority is able and willing to exercise or perform the function or service, the Agency and the public authority may enter into an agreement that the function or service shall be so exercised or performed on behalf of the Agency by the public authority.

## 4.8 Functions of the Agency

The functions of the Agency are set out in s 52(1). These include:

(a) the licensing, regulation and control of activities for the purposes of environmental protection;

(b) the monitoring of the quality of the environment, including the establishment and maintenance of databases of information related to the environment and making arrangements for dissemination and availability to the public of such information;

(c) the provision of support and advisory services for the purposes of environmental protection to local authorities and other public authorities;
(d) the promotion and co-ordination of environmental research and the carrying out, or arranging for such research;
(e) liaising with the European Environment Agency; and
(f) such other functions in relation to environmental protection as may be assigned or transferred to it by the Minister under s 53 or 54 of the Act, including functions arising from European Community obligations, or any other international convention or agreement to which the State is, or becomes a party.

The Agency is obliged by s 52(2), in carrying out these general functions, to have regard to the following environmental principles. It must:

(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 would cause significant environmental pollution;
(d) have regard to the need to give effect, in so far as it is feasible, to the 'polluter pays' principle, as set out in the EC Recommendation 75/436/EURATOM, ECSC, EEC, regarding cost allocation and action by public authorities on environmental matters; and
(e) ensure, in so far as is practicable, that a proper balance is achieved between the need to protect the environment (and the cost of such protection), and the need for infra-structural economic and social progress and development.

### 4.8.1 Assignment of additional functions

Section 53(1) of the Act gives the Minister power, following consultation with the Agency and with any other Minister of the Government who, in the opinion of the Minister is concerned, to make regulations assigning to the Agency, such additional functions in relation to environmental protection as, from time to time, he considers appropriate.

### 4.8.2 Transfer of functions

The Minister may, following consultation with the Agency, make regulations, pursuant to s 54(1) of the Act, providing that any function in respect of environmental protection conferred on a public authority under any enactment

specified in the Second Schedule to the Act shall, where the Minister is satisfied that the function could be more effectively performed by the Agency, in addition to, or in lieu of, being performed by that public authority, be performed by the Agency with effect from the date specified in the regulations.

### 4.8.3 Advisory functions in relation to Ministers of the Government

According to s 55(1) of the Act, the Agency may, and must when requested by a Minister of the Government, give information or advice or make recommendations for the purposes of environmental protection to any such Minister on any matter in relation to his functions or responsibilities and that Minister must have regard to any such information or advice given or recommendations made.

Section 55(2)(a) gives examples of the matters which the Agency may do, pursuant to s 55(1) of its own volition, and must do when requested by a Minister of the Government, such as:

(a) preparing and submitting to the Minister concerned an assessment of any proposal for any treaty governing the European Community or any act of the institutes of the European Community or other international convention or agreement to which the State is or may become a party which is of relevance to the protection of the environment or a proposal for the amendment or implementation of any such treaty, article, convention or agreement;

(b) advising the Minister concerned in relation to any proposals for legislative change of any other policy matters concerning environmental protection and related matters;

(c) submitting to the Minister concerned any proposals it may consider appropriate for amendment of any enactment or for new enactments in relation to environmental protection;

(d) preparing and submitting information to, or advising, the Minister concerned in relation to guidelines, standards and other matters, including management of coastal areas, in relation to environmental protection; and

(e) reporting on, and making recommendations to the Minister concerned on particular environmental issues or problems.

Section 55(2)(b) of the Act provides that the Agency may, and must when requested by the Minister, make recommendations to the Minister in relation to any modification or extension of the functions of the Agency which it considers appropriate.

Section 55(3) of the Act gives the Minister power, by order, after he has consulted any other Minister of the Government concerned, to provide that a function performable by the Agency under s 55(1) or 55(2)(a) of the Act shall also be performable in relation to any other public authority for which that other Minister is responsible.

### 4.8.4 Advisory functions in relation to local authorities

By virtue of s 56(1) of the Act, the Agency may, and must when requested by the Minister, give information or advice to make recommendations for the purposes of environmental protection to a local authority, or local authorities generally, in relation to the performance of any of its or their functions. The local authority or local authorities must have regard to any such information or advice given or recommendations made.

### 4.8.5 Assistance to local authorities

The Agency is required by s 57(1) of the Act to provide such general support and assistance for the purposes of the environmental protection to local authorities in relation to performance of any of their functions as it considers necessary and feasible. Section 57(2) of the Act provides that the Agency may, for the purposes of s 57(1), make arrangements with a local authority on such terms and conditions as may be agreed, for the provision of services, including services relating to staffing and equipment, to that local authority.

### 4.8.6 Drinking water

The Agency may require a sanitary authority, pursuant to s 58(1)(a) of the Act, to submit to it, in such manner and at such times as it may direct, such specified information about the monitoring of the quality of water intended for human consumption pursuant to the European Communities (Quality of Water Intended for Human Consumption) Regulations 1988, or any enactment amending or replacing those regulations, or any other enactment relating to drinking water as may be prescribed. The Agency is required by s 58(2) of the Act to prepare and submit to the Minister an annual report on such monitoring, and an assessment of the results, together with any recommendations which it considers appropriate.

### 4.8.7 Sewage or other effluents

The Minister is given power by s 59(1) of the Act for the purposes of environmental protection, and, in particular for the purposes of giving full effect to Directive 91/271/EEC (concerning urban waste-water treatment), to make regulations for the collection, treatment, discharge or disposal of sewage or other effluents to waters from any plant or drainage pipe vested in, or controlled or used by, a sanitary authority for the treatment of drinking water, or any plant, drainage pipe or sewer used by a sanitary authority for the treatment and disposal of sewage or other effluents.

Section 59(7) states that it shall be a good defence to a prosecution for an offence under any enactment other than the Act that the act constituting the alleged offence was in compliance with a standard or other requirement specified under s 59(2)(c), or an authorisation granted under this section.

### 4.8.8 Monitoring in relation to a sanitary authority's effluents

Section 61(1)(a) of the Act provides that a sanitary authority in which is vested or which has control over or the use of any plant, sewer or drainage pipe from which effluent is discharged to waters and in respect of which standards or other requirements have been prescribed or an authorisation issued under s 59, or criteria and procedures have been specified under s 60, shall carry out, or cause to be carried out, such monitoring of the effluent or of the waters concerned or in connection with the management or operation of the plant, sewer or drainage pipe:

(i) as may be necessary or prescribed under s 59(2)(e) of the Act to assess compliance with standards or other requirements prescribed, or authorisation issued, under s 59 of the Act; or

(ii) as the Agency shall direct in relation to criteria and procedures specified under s 60 of the Act, and shall transmit the results of such activity to the Agency in such manner and at such times as the Agency shall direct.

Where the Agency is of the opinion that the monitoring being carried out by the sanitary authority in accordance with the provisions of s 61(1)(a) of the Act is inadequate, or is not satisfied with the response of the sanitary authority to a direction under s 61(1)(a), it is required by s 61(2) to consult with the sanitary authority concerned. If the Agency still is dissatisfied with the response after such consultation, the Agency must carry out, cause to be carried out, or arrange for the monitoring concerned. The costs of the monitoring may be recovered by the Agency from the sanitary authority in question as a simple contract debt in any court or competent jurisdiction.

### 4.8.9 Landfill sites for waste disposal

The Agency is required by s 62(1) of the Act as soon as is practicable, for the purposes of environmental protection, to specify and publish information in respect of criteria and procedures for the selection, management, operation and termination of use of landfill sites for the disposal of domestic and other waste. Section 62(2) of the Act gives examples of the types of matters to which the criteria and procedures may relate, such as:

(a) site selection;

(b) design and bringing into operation of sites;

(c) impacts on the environment;

(d) operational guidelines, including classification of wastes and establishment of acceptance criteria for landfill;

(e) acceptance of different classes of waste at different classes of sites;

(f) fire, pest and litter control;

(g) appropriate recovery, re-use and recycling facilities; and

(h) termination of use and subsequent monitoring.

Section 62(5) of the Act provides that where criteria and procedures which are specified under that section relate to a landfill site managed or operated by a

local authority, the local authority concerned must, when necessary, take steps as soon as is practicable to ensure that the management or operation of that landfill site complies with the specified criteria and procedures.

### 4.8.10 Monitoring activities of public authorities

Section 68(1) of the Act requires the Agency to exercise general supervision over the monitoring carried out by local authorities (and such other public authorities as may be prescribed) for the purpose of any enactment relating to environmental protection.

The Agency is further required by s 68(2) to keep itself informed of the nature and extent of the monitoring carried out by each local authority and by each public authority prescribed under s 68(1).

For the purposes of s 68(2), the Agency is given power by s 68(3) to require a local authority or other public authority prescribed under s 68(1) to provide information within a specified period on matters such as:

(a) the number and location of places at which monitoring is being carried out and the frequency of such monitoring;

(b) the manner in which samples and measurements are taken and analyses are carried out;

(c) the equipment being used for the purposes of taking such samples and measurements or of carrying out such analyses;

(d) the results of such monitoring; and

(e) the local authority or public authority, as the case may be, must not unreasonably withhold the information sought.

### 4.8.11 Environmental quality database

A duty is imposed on the Agency by s 69(1), following consultation with such persons or bodies as may be prescribed, to establish and maintain, or arrange to have established and maintained, a database in respect of the quality of the environment. Section 69(2) of the Act provides that the database must include information on matters such as:

(a) ambient air quality;

(b) the quality of inland waters, estuarial and coastal waters, and ground waters;

(c) soil quality;

(d) noise levels; and

(e) inventories of emissions to the environment.

The Agency may require any public authority to make available to it, in accordance with s 69(3) of the Act, any information in respect of environmental quality which is in the possession or control of that public authority. The Agency is also empowered by s 69(4)(a) to make arrangements for information in relation to environmental quality which is held by any person or body to be sent to it on such terms and conditions as may be agreed and for such infor-

mation to be included in the database. Furthermore, the Agency may compile and maintain a register of sources of data in relation to the quality of the environment pursuant to s 69(4)(b) of the Act. The register in question must be available for inspection by the public free of charge at the Agency's headquarters during office hours.

### 4.8.12 Environmental audits

Section 74 of the Act deals with environmental audits. An 'environmental audit' is defined in s 74(1) as being:

> in relation to any process, development or operation, a systematic, documented and objective periodic assessment of the organisational structure, management systems, processes and equipment pertaining to, or incidental to, that process, development or operation, for the purposes of environmental protection and, in particular for the purposes of:
>
> (a) facilitating management control of practices which may have an impact on environmental protection;
>
> (b) assessing compliance with enactments relating to environmental protection and with such environmental conditions as may be attached to any licence or permit granted or issued in connection with the aforesaid process, development or operation; and
>
> (c) minimising the impact of the process, development or operation on the environment.

### 4.8.13 Codes of practice

The Agency is given power by s 76(1) of the Act to prepare and publish codes of practice, or approve of a code of practice, or part of one, which is drawn up by another body, for the purpose of providing practical guidance in relation to compliance with any enactment or otherwise for the purposes of environmental protection. The Agency is also empowered by s 76(4) to revoke or revise all or part of any code of practice which it has prepared or published. It may also withdraw its approval of any code of practice or part of one.

### 4.8.14 Labelling of products and services

Section 78(1) of the Act requires the Agency, if it considers it necessary or desirable to do so, having regard to any act of any institution of the European Community relating to a European Community labelling scheme, to establish, or arrange for the establishment of, a scheme or schemes for the use of a special symbol or symbols on the labels of specified products, or in connection with specified services, which meet specified criteria and standards in respect of their impact on the environment.

The Agency is given a number of powers by s 78(2) of the Act, in relation to the establishment of a labelling scheme, such as the power to:

(a) set the criteria and standards under which a special symbol can be used on the labels of products or in connection with services;
(b) provide for procedure and other matters in relation to the use, or an application of an appeal against the refusal for the use, or for the withdrawal, of a special symbol;
(c) provide for charges for the carrying out of tests or analyses;
(d) determine the product categories or services to which such a scheme would apply; and
(e) prepare and publish periodic reports on, and publish details of, the scheme.

According to s 78(4) of the Act, it shall be an offence:

(a) to use a symbol provided for in a scheme under that section, or under a European Community environmental labelling scheme in force in the State, or a similar symbol, on the labelling of a product or in connection with a service which has not been approved under the scheme or for which the approval has been withdrawn or, if approved, no longer meets the standards or criteria of the scheme; or
(b) for a person to make a statement of claim in writing or otherwise in connection with the use, or an application or an appeal against a refusal for the use, or for the withdrawal, of a special symbol which to his knowledge is false or misleading in a material respect.

### 4.8.15 General policy directives

The Minister is given power by s 79(1) of the Act, whenever he thinks proper, to give such general directives in writing to the Agency as to policy in relation to environmental protection. Section 79(2) requires the Agency, in performing its functions, to adhere to any directions given by the Minister under that section.

However, s 79(3) provides that nothing in s 79 shall be construed as enabling the Minister to exercise any power or control in relation to the performance of any particular service of the Agency of a function assigned to it by or under the Act.

## 4.9 Integrated pollution control

Part IV of the Act is concerned with integrated pollution control. This Part introduces a new approach to the system of licensing and the permits required in respect of the various media. Before the passing of this Act, separate licences would be required under the Local Government (Water Pollution) Act 1977, the Air Pollution Act 1987, the Fisheries Acts 1995 to 1997 and under the various waste regulations. However, the Act introduces a new approach for certain activities which are specified in the Act, whereby only one licence will be required to cover emissions to the environment in general. This licence will be granted by the Agency, as opposed to the other types of environmental licences,

which are granted by the local authority for the functional area in which the activity in question will be, or is, carried on.

### 4.9.1 Obtaining an IPC licence

Section 82(2) of the Act prohibits a person from carrying on an activity, other than an established activity, on or after such day as may be prescribed unless a licence or revised licence under Part IV is in force in relation to the activity.

### 4.9.2 Grant of an IPC licence

An application for an IPC licence is made to the Agency in accordance with any regulations made under s 83 of the Act. Section 83(1) states that where an application is made to the Agency for an IPC licence under Part IV it may, subject to s 99A of the Act and to compliance with any regulations made under s 89, grant the licence subject to, or without, conditions or refuse the application.

In considering an application for a licence, or the review of a licence or revised licence under Part IV, the Agency is required by s 83(3) of the Act to have regard to:

(a) any relevant air quality management plan under s 46 of the Air Pollution Act 1987, or water quality management plan made under s 15 of the Local Environment (Water Pollution) Act 1977, or waste management plan;

(b) any relevant noise regulations under s 106;

(c) any special control area order under s 39 of the Air Pollution Act 1987, in operation in relation to the air concerned;

(d) the policies and objectives of the Minister of the Environment in relation to the prevention, elimination, limitation, abatement or reduction of emissions for the time being extant;

(e) (i) the environmental impact statement (if any) submitted with the application;

(ii) any submissions or observations made to the Agency in relation to the environmental impact statement;

(iii) any further information or particulars submitted in relation to the environmental impact statement in compliance with a notice given under regulations under s 89; and

(iv) where appropriate, the comments of other member states of the European Communities in relation to the effects on the environment of the proposed activity;

(f) insofar as the statement, submissions, observations, information or particulars relate to the effects on the environment or emissions from the activity;

(g) such other matters related to the prevention, elimination, limitation, abatement or reduction of emissions as it considers necessary.

The Agency is precluded by s 83(5) of the Act from granting an IPC licence or revised licence for an activity unless it is satisfied that:

(a) any emission from the activity will not result in the contravention of any relevant air quality standard specified under s 50 of the Air Pollution Act 1987, and will comply with any relevant emission limit value specified under s 51 of the Air Pollution Act 1987;

(b) any emissions from the activity will not comply with, or will not result in the contravention of, any relevant quality standard for waters, trade effluents and sewage effluents and standards in relation to the treatment of such effluents prescribed under s 26 of the Local Government (Water Pollution) Act 1977;

(c) any emissions from the activity or any premises, plant, methods, processes, operating procedures or other factors which affect such emissions will comply with, or will not result in the contravention of, any relevant standard including any standard for an environmental medium prescribed under regulations made under the European Communities Act 1972, or under any other enactment;

(d) any noise from the activity will comply with, or will not result in the contravention of, any regulations under s 106 of the Act;

(e) any emission from the activity will not cause significant environmental pollution;

(f) the best available techniques will be used to prevent or eliminate or, where that is not practicable, generally to reduce an emission from the activity;

(g) having regard to Part III of the 1996 Act, production of waste in the carrying on of the activity will be prevented or minimised or, where waste is produced, it will be recovered or, where that is not technically or economically possible, disposed of in a manner which will prevent or minimise any impact on the environment;

(h) energy will be used efficiently in the carrying on of the activity;

(i) necessary measures will be taken to prevent accidents in the carrying on of the activity and, where an accident occurs, to limit its consequences for the environment and, in so far as it does have such consequences, to remedy those consequences;

(j) necessary measures will be taken upon the permanent cessation of the activity (including such a cessation resulting from the abandonment of the activity) to avoid any risk of environmental pollution and return the site of the activity to a satisfactory state; and

(k) the applicant or licensee or transferee, as the case may be, is a fit and proper person to hold a licence,

and, where appropriate, the Agency shall effect conditions relating to the matters specified in the foregoing subparagraphs of the licence or revised licence.

### 4.9.3 Effect of the granting of the IPC licence

Section 84(1) of the Act states that where a licence or a revised licence is required under Part IV of the Act in respect of an activity, a licence under

(a) Part III of the Air Pollution Act 1987; or

(b) s 4 or 16 of the Local Government (Water Pollution) Act 1977; or

(c) s 171 of the Fisheries (Consolidation) Act 1959,

shall not be granted in relation to such activity.

Section 84(3) states that it shall be good defence:

(a) to a prosecution for an offence under any enactment other than Part IV of the Act; or

(b) to proceedings under s 10 or 11 of the Local Government (Water Pollution) Act 1977, s 20 of the Local Government (Water Pollution) (Amendment) Act 1990, ss 28, 28A or 28B of the Air Pollution Act 1987, s 57 or 58 of the 1996 Act, or s 94 of the Act,

to provide that the act complained of is authorised by a licence or a revised licence granted under Part IV of the Act.

### 4.9.4 Conditions attached to a licence

Section 86(1) of the Act gives examples of the type of condition which may be attached to a licence or a revised licence granted under Part IV of the Act. Section 84(2) makes it an offence not to comply with any condition attached to a licence or a revised licence.

### 4.9.5 Planning permission

Where planning permission has been granted under Part IV of the Planning Act 1963, or an application has been made for such permission, in respect of an activity, the Agency may under s 86(8)(a) consult with the planning authority in whose functional area the activity is, or will be, situated, in relation to any development which is necessary to give effect to any conditions to be attached to an IPC licence or revised licence and which the Agency considers is not the subject of a permission, or an application for a permission, under s 34 of the 2000 Act.

The Agency may, in accordance with s 86(8)(b) of the Act, attach any conditions specified by the planning authority or stricter conditions if the Agency considers it necessary to do so to prevent, limit, eliminate, abate or reduce emissions.

### 4.9.6 Procedure for applying for an IPC licence

The procedure for applying to the Agency for an IPC licence is set out in s 85 of the Act. Section 87(1)(a) provides that where an application is being made for such a licence, the applicant must notify the planning authority for the area in which the activity is, or will be, located, and such other person (if any) as may

be prescribed. He must also give public notice, in accordance with any regulations made by the Minister under s 89 of the Act. Before making its decision under s 83 of the Act on an application for a licence, or under s 90 on the review of a licence or revised licence (including such a review conducted by or of its own volition), the Agency shall notify:

(a) the planning authority in whose functional area the activity is or will be situate;
(b) the applicant or licensee as the case may be;
(c) any person who has made a written submission in relation to the application or the review; and
(d) such other persons as may be prescribed.

### 4.9.7 Review of an IPC licence

Section 90(1) of the Act sets out the circumstances in which an IPC licence may be reviewed by the Agency. Such a licence may be reviewed:

(a) at any time with the consent, or an application of, the licensee;
(b) periodically or after such period as may be prescribed (but not before the expiry of three years from the date on which the licence or revised licence was granted);
(c) if the Agency considers–
    (i) that emissions from the activity to which the licence or revised licence related are, or are likely to be, of such significance that the existing emission limit values, or equivalent parameters or technical measures specified in the licence or revised licence need to be reviewed or new such values, parameters or measures, as the case may be, need to be specified in the licence or revised licence,
    (ii) that substantial changes in best available techniques make it possible to reduce emissions significantly from the said activity without imposing excessive costs,
    (iii) that the operational safety of the said activity requires techniques, other than those currently being used in respect of it, to be used, or
    (iv) that such a review is required by virtue of any act adopted by an institution of the European Communities or any agreement entered into by the State, or any enactment passed or made after the licence or revised licence was granted or last reviewed under this section;
(d) if–
    (i) there is a proposal to make a substantial challenge to the nature or extent of an emission,
    (ii) there has been a substantial change, which could not have reasonably been foreseen when the licence or revised licence was granted, in the condition of the environment or an environmental medium in the area in which the activity to which the licence or revised licence relates is situate,

(iii) evidence, which was not available when the licence or revised licence was granted, has become available, or a new standard is prescribed relating to the contents or nature of the emission concerned or the effects of the emission on the environment.

### 4.9.8 Duration of an IPC licence

Section 92(1) of the Act states that an IPC licence or revised licence shall cease to have effect where the activity to which it relates has not been substantially commenced

(a) within three years after the date on which the licence or revised licence was granted; or

(b) within the period referred to in s 92(2)(a) and (b) of the Act:

> The Agency may, having regard to the nature of the activity to which a licence or revised licence to be granted or granted by it will relate or relates, as the case may be, and any arrangements necessary to be made in connection with the carrying on of the activity and any other relevant consideration–
>
> (a) specify for the purposes of subsection (1) a period of more than 3 years beginning on the date on which the licence or revised licence is to be granted,
>
> (b) in the case of a licence or revised licence granted by it, on an application which complies with such requirements (if any) as may be prescribed being made by the licensee in that behalf, extend for the purposes of subsection (1) the period referred to in that subsection or specified by it under paragraph (a), as may be appropriate.

### 4.9.9 Alteration of an activity

Where a person in charge of an activity in respect of which an IPC licence or revised licence is in force or required under Part VI of the Act, or an established activity which, for the time being, does not require a licence, proposes to alter the activity and such alteration or reconstruction would or would be likely to materially change or increase emissions or cause new emissions from the activity, he is obliged by s 98(1) to give notice of his proposal in writing to the Agency.

Section 98(2)(a) states that where the Agency receives notification under that section or otherwise becomes aware of such alteration or reconstruction, where a licence exists in respect of the activity, it may either review that licence under s 90 or direct the person in charge of the activity to apply for a new licence. Where the activity is unlicensed, the Agency may require the person to apply for a licence pursuant to s 98(2)(b) of the Act. Until the Agency has carried out its review of the licence, or a new licence has been granted, the person may not carry out the proposed alteration.

## 4.10 Noise

Part VI of the Act deals with a number of miscellaneous matters. Section 106(1) gives the Minister power, after he has consulted with any Minister of the Government who, in the opinion of the Minister, is concerned and after consultation with the Agency, to make regulations for the purpose of preventing or limiting any noise which may give rise to a nuisance or disamenity, constitute a danger to health, or damage property.

Section 107(1) of the Act gives a local authority or the Agency power to serve a notice on a person requiring that person to take the measures set out in the notice in order to prevent or limit noise. The person on whom the notice is served is required by s 107(4) to comply with the terms of the notice within the period specified in the notice. If the notice is not complied with within the time specified, the local authority, or Agency, is empowered by s 107(5) to take such steps as it thinks reasonable and necessary to comply with the notice and may recover the cost of doing so from that person.

If the person is prosecuted for failure to comply with the notice, it shall be a good defence, pursuant to s 107(6), where the noise is caused in the course a trade or business, for that person to prove that he took all reasonable care to prevent or limit the noise, or that it was in accordance with the terms of a licence granted or regulations made under the Act.

Under s 108(1) of the Act, a local authority, the Agency or any person may complain to the District Court where any noise constitutes a nuisance to a person in any premises in the neighbourhood or lawfully using any public place. The District Court may make an order requiring the person or body making, causing or responsible for the noise to take measures to prevent or limit the noise. It is an offence not to comply with such an order.

According to s 108(2), it shall be a good defence, in the case of proceedings under s 108(1) or in a prosecution for a contravention of that section, where noise is caused in the course of a trade or business, for the person being prosecuted to prove either that he took all reasonable care to prevent or limit the noise by providing, maintaining, using, operating and supervising facilities, or by employing practices and methods of operation which were suitable for the purposes of such prevention, or that the noise is in accordance with the terms of a licence under the Act or with regulations made under s 106.

CHAPTER 5

# THE IRISH DEPARTMENT OF THE ENVIRONMENT

*Joanie A Burns*

## 5.1 Background

The Department of Environment, Heritage and Local Government (DoEHLG) is one of 15 Departments of State in Ireland. Each government department is headed by a Minister appointed by the Taoiseach (Irish Prime Minister). Through its Ministers, the Department is accountable to the Government, Parliament (the Oireachtas) and the public.

### 5.1.1 Mission

The mission of the Department, as set out in its Strategy Statement, is:

> … to promote sustainable development and improve the quality of life in Ireland through environmental protection, provision of infrastructure, balanced regional development and good local government ...

The Department's primary task is to ensure that Ireland's natural and built environment, key infrastructure and the associated quality of life are in line with our status as an advanced economy and society.

The Department is responsible for policy, legislation and programme formulation in relation to the environment, the development of financing of certain public infrastructure and public housing, and a number of regulatory functions. Most of the Department's funding is channelled through local authorities; as such, local authorities are the main providers of public infrastructure and services locally.

The principal responsibilities of the Department include:

(a) promotion of sustainable development;
(b) ensuring environmental protection;
(c) increasing environmental awareness;
(d) waste management policy and legislation;
(e) ensuring proper regulation of polluting activities;
(f) development of policy and legislative framework for physical planning;
(g) development of water and waste water services;
(h) ensuring the development of services and policies for fire protection;

(i) overseeing the performance of the building industry;
(j) maintenance of an effective system of construction control;
(k) promotion of urban renewal;
(l) overseeing the national housing programme;
(m) funding and policy framework for social housing;
(n) supporting the private housing sector, including owner occupation and private renting;
(o) supporting the development of public amenities by local authorities;
(p) the electoral process;
(q) development of policy in relation to local government, including fair and equitable funding and the development of modern human resources policy;
(r) auditing public bodies in accordance with the Code of Local Government Audit Practice.

As this book is concerned primarily with matters of an environmental nature, this chapter and the discussion of the Department's roles and functions will focus on those relating to the environment and environment policy.

### 5.1.2 Staffing

Staff numbers in the Department have been on the increase in recent years. The total staffing complement in 1998 was around 800 and in 2001 this had increased to over 900. Today, following the transfer of most of the former Roads Division to the newly created Department of Transport as well as the assumption of responsibilities in relation to the built and natural heritage, the Department employs nearly 2,500 professional, technical and administrative personnel. Some of this staff is, however, expected to move to other Departments as part of the ongoing organisational changes discussed below, in Section 5.4.

Recruiting and retaining staff has presented a challenge to the Department as well as other public service employers. The success of the Irish economy in the recent past has increased competition in the labour market significantly. The relatively more difficult economic circumstances which now prevail also present challenges. Economic downturns have traditionally triggered a migration of labour to the public sector; however, the Department must always adhere to Government staffing objectives.

Maintaining an appropriate staff balance is particularly important at present, in light of the increasing focus on the Department's responsibilities relating to environmental protection, heritage policy and conservation. The increased pressures and requirements for additional staff necessary to support Ireland's presidency of the European Union in the first half of 2004 also present new challenges in ensuring that staff resources meet the operational needs of the Department, including the specific skills and expertise required.

### 5.1.3 Budget

Exchequer funding in the Estimates for 2003 amounted to more than €2.3 billion. This was divided into a number of expenditure areas or programmes, with those relating specifically to environment, heritage and local government receiving approximately 45% (slightly less than €1.06 billion) and the remainder allocated to administration, housing and other services.

In addition to the Exchequer funds provided in the Estimates, principal non-Exchequer capital allocations provided for in 2003 included €140 million for environmental services. Further revenue accrued to the Environment Fund from landfill levies and from plastic bag sales. In 2003, €55 million from the Environment Fund was expended on a range of environmental programmes.

## 5.2 The Department's mandate

The Department is somewhat unique among Irish Departments of State in that its remit is extremely broad and diverse. It has general responsibility for policy in relation to environmental protection, including natural heritage, and has functions relating to, but not limited to, spatial planning, urban and village development, built heritage, water and wastewater services, nuclear safety, fire protection, and building control. From the quality of the environment to housing, water and other services, the programmes and activities of the Department have an effect on the everyday lives of all Irish citizens. Specifically in the area of environmental protection, the Department defines and prioritises environmental policies and strategies and, based on these, prepares the legislation necessary for implementation.

Sustainable development is at the heart of the Department's mandate and mission. The Department has the responsibility for the development and implementation of strong policies in support of the environment, for promoting integration of environmental considerations into economic/fiscal and sectoral policies and for promoting the achievement of balanced regional development. In addition, the Department's responsibilities in the areas of built and natural heritage must be taken into consideration, for instance, in the context of the provision of housing and infrastructure, as Ireland's heritage forms part of the national sense of identity and it provides resources of social, educational, recreational and aesthetic value.

Local government also continues to be a central element of the Department's mandate. The Department has responsibility to provide, through local authorities and in partnership with the private sector, much of the infrastructure which Ireland needs to realise its full development potential. In the context of sustainable development, it must be provided in ways which minimise impacts on the environment and maximise environmental gain. The Department must therefore secure the objectives for the main areas of responsibility without significantly affecting economic activity or the growth prospects of individual sectors or regions of the economy, and with due regard to the social issues of equity and fairness.

## 5.3 History of the Department

The first Government agency with responsibility for local affairs in Ireland can be traced back to the passing of the Poor Relief (Ireland) Act in 1838, which established a network of poor law boards whose members were made up of justices and members elected by ratepayers. Initially, the boards operated under the control of Poor Law Commissioners sitting in London, with the Irish branch office in the Custom House, Dublin (in which the Department of Environment, Heritage and Local Government is now based). In 1872, the Poor Law Commission was transformed into the Local Government Board for Ireland. This followed extended responsibilities of the Poor Law Commissioners from basic care for the poor into areas such as hospitals, disease eradication, medical services, sanitary services, and housing.

In 1920, the then underground Dáil Eireann set up a Department of Local Government. For a while there were actually two central entities competing for the allegiance of local authorities; however, the Department of Local Government had taken on the functions of a central authority and a majority of the local authorities soon broke with the Local Government Board.

In 1922, the Department of Local Government of the newly independent Free State took over the central administration. Shortly thereafter, the Department of Local Government and Public Health was established to take over the task of supervising the local government system, which had previously been performed by the Local Government Board under the former British administration. The focus of Department activities in the 1920s and 1930s was on reform of the operation of the local government system, expansion of the housing programme, development of other infrastructural services, introduction of town planning and growth in health and welfare services.

By the 1940s, the range of functions of the Department had become too large and separate Departments of Health and Social Welfare were created. The resulting department, renamed the Department of Local Government, concentrated on local government matters and the infrastructural programmes of housing, roads, and water/waste water services. In subsequent years, the range of functions expanded in line with changes in perceptions of the role of government in promoting national development as well as with broader economic and social change. New initiatives in the 1960s included comprehensive road traffic legislation, a renewed drive to meet demands for housing, and, significantly, a modern physical planning system for the whole country (from 1963).

In line with the worldwide increase in environmental awareness in the 1970s, the title of the Department was changed in 1977 to the Department of the Environment. This change reflected the developing role for the Department in the area of environmental promotion and protection, which, as previously mentioned, continues today. Another major priority in more recent years was the drive to modernise the local government system. As such, the Department's name was changed again in 1997 to the Department of the Environment and Local Government.

## 5.4 The Department today

The broadening of the Department's remit has continued over recent years to further encompass functions relating to Ireland's built and natural heritage and to the environment. In June 2002, the heritage functions of Dúchas, the Heritage Service of the Department of Arts, Heritage, Gaeltacht and the Islands, were transferred to the Department. At the same time, almost all of the Roads Division of the Department (including functions relating to vehicle and driver licensing and driver testing) was transferred to a newly created Department of Transport. These changes were designed to facilitate and enhance the Department's focus on environmental protection, heritage policy and conservation. Given the continued focus on environmental sustainability, it was appropriate that heritage matters relating to nature conservation and biodiversity should become integrated into the Department.

### 5.4.1 Review of organisational arrangements in relation to the built and natural heritage

The transfer of Dúchas to the Department was considered as a first step and, to a certain extent, an interim measure while a comprehensive review of organisational arrangements with respect to built and natural heritage functions was completed. The Government intended to give responsibility for the management of operational aspects of Ireland's built heritage to the Office of Public Works (OPW), and it was therefore necessary to conduct such a review in order to assess how best the state heritage functions should be managed, having regard to the strengths of the Department, the OPW and other public sector players. In addition, the organisational review involved the exploration of opportunities to formalise existing linkages between some of the heritage functions and activities in the Department's Planning and Environment Divisions, and the identification of new linkages and avenues through which these could be best exploited, including possibilities for regulatory reform and rationalisation.

Based on the findings of the review, the Government took the decision in April 2003 to transfer functions relating to Historic Properties/Education, Visitor Services, and the operational side of National Monuments and Architectural Protection to the Office of Public Works. A key theme of the report of the review was the need to secure an effective integration of the heritage functions within the organisations of which they are now a part. In that context, the findings of the review pointed to important linkages which exist between architecture, archaeology and planning, and to the desirable synergies between biodiversity/nature conservation and the wider – and widening – environmental agenda for which the Department is responsible.

### 5.4.2 Current structure of the Department

Taking account of the factors identified in the review of the Department's heritage functions and of the growing responsibilities arising from the international environmental agenda, significant changes have recently been made to

the divisional structure of the Department (see Annex 1). Accompanying changes were also made to the distribution of functions between divisions.

One of the primary objectives of the reorganisation was to facilitate a closer alignment of the Department's staff working on the built environment. Other changes which have been introduced are intended to bring greater coherence between nature conservation and other functions relating to environmental protection. In line with the Department's *Statement of Strategy 2003–2005*, which is discussed further in Section 5.7 below, some of the changes introduced are intended to encourage even wider integration, extending from that which takes place within the areas of built and natural environment to greater integration and co-ordination between these two areas.

The Department is organised into six Divisions, comprising administrative sections and professional staff. Each Division is headed by an Assistant Secretary who, along with the Secretary General and the Legal Adviser, are members of the Management Advisory Committee. The Management Advisory Committee has a particular role in strategic planning, policy co-ordination and personnel and organisation matters, and much of its work feeds directly back into the six Divisions.

## 5.5 Bodies operating under the aegis of the Department

The programmes and policies of the Department are implemented largely through the local government system and through 17 agencies and semi-state bodies (see Annex 2). Some of these administrative bodies are responsible for ensuring that environmental effects of the policies, programmes and projects are fully considered before decisions are taken. Conversely, others are responsible for taking decisions in relation to matters other than specifically environmental issues (eg, planning, development of housing or infrastructure), which could have environmental implications. Bodies most likely to be involved or otherwise concerned with environmental considerations include:

### 5.5.1 An Bord Pleanála, the Planning Appeals Board

An Bord Pleanála was established in 1977 under the Local Government (Planning and Development) Act 1976, and is an independent body responsible for the determination of appeals and certain other matters under the Planning and Development Acts 2000 to 2002, and with appeals under the Building Control Act 1990, the Local Government (Water Pollution) Acts 1977 and 1990 and the Air Pollution Act 1987.

### 5.5.2 Environmental Protection Agency (EPA)

The EPA is an independent body set up under the Environmental Protection Agency Act 1992. It is responsible for the licensing and control of large-scale activities having the potential to cause significant environmental pollution and for the licensing of landfill sites and other significant waste activities carried out by either private operators or local authorities. The EPA also provides guidance and support to local authorities in relation to management of sewage treatment

plants and drinking water quality and, together with local authorities, it constitutes the primary enforcement body with respect to environmental regulation. EPA is advised by a widely representative Committee, appointed by the Minister for the Environment, Heritage and Local Government from nominees of all the main sectors with environmental interests.

### 5.5.3 Comhar, the national sustainable development partnership

Comhar was established in 1999 to encourage greater sectoral and public participation in advancing sustainable development. It is a forum for national dialogue between the State, economic sectors, environmental and social NGOs and academics. Comhar also plays an important role in the legislative consultation process, which is discussed further below.

### 5.5.4 The Heritage Council

The Heritage Council was established as a statutory body under the Heritage Act 1995. Its role is to propose policies and priorities for the identification, protection, preservation and enhancement of the national heritage. The Council has a particular responsibility to promote interest, education, knowledge and pride in the national heritage. In addition, in partnership with the local government system, the Council has put in place a programme of engaging Heritage Officers within local authorities.

The focus of the Heritage Council has changed in recent years. For example, whereas it might have been involved in the planning process at a fairly detailed or specific level (for example, commenting on individual planning applications), it is now more concerned with securing more effective integration of heritage issues at a policy level. Further changes can be expected in the future; the policy roles and functions of the Council are being reviewed in the light of a preliminary review of the Heritage Act 1995, which was completed in 2003, and in the context of a much more fundamental review of the respective heritage policy roles and functions of both the Department and the Heritage Council.

### 5.5.5 Radiological Protection Institute of Ireland (RPII)

The RPII provides the Department with scientific advice on all matters relating to radiological safety and undertakes research in relation to such matters. It also operates an extensive monitoring function in relation to the presence and origin of environmental radioactivity and regulates the provision, use and disposal of radioactive substances employed in health and other industries.

## 5.6 Co-operation with the private sector

A major objective of the Department is to adopt new and innovative methods of working with the private sector, for example through public private partnerships (PPPs). The PPP approach is designed to promote efficiency in the delivery of infrastructural projects, to stimulate competition and to improve

service standards. The Department supports the PPP process through development of strategy documents, such as the *Framework for Public Private Partnerships*, as well as guidance documents and technical notes. In this capacity the Department's objective is to ensure an efficient competitive process and a fair balance in division of responsibilities between the public and private sectors.

The *Framework for Public Private Partnerships* requires that risks associated with the provision of infrastructure and the delivery of services are shared fairly between the public and the private sectors. The Department implements this strategy through the development of policy frameworks and other guidance at sectoral level, which takes account of the national PPP Framework and the experience gained through promotion of pilot projects.

The Department provides funding for innovative PPP projects within the local government sector and supports communication and training programmes to encourage continued engagement in PPP projects by both private and public sector bodies. In addition, the Department provides extensive direct and indirect guidance for local authorities on the procurement and negotiation of PPP contracts, particularly in the areas of financial and legal advice, and it encourages awareness for both local government and private sector audiences through regular publication of circulars, newsletters and briefings.

## 5.7 Functions of the Department

### 5.7.1 Policy formulation

The Department holds the main environmental policy-making role in government. Environmental policies are influenced by various factors including guidance from and/or accountabilities to international (including EU) interests, as well as national priorities and the economic and social objectives of the Government. Environmental policy is established based, *inter alia*, on consultation with relevant interested parties including, where appropriate, the partner agencies and bodies discussed above.

### 5.7.2 Government policy statements

The development of environmental policy by the Department is often initiated through the formulation of broad government policy statements. Government policy statements reflect national priorities over a broad range of policy areas. The current government policy programme, the *Agreed Programme for Government*, is a key shaper of national policy as is *Sustaining Progress*, the current partnership agreement adopted by the Government and the social partners (employers, businesses, trade unions, farming interests and the community voluntary sector). These influence the Department in a more direct way; they help to set the agenda for the Department in its identification and prioritisation of goals and objectives and for the development of appropriate strategies and policies in the areas falling under the Department's remit.

### 5.7.3 Department policy statements

Building on national policy priorities, strategies and policies in the areas falling directly under the Department's remit are further developed through strategy or policy statements issued directly by the Department. The Secretary General has statutory responsibility under the Public Service Management Act 1997 for the preparation and submission to the Minister of a *Statement of Strategy* for the Department within six months after the appointment of a new Minister, or at the expiration of the three-year period since the last such statement was prepared and submitted. Statements of Strategy serve as a framework for action for the Department over the three-year period covered; they outline the objectives of the Department for the coming years and the strategies intended to reach them. A programme of implementation is also provided, which defines critical success factors and the ways in which the Department's success in implementing the proposed strategies can be measured and monitored.

The most recent *Statement of Strategy* was published in March 2003 and covers the period 2003–2005. The influence of the European Union and the *6th Environment Action Programme* in particular on the Department's prioritisation of its environmental agenda in the Statement is evident, as policy priority areas identified include climate change; nature, biodiversity and heritage; environment and health; and waste management.

The Department outlines its policy commitments relating to more specific issues through publication of more focused and generally government-endorsed policy statements, strategies, plans and programmes. For example, the National Spatial Strategy presents a strategy for ensuring balanced regional development, while the Department's policy commitment to the environment is well reflected in a range of documents, including:

(a) *Sustainable Development: A Strategy for Ireland*;
(b) *Making Ireland's Development Sustainable*;
(c) *Waste Management: Changing Our Ways*;
(d) *Preventing and Recycling Waste: Delivering Change*;
(e) *The National Climate Change Strategy*; and
(f) *The Litter Action Plan*.

In addition, a number of core environment policy principles have evolved over the years and are currently applied in the context of formulating environmental policies in Ireland. Key principles which are applied today at both the European and national levels are presented in Annex 3.

### 5.7.4 Preparing and ensuring implementation of legislation

Irish environmental legislation includes various Acts accompanied by related Regulations. In the last 10–15 years Ireland has seen a significant evolution in relation to environmental regulation, particularly with respect to waste, planning and environmental protection. We now have a modern body of environmental legislation. General procedures for bringing legislative proposals

forward for wider government approval are outlined in Annex 4 and a list of key environmental and environment-related legislation is provided in Annex 5.

The Department is responsible for the transposition of EU environmental legislation into Irish law as well as for drafting and securing implementation of other environmental legislation necessary to achieve the commitments and objectives set out in environmental policies. This involves constantly monitoring and evaluating environmental legislation and the effects it is having, developing legislative guidelines (many of which are intended for local authorities) and amending legislation whenever necessary. In addition, the existing body of environmental legislation requires regular updating. This is a more common occurrence of late, particularly as the EU policy and legislative framework continues to evolve and existing EU legislation is reviewed and amended, including in the context of EU enlargement.

#### *5.7.4.1 The consultation process*

Today there is increasing emphasis on the use of wider consultation and participative structures in the formulation and development of policy and legislation. This is true throughout government generally and with respect to environmental policy and legislation in particular, as has been highlighted in recent years with the growing public debate on environmental issues; environment policy and particularly challenging policy areas such as waste management have begun to take centre stage.

The Department works to build wide public support for its existing programmes and policies through communication and partnership with the relevant bodies and organisations. Key stakeholders also play an increasingly important role in the earlier stages of policy and legislative development, such as through consultations and provision of input regarding current or proposed EU legislation.

Inter-government consultation with other sections or Divisions within the Department or with other Departments is almost always carried out. An Environmental Network of Government Departments was established in 1994 to encourage greater inter-government consultation and integration in relation to environmental matters. In addition, the Cabinet sub-committee on housing, infrastructure and public-private partnerships often participates in the policy/legislative process.

As the Department plays a key role in negotiating and influencing European environmental legislation, information from key stakeholders regarding specific issues contained in, or potential effects of, a particular piece of legislation is often critical in dealing with other Member States and/or the European Commission on these matters. Obtaining necessary information typically involves consultation with a wide range of stakeholders and interested parties, not the least important of which is Comhar. Other important sources of information and input include:

(a) holding information sessions and conferences and establishing working groups, task forces or committees to examine the issues in a co-operative, comprehensive fashion;

(b) seeking input from industry and other private sector representatives, NGOs/special interest groups and other key stakeholders; and, as previously mentioned,

(c) inter-government consultation with other sections or Divisions within the Department or with other Departments (as previously mentioned).

The first forms of consultation listed above are relatively new and have been employed to an increasing extent in light of the 'Producer Responsibility' principle (Annex 3), under which many of the recently proposed or adopted EU waste laws were formulated. 'Producer' and other key stakeholder input is critical to the success of such legislation. Therefore, in order to achieve its objectives the Department must have good working arrangements not only with bodies and agencies falling under its remit, but also with other social partners and economic, social and non-governmental organisations.

Much of the existing body of environmental legislation includes extensive provisions for public consultation and input in relation to the materials, actions or individuals subject to the legislation. Formal consultation periods are required in many of the planning and/or application processes for proposed developments, activities or actions by government agencies, local authorities or public bodies or operators. In addition, specific public access and information rights are provided for under the Freedom of Information Act 1997.

### 5.7.5 Supporting local government

The Department is responsible, generally, for setting policy and developing legislation relating specifically to local authority roles, functions, codes of practice and other administrative matters (eg accounting policies, regulations regarding to rating, electoral administration). In addition, the Department is responsible for the promotion of best personnel practices and procedures in respect of local government staff; for example, in relation to human resources and industrial relations, pay and pensions policies and operation of superannuation schemes for current and former staff.

In formulating environmental legislation, the Department also determines the level and extent to which local authorities will play a role in its implementation. While the Department can have direct responsibility for enacting certain elements of environmental legislation (for example, the Department designates Special Areas of Conservation and Special Protection Areas in line with the relevant EU Directives), much of the existing body of environmental legislation assigns a significant regulatory or administrative role directly to local authorities. Examples include permitting of waste collection and certain waste recovery or disposal activities, enforcement of regulations relating to pollution control including air and water pollution and preparation of waste management plans. As such, the Department provides financial support as well as technical or other guidance to local authorities, such as through Department circulars, briefings or workshops/seminars.

Local authorities need substantial financial resources if they are to be able to deliver on their extensive remit and to maintain a wide range of high quality public services. As such, taking account of national budgetary strategies, the

Department works to ensure that local government is adequately funded and that available funds are distributed to local authorities in a fair and equitable manner. As previously discussed in the context of the Departmental budget, the Department is not only responsible for the provision of regular annual funding to local authorities through the normal government budget procedures: it also has the responsibility for the distribution of general purpose funding from the Local Government Fund and environment-related funding from the Environment Fund.

### 5.7.6 International relations and integration

International co-operation for the environment is an integral part not only of Irish environmental policy but of Irish foreign policy as well. To a great and increasing extent, much of Ireland's public policy, and that relating to the environment in particular, is influenced by the policies and priorities which are set at the European and/or a wider, international level. Through its membership of the European Union (EU), the United Nations (UN) and the Organisation for Economic Co-operation and Development (OECD), ratification of various environmental instruments and conventions, and programme of official development assistance (ODA), Ireland is an active participant in many global environmental initiatives and is in many cases guided by and/or accountable to these wider bodies. Examples of how the Department's policy-making decisions are influenced in this context are provided below.

#### *5.7.6.1 The OECD*

Ireland participates within the OECD in the development of a broad range of strategic policies. Substantial policy analysis towards enhancing environmental protection and sustainable development among OECD Member States culminated in the adoption in May 2001 of two important OECD policy statements:

(a) a *Policy Report on Sustainable Development*; and

(b) the *OECD Environmental Strategy for the First Decade of the 21st Century*.

These provide an important context and support for environmental policy in Ireland.

As part of an ongoing Environmental Performance Review Programme, the OECD conducts peer reviews of environmental conditions and progress in each Member country; this was done for Ireland in 2000. The review examines results to date in light of both domestic objectives (ie existing policies) and international commitments, and presents findings according to the following strategic goals identified by OECD Environment Ministers:

(a) Pollution prevention and control. This focuses on water, air and waste management.

(b) Integration of policies. This focuses on institutional aspects and on how policies concerning other related issues, such as economics and transport are integrated with environmental policies.

(c) Co-operation with the international community. This focuses on international environmental topics specifically concerning Ireland.

The report also presents a comprehensive set of conclusions and recommendations pertaining to implementing environmental policies, working towards sustainable development and enhancing international co-operation. The review served as a valuable tool not only in identifying some of the environmental challenges facing Ireland but also in suggesting policies, programmes and projects to address them. The Department, along with relevant administrative bodies such as the EPA, has gone on to prioritise and implement many of the recommendations of the OECD report.

#### *5.7.6.2 The United Nations*

Ireland has been a member of the UN since 1955. Our direct involvement with the UN is primarily in areas such as international peace and security. Increasingly the UN is playing a critical role in relation to global and regional environmental problems through its constituent organisations such as the Commission on Sustainable Development, the United Nations Environment Programme and the Regional Economic Commissions, and through the negotiation of a range of multilateral environmental agreements. A process of mainstreaming sustainable development issues into all UN institutions has begun. In certain circumstances the EU has a legal standing in its own right in relation to participation in such agreements and may become a signatory and a party to such agreements in addition to or on behalf of its Member States. The Commission then makes proposals for legislation at EU or national level to give effect to the agreement and if adopted under the normal decision making processes of the EU, these must be complied with by Ireland.

Normally, the Presidency of the EU presents the Union's co-ordinated position and conducts the negotiations in relation to multilateral environmental agreements in international fora. In areas where the European Commission has exclusive competence under the Treaties, eg trade issues, the Commission presents the EU position and conducts the negotiations on the Union's behalf. This typically involves a consultation process, whereby a common position is reached and is taken forward by the Presidency or European Commission for negotiations in the UN. It is the practice for the Presidency, or, where appropriate, the Commission, to speak on behalf of the EU. In certain circumstances, the Presidency or the Commission may invite individual Member States to make additional points or to reinforce the co-ordinated EU position. Examples of Conventions which the EU and the Member States were involved in negotiating and are now in force include the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, the Convention on the Transboundary Effects of Industrial Accidents, and the Framework Convention on Climate Change and related Kyoto Protocol. At a national level, in July 2002 Ireland ratified the UNECE Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo (EIA) Convention), which aims to improve international co-operation in assessing environmental impacts of proposed major developments where they are likely to have significant environmental effects in greater than one country.

#### *5.7.6.3 The European Union*

As an EU Member State, Ireland is bound to comply with EU laws and policies and is subject to economic instruments that have environmental objectives and targets. Failure to comply with these can ultimately result in prosecution of the Irish Government by the European Commission at the European Court of Justice. Up to 80% of national environmental legislation derives from legislation at the EU level. Ireland fully participates in all relevant EU negotiations in this regard. EU Directives are subsequently transposed into national legislation, making it more readily enforceable through the Irish courts.

The EU has a leadership role in the international arena in promoting global sustainable development; this was effectively deployed at the World Summit on Sustainable Development in Johannesburg in 2002. *The Plan of Implementation* arising from the summit reflects the strong role played by the EU in reaffirming commitment to targets in various international agreements. The plan also defines new targets for more sustainable use of natural resources, safer use and production of chemicals and a delinking of economic growth from environmental degradation. These targets will influence action in Ireland, as well as at the European and wider international levels in the pursuit of sustainable development.

In addition to wider international agreements and commitments, much of EU environment policy is based on Environmental Action Programmes. These provide a guiding framework for policies and actions to address environmental challenges in Ireland. The First Environmental Action Programme was laid out in 1973, before the focus on the environment was or even could be on prevention. At that time the programme was focused primarily on cleaning up and remedying past environmental problems. In more recent years, however, the focus has shifted. The 5th Environmental Action Programme, covering the years 1992 to 1999, contained an overriding theme of sustainability and at present and until 2012, EU action on the environment will be determined in the context of the 6th Environmental Action Programme, which identifies climate change, nature and biodiversity, environment and health, and resource efficiency and waste management as key priorities.

As a further innovation under the 6th Environmental Action Programme, the EU is developing specific Thematic Strategies to address certain environmental issues where a package of co-ordinated measures can yield better results. These Strategies, which may include a range of instruments from legislative proposals, economic/fiscal incentives, and voluntary instruments through to dissemination of information, will set out the overall policy approach and the proposed package of measures needed to achieve the environmental objectives and targets in an efficient, cost-effective manner. Seven Thematic Strategies have been proposed by the European Commission, focusing on soil protection, marine environment, pesticides, air quality, sustainable resource use, the urban environment and waste recycling.

## 5.8 Policy priorities and future challenges

De-coupling economic growth from environmental damage is a major challenge facing many countries, and environmental policies are continuously evolving to meet the challenge of appropriately balancing economic development and environmental protection. This challenge in Ireland has been made more immediate by the relatively recent economic surge here and must also be addressed against the background of increasing international obligations and the corpus of environmental legislation to which the country is now committed.

Environmental policy in Ireland will continue to be shaped by developments in European environmental law and policy. The EU's 6th Environmental Action Programme identifies climate change, nature and biodiversity, environment and health and resource efficiency and waste management as key priorities. The Department, in its current Statement of Strategy and in its review of national sustainable development policy, *Making Ireland's Development Sustainable*, has adopted these as priority areas for Ireland. Challenges for Ireland identified within the overall environmental and the wider sustainability agenda include:

(a) reducing eutrophication of inland waters;

(b) improving waste management;

(c) protecting the urban environment;

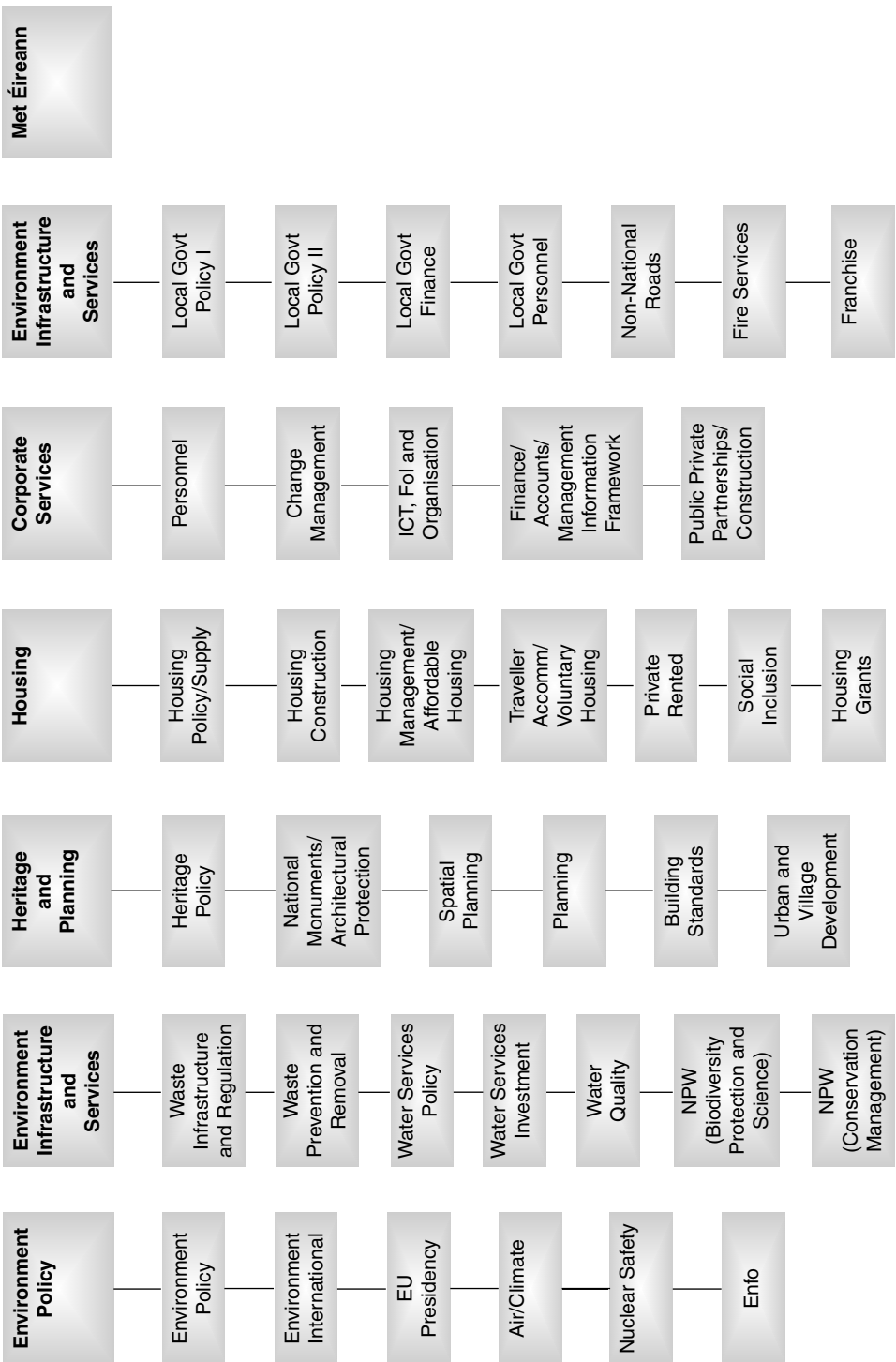
(d) controlling greenhouse gas and other transboundary emissions in accordance with international agreements; and

(e) protecting natural resources.

An examination of the list above provides an indication of areas where future Departmental programmes and policies may focus. In addition to ongoing policy development, addressing these challenges will require more effective implementation of existing environmental controls, an area which will be of particular focus in the near future. Further areas of focus will be the greater integration of environmental considerations into economic/fiscal and sectoral policies, providing information and raising awareness towards changing behaviour and continuing to encourage a partnership approach, and the concept of shared responsibilities in relation to environmental issues.

# Annex 1

## Department divisional structure – April 2003



## Annex 2

### Agencies and semi-state bodies operating under the aegis of the Department of the Environment, Heritage and Local Government

- An Bord Pleanála, the Planning Appeals Board
- An Chomhairle Leabharlanna, The Library Council
- Building Regulations Advisory Body
- Comhar, The National Sustainable Development Partnership
- The Heritage Council
- Dublin Docklands Development Authority
- Environmental Protection Agency
- Fire Services Council
- Housing Finance Agency
- Irish Water Safety Association
- Local Government Computer Services Board
- Local Government Management Services Board
- National Building Agency
- Private Residential Tenancies Board
- Radiological Protection Institute of Ireland
- Rent Tribunal
- Temple Bar Renewal

Met Éireann (the meteorological office) and the National Franchise and Electoral System also form part of the Department. Furthermore, certain functions relating to the construction industry fall under the Department's remit.

Up until June 2002 the Medical Bureau of Road Safety, the National Safety Council, the National Roads Authority and the Dublin Transport Office fell under the Roads Division within the Department; however, these are now part of the new Department of Transport.

## Annex 3

### Key environmental policy principles

*Sustainable development*

Sustainable development is at the heart of the Department's mandate and mission. Generally, it is activity which meets the needs of the present without compromising the ability of future generations to meet their own needs.

Sustainable development was the overarching theme of the EU's 5th Environmental Action Programme as well as the worldwide Earth Summit in Rio De Janeiro in 1992. The principle was considered and applied in just about every piece of EU and, consequently, Irish legislation arising during the period covered by the 5th EAP. It is now engrained in environmental policy worldwide, and has been taken forward as a premise in setting the environmental objectives and priorities of the EU's 6th EAP, the Department's Statement of Strategy 2003–2005 and the majority of other environmental policies existing at the EU and national level.

*Best available techniques*

Best available techniques, or BAT, essentially means applying technology which provides for the most effective prevention, minimisation or rendering harmless of polluting emissions and which is procurable by the industry concerned. Available does not necessarily imply that the technology is widely used or locally available. Technology itself is taken as the techniques and the use of techniques, which include training and maintenance.

*Polluter pays*

This principle works on the premise that the cost of preventing or rectifying environmental damage should be borne by the one who causes it, ie, the polluter. This includes costs of administration, environmental agencies, repair/remedying of environmental damage and, to a certain and increasing extent, replacement of environmental services or amenities.

*Precautionary principle*

The precautionary principle acknowledges that it is not always possible to know what the environmental consequences are of a particular activity or process. To cope with this level of uncertainty, applying the precautionary principle may require:

(a) cautious progress until a process or activity is determined to be 'innocent';
(b) ordinary progress until findings of guilt are made;
(c) no progress until intensive research has been completed and the innocence of the process is demonstrated.

*Producer responsibility*

Producer responsibility essentially takes the polluter pays principle a step further. Whereas polluter pays is somewhat of an 'end of pipe' principle, producer responsibility starts at the 'front end' of a product, making producers responsible for its environmental fate, even if it has left their control. This principle is applied largely in the context of waste legislation and is meant to encourage the use of Integrated Product Policy (see below) and application of 'design for the environment' in making and developing any product.

*Integrated Product Policy (IPP)*

IPP has been widely accepted as a principle; however, as an actual policy it is still in a developing stage. There are ideas of what IPP is supposed to mean, but the definition is currently the subject of some debate, which is taking place largely in the context of proposals by the European Commission to formally create an EU Integrated Product Policy. The general aim of IPP in principle is to reduce the overall impacts of a product throughout its lifecycle. The ultimate objective of IPP is to negate the need to regulate products by encouraging 'front end' improvements, for example, taking into consideration factors such as materials use or manufacturing processes.

## Annex 4

### The legislative process

Where proposals for legislation relate to matters on which government/ Department policy has not already been laid down, or where they involve a new development or a material departure from existing policy, the Department first submits proposals to the Government by way of a memorandum for a decision in principle. Following such a decision in principle, or where proposed legislation is in accordance with the general lines of the Department's existing policies, the Department prepares a general scheme of the proposed Bill in numbered heads. Consultation with interested parties may take place at this stage.

The draft heads, when completed, are forwarded to the Department of Finance and every other Department concerned, as well as the Office of the Attorney General, which may have already been consulted during preparation of the draft scheme. Some legislative proposals are also submitted, upon request, to Oireachtas Committees for consideration.

When the Government have approved the general scheme of a Bill, the Department arranges for drafting by the office of the Parliamentary Counsel to the Government (within the office of the Attorney General). Consultations may, again, take place during this process, although the text of the proposal is not actually disclosed to third parties prior to approval by Government and presentation to the Houses of the Oireachtas. When drafting is completed, Government approval to publish the legislation is sought. Once obtained, the Bill is presented either in the Dáil (Lower House) or the Seanad (Upper House). The Bill is accompanied by an Explanatory and Financial Memorandum outlining the provisions of the Bill, setting out the existing law and the changes therein, proposed by the Bill and providing information about the estimated Exchequer costs and staffing implications for the Department, State Bodies, local authorities, etc.

## Annex 5

### Key environmental and environment-related legislation

- Local Government (Water Pollution) Act 1977 (amended in 1990).
  Associated Regulations include those relating to Nutrient Management Planning and Water Quality Standards.
- The Air Pollution Act 1987.
- The Environmental Protection Agency Act 1992 (as amended by the Environmental Protection Act 2003).
  Associated Regulations include those relating to urban wastewater treatment, control of emissions to certain environmental media and Integrated Pollution Control (IPC) Licensing (soon to be amended to become fully in line with the EU Directive on Integrated Pollution Prevention and Control (IPPC)).

- The Waste Management Acts (comprising the Waste Management Act 1996, the Waste Management (Amendment) Act 2001 and the Environmental Protection Act 2003).
  Associated Regulations include those relating to hazardous waste and movement of waste including transfrontier shipments and licensing and permitting of waste activities including waste collection.
- The Litter Pollution Act 1997 (as amended by the Environmental Protection Act 2003).
  Repeals the Litter Act and associated amendments.
- The Planning and Development Act 2000.
  Repeals the Local Government (Planning and Development) Act and associated amendments.
- The European Communities Act 1972 and subsequent amendments.
  A number of environmental Regulations have been made under this Act including, but not limited to, those relating to Environmental Impact Assessment, access to information on the environment, drinking water quality, control of certain emissions and minor amendments to existing environmental legislation.

Other environmental Acts include, but are not limited to, those relating to:

- forestry;
- wildlife;
- derelict sites
- sea pollution, including specific Acts relating to fisheries, foreshores, oil pollution and dumping at sea;
- radiological protection.

CHAPTER 6

# THE ENVIRONMENTAL PROTECTION AGENCY AND INTEGRATED POLLUTION CONTROL

*Alan Doyle*

## 6.1 Introduction

The Environmental Protection Agency (the Agency) was set up under the Environmental Protection Agency Act 1992 (the EPA Act). The Act also established the system of licensing known as Integrated Pollution Control (IPC). IPC licensing had previously been introduced in England in 1990.

The idea of IPC licensing was taken up at European level and led to the adoption of Council Directive 96/61 on integrated pollution prevention and control (OJ L257 10.10.96 p 26), known as the IPPC Directive. Ireland implemented the IPPC Directive five years late, in the Protection of the Environment Act 2003. Much of that Act has still to come into force, though the Irish IPC regime was already broadly in line with EU requirements and had to be interpreted in accordance with the objects and purposes of the EU Directive.

The Agency is a statutory body corporate and has legal personality. It can sue and be sued. It is headed by a Board of Directors chaired by a Director General. Part II of the EPA Act deals with the establishment and functioning of the Agency.

### 6.1.1 Powers and duties of the Agency

The Agency enjoys a wide remit in relation to the protection of the environment. Its powers are set out in s 52 of the EPA Act. They are:

(a) licensing and control of polluting activities;

(b) monitoring and recording environmental quality;

(c) support and advice to local and public authorities and to government ministers; and

(d) promotion, co-ordination and funding of environmental research.

Additional powers may be conferred on the Agency by the Minister for the Environment. The Agency's powers in relation to local authorities include setting out procedures to be followed, offering advice, and requiring information and monitoring. This programme-oriented portion of the Agency's

responsibility is possibly its most scientifically significant activity, though of least significance to lawyers.

Section 52(2), on the other hand, is relevant for lawyers because it provides an underlying policy for the Agency's actions in the fields of licensing and enforcement, where the Agency has most contact with the public and with industry. It outlines the considerations which must guide the Agency's policy. The Agency must:

(a) keep itself informed of public policy;

(b) have regard to the need for a high standard of environmental protection;

(c) promote sustainable and environmentally sound development;

(d) take a precautionary approach where there is reasonable evidence of likely significant environmental harm;

(e) apply the 'polluter pays' principle insofar as possible; and

(f) balance the need for development against the need to protect the environment.

The Agency must take account of these objectives in its actions. Significantly they are similar to the objectives of EU environmental law laid down in Art 174 of the EC Treaty.

## 6.2 Integrated Pollution Control

IPC is a system of licensing industrial activities in order to control the pollutants they emit.

### 6.2.1 Control of environmental pollution

The purpose of the IPC licensing system is to control environmental pollution. This is defined to include air pollution, water pollution and waste, in a way which ties the EPA Act in with the Air Pollution Act 1987, Local Government Acts 1997–90, and Waste Management Act 1996.

### 6.2.2 The pollution displacement problem

Where there are different rules for air pollution, water pollution and waste disposal, waste will tend to be disposed of in such a way as to take advantage of the least strict regime. If air emission standards are strict, waste products may be diverted to water instead, for example. IPC tries to prevent this by setting up one licence for all pollutants.

### 6.2.3 Implementation of IPPC Directive

Because the IPPC Directive postdates the EPA Act, the Act cannot be regarded as implementing the Directive. Although the deadline for implementation was 30 October 1999, Ireland still only adopted legislation to implement the

Directive in 2003. The Protection of the Environment Act should remedy this problem, but much of it has not been commenced at the time of publication. In the meantime, the EPA Act can, and indeed must, be interpreted in order to give effect to the IPPC Directive. This is a straightforward application of the rule laid down by the European Court in Case C-106/89 *Marleasing* [1990] ECR I-4135. The Directive is very similar to the Irish provisions, so compliance is relatively easy. There may be some incompatibilities but no litigant has yet identified them.

### 6.2.4 Obligation to hold a licence

A person who wishes to carry on an activity must first obtain an IPC licence. This is laid down in s 82 of the EPA Act and Art 4 of the Directive. The question 'is this an activity?' is the first question to ask in any case.

### 6.2.5 Activities

An activity is defined as any activity listed in the First Schedule. An activity is any 'process, operation or development'. There are 12 classes of activity listed in the Schedule, each subdivided into a number of sub-headings. The general classes are:

(a) mineral extraction;
(b) energy production;
(c) metal production and use;
(d) production of mineral fibres and glass;
(e) chemical production;
(f) intensive agriculture (pigs and poultry);
(g) food and drink production;
(h) wood, paper, textile and leather working;
(i) extraction and refining of fossil fuels;
(j) cement production;
(k) waste disposal or recovery (where combined with an activity under another class only) (Waste Management (Amendment) Act 2001, s 13);
(l) paints, electroplating and other surface coatings; and
(m) some minor miscellaneous activities.

In order to determine whether something constitutes an activity, it is always necessary to check the First Schedule to see if it comes within any of the relevant sub-classes.

The 2003 Act amends the list of classes of activity in the First Schedule to the 1992 Act. The two are broadly similar but there are differences of detail.

Activities are covered when they rise above a certain intensity, usually measured by reference to the capacity of the activity. For instance, piggeries

with a capacity of over 3,000 units need a licence (or 1,000 units on gley (waterlogged) soils), and power stations with a rated thermal input greater than 50MW.

Interpretation of thresholds in the Act poses problems. Three examples may be noted.

First, in relation to piggeries, pigs are counted as one unit but sows are counted as 10 units. In the case of *Shannon Regional Fisheries Board v An Bord Pleanála* [1994] 3 IR 449 the High Court held that a 'maiden gilt' (a sow which had not yet had her first litter) was a sow and not a pig. The practice had been to treat it as a pig, since sows are counted as 10 units to take account of the waste produced by their offspring. Then in *Maher v An Bord Pleanála* [1999] 2 ILRM 198 the High Court held that, in spite of this explanation for counting a sow as 10 units, each of the sow's progeny had to be counted as a separate unit. This meant that piggeries across the country were overnight reckoned to hold twice as many pig units (these cases were brought in relation to environmental impact assessment where Irish law uses the same thresholds). Under the new Act the problem disappears: piggeries which either have more than 2,000 production pigs or 285 sows need a licence.

Secondly, a similar problem arises in relation to slaughterhouses. Where these have the capacity to slaughter more than 300 cattle per day, they need a licence. It is not clear whether this is based on the capacity which they could slaughter in a 24-hour day, or the actual number routinely slaughtered in a working day. This difficulty is replicated under the 2003 Act.

Thirdly, in relation to electrical equipment, power stations can be run in excess of 100% of their nominal value for a limited period of time, so the normal maximum is not the real maximum.

In all instances, thresholds need to be treated with some caution, but also with a measure of common sense. If an activity is at or near the threshold, it is probably better to apply for a licence, but an unduly technical reading is probably not required: it is better for the applicant to decide what capacity the activity will actually be carried out at, and then not to exceed that level, even if it would nominally be possible to do so.

There are differences in threshold level between the Act and the Directive. Where the Irish threshold is lower than the EU threshold the difference should not pose a problem.

### 6.2.6 Established activities and new activities

As a rule, all new activities require a licence. Almost all established activities also require a licence.

An established activity is an activity for which planning permission was granted before the 'relevant' day in 1994–96 or for which planning permission was not required on that day. The relevant day is prescribed in Art 4 of the Environmental Protection Agency (Licensing) Regulations 1994–96 (SI 85/1994 as amended, the relevant amendment in this case being SI 240/1996) and is either 16 May 1994, 3 April 1995 or 3 September 1996. The Minister set out different days for different classes of activity, and this can be confusing. Provided planning permission was granted after 3 September 1996, the activity is not

established. If it was granted before then, it will be necessary to look at the question in more detail.

Licensing of established activities was introduced in stages. The Minister specified a number of dates by which different established activities had to have a licence (Environmental Protection Agency Act 1991 (Established Activities) Orders 1995–98 (SI 58/1995 and SI 460/1998)). If a licence has not been obtained by the day specified for that class of activity, it is an offence to continue the activity.

Established activities could continue to operate prior to the grant of a licence, provided the owner applied for a licence before the specified day. The Agency prosecutes the owners of activities for not applying for a licence in time and further unlicensed activities are still coming to light.

Where an unlicensed activity is modified, the owner must notify the Agency, and the Agency may require the owner to apply for a licence.

Article 5 of the IPPC Directive mirrors the requirements of the Act. Existing installations must obtain an IPPC permit within eight years, or immediately if the installation is to be altered; they should also comply with the objectives of the Directive, public availability of monitoring results and best available technology requirements immediately. Installations are defined in the Annex. Existing installations are defined as those which are already operating when the Directive is brought into effect, or which have a permit and commence operating within one year of the implementing law.

If an activity listed in the Annex of the IPPC Directive is not included in the Schedule of the EPA Act, or if no date has been set by which it must obtain a licence, the Agency cannot require the operator of the activity to apply for a licence. Its duty as competent authority to give effect to the Directive is limited by the rule laid down by the European Court in Case C-168/95 *Arcaro* [1996] ECR I-4705 that the obligation to reinterpret pre-existing national law to give effect to a Directive cannot be used to impose new obligations on individuals. To impose such obligations would effectively give horizontal direct effect to a Directive, and that cannot be done. Thus, if there is any activity which should be licensable, but is not, this can only be rectified by further legislation.

### 6.2.7 The Agency as licensing authority

Under s 83 of the EPA Act, you apply to the Agency for a licence. It may grant a licence, with or without conditions, or may refuse a licence. The Agency must have regard to the following criteria:

(a) relevant air quality, water quality and waste management plans;

(b) any special control area under the Air Pollution Act 1987;

(c) any noise regulations; and

(d) any other matters relating to environmental pollution which it considers necessary.

The Agency must also have regard to any environmental impact statement submitted, and to any further information from the applicant and any comments or submissions from the public or other Member States relating to it, but only

insofar as the EIS and comments relate to the risk of environmental pollution. The Agency is thereby made the competent authority responsible for carrying out that part of an environmental impact assessment (Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, OJ L175 5.7.85 p 40 as amended by Council Directive 97/11/EC, OJ L73 14.3.97 p 5) which relates to matters within its jurisdiction. This issue is discussed in more detail below.

The Agency cannot grant a licence unless it is satisfied that:

(a) emissions to air and water, and waste disposal or recovery, will comply with any relevant environmental quality standards and emission limits for air, water, waste, noise, or otherwise;

(b) the emissions from the activity will not cause significant environmental pollution (in practice this significant environmental pollution test is very important); and

(c) the Best Available Technology Not Entailing Excessive Cost (BATNEEC) will be used (now Best Available Techniques under the 2003 Act, though the two concepts include a cost element and are quite similar).

In coming to its decision, the Agency must attach conditions to ensure that the above requirements are complied with. Thus, any condition which contributes to the fulfilment of these obligations should be valid.

### 6.2.8 The licence application

An IPC licence is effectively a two-stage procedure. The procedure is laid down in s 84 of the EPA Act and in the Environmental Protection Agency (Licensing) Regulations 1994 (SI 85/1994).

#### *6.2.8.1 Stage 1: Proposed determination*

In the first stage, leading up to the proposed determination, an applicant publishes a newspaper notice and erects a site notice informing people of the licence application which the applicant then lodges with the Agency.

The application must contain the application fee and a long list of information about the proposed activity including:

(a) what it is and where it is;

(b) what local authorities are relevant;

(c) what emissions the proposed activity will cause;

(d) how emissions will be monitored and controlled;

(e) what BATNEEC (or, presumably, under the 2003 Act amendments, BAT) the Agency has prescribed and how the applicant will use it (if no BATNEEC has been prescribed, there is no such obligation).

An environmental impact statement should be included where the application is for an activity which requires an EIA.

The Agency assesses the application to see if it is valid. If it is not, the Agency may either reject it outright or may request that the applicant supply further information to complete the application. The Agency can also require

that the applicant make a further publication if it believes the original notices were insufficient. It is not unusual for the stage of requirements for further information to continue for a considerable time, with the applicant answering only a part of the Agency's requirements or needing time to carry out monitoring or research which the Agency requires. Having determined that an application is valid, the Agency will usually require that the applicant publish a further notice of the application, so that interested parties can make submissions.

Once the application has been assessed as valid, time begins to run against the Agency. Section 85(3) provides that the Agency must publish notice of its proposed determination within two months. However, the Agency has jurisdiction to request further information under Art 17 of the Licensing Regulations. Usually the Agency requests so much information before confirming that the application is valid that it has little need to require further information here, and the two powers effectively duplicate one another. However, if Art 17 is invoked, the time for the Agency to issue its proposed determination is extended to two months from the date on which the Art 17 notice is complied with, and the Agency must publish notice of the extension of time in a newspaper circulating in the area.

The right of interested persons to make submissions is inferred from two provisions. Under s 85(3) the Agency must serve notice of its proposed determination on any person who made a submission on the application. Under s 85(2) the Agency must take account of any submission made in relation to an Environmental Impact Statement submitted as part of a licence application. It must therefore be intended that people can make submissions. Submissions can be made within one month after receipt of the application. Where further information is received, the Agency will normally notify anyone who has made a submission so that he/she can make a submission on the further information. (These provisions are contained in s 87 of the EPA Act as amended by the 2003 Act.)

Once the application is complete, the Agency's inspector prepares a report and a draft licence (if appropriate) and forwards them to the Board of the Agency. The Board considers the application, submissions and report and issues a 'proposed determination' stating how it proposes to decide the application. This concludes the first stage of the procedure.

If there is no objection to the proposed determination, the Agency must issue the licence in those terms within one month. If there is an objection, the process moves to its second stage.

#### *6.2.8.2 Stage 2: Objection*

In the second stage, any person may object to the proposed determination. An objection must be made in writing, accompanied by the appropriate fee, and set out the grounds of objection.

The Agency circulates the objection to the licensee and to the local authority. Where there are other objectors, it circulates each objection to each objector as well. The applicant for a licence will often object to the severity of the conditions. Every person to whom an objection is circulated has the right to make a submission on it.

Where a submission contains new information, the Agency may circulate it to the parties, and will normally do so to comply with the requirements of natural justice. The Agency has to satisfy itself that it is appropriate to grant the licence and so it can carry out investigations and commission reports. The results of these should also usually be circulated to the parties. (The parties are the objectors, the applicant, and the local authority.)

Any party may request an oral hearing and the Agency has an absolute discretion whether to hold one. In practice, very few oral hearings have been held under the EPA Act, though a considerable number have taken place under the similar Waste Management Act. If there is an oral hearing, the Agency appoints a Chairman of the hearing to conduct the hearing and to report on it.

The Agency considers the objection(s) and all submissions received and decides what changes, if any, it should make to the proposed determination before issuing its final decision. The decision may be to grant, to refuse, or to grant subject to conditions. In most cases the decision is to grant subject to conditions. A grant without conditions would probably be invalid since the Agency is obliged to impose appropriate conditions to ensure that the statutory objectives are complied with. The Agency must notify the decision to all the parties to the objection. Some aspects of the procedure deserve comment.

The public has the right to access the application under Art 23 of the Licensing Regulations and this facilitates the making of submissions and objections.

### 6.2.9 Duration and transfer of licences

Where a licence is granted, operation must commence within three years. If it does not, the licence will lapse. If operations cease for a period of more than three years, the licence will also lapse. The Agency can grant a licence for more than three years, and the licensee can apply for an extension of time (s 90). A licence 'enures for the benefit of' the activity, so when a landowner sells the land on which the activity is carried out, the licence passes to the new landowner. Where a transfer is proposed, the Agency must be notified, and, under the 2003 Act, the Agency has a role in consenting to the transfer or surrender of a licence.

### 6.2.10 Review of licences

The Agency can review an IPC licence under s 88 of the EPA Act. A review can be carried out after three years without the need for further justification. It can be carried out if the licensee agrees or wants it. It can also be carried out after less than three years if there is a significant risk of pollution, or the nature of an emission has changed, or the state of the environment has changed in a way which could not have been foreseen. It can also be carried out if there is new evidence available, or if new standards have been adopted, or if a special control area order has been made for the area where the activity is located. Under the 2003 Act, all existing licences must be examined to see if they should be reviewed in order to bring them into compliance with the Directive and the new Act. The procedure applicable to a review is essentially the same as for an

initial application, but the public notice requirements differ slightly, in particular in that the Agency must publish notice that it is commencing the review.

On an application for a review, the Agency originally had no power to refuse the licence, but the 2003 Act confers such a power.

### 6.2.11 Modification of installations

Where the operator of an activity proposes to carry out any reconstruction, or to modify the activity, where this would materially change or increase the emissions, the Agency must be informed under s 92 (s 98 once the amendments come into force), and it may decide to review the licence.

### 6.2.12 Relationship to Planning and Development Act: IPC and EIA

Section 98 of the EPA Act (now s 99F) deals with the relationship of IPC to other procedures, and was amended in 2000.

Originally, the Agency could only consider the risk of environmental pollution, while the planning authority (or An Bord Pleanála) was precluded from considering the risk of environmental pollution. This was an attempt to establish an absolute line between the planning process and the IPC process. This led to an alleged incompatibility between s 98 and the EIA Directive. It has caused a substantial amount of litigation but there is no decided case on the point.

In effect the EIA was split between the EPA and the planning authorities/An Bord Pleanála. This has meant that the Agency considered the effect of emissions, while the planning authorities considered the effect on the built environment. It was argued that the Agency could not consider whether an activity was appropriate in a particular location, since it could grant a licence for any location, provided the emission limits were strict enough, while the planning authorities could not refuse an application for an activity in a sensitive location, since it could not consider the risk of environmental pollution. Hence, it was said, the key feature of the risk of an accident was always overlooked. The second argument put forward (more frequently) was that nobody ever considered the interaction between the different effects or decided whether on balance the project should be allowed to go ahead or not and that this breached the whole idea of an assessment. Cases relating to this point are still before the courts and could have an effect on the new version of s 98.

As amended, s 98 allows the planning authority or An Bord Pleanála to take account of the risk of environmental pollution, and to refuse planning permission where the risk is excessive, but not to impose conditions intended to control such pollution. Section 34 of the Planning and Development Act 2000 provides that the planning authority or An Bord Pleanála may request the Agency's views on the proposed activity, and the Agency has three weeks to give an opinion.

### 6.2.13 Monitoring

The IPPC Directive requires that licensed activities should be monitored, that the monitoring results should be communicated quickly to the Agency, and that the monitoring results should be available to the public. In an IPC licence, licensees are generally required to install monitoring equipment at selected points, and to send the results of monitoring to the Agency which puts them on the register where the public may inspect them. This also enables the Agency to obtain the information it needs to know if a breach of the licence has occurred, or if the activity is causing pollution. The Agency's other method of obtaining information is through using its powers to inspect activities under s 13.

### 6.2.14 Enforcement

Section 84(2) makes it an offence to breach the conditions of a licence. In addition, s 8 makes it an offence to breach any provision of the Act. Penalties for offences are laid down in s 9: €1,269.74 on summary prosecution and €12,697,380.78 on indictment. The Agency is authorised to prosecute summarily under s 11, and regularly does so. It has brought a large number of prosecutions across the State. Only the Director of Public Prosecutions can prosecute more serious offences, though to date there have been no prosecutions brought on indictment.

The Agency is also responsible for enforcing the requirement to hold a licence. Section 83 provides that an activity shall not be carried out after a particular date unless a licence or revised licence is in force in respect of the activity. Section 8 makes it an offence to breach any provision of the Act. Penalties are as mentioned above.

### 6.2.15 Civil enforcement

Civil remedies are introduced into the EPA Act by the 2003 Act. The Agency can seek an injunction to restrain a breach of an IPC licence or to clear up pollution caused by such a breach (s 99H). The 2003 Act also give the Agency power to suspend or revoke a licence, subject to a right of appeal to the High Court (s 15, amending s 97 of the 1992 Act). It is also open to the Agency or any person to seek an injunction against a licensee in relation to actual or threatened air pollution (Air Pollution Act 1987, s 28B, as inserted by the Second Schedule of the EPA Act itself) water pollution (Local Government (Water Pollution) (Amendment) Act 1990, s 20), or waste (Waste Management Act 1996, s 57).

### 6.2.16 IPC, IPPC and relationship to other Directives

As the IPC procedure has to be implemented in such a manner as to give effect to the IPPC Directive, it is appropriate to set out the scheme of the IPPC Directive below. Each provision of the Irish legislation may need to be examined in order to determine how it should be interpreted to accord most closely with European law. In the Directive:

- Article 1 sets out the objectives of the Directive.

- Article 2 provides definitions.
- Article 3 sets out general principles which the competent authority must oblige the operator of an activity to comply with, and is a key provision.
- Article 4 provides that all new activities need a permit.
- Article 5 provides that existing activities must comply with some of the obligations immediately, and must obtain a permit within eight years of implementation.
- Article 6 lays down procedures which must be incorporated into the permit regime.
- Article 7 specifies that procedures must be fully co-ordinated where more than one competent authority is involved in granting permits which together constitute an IPPC permit, so that the result will be a fully co-ordinated procedure.
- Article 8 provides that, where a permit is granted, it must contain conditions to ensure that the objectives of IPPC are achieved.
- Article 9 details the matters which the conditions must deal with.
- Article 10 provides that environmental quality standards must be achieved even where best available techniques are incapable of delivering them: additional measures are required.
- Article 11 stipulates that Member States must ensure that the competent authorities are kept informed of the best available techniques.
- Article 12 states that installations cannot be altered without a permit.
- Article 13 requires that permits must be reviewed periodically, particularly where there is pollution, or new legislation, techniques or standards.
- Article 14 deals with compliance and monitoring.
- Article 15 deals with public participation in licensing and public access to information.
- Article 16 addresses exchange of information between Member States in general.
- Article 17 deals with consultation between Member States in relation to installations with transboundary effects.
- Article 18 provides for the Council to set emission limit values for the industries listed in the Annex, except waste activities which are covered by separate legislation.

Procedural rules for EU institutions follow.

The Directive came into force on 14 October 1996 and had to be implemented by 14 October 1999. To date, Ireland has activated only parts of the implementing legislation.

While the IPC procedure laid down in the EPA Act largely gives effect to the IPPC Directive, the Directive itself gives rise to difficulty. It is stated to apply without prejudice to the application of other Community measures, including the Environmental Impact Assessment Directive (Council Directive 85/337 as amended by Council Directive 97/11), the Habitats Directive (Council Directive 92/43), as well as Council Directive 76/464 on water pollution, and

Council Directive 84/360 on discharges to the atmosphere from industrial plants, and the Waste Framework Directive (Council Directive 75/442 as amended by Council Directive 91/156). This 'without prejudice' approach poses huge problems of interpretation where national implementing legislation has to bring the various EU Directives together into a coherent whole with no guidance from European law itself. It may well be that any Irish failure to implement European law properly may be as much the fault of the EU as of the State.

## 6.3 Conclusion

In Irish law, IPC is a two-stage procedure. An applicant applies for a licence and gets a proposed determination. There is then an opportunity for anyone to object to the grant of the final licence. The public is involved at all stages. The objective of IPC is to prevent environmental pollution. When the Agency considers a licence application, this is its overriding objective. It is usually possible to grant a licence provided the emission limits are set low enough and provided the controls are good enough. Enforcement is usually carried out by way of criminal prosecution in the District Court, but prosecutions on indictment are possible, and injunctive relief will soon be available. The IPC procedure gives effect to the subsequent IPPC Directive and this causes some interpretation difficulty.

CHAPTER 7

# ENVIRONMENTAL IMPACT ASSESSMENT

*Rachel Minch*

## 7.1 Introduction

The concept of environmental impact assessment (EIA) has its origins in European law and Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 97/11/EC (the Directive). The Directive will be further amended by the Directive providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment (2003/35/EC) and amending Council Directives 85/337/EEC and 96/91/EC.

The Directive introduced a requirement that Member States must ensure that projects likely to have a significant effect on the environment by virtue *inter alia* of their nature, size and location are made subject to a requirement for a development consent and an assessment with regard to their effects on the environment: Art 2. In particular, Art 3 provides that the EIA shall identify, describe and assess the direct and indirect effects of the project on the following factors:

(a) human beings, fauna and flora;

(b) soil, water, air, climate and the landscape;

(c) material assets and cultural heritage; and

(d) the interaction between the above factors.

The Directive gives effect to an important principle of European environmental policy known as the prevention principle: the creation of pollution should be prevented at source rather than subsequently trying to counteract its effects. The EIA procedure enables the decision-making authority to decide whether or not to grant consent to a project based on its likely effects on the environment and, if it does decide to grant consent, to impose conditions preventing or mitigating these effects. The information received by the authority as a result of the EIA procedure need only be taken into consideration: Art 8. The Directive is of a procedural nature and does not stipulate the actual decision which the authority should reach as a result of the EIA.

In summary, the Directive provides that EIA is mandatory for all Annex I projects on the basis that they will always have significant environmental effects: Art 4(1). The term 'project' has a very broad definition for the purposes of the Directive and is defined as the execution of construction works or of other installations or schemes, and other interventions in the natural surroundings and landscape including those involving the extraction of mineral

resources. Annex I projects include oil refineries, integrated chemical installations and significant infrastructure projects. As regards projects listed in Annex II, Member States must determine on a case-by-case basis and/or on the basis of thresholds or other criteria whether or not an Annex II project should be subject to EIA: Art 4(2). The criteria in Annex III must be taken into account when a case-by-case examination is being carried out or criteria or thresholds are being set. Projects which require an EIA must be subject to an EIA in accordance with Arts 5 to 10 which deal *inter alia* with the information to be provided by the developer, scoping requests, public consultation requirements and transboundary effects. These provisions are considered in more detail below in the context of Irish implementing legislation.

Article 2(2) of the Directive provides that Member States can integrate EIA into existing procedures for consent to projects, into other existing procedures or into procedures established to comply with the Directive. In Ireland, the Directive has been implemented through the integration of its requirements into the planning control system and several other development consent procedures covering, for example, local authority development, road development and the laying of oil and gas pipelines. This has been done principally by the European Communities (Environmental Impact Assessment) Regulations 1989 to 2001 (the EIA Regulations), the Planning and Development Act 2000 (the 2000 Act) and the Planning and Development Regulations 2001 (the 2001 Regulations).

This chapter will focus on the EIA system in the context of the planning control system. It will also look briefly at the integration of EIA into other development consent systems and at Irish and European caselaw on general issues concerning EIA.

## 7.2 EIA under planning legislation

The Local Government (Planning and Development) Regulations 1990 and 1994 and the EIA Regulations originally implemented the Directive into the planning control system. The 2000 Act and 2001 Regulations have superseded this regime. Part X of the 2000 Act now provides the framework for EIA in the planning process. The 2001 Regulations contain the procedural details.

### 7.2.1 Development which requires EIA

#### *7.2.1.1 Mandatory EIA for development specified in Schedule 5*

EIA is required for classes of development prescribed in regulations made under s 176 of the 2000 Act. These classes of development are set out in Schedule 5 to the 2001 Regulations (see Art 93, 2001 Regulations). Part 1 of Schedule 5 replicates Annex I of the Directive. Part 2 replicates Annex II. However, it also sets the thresholds or criteria which determine whether an Annex II project requires an EIA (as required by Art 4(2) of the Directive).

An environmental impact statement (EIS) must accompany a planning application made in respect of a development referred to in Schedule 5, which meets the specified thresholds and criteria. There is a distinction between the

EIA, the procedure which assesses the likely environmental effects of a project, and the EIS, which is part of the information on which that assessment is based. Outline planning applications may not be made in respect of development which requires an EIA (Art 96, 2001 Regulations).

#### *7.2.1.2 Mandatory EIA for sub-threshold development which is likely to have significant effects on the environment*

Sub-threshold development is defined in Art 92, 2001 Regulations, as:

> development of a type set out in Schedule 5 which does not exceed a quantity, area or other limit specified in that Schedule in respect of the relevant class of development.

Where a planning application for sub-threshold development is not accompanied by an EIS, and the planning authority or the Planning Board (the Board) on appeal considers that the development would be likely to have significant effects on the environment, it must require an EIS (Arts 103(1) and 109(2), 2001 Regulations).

#### *7.2.1.3 Sensitive sites*

Where a proposed development would be located on or in a European site, a proposed or designated Natural Heritage Area or a nature reserve or nature refuge, then the planning authority or the Board must make a specific decision as to whether the development would or would not be likely to have significant effects on the environment of such a site (Arts 103(2) and 109(3), 2001 Regulations).

The planning authority or the Board on appeal, must have regard to the criteria set out in Schedule 7 to the Regulations in determining whether or not a sub-threshold development would or would not be likely to have significant effects on the environment. These include details regarding the characteristics, location and potential impacts of the proposed development. Professor Yvonne Scannell submits that regulatory authorities should always consider and decide whether or not to require an EIS for a sub-threshold development, regardless of whether or not it is located in or on a sensitive site, and that proper records should be kept of this decision (Arts 103(2) and 109(3), 2001 Regulations).

#### *7.2.1.4 Exemptions*

An applicant or person intending to apply for planning permission can request the Board to grant an exemption from the requirement to prepare an EIS. The Board may only grant an exemption in exceptional circumstances and only after having considered the observations of the relevant planning authority and whether the environmental effects of the development should be assessed in some other manner. Notice of the Board's decision to grant an exemption and the reasons for doing so must be published in *Iris Oifigúil* and one daily newspaper (s 172(3) and (4), 2000 Act). A European site includes proposed and designated Special Areas of Conservation and Special Protected Areas (see s 2, 2000 Act).

### 7.2.2 Content of EIS

Article 94 of the 2001 Regulations prescribes the information which an EIS must contain:

(a) The information specified in paragraph 1 of Schedule 6:
- A description of the proposed development comprising information on the site, design and size of the proposed development.
- A description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse affects.
- The data required to identify and assess the main effects which the proposed development is likely to have on the environment.
- An outline of the main alternatives studied by the developer and an indication of the main reasons for his/her choice, taking into account the effects on the environment.

(b) The information specified in paragraph 2 of Schedule 6 (which sets out further information by way of explanation or amplification of the information referred to in paragraph 1 above) to the extent that:
- it is relevant to a given stage of the consent procedure and to the specific characteristics of the proposed development and of the environmental features likely to be affected; and
- the person preparing the EIS may reasonably be required to compile such information, having regard, among other things, to current knowledge and methods of assessment.

(c) A non-technical summary of the above information.

In 2002, the EPA also published new Guidelines on the Information to be Contained in EIS. These include guidelines on determining whether an EIS should be prepared for sub-threshold development. Local authorities are bound by these guidelines.

### 7.2.3 Scoping requests

Applicants for planning permission can request the planning authority and the Board, where appropriate, to give a written opinion on the information which should be contained in the EIS prior to submitting the planning application. This is known as a 'scoping request'. This facilitates the preparation of an adequate EIS and reduces the likelihood of requests for further information once an EIS has been submitted, thereby avoiding delays. However, as noted by Patrick Sweetman ('Recent developments in conveyancing practice – the European Communities (Environmental Impact Assessment) (Amendment) Regulations 1999' [1999] 6 IPELJ 110):

> to seek an opinion is to invite the planning authority to request a very much more comprehensive and wide-ranging EIS than might be warranted in the circumstances of a particular case.

The giving of a written opinion by the planning authority does not prejudice its powers to request further information (s 173 of the 2000 Act; Art 95 of the 2001 Regulations sets out the detailed procedure for scoping requests).

The Commission published *Guidelines on Scoping* in 2001.

### 7.2.4 Adequacy of the EIS

The planning authority or the Board must consider whether the EIS is adequate, ie whether it complies with Art 94 or, if it has given a written opinion pursuant to a scoping request, with that written opinion. Applications for judicial review of planning decisions often challenge them on the basis that the EIS was inadequate.

### 7.2.5 Consultation requirements

#### *7.2.5.1 The public*

The Directive requires that any request for development consent and any information gathered pursuant to Art 5 must be made available to the public in order to give them an opportunity to express their opinion before consent may be granted: Art 6(2). As noted by Lord Hoffmann in the House of Lords decision of *Berkley v Secretary of State for the Environment* [2000] 3 All ER 897:

> The directly enforceable right of the citizen which is required by the Directive is not merely a right to a fully informed decision on the substantive issues. It must have been adopted on an appropriate basis and that requires the inclusive and democratic procedure prescribed by the Directive in which the public, however misguided or wrong-headed its views may be, is given an opportunity to express its opinion on the environmental issues.

The newspaper notice, which must be published in respect of a planning application, must also state that an EIS will be submitted to the planning authority and that it will be available for inspection or purchase for a reasonable fee: Art 98, 2001 Regulations. Where a planning authority requires an EIS for subthreshold development, the applicant must publish a further newspaper notice of its intention to submit an EIS. The public is, therefore, made aware of development that requires an EIA and is entitled to make submissions or observations in relation to the EIS in accordance with planning legislation. The Commission has issued a Reasoned Opinion against Ireland stating that it is contrary to the EIA Directive to make comment by the public subject to a participation fee (currently €20). Similar provisions also apply in respect of appeals to the Board which involve an EIS: Arts 112 to 115, 2001 Regulations.

#### *7.2.5.2 Prescribed bodies*

The Directive also requires that Member States take the necessary measures to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities are given an opportunity to express their opinion on the EIS and the proposed development: Art 6.

Under the 2001 Regulations, the planning authority must send a copy of the EIS to the bodies it is required to notify in Art 28(2), stating that written sub-

missions or observations can be made in relation to the EIS within five weeks of receipt by the planning authority of the EIS: Art 107, 2001 Regulations. For example, the authority must send a copy of the EIS to the EPA if the proposed development comprises or is for the purposes of an activity which requires an IPC licence or a waste licence, or to An Taisce and the Department of the Environment if it appears that the development might have significant effects in relation to nature conservation.

#### *7.2.5.3 Transboundary states*

The planning authority or the Board, in the case of an appeal or application for approval, must notify the Minister for the Environment, Heritage and Local Government (the Minister) of planning applications for proposed development which would be likely to have significant effects on the environment in a transboundary state: Art 104, 2001 Regulations. A transboundary state is defined as any state other than Ireland which is a Member State of the European Communities or a party to the UNECE Convention on Environmental Impact Assessment in a Transboundary Context, otherwise known as the Espoo (EIA) Convention. The Minister must then consult with the planning authority or Board in relation to:

(a) providing the state concerned with information on the proposed development, including the EIS; and
(b) consultations with the state in relation to the potential transboundary effects of the proposed development.

The planning authority or Board must then provide information to the state concerned and enter into consultations with it (Art 126, 2001 Regulations). The planning authority can also, having regard to the views of a transboundary state, require the developer to submit further information and notify certain persons in relation to the additional information received (Arts 128 and 129, 2001 Regulations).

The planning authority or Board shall not reach its decision until after the views, if any, of the relevant transboundary state have been received or consultations are otherwise completed (Art 130, 2001 Regulations).

### 7.2.6 The decision on the application

In reaching its decision, the planning authority or the Board on appeal must have regard to the EIS, any supplementary information relating to the EIS and any submissions or observations concerning the effects on the environment of the proposed development (s 173, 2000 Act).

## 7.3 EIA and other development control systems

### 7.3.1 Local authority development under Part X of the 2000 Act

Development by a local authority in its functional area is exempt development for the purposes of the 2000 Act and is not therefore subject to the EIA requirements discussed above in relation to private sector development: s 4(1), 2000

Act. Local authority development carried on outside its functional area is treated on the same basis as private sector development and is subject to the requirements discussed above). However, s 175 of the 2000 Act provides that local authority development in its functional area which belongs to a class of development listed in Schedule 5 to the 2001 Regulations cannot be carried out unless:

(a) the local authority has prepared an EIS;

(b) the Board has approved of the proposed development with or without modifications. (It should be noted that a local authority development which consists of road development within the meaning of the Roads Acts 1993 to 2001 is subject to a separate EIA regime under those Acts. This is discussed further below.)

The 2001 Regulations contain similar provisions regarding sub-threshold local authority development as noted above (Arts 117 to 124, 2001 Regulations). Where a local authority proposes to carry out sub-threshold development and it considers the development would be likely to have significant effects on the environment, it must prepare an EIS for submission to the Board. Similarly, a local authority must make a specific decision as to whether or not sub-threshold development in or on a sensitive site requires an EIS. The Board can also request an EIS be prepared in respect of sub-threshold development which it considers would be likely to have significant effects on the environment. The local authority or the Board must also have regard to the criteria set out in Schedule 7 when deciding whether a development is likely to have significant effects on the environment.

Section 175(4) also prescribes a public consultation process. The local authority must publish a newspaper notice stating its intention to apply to the Board for approval of the proposed development, that an EIS has been prepared, and that submissions and observations can be made to the Board relating to:

(a) the implications of the proposed development for proper planning and sustainable development in the area concerned; and

(b) the likely effects on the environment of the proposed development if carried out.

The local authority must also send a copy of the application and the EIS to certain prescribed authorities together with a notice stating that they may also make such submissions or observations (Art 121 of the 2001 Regulations sets out the prescribed authorities for the purposes of s 175). Under s 175(5), the Board can require a local authority to furnish additional information in relation to the effects on the environment of the proposed development. If the Board considers that the further information contains significant additional data, it must require the local authority to publish a further newspaper notice stating that submissions or observations can be made in relation to the additional information.

Before making a decision in respect of the proposed development, the Board must consider the EIS, any submissions or observations from the public and the prescribed authorities, the views of a transboundary state and the

views of the EPA where requested under s 175(10). Section 175(10) relates to proposed local authority development, which comprises or is for the purposes of an activity for which an IPC licence or waste licence is required. The Board can consult with the EPA regarding such development. Like s 98 of the Environmental Protection Agency Act 1992, where the Board decides to approve the proposed development it shall not subject that approval to conditions which are for the purposes of controlling emissions. However, the Board can, notwithstanding the licensing of the activity, decide to refuse the proposed development where the Board considers the development is unacceptable on environmental grounds having regard to the proper planning and sustainable development of the area in which the development is or will be situated.

### 7.3.2 Road development

The Roads Acts 1993 to 2001 require that local authorities prepare an EIS in respect of certain proposed road development such as motorways, busways, a new road of four or more lanes and a new bridge or tunnel 100 m or more in length. Section 50(1)(d) of the Roads Act (as inserted by the European Communities (Environment Impact Assessment) (Amendment) Regulations 1999, SI 93/1999, Art 14) also provides that a local authority must prepare an EIS in respect of other types of proposed road development if they would be likely to have significant environmental effects on a sensitive site.

Section 50 of the Roads Act as amended by Art 14 of the European Communities (Environment Impact Assessment) (Amendment) Regulations 1999 prescribes the content of the EIS. The information that the EIS must contain is identical to that which is required for private sector development noted at 7.2.2 above.

The local authority must then apply to the Board for approval of the road development under s 51, which application must include the EIS. Initially, the Minister for the Environment and Local Government was responsible for approving road development under s 51 of the Roads Acts. His functions have now been transferred to the Board under s 215 of the Planning and Development Act 2000. The EIS can be inspected by members of the public who can make written submissions to the Board regarding the likely effects of the proposed road development on the environment. The EIS must also be sent to various prescribed authorities for comment.

The Board can hold an oral hearing where it considers it necessary or expedient for the purposes of reaching its decision (European Communities (Environment Impact Assessment) (Amendment) Regulations 2001, SI 450/2001, Art 6). However, the inspector conducting the oral hearing into the compulsory acquisition of land for the proposed road development is entitled to hear evidence in relation to the likely effects on the environment of the road development (s 51(7)). The Board must also approve the compulsory purchase order at the same time. So, in practice, one oral hearing is held to consider both the environmental and compulsory acquisition issues relating to proposed road development.

The Board may, by order, approve the proposed road development with or without modifications or may refuse to approve it (s 51(6)).

### 7.3.3 Environmental licensing

The EPA does not have a statutory power to request an EIS of its own accord when considering whether or not to grant an IPC licence or a waste licence. However, where an application for planning permission for development (comprising or for the purposes of an activity which also requires an IPC licence) requires an EIS, then copies of the EIS must also be sent to the EPA. The EPA must consider the EIS in so far as the risk of environmental pollution is concerned and has the power to seek further information (Environmental Protection Agency (Licensing) Regulations 1994, SI 85/1994, Art 14). Similar provisions apply with respect to waste licensing (Waste Management (Licensing) Regulations 2001, SI 185/2000, Art 13).

The EPA also has environmental assessment functions under the European Communities (Natural Habitats) Regulations 1997 (SI 94/1997) (this is discussed in Chapter 11).

### 7.3.4 Other development control systems

The EIA procedure has also been incorporated into various other development control systems relating to, for example, development on the foreshore, arterial drainage, afforestation and oil and gas pipelines development.

## 7.4 Recurring issues regarding EIA

The decisions of regulatory authorities are often challenged by way of judicial review on the basis of a failure to comply with EIA requirements. The following are some of the issues which have come before the Irish and European courts.

### 7.4.1 Requirement for EIA

The requirement for an EIA is a matter of law for the courts to determine. In *Maher v An Bord Pleanála* [1999] 2 ILRM 198, the applicant alleged that the Board's failure to require an EIS for a 200-sow integrated pig-unit was in contravention of the EIA Regulations. The EIA Regulations provided that an EIA was mandatory for:

> Pig rearing installations where the capacity would exceed 1,000 units on gley soils or 3,000 units on other soils and where units have the equivalents: 1 pig = 1 unit; 1 sow = 10 units.

The Board had excluded weaners and finishers from the calculation of the number of units. On that basis, the Board considered that the capacity of the installation would only be 2,208 units and that an EIA was not therefore required as it fell below the 3,000 unit threshold. Kelly J in the High Court held that the proper interpretation of the EIA Regulations and questions as to whether thresholds had been exceeded are matters of law to be decided by the courts. He stressed that since the EIA Regulations have their genesis in an EU Directive, they must be interpreted in accordance with the underlying purpose

of the Directive: projects likely to have a significant effect on the environment must be subject to an EIA. Having regard to these purposes, Kelly J held that the Board had incorrectly included weaners and finishers among the 10 units attributed to a sow (although it was correct to include unweaned piglets). They ought to have been regarded as pigs attracting one point each which meant that the capacity of the piggery was well in excess of the 3000 unit threshold. An EIA was therefore required. As no EIA had been carried out, the Board's decision to grant planning permission was fatally flawed and was accordingly quashed. See also *Shannon v Regional Fisheries Board and An Bord Pleanála* [1994] 3 IR 449, where the High Court interpreted the word 'sow' purposively to include a pregnant gilt and rejected the Board's contention that it was not entitled to interpret the EIA Regulations unless the Board's decision could be classified as wholly irrational.

The matter is less clear when it comes to the role of the courts in determining whether an EIA is required for sub-threshold development. As noted above, where a planning authority considers that a sub-threshold development is likely to have significant effects on the environment, it must require an EIA. In *O'Nuallain v Dublin Corporation* (unreported, 2 July 1999, High Court, Smyth J), the decision to grant planning permission for the Millennium Spike was challenged on the basis that an EIS should have been prepared. The High Court held that the Spike was an urban development project within the meaning of the EIA Regulations even though it fell well below the thresholds set for an EIA. The EIA Regulations required an EIA for urban development projects comprising an area greater than two hectares within existing urban areas. However, the High Court found that the development would have significant effects on the environment noting that the planning authority should consider the positive as well as the negative impacts of the proposed development on the environment. Dublin Corporation was therefore obliged to carry out an EIA in respect of the Spike.

This decision can be contrasted with that of the Supreme Court in *Lancefort v An Bord Pleanála* [1998] ILRM 401. In this case, the applicants sought to challenge the Board's decision to grant planning permission to develop what is now the Westin Hotel, office accommodation and a bank on the grounds *inter alia* that it involved the demolition of and interference with listed buildings. Again, the development fell below the thresholds set for EIA. However, the applicants considered that it would unarguably have a significant effect on the environment and specifically the material assets and cultural heritage of the area (see Art 3 of the Directive, third indent). Accordingly, the applicants contended that the Board was obliged at the least to consider whether it should exercise its power to require an EIS for sub-threshold development. The Supreme Court held that the applicants, a limited liability company, did not have *locus standi* to challenge the Board's decision primarily on the basis that it had been incorporated after the decision which it sought to challenge had been reached. However, the court did consider the merits of the case in determining whether the applicants had *locus standi*. The court said it would be unwilling to interfere with the exercise of the Board's discretion unless it involved an abuse of power or grave default in procedure. The Supreme Court also considered that it had not been shown that the failure to consider whether an EIS should

have been prepared had the slightest effect on the attainment of the Directive's objectives.

### 7.4.2 Adequacy of the EIS

The Irish courts have generally been proactive in determining whether or not an EIS is required. However, they have consistently deferred to the regulatory authorities regarding the adequacy of EIS. In *Browne v An Bord Pleanála* [1989] ILRM 865, Baron J took the view that it is solely for a planning authority to determine upon the sufficiency of an EIS. He considered that any other approach would be to turn an application for judicial review into a further appeal. A similar approach was taken by the High Court in *Murphy v Wicklow County Council* (unreported, 19 March 1999, High Court, Kearns J). The applicant had brought judicial review proceedings challenging the controversial decision of the Minister to approve a road-widening scheme through the Glen of the Downs nature reserve. The High Court held that the Minister was the sole arbiter for determining the adequacy of compliance with the EIA Regulations. Kearns J considered that:

> To interfere, the court would require to be satisfied that there was virtually no material upon which the Minister could reasonably exercise his discretion to grant a certificate. It is not a function of the court to 'second-guess' the Minister or to apply standards of an extreme nature particularly when any review is taking place almost ten years after the EIS was first prepared.

Kearns J therefore adopted the test of unreasonableness laid down in *O'Keefe v An Bord Pleanála* [1993] 1 IR 39. This case established that an applicant must satisfy the courts that a decision-making authority had no information before it which would support its decision before a court would quash the decision. This is subject to the caveat that the courts will intervene if the statutory requirements have not been complied with (for example, if the EIS fails to contain the basic information specified in Art 94 of the 2001 Regulations). Once the statutory requirements have been satisfied, the Irish courts will not concern themselves with the qualitative nature of the EIS unless the decision of the planning authority or the Board, that the EIS was adequate, was so unreasonable that it should be quashed. See also *Kenny v An Bord Pleanála* [2001] 1 IR 565 where the applicant unsuccessfully sought to impugn the decision of the Board to grant planning permission to Trinity College Dublin for the development of student accommodation at Trinity Hall, Dartry, on the grounds that the EIS was so defective that it did not comply with the statutory requirements.

Aine Ryall has argued that the courts should take a more robust approach regarding the adequacy of EIS in light of the 'clear mandate from Luxembourg to enforce EIA law locally'. Ryall is of the view that the national courts are under a clear duty to review whether the information supplied in the EIS is sufficient to enable the competent authority to assess the likely environmental impacts of the proposed project (Aine Ryall, 'Judicial review and the adequacy of the EIS: *Kenny v An Bord Pleanála*' [2002] 9 IPELJ).

### 7.4.3 Multiple consents and s 98 of the Environmental Protection Agency Act 1992

Section 98 provided that, where a proposed development required an IPC licence, the planning authority or the Board could not have regard to the risk of environmental pollution when deciding whether to grant permission or when imposing conditions on the grant. The reason for this is that, in cases where an IPC licence is required, the EPA is the competent authority to consider matters relating to environmental pollution. Several cases have come before the courts alleging that this division of functions between the planning authorities and the EPA fails to implement the Directive.

In *O'Connell v EPA* (unreported, 21 February 2003, Supreme Court) the applicant sought to challenge the decision of the EPA to grant an IPC licence for a power plant. The heat output of the plant was such that it required an IPC licence but did not require an EIA. Neither the planning authority or the Board exercised its power to request an EIS for sub-threshold development when considering whether to grant planning permission (and, as noted above, the EPA does not have an express statutory power to require an EIS). The principal grounds of challenge were that:

(a) the licence sought was likely to have a significant effect on the environment and accordingly an EIS was required;

(b) the planning authority and the Board were precluded by s 98 from considering environmental pollution not only when deciding whether to grant permission but also in considering whether to demand an EIS;

(c) therefore, in order to give effect to the Directive the court should interpret the powers of the EPA as including a power to demand an EIS, otherwise the state is in breach of its obligations under EC law.

The Supreme Court held that the applicant's argument regarding s 98 was mistaken. Section 98 prevented the planning authority and the Board from considering matters of environmental pollution only when making the substantive planning decision. This did not apply at the earlier stage when it was necessary to consider whether to require an EIS in sub-threshold cases. (The applicant may have stood a better chance if she had challenged the decisions of the planning authority or Board. Presumably she missed the two-month time limit within which she had to file her application for leave to apply for judicial review.)

In the *O'Connell* case, the applicant unsuccessfully argued that s 98 resulted in a failure to require an EIS contrary to the Directive. Section 98 has also been challenged on the basis that the division of functions results in inadequate EIA. As noted above, Art 3 of the Directive requires an assessment of the interaction between the various factors which an EIA must consider. In *Martin v An Bord Pleanála* (unreported, 24 July 2002, High Court, O'Sullivan J), the applicant, a member of the No Incineration Alliance, was granted leave to apply for judicial review of, *inter alia*, the decision of the Board to hold an oral hearing regarding the application for a proposed incinerator on the basis that the system operated by the Board contravened the Directive. The key challenge is that by splitting the consideration of the potential effects of the incinerator between the Board and the EPA:

(a) all relevant considerations are not considered before the go-ahead is given for the construction of the plant (ie because it can receive planning permission before an IPC licence is granted); and

(b) some environmental effects – especially those which can arise from the interaction between planning and environmental effects – are not considered at all.

However, the High Court, applying *Campus Oil* principles, refused the application for a stay on the Board's proceedings until the court had determined, at the substantive hearing, whether the Directive had been correctly implemented into Irish law. In *O'Brien v South Tipperary County Council* (unreported, 22 October 2002, High Court, O'Caoimh J), the decision of a planning authority was challenged on very similar grounds. The respondents conceded that the applicant raised substantial grounds of challenge but O'Caoimh J rejected their argument that an appeal to the Board was a more appropriate remedy. He also considered that the balance of convenience favoured the granting of a stay on an appeal to the Board. In this regard, O'Caoimh J attached significance to the fact that the applicant would be in a position to honour his undertaking as to damages (distinguishing the *Martin* case where the court considered that the applicant had only made a perfunctory undertaking as to damages).

The Commission also issued a reasoned opinion against Ireland in July 2001 arguing that s 98 results in a breach of Art 3 of the Directive (as there is no provision to ensure that the EIA will cover the interaction of factors mentioned) and of Art 8 (which requires that the competent authority take into account all the information gathered under Arts 5, 6 and 7).

We need to await the outcome of the courts' decisions in *Martin* and *O'Brien* and possibly a decision of the ECJ for a final determination of the matter. It should however be noted that s 98 has since been amended by s 256 of the 2000 Act. Planning authorities and the Board are prohibited from imposing conditions for the purposes of controlling emissions (this is the function of the IPC licence). However, they can now refuse a grant of permission, notwithstanding the licensing of the activity, if it considers that the development is unacceptable on environmental grounds having regard to the proper planning and sustainable development of the area. This goes some way to remedying any perceived defects in the implementation of the Directive as the planning authority and Board can have regard to environmental effects in deciding whether to grant permission.

This division of functions between the EPA and local authorities also exists under the waste licensing regime (see s 54 of the Waste Management Act 1996). Section 54 has also been amended by s 257 of the 2000 Act so that planning authorities and the Board can refuse permission for development on environmental grounds notwithstanding the licensing of the activity.

### 7.4.4 Cumulative impacts

EIS have been challenged as being inadequate on the basis that they failed to take into consideration the cumulative impacts of existing development or other proposed development. As noted by Scannell, developers are not expected to

enter the realms of speculation but the Advocate General in *Bund Naturschutzin Bayern v Freistaat Bayern* [1994] ECR I-3137 referred to projects within 'current plans' (Yvonne Scannell, *Environmental Impact Assessment* (Intensive Course on Planning Law 2002, Centre for Environmental Law and Policy)).

In *O'Connell v O'Connell* [2001] IEHC 69 (29 March 2001), the applicants' argument that the EIS should have covered a possible future extension of the road was rejected by the High Court. Similarly, in *Sloan v An Bord Pleanála* (unreported, High Court, 7 March 2003), the High Court refused an application to challenge a decision of the Board confirming a proposed motorway scheme. The principle ground of challenge was that the inspector conducting the oral hearing had wrongfully excluded evidence in relation to the cross border route on the basis that it did not relate to the proposed development, the subject matter of the application. The High Court held that the inquiry did not require an investigation into a road, which would be the subject matter of a future scheme and a separate inquiry.

The ECJ has however condemned Ireland for failing *inter alia* to take into account the cumulative effects of certain projects in *Commission v Ireland* [1999] ECR I-5901. As noted above, Art 4(2) of the Directive requires that projects listed in Annex II must be the subject of an assessment where their characteristics so require. Member States can specify certain types of projects or may establish the criteria and/or thresholds necessary to identify such projects. In this case, the Commission challenged Irish legislation regarding EIS for afforestation, peat extraction and the use of uncultivated/semi-natural areas for intensive agricultural purposes. The legislation provided that only projects which exceeded certain size thresholds had to be subject to an EIS. The ECJ held that Ireland was in breach of the Directive as the thresholds failed to take the nature and location of the projects into consideration contrary to Art 2(1). The ECJ also stated that a Member State would exceed the limits on its discretion under Arts 2(1) and 4(2):

> where a Member State merely set a criterion of project size and did not also ensure that the objective of the legislation would not be circumvented by the splitting of projects. Not taking account of the cumulative effects of projects means in practice that all projects of a certain type may escape the obligation to carry out an assessment when, taken together, they are likely to have a significant effect on the environment within the meaning of Art 2(1).

The European Communities (Environmental Impact Assessment) (Amendment) Regulations 2001 (SI 450/2001) were subsequently introduced to facilitate compliance with the ECJ's decision. With regard to initial afforestation, the Regulations provide for the introduction of a statutory consent system by the Minister for the Marine and Natural Resources which provides for mandatory EIA above the reduced 50-hectare threshold and also provides for the possibility of sub-threshold EIA, where a project is likely to have significant effects on the environment. The threshold for mandatory EIA in relation to peat extraction has been reduced from 50 hectares to 30 hectares. The 2001 Planning Regulations also include a new planning threshold for peat extraction of 10 hectares. These EIA Regulations also amend the Wildlife (Amendment) Act 2000 and the European Communities (Natural Habitats) Regulations 1997 to

allow for the possibility of EIA for peat extraction below the 10-hectare threshold in Natural Heritage Areas and Special Areas of Conservation, where a project is likely to have significant effects on the environment.

### 7.4.5 Substantial compliance

An issue that has been attracting some debate is whether 'substantial compliance' with the Directive is sufficient. The decision of the House of Lords in *Berkeley v Secretary of State for the Environment* [2000] 3 All ER 897 considers this issue. The applicant challenged the decision of the Secretary of State for the Environment approving the redevelopment of the Fulham Football Club ground at Craven Cottage on the grounds that he should have considered whether the project should have been subject to an EIA. Both the High Court and the Court of Appeal rejected his application on the basis that an EIA would not have altered the Secretary's decision and that the objectors had not been prejudiced by the absence of an EIA. However, the House of Lords quashed the Secretary's decision.

By the time the matter came before the House of Lords, the parties had agreed that the Secretary's decision was *ultra vires* because of his failure to consider whether an EIA was required. They also agreed that the fact that his decision would have been the same did not remedy the situation. The issue before the House of Lords was whether there had been 'substantial compliance' with the Directive. Hoffmann LJ considered that an EIA by any other name would satisfy the requirements of the Directive provided that the procedure followed was 'in substance' an EIA. However, he rejected the argument that the equivalent of an EIS could be found in the documents submitted in this case, namely, the statement of case submitted by the developer, which in turn referred to the local authority's statement of case, which in turn incorporated the report to the planning sub-committee which incorporated third party submissions! The public had access to all these documents and would have been entitled to express an opinion on them at the public inquiry. He stated as follows:

> My Lords, I do not accept that this paper chase can be treated as the equivalent of an environmental statement … The point about the environmental statement contemplated by the Directive is that it constitutes a single and accessible compilation, produced by the applicant at the very start of the application process, of the relevant environmental information and the summary in non-technical language. It is true that Art 6(3) gives member states a discretion as to the places where the information can be consulted, the way in which the public may be informed and the manner in which the public is to be consulted. But I do not think it allows member states to treat a disparate collection of documents produced by parties other than the developer and traceable only by persons with a great deal of energy and persistence as satisfying the requirement to make available to the public the Annex III information which should have been provided by the developer.

Hoffmann LJ did accept that a court could exercise its discretion not to quash a planning permission in a case where there was a failure to observe 'a procedural step which was clearly superfluous to the requirements of the Directive'

without breaching the courts' obligations under Community law. However, this was not such a case. See Aine Ryall, 'Environmental assessment law: *Berkeley v Secretary of State for the Environment*' [2001] 2 IPELJ for an analysis of this decision in the context of ECJ judgments regarding the Directive. Ryall submits that the judgments of the ECJ are sufficiently broad to be interpreted as requiring national courts to quash decisions taken in breach of the Directive. She notes that the ECJ has acknowledged that a Member State could adopt an alternative assessment procedure provided that it satisfied the requirements of Arts 3 and Arts 5 to 10 of the Directive. However, in light of the ECJ's determination to ensure that the effectiveness of the Directive is not undermined, it may take a strict approach if asked to provide a preliminary ruling on the substantial compliance issue.

The decision in *Berkeley* can be contrasted with the approach of the Supreme Court in the *Lancefort* case discussed at 7.4.1 above. Keane J was of the view that it had not been shown that the failure to consider whether an EIS should have been prepared had 'the slightest adverse effect' on the attainment of the Directive's objectives. In particular, he noted that the public had access to the detailed plans lodged with the planning application and that an exhaustive public consultation process had been carried out. Ryall considers that the judgment suggests a minimalist approach to the requirements of the Directive in contrast to the approach taken by Hoffmann J in *Berkeley*. In particular, she notes that Keane J did not consider how the information supplied complied with the requirements of Arts 3 and 5 of the Directive. However, it is possible that the courts will take a different approach where the applicant has been granted *locus standi*.

The decision in *Berkeley* also raises questions regarding excessive requests by decision-making bodies for further information on the EIS.

### 7.4.6 Qualified consents

As noted above, outline planning permission is not permissible where an EIS is required for the reason that an outline application would not contain sufficient details to enable the likely significant effects on the environment to be described and to then identify the requisite mitigation measures. Similar concerns arise regarding 'qualified consents', ie consents which leave certain matters to be addressed at a later stage. A common example is a planning permission which contains conditions that certain matters, such as landscaping or wastewater treatment, must be the subject of future agreement with the planning authority. The leading case in this area is *Boland v An Bord Pleanála* [1996] 3 IR 435. The courts are of the view that some degree of flexibility must be left to developers engaged in a complex development. The extent to which flexibility is permissible in a planning permission is largely a matter of degree. These types of condition raise concerns regarding public participation requirements and the abdication by the authorities of their responsibilities (and particularly of the Board if it remits matters to be decided between the developer and the planning authority). However, they also raise questions regarding compliance with the EIA Directive.

In *McNamara v An Bord Pleanála* [1995] 2 ILRM 125, the High Court held that substantial grounds for granting leave to apply for judicial review included the fact that a condition in the planning permission required the large-scale excavation of sand and gravel below the waterline. An EIA may have been required for this development and the planning authority should have required further information from the developer on the environmental effects of this condition. Similarly, in *Houlihan v An Bord Pleanála* (unreported, 4 October 1993, High Court, Murphy J), the High Court held that most of the conditions requiring future agreement were valid as they concerned matters of detail. However, it held that the Board had improperly abdicated its responsibilities by imposing a condition which required the effluent discharge to be re-routed in an easterly direction in a manner to be agreed with the planning authority. The Board should at least have prescribed that the main should be re-routed along a wide but defined pathway with the particular route to be agreed with the planning authority.

A recent decision of the English courts goes much farther than this. In *R v Cornwall County Council ex p Hardy* [2000] Env LR 25, ecological surveys revealed the possible existence of a habitat for bats. The planning authority considered that the development did not raise any significant nature conservation issues and granted planning permission. However, the permission was subject to conditions prohibiting the commencement of the development until additional surveys had been carried out and, if such habitats existed, the approval of mitigatory measures. The High Court considered that the planning authority could not rationally have decided that nature conservation aspects did not amount to significant adverse effects until it had the results of the surveys. This information should have been included in the EIS, otherwise the authority could not comply with the EIA Regulations. The authority must have all the information it needs to assess the likely significant effects of the project before it reaches its decision.

Professor Scannell submits that it is permissible to impose conditions reserving matters for future approval or agreement, provided the reserved matters deal with the proposed development, the likely significant impacts of which are capable of being assessed at the initial consent stage. As was the case in *Hardy*, the developer can do this by providing a worst case scenario. The planning authority can then impose conditions requiring that these effects be mitigated in the event that the worst case scenario occurs.

### 7.4.7 Subsequent modifications

Paragraph 13 of Annex II to the Directive includes:

> Projects which involve any change or extension of projects listed in Annex I or Annex II already authorised, executed or in the process of being executed, which may have significant effects on the environment.

So projects which may already have been the subject of an EIA will require a further EIA if they have been modified in a manner which is likely to have significant effects on the environment. See *Commission v Germany* [1995] ECR I-02189, where the ECJ held that a project which comes within Annex I must

undergo an EIA irrespective of whether it is a separate project, will be added to a pre-existing project or even if it has close functional links with the pre-existing project. A project which comes within Annex I cannot come within the category of 'modifications to development projects, included in Annex I' mentioned in paragraph 12 of Annex II for which an optional assessment is provided. The EIA Directive will be expressly amended to incorporate the ECJ's decision by adding a new class of projects to Annex I to include:

> any changes to or extension of projects listed in this Annex where such a change or extension in itself meets the appropriate criteria or threshold set out in this Annex.

As noted above, Member States must determine on a case-by-case basis and/or on the basis of thresholds or other criteria whether or not an Annex II project should be subject to EIA. The 2001 Regulations (paragraph 13, Part 2, Schedule 5, 2001 Regulations) require an EIA for any change or extension of development which would:

(a) result in the development being of a class listed in Part 1 or paragraphs 1 to 12 of Part 2 of Schedule 5; and

(b) result in an increase in size greater than 25% or an amount equal to 50% of the appropriate threshold,

whichever is the greater.

It is questionable whether the thresholds have been set too high. In addition, it does not appear to cover modifications to a development which was already in a class listed in Schedule 5.

Modifications to road development which have already been approved by the Minister, now the Board, under the Roads Acts have given rise to some challenges. As noted above, certain road development is subject to a separate regime under the Roads Act. Unlike the planning regulations, the Roads Acts do not contain any express provisions regarding modifications to road development post statutory approval.

In the decision of *O'Connell v O'Connell* noted above, the applicant sought to argue that the EIS was inadequate on the basis that it did not consider the effects of a subsequent omission of a 1 km stretch of road. The High Court refused to amend the applicant's grounds for judicial review in this regard holding that the EIS covered the effects of such an omission. This case is not, strictly speaking, a case of modification post approval (as the scheme was modified on the last day of the oral hearing). However, it raises similar issues regarding the adequacy of the EIA.

The development of the M50 through an archaeological site at Carrickmines also raised these issues. The Minister approved the road development in 1998. In 2001, subsequent modifications were proposed in order to preserve more of the site. An application was made to the Board requesting a further EIS under the Roads Acts in respect of these modifications. The Board refused to direct the road authority to prepare a further EIS as the modifications:

(a) did not significantly alter the proposed development from that previously approved and that the development remained in essence the same as that for which approval had previously been obtained; and

(b) would not of themselves have significant adverse effects on the environment and accordingly do not comprise a project specified at paragraph 13 of Annex II of the EIA Directive.

In *DeFreitas Waddington v An Bord Pleanála* (unreported, 21 December 2000, High Court, Butler J) where the applicant sought judicial review of the Board's decision to grant permission for a 60 m riverside quay extension which was adjacent to a Special Protection Area (SPA). The High Court held that the Board had already conducted an EIA for the previous development of the quay and in any event was entitled to conclude that that the proposed extension was not 'likely to have a significant effect' on the site under Regulation 27 of the European Communities (Natural Habitats) Regulations 1997. Accordingly, leave to apply for judicial review was refused.

## 7.5 The ECJ and the Directive

There is extensive European case law on the EIA Directive. Unfortunately it is not within the scope of this book to consider this in detail. However, the following are some important points to note:

(a) Individuals may invoke the obligations imposed on Member States by the EIA Directive in proceedings before the national courts to consider whether the legislative or administrative authorities have remained within the limits of their discretion, as set out in the Directive. See *Luxembourg v Linster* [2000] ECR I-06917; *WWF and Others v Autonome Provinz Bozen* [1999] ECR I-05613; and *Kraaijeveld* [1996] ECR I-054030.

(b) Individuals can call on the national courts to set aside national rules or measures incompatible with the provisions of the Directive. As noted by Aine Ryall, it appears that the national court are also obliged to quash a planning decision taken in breach of the requirements of the Directive. However, this point is not settled. The ECJ in its case law has referred to national 'provisions', 'rules' and 'measures' that must be set aside, rather than expressly stating that individual planning decisions taken in breach of the Directive must be quashed. However, Ryall submits that the ECJ's ruling in *Kraaijeveld* is sufficiently broad to be interpreted as requiring national courts to quash such decisions.

(c) Member States cannot exclude, from the outset and in their entirety, from the EIA procedure certain classes of Annex II projects or specific projects unless the specific project, or those classes of projects 'in their entirety' could be regarded, on the basis of a comprehensive assessment, as not being likely to have significant effects on the environment (the *Bozen* case).

(d) Member States are entitled to use an assessment procedure other than the procedure introduced by the Directive provided that it satisfies the requirements of Art 3 and Arts 5 to 10 of the Directive, including the public participation requirements laid down in Art 6 (the *Bozen* case).

## 7.6 New developments

### 7.6.1 Strategic environmental impact assessment

The EIA Directive discussed above requires an environmental assessment of certain projects. Directive 2001/42/EC on the assessment of certain plans and programmes on the environment, as its name suggests, requires that certain plans and programmes, which provide a framework for the development consent of projects, be assessed for their environmental effects. (Plans and programmes are defined as plans and programmes, including those co-financed by the European Community, as well as any modifications to them, which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and which are required by legislative, regulatory or administrative provisions.) This is known as strategic environmental assessment (SEA) and this Directive is often referred to as the SEA Directive.

The SEA Directive was adopted on 21 July 2001 and must be transposed by 21 July 2004. The essential objective of the SEA Directive is the same: to ensure that the environmental effects of plans and programmes are taken into consideration during their preparation and before their adoption. The SEA Directive is also of a procedural nature.

#### *7.6.1.1 Scope of the SEA Directive: Art 3*

Under the SEA Directive, an environmental assessment must be carried out for all plans and programmes which:

(a) are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annex I and II to the EIA Directive; or

(b) in view of the likely effect on sites, have been determined to require an assessment under Arts 6 or 7 of the Habitats Directive 92/43/EEC.

However, these types of plans and programmes which determine the use of small areas at local level and minor modifications to these plans and programmes will only require an environmental assessment where Member States determine that they are likely to have significant environmental effects. Similarly, any other types of plans and programmes, which set the framework for development consent of projects, will only require an assessment if they are likely to have significant effects on the environment. Member States must determine whether these plans and programmes are likely to have significant environmental effects on a case-by-case basis and/or by specifying certain types (taking into account the criteria set out in Annex II).

The SEA Directive does not apply to certain plans and programmes eg those whose sole purpose is to serve national defence or civil emergency.

#### 7.6.1.2 Environmental assessment: Arts 4 to 9

The requirements of the SEA Directive must be integrated into existing procedures or into procedures established to comply with the Directive. The environmental assessment must be carried out before the adoption of the plan or programme and is defined in Art 2(b) as:

> the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making and the provision of information on the decision in accordance with Arts 4 to 9.

This definition neatly summarises the requirements of the SEA Directive. An environmental report must be prepared in which the likely significant effects on the environment and reasonable alternatives are identified and evaluated. The information which the report must contain is set out in Annex I. This includes *inter alia* the contents of the plan or programme and its main objectives, any relevant existing environmental problems, relevant environmental protection objectives, the likely environmental effects and mitigation measures. Like the EIA Directive, the report must also include a non-technical summary of the information. The public, certain authorities by virtue of their specific environmental responsibilities and affected Member States must be consulted. Their views and the environmental report must be taken into account during the preparation of the plan or programme and before its adoption.

An environmental assessment carried out under the SEA Directive shall be without prejudice to any requirements under the EIA Directive and any other Community law requirements. However, Member States may provide for co-ordinated or joint procedures for plans and programmes which require an environmental assessment under both the SEA Directive and other Community legislation (Art 11).

#### 7.6.1.3 SEA in Ireland

As noted by Professor Scannell, there has been some informal SEA in Ireland already. The National Development Programme 2000–2006 and other programmes for investment in infrastructure have been subjected to eco-audits. Under the 2000 Act, development plans, local area action plans and regional planning guidelines must also contain information on the likely effects on the environment of implementing the plan.

### 7.6.2 Public participation and access to information on the environment

In May 2003, the Council adopted Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending Council Directives 85/337/EEC and 96/61/EC. This Directive amends the EIA Directive in order to comply with the Community's obligations arising under the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (otherwise known as the Aarhus Convention). This Directive still has to be formally approved and will come into effect two years

from the date of its publication in the Official Journal. The text of the approved Directive is published as OJ L156/17, 25/6/03.

Current information indicates that the new Directive contains the main elements of the Commission's proposal. This amends Art 6 of the EIA Directive to ensure fuller public participation in the EIA procedure. Article 6 previously just provided that the information gathered under Art 5 had to be made available to the public within a reasonable time in order to give the public concerned the opportunity to express an opinion before the development consent was granted. Article 6, as amended, should ensure greater public participation as it specifies that the public be given an early and effective opportunity to participate in the development consent procedure and that it be informed, whether by public notices or other means, of certain specified information. The public concerned must then be entitled to express comments and opinions to the competent authority before it reaches its decision.

The Commission proposal also inserts a new Art 10(a) which provides that Member States must ensure that the public concerned has access to a review procedure before the courts or other body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of the EIA Directive. This procedure must be expeditious and must not be prohibitively expensive. Irish legislation would already appear to comply with these amendments regarding public participation and the availability of a review procedure.

The Council has also adopted a new Directive 2003/4/EC on public access to environmental information. This Directive must be implemented by 14 February 2005 and will replace the current Directive 90/313/EEC on the Freedom of Access to Information on the Environment. This Directive also seeks to ensure compliance with the Community's obligations under the Aarhus Convention regarding access to environmental information. The objectives of the Directive are to guarantee the right of access to environmental information held by or for public authorities and to ensure that environmental information is progressively made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination to the public of environmental information (Art 1). These Directives therefore complement the EIA and SEA Directives.

CHAPTER 8

# WATER POLLUTION

*John Darby*

## 8.1 Introduction

This chapter examines the legislation concerning water pollution in Ireland.

## 8.2 Local Government (Water Pollution) Act 1977

### 8.2.1 Introduction to the Act

The Local Government (Water Pollution) Act 1977 (the Act) provides for the prevention of water pollution in Ireland.

### 8.2.2 Offence to cause or permit polluting matter to enter waters

Section 3(1) makes it an offence for a person to cause or permit any polluting matter to enter waters.

### 8.2.3 Definition of 'polluting matter'

'Polluting matter' is defined in s 1 of the Act as including:

> any poisonous or noxious matter, and any substance (including any explosive, liquid or gas), the entry or discharge of which into any waters is liable to render those or any other waters poisonous or injurious to fish, spawning grounds or the food of any fish, or to injure fish in their value as human food, or to impair the usefulness of the bed and soil of any waters as spawning grounds or their capacity to produce the food of fish or to render such waters harmful or detrimental to public health or to domestic, commercial, industrial, agricultural or recreational uses.

### 8.2.4 Definition of 'waters'

Section 1 of the Act also provides the definition of 'waters', which are defined as including:

(a) any (or any part of any) river, stream, lake, canal, reservoir, aquifer, pond, watercourse or other inland waters, whether natural or artificial,

(b) any tidal waters, and

(c) where the context permits, any beach, river bank and salt marsh or other area which is contiguous to anything mentioned in paragraph (a) or (b), and the channel or bed of anything mentioned in paragraph (a) which is for the time being dry,

but does not include a sewer.

### 8.2.5 Definition of 'sewer'

'Sewer' is defined in s 1 of the Act, as substituted by s 2 of the Local Government (Water Pollution) (Amendment) Act 1990 (the 1990 Act), as being:

> a sewer within the meaning of the Local Government (Sanitary Services) Acts, 1878 to 1964, that is vested in or controlled by a sanitary authority and includes a sewage treatment works, and a sewage disposal works, that is vested in or controlled by a sanitary authority.

### 8.2.6 Definition of 'aquifer'

'Aquifer' is defined in s 1 of the Act, as substituted by s 2 of the 1990 Act, as being:

> any stratum or combination of strata that stores or transmits groundwater.

### 8.2.7 Defence to a charge of committing an offence under s 3(1)

Section 3(3), as substituted by s 3(1)(a) of the 1990 Act, provides, however, that it is a good defence to a charge of committing an offence under s 3(1) of the Act for the accused to prove that he took all reasonable care to prevent the entry of any polluting matter into any waters to which the charge relates by providing, maintaining, using, operating and supervising facilities, or by employing practices or methods of operation that were suitable for the purpose of such prevention.

### 8.2.8 Prosecution for an offence under s 3(1) of the Act

Section 27(b) of the 1990 Act (which replaces s 3(4) of the Act) provides that a prosecution for a summary offence under s 3(1) of the Act may be brought by a local authority, or regional board, in or adjoining whose area any of the waters concerned are situated or any other person affected.

### 8.2.9 Discharges which are not in breach of s 3(1) of the Act

Section 3(5) of the Act, as substituted by s 3(1)(b) of the 1990 Act provides that certain discharges which are controlled by other provisions of the Act or by other enactments are not offences within s 3(1) of the Act.

These discharges include, *inter alia*, discharges of trade effluent or sewage effluent made under and in accordance with a licence granted under s 4 of the Act or in accordance with any applicable regulations, the entry of any matter

from vessels to tidal waters or discharges authorised by the Foreshore Act 1933, the Harbours Act 1946 or the Fisheries Acts 1959 to 1997.

### 8.2.10 Offence to discharge effluent to waters without a licence

Section 4(1) of the Act controls the discharge of any trade effluent or sewage effluent. It provides that a person shall not discharge, or cause or permit the discharge of, any trade effluent or sewage effluent to any waters except under and in accordance with a licence granted, in the case of a discharge to waters, by the local authority of the area in which the waters into which the effluent is discharged are located, or, in any other case, by the local authority in whose area any premises, works, apparatus, plant or drainage pipe from which the effluent is discharged are situated.

According to s 4(2), s 4(1) does not apply to discharges to tidal waters from vessels or marine structures, or to discharges from a sewer, or discharges exempted by regulations made under s 4(10) of the Act.

### 8.2.11 Local authority may grant a licence

Section 4(3) of the Act provides that a local authority may grant or refuse to grant a licence under s 4, or may grant it subject to conditions. In deciding whether or not to grant a licence the local authority must have regard to the objectives contained in any relevant water quality management plan made under s 15 of the Act.

### 8.2.12 Compliance with water quality standards

By virtue of s 4(4) of the Act, a local authority must not grant a licence in respect of the discharge of an effluent which would not comply with, or would result in the waters to which the discharge is made not complying with, any relevant water quality standard prescribed under s 26 of the of the Act.

### 8.2.13 Types of conditions which may be attached to a licence

Section 4(5) of the Act lists the types of conditions which may be attached to a licence. The conditions may deal with such matters as the nature, composition, rate, volume, method of treatment and location of a discharge, the periods during which a discharge may or may not be made, the provision and maintenance of meters, gauges and other apparatus, the keeping of records of discharges and the prevention of a discharge in the event of breakdown in plant. A local authority may also attach a condition requiring the payment of a charge or charges to the local authority.

### 8.2.14 Lapse of a licence granted under s 4(1) of the Act

If a licence has been granted under s 4(1) for a certain type of discharge but no such discharge has been made, or has ceased, for three years, s 4(7) provides that the licence shall cease to have effect.

### 8.2.15 Prosecution for an offence under s 4(1) of the Act

Section 4(9), which listed the parties permitted to bring a prosecution for an offence under s 4 of the Act, was repealed by s 30 of the 1990 Act. In its place, s 27(b) of the 1990 Act provides that a prosecution for a summary offence under s 4 of the Act may be brought by a local authority, or regional board, in whose area or adjoining whose area any of the waters concerned are situated, or any other person affected.

### 8.2.16 Defence to a prosecution for an offence under other enactments

Section 4(11) of the Act states that it shall be a good defence to a prosecution for an offence under any other enactment that the act constituting the alleged offence is authorised by a licence under s 4 of the Act.

Section 4(12) provides that the fact that a person has a licence under s 4 does not mean that he is entitled to discharge trade effluent or sewage effluent to waters solely by reason of such licence without regard to such obligations which he may have to others.

### 8.2.17 Licensing of existing discharges

Section 5 of the Act deals with the licensing of existing discharges of trade effluent or sewage effluent which were being made before, and continued to be made after, the Act came into force. It provides that once a licence application is made for an existing discharge before a date to be prescribed by regulations and any information required by any regulations in relation to a licence is furnished, the applicant may continue to make discharges without being in breach of s 4(1) until such time as the local authority grants or refuses a licence.

### 8.2.18 Review of licences granted under s 4(1) of the Act

Section 7(1) of the Act provides that licences issued under s 4(1) may be reviewed by a local authority at intervals of not less than three years from the date of granting of the licence, or the date of its last review, or at any time with the consent of the person making, causing or permitting the discharge.

Sections 7(2) and 7(3) of the Act have been amended by s 5 of the 1990 Act which substitutes new s 7(2) and (3) into the Act and inserts a new s 7(2A) into the Act. Section 7(2), as substituted, provides that, notwithstanding any other provision of the Act or any condition in a licence, the licence may be reviewed at any time by the local authority that granted it if any of the following occurs:

(a) the local authority has reasonable grounds for believing that the discharge authorised by the licence is, or is likely to be, injurious to public health or renders, or is likely to render, the waters concerned unfit for use for domestic, commercial, industrial, fishery (including fish-farming), agricultural or recreational uses;

(b) there has been a material change in relation to the nature or volume of the discharge;

(c) there has been a material change in relation to the waters to which the discharge is made;
(d) further information has become available since the date of granting of the licence relating to polluting matter present in the discharge concerned, or relating to the effects of such matter; or
(e) the licensee applies to the local authority concerned to review the licence.

### 8.2.19 Local authority action following a review of a licence

Section 7(3) of the Act, as substituted, provides that on completion of a review under s 7, a local authority may amend or delete any condition of the licence or may attach conditions or further conditions to it or may revoke it. Where it proposes to exercise any of these powers it must do so as soon as may be after the completion of the relevant review.

### 8.2.20 Appeals

A new s 8 of the Act has been substituted by s 6(1) of the 1990 Act. Section 8(1)(a), as substituted, gives any person a right of appeal to An Bord Pleanála in relation to the grant, refusal to grant or revocation of a licence by a local authority under s 4. An appeal may also be made in relation to the attachment of conditions or additional conditions to such a licence or the amendment or deletion of any such condition. An appeal under s 8(1) must be made before the expiration of such period as may be prescribed by regulations.

### 8.2.21 Date of effectiveness of a local authority's decision

Section 8(1)(b) of the Act provides that a decision of a local authority in relation to the grant, refusal to grant, or revocation of a licence, or in relation to the conditions attached to such a licence, shall have effect, where no appeal is brought against it, on the expiration of the period prescribed by regulations.

If an appeal is brought against such a decision and the decision is not set aside by the final determination of the appeal, the decision will have effect in accordance with such final determination. Where an appeal is brought against such a decision but is withdrawn before the final determination of the appeal, the decision shall have effect on such withdrawal if the period prescribed by regulations has expired. If the period has not expired, the decision shall have effect on its expiry.

### 8.2.22 Decision of An Bord Pleanála

Section 8(2) of the Act provides that An Bord Pleanála, after consideration of an appeal under s 8, shall (as it thinks proper) allow or refuse an appeal and may give any direction that it considers appropriate to the local authority concerned. This may include a direction that a specified condition be attached to the licence concerned or be amended or deleted. A local authority must comply with any such direction.

### 8.2.23 Registers of licences and abstractions

Section 9 of the Act obliges a local authority to establish and keep a register of all licences granted by it under s 4 and also to keep a register of abstractions from waters in its area. Each sanitary authority must also keep a register of all licences granted by it under s 16 of the Act.

All registers must be kept at the offices of the local authority or sanitary authority and must be open to inspection by any person at all reasonable times. Any person is also entitled to obtain a copy of any entry in a register on payment of a prescribed fee.

### 8.2.24 Court order to terminate discharge, remedy effects and pay costs

Section 7 of the 1990 Act has substituted a new s 10 of the Act. Under s 10(1), as substituted, where, on the application of any person to the appropriate court, whether or not that person has an interest in the waters concerned, that court is satisfied that another person either:

(a) is causing or permitting, or has caused or permitted, polluting matter to enter waters and the entry is or was not one to which s 3(5) applies and is or was not authorised by a licence under s 171 of the Fisheries (Consolidation) Act 1959 (the Fisheries Act 1959); or

(b) is discharging or causing or permitting to be discharged, or has discharged or caused or permitted to be discharged, trade effluent or sewage effluent to waters and the discharge is or was not one to which s 4(2) of the Act applies and is or was not one authorised by a licence under that s or s 171 of the Fisheries Act 1959, the court may order that other person to do any one or more of the following:

- to terminate the entry or discharge within a specified period; or
- to mitigate or remedy any effects of the entry or discharge in such manner and within such period as may be specified; or
- to pay to the applicant or other specified person a specified amount to defray all or part of the costs incurred by the applicant or such specified person in investigating, mitigating or remedying the effects of the entry or discharge concerned.

### 8.2.25 Application for an order under s 10(1) of the Act

An application under s 10(1) of the Act, as substituted, may, in any case, be made to the High Court. If the estimated cost of complying with the order to which the application relates comes within the jurisdiction of the District Court or Circuit Court it may, alternatively, be made to the relevant court. If such an application is made and during the hearing of the action the court is of the opinion that the estimated cost will exceed the jurisdiction of the court, it may, if it thinks fit, transfer the application to the appropriate court.

An application under s 10(1) of the Act shall be brought in a summary manner and a court may, if it thinks fit, make such interim or interlocutory order as it considers appropriate.

### 8.2.26 Offence not to comply with an order made under s 10(1) of the Act

If a person does not comply with an order made under s 10(1), he shall be guilty of an offence under s 10(2).

### 8.2.27 Defendant must be heard by the court before an order is made

Section 10(3) of the Act, as substituted, provides that an order shall not be made by a court under s 10(1) unless the person named in the order has been given an opportunity of being heard by the court in proceedings relating to an application for the order.

### 8.2.28 Local authority may take action specified in order and recover costs

Section 10(4) of the Act, as substituted, gives the local authority, or the regional board, in whose area the waters concerned are situated, the power, where a person does not comply with an order under s 10(1), to take any steps specified in the order to remedy or mitigate the effects of the entry or discharge. The costs of taking such steps shall be recoverable by the local authority or regional board, as the case may be, from the person in respect of whom the order was made as a simple contract debt in any court of competent jurisdiction.

### 8.2.29 Local authority may serve a notice requiring cessation of discharge

Section 10(5) of the Act as substituted, empowers a local authority to require, by notice in writing, the cessation of the entry or discharge of polluting matter, or trade or sewage effluent, to waters. Such a notice may be served on a person who is causing or permitting the entry of polluting matter, or trade or sewage effluent, to waters where s 3(5) or s 4(2) of the Act does not apply to such entry or discharge and the entry or discharge is not under and in accordance with a licence under s 171 of the Fisheries Act 1959.

### 8.2.30 Contents of a notice served under s 10(5) of the Act

According to s 10(5) of the Act, as substituted, the notice shall require the cesser of the entry or discharge within such period as may be specified in the notice and shall require the mitigation or remedying of any effects of the entry or discharge within such period and in such manner as may be specified.

If the notice is not complied with within the specified period, s 10(6), as substituted, provides that the local authority may carry out the works itself and recover the cost from the person on whom the notice was served as a simple contract debt in any court of competent jurisdiction.

### 8.2.31 Jurisdiction of courts in making an order under s 10(1) of the Act

Section 10(7) of the Act, as substituted, deals with the jurisdiction of the District Court or Circuit Court in relation to the making of orders under s 10(1). Where an order is sought under s 10(1), as substituted, an application must be made to the judge of the District Court or Circuit Court, as the case may be, for the district or circuit in which the waters concerned, or the land or other premises from which the entry or discharge concerned takes place, are situated.

### 8.2.32 Action which may be specified in a notice served under s 10(5) of the Act

Section 10(8) of the Act, as substituted, specifies the steps which an order made, or notice served, under s 10(1) or s 10(5), as substituted, may require to be taken. These include the replacement of fish stocks, the restoration of spawning grounds, the removal of polluting matter from waters and the treatment of affected waters so as to mitigate or remedy the effects of the entry or discharge concerned.

### 8.2.33 Notice may be served without prosecution under s 3 or s 4 of the Act

By virtue of s 10(9), as substituted, an application may be made under s 10(1), as substituted, and a notice may be served under s 10(5) whether or not there has been a prosecution under s 3 or s 4.

### 8.2.34 Application for an order of the High Court under s 11(1) of the Act

The High Court may make an order under s 11 if it is satisfied that:

(a) polluting matter is being, has been or is likely to be caused or permitted to enter waters and the entry is not one to which s 3(5)178 of the Act applies or would apply and is not under and in accordance with a licence under s 171 of the Fisheries Act 1959;

(b) trade or sewage effluent is being, has been, or is likely to be, discharged or caused or permitted to be discharged to waters and the discharge is not one to which s 4(2)180 of the Act applies or would apply and is not under and in accordance with a licence under that section or s 171 of the Fisheries Act 1959; or

(c) polluting matter has escaped, is escaping or is likely to escape accidentally from premises to waters.

Such an order may:

(a) prohibit any person from causing or permitting, or continuing to cause or permit, the entry of polluting matter, or the discharge of trade or sewage effluent, to the waters;

(b) require the carrying out of specified measures by any person having the custody or control of polluting matter or trade or sewage effluent to prevent any such entry or discharge, or its continuance or recurrence, or refrain from or cease doing any specified act or making any specified omission;

(c) for the purposes of preventing the escape of polluting matter from premises, require the carrying out by the occupier of any such premises of specified measures or to do, refrain from, or cease doing any specified act or making any specified omission.

### 8.2.35 Application may be made in the absence of a prosecution under s 3 or s 4 of the Act

Section 11(1A) of the Act provides that an application may be brought under s 11(1) notwithstanding that a prosecution under s 3 or s 4 in respect of the relevant entry or discharge has not been brought.

### 8.2.36 Notice served on person having custody or control of polluting matter

Under s 12(1) of the Act, a local authority may serve a notice in writing on any person having the custody or control of any polluting matter on premises in its area, where it appears that it is necessary to do so in order to prevent or control pollution of waters.

Section 12(2) states that the notice shall:

(a) specify the measures which appear to the local authority to be necessary to prevent such matter from entering waters; and

(b) direct the person on whom the notice is served to take the measures specified in the notice within a stated period.

Section 9 of the 1990 Act inserts an additional s 12(2A) into the Act. The new s 12(2A) provides that a notice under s 12(1) of the Act may, either in addition to, or in lieu of, complying with s 12(2) of the Act:

(a) regulate or restrict in such manner and for such period as may be specified in the notice the carrying on of any activity, practice or use of premises that, in the opinion of the local authority concerned, could result in the entry of polluting matter to waters; and

(b) require the provision, re-location or alteration of facilities for the collection or storage of polluting matter.

### 8.2.37 Person served may make written representations to the local authority

Section 9 of the 1990 Act also substitutes a new s 12(3) into the Act. This provides that a person on whom a notice under s 12(1) of the Act is served may make representations in writing to the local authority regarding the terms of the notice within such period as may be specified in the notice and the local authority may, after consideration of any representations, confirm, amend or revoke the notice and shall inform the person in question of its decision.

### 8.2.38 Power of local authority to take action to prevent and abate pollution

A new s 13 of the Act has been substituted by s 10 of the 1990 Act. Section 13(1), as substituted, gives a local authority or a sanitary authority power to prevent and abate pollution. The local authority or sanitary authority may take such measures as it considers necessary for the purpose of:

(a) preventing the entry of polluting matter to any waters, or to any drain or sewer provided solely for the reception or disposal of storm water in its area;

(b) removing polluting matter from any such waters, drain or sewer;

(c) preventing polluting matter in waters outside its area from affecting such area or any seashore (within the meaning of the Foreshore Act 1933) adjoining such area; or

(d) mitigating or remedying in relation to its area or any such seashore the effects of any polluting matter in any such waters, drain or sewer.

### 8.2.39 Measures which may be taken under s 13(1) of the Act

The measures taken by a local authority or sanitary authority under s 13(1) may include the giving of assistance, whether financial or otherwise and the procuring of the taking of measures by others. The local authority or sanitary authority may also dispose of any such polluting matter in such manner as it thinks fit.

### 8.2.40 Recovery of costs by a local authority or sanitary authority

Section 13(2) of the Act, as amended, states that where any measures taken by a local authority or a sanitary authority under s 13(1) were necessitated by the acts or omissions of a person which that person ought reasonably to have foreseen would or might necessitate the taking of the measures by the relevant authority, the authority may recover the expenditure incurred in taking such measures from the person as a simple contract debt.

### 8.2.41 Notification of an accidental discharge

Under s 14, notification of any accidental discharge, spillage or deposit of any polluting matter which enters, or is likely to enter, any waters or a sewer must be made as soon as practicable after the occurrence of the discharge, spillage or deposit by the person responsible to the local authority in whose area the discharge, spillage or deposit occurs or, in the case of a sewer, to the sanitary authority in which the sewer is vested or by which it is controlled. It is an offence to fail to make such notification.

### 8.2.42 Licence to discharge trade effluent or other matter to a sewer

Section 16(1) of the Act provides that a person, other than a sanitary authority, shall not discharge or cause or permit the discharge of any trade effluent or

other matter (other than domestic sewage or storm water) to a sewer, except under and in accordance with a licence granted by the sanitary authority in which the sewer is vested or by which it is controlled.

### 8.2.43 Procedure for granting and reviewing a licence granted under s 16(1) of the Act

The provisions governing the granting, reviewing and duration of a licence granted under s 16(1) are broadly similar to those under s 4(1). However, the procedure laid down by regulations to be followed by an applicant for a licence under s 16(1) and by the sanitary authority in considering such an application contains a number of differences from that laid down in respect of a licence under s 4(1). Among the most relevant of these differences are the following:

(a) an applicant for a licence under s 4(1) must publish notice of his intention to apply for a licence in a newspaper circulating in the local authority's area;

(b) the application for a licence under s 4(1) and all relevant plans and other particulars submitted by the applicant to the local authority must be made available for public inspection at the local authority's offices but no provision is made for public inspection of materials relating to an application pursuant to s 16(1) of the Act;

(c) only the applicant, the occupier of premises for which a discharge to which a licence under s 16(1) relates and the sanitary authority which granted, refused or reviewed such a licence may appeal a decision on the licence, whereas any person may appeal against a decision by a local authority relating to a licence granted pursuant to s 4(1) of the Act.

### 8.2.44 Power of a sanitary authority to grant a licence under s 16(1) of the Act

Section 16(2) of the Act gives a sanitary authority power to refuse to grant a licence under s 16(1) of the Act, or to grant such a licence subject to specified conditions. In considering whether or not to grant a licence, a sanitary authority is obliged to consider the objectives stated in any relevant water quality management plan made under s 15 of the Act. In addition, s 16(3) prohibits the granting of a licence in respect of the discharge of a trade effluent which would not comply with any water quality standards made under s 26(1) of the Act.

### 8.2.45 Conditions attached to a licence under s 16(1) of the Act

Section 16(4)(a) provides that any conditions attached to a licence granted under s 16(1) may relate (but are not limited) to such matters as the nature, composition, temperature, volume, method of treatment and location of a discharge and the times during which a discharge may or may not be made.

Conditions may also provide for the provision and maintenance of meters, gauges and other apparatus and require the taking of samples and the keeping of records. A date may also be specified by which conditions must be complied with.

A new s 16(4)(b) has been substituted by s 12 of the 1990 Act. This gives the sanitary authority power to attach a condition to a licence requiring the licence-holder to pay the sanitary authority such amount as may be specified by it, having regard to expenditure incurred by it in monitoring, treating and disposing of discharges to sewers in its area.

Section 16(5) provides that any condition attached to a licence granted under s 16(1) of the Act shall be binding on any person discharging, or causing or permitting the discharge of, trade effluent or other matter to which the licence relates.

### 8.2.46 Lapse of a licence granted under s 16(1) of the Act

If after three years from the date on which such a licence is granted no discharge of the type authorised by that licence has been made, or where such a discharge has ceased for a period of three years, s 16(6) of the Act stipulates that the licence shall cease to have effect.

### 8.2.47 Offence to discharge to a drain or sewer provided for storm water

Section 16(7) of the Act makes it an offence for a person to permit or cause the entry of any polluting matter (including sewage) to any drain or sewer provided solely for the reception or disposal of storm water.

### 8.2.48 Prosecution of offences under s 16 of the Act

Section 16(9), which provided for the prosecution of offences under s 16 by any sanitary authority, has been repealed by s 30 of the 1990 Act and, in its place, s 27(b) of the 1990 Act now provides that a summary offence under s 16 of the Act may only be prosecuted by the sanitary authority in which the sewer concerned is vested, or by which it is controlled, or in whose area it is situated.

### 8.2.49 Defence to a prosecution under other enactments

According to s 16(11) of the Act it shall be a good defence to a prosecution under any other enactment that the act constituting the alleged offence is authorised by a licence under s 16.

However, s 16(12) provides that a person shall not be entitled solely by reason of a licence under s 16 to make, cause or permit a discharge to a sewer.

### 8.2.50 Local authority power to require cessation of discharge in breach of s 16 of the Act

A sanitary authority is given power by s 16(13) to serve a notice in writing on any person making, causing or permitting a discharge or entry in breach of s 16(1) or 16(7), requiring the cessation of the breach within such period as may be specified in the notice. The notice may also require the mitigation or remedying of any effects of the breach within a specified period and may specify the actual steps to be taken.

### 8.2.51 Offence not to comply with a notice served under s 16(13) of the Act

Section 16(13) has been strengthened by the insertion by s 12(b) of the 1990 Act of a new s 16(13A) into the Act. Section 16(13A), as inserted, makes it an offence not to comply with a notice served under s 16(13).

### 8.2.52 Sanitary authority may take steps specified in the notice

In addition, where a person does not comply with a notice served under s 16(13) of the Act within the period specified in the notice, s 16(14) provides that the sanitary authority which served the notice may take any steps it considers necessary to prevent the discharge or entry, or to mitigate or remedy any effects of the breach. It may recover the cost of such steps from the person on whom the notice is served as a simple contract debt in a court of competent jurisdiction on proving to the satisfaction of the court that that person is responsible for the breach.

### 8.2.53 Review of a licence granted under s 16 of the Act

Section 17, as amended by s 13 of the 1990 Act, deals with the power and, in certain cases, the obligation of a sanitary authority to review a licence granted by it under s 16(1).

The circumstances in which the sanitary authority may, and those in which it must, review a licence granted under s 16 are in terms identical to those specified in s 7 of the Act, as amended by s 5 of the 1990 Act, relating to licences granted under s 4(1) of the Act.

### 8.2.54 Offence to make a false or misleading statement

Section 19(3)(a) of the Act, as amended by s 24(2) of the 1990 Act, provides that a person who, on application for a licence under s 16, or on appeal under s 20, makes a statement in writing which is false or to his knowledge misleading in a material respect shall be guilty of an offence.

In addition, any licence issued to that person as a result of the application or appeal in relation to which the information was furnished shall stand revoked from the date of the conviction.

### 8.2.55 Appeals relating to a licence granted under s 16 of the Act

A new s 20 of the Act has been substituted by s 15(1) of the 1990 Act. The new s 20(1)(a), as substituted, now provides that the occupier of premises from which a discharge is made which requires a licence under s 16 may appeal to the Planning Board, within such period as may be prescribed by regulations, against the decision of the sanitary authority to revoke the licence, attach conditions to the licence, or amend or delete any such conditions.

Section 20(1), as substituted, gives a person whose application for a licence under s 16(1) has been refused by a sanitary authority a right of appeal to An Bord Pleanála within such period as may be prescribed by regulations.

### 8.2.56 Decision of An Bord Pleanála

Section 20(2) of the Act, as substituted, provides that the Planning Board, after consideration of an appeal, shall allow or refuse the appeal and may give a direction to the sanitary authority concerned, which must be complied with by that sanitary authority. Any such direction may require that a specified condition be attached to the licence concerned or be amended or deleted.

### 8.2.57 Monitoring of waters and discharges

Under s 22(1) of the Act a local authority or sanitary authority must carry out, or cause to be carried out, such monitoring of waters and discharges of trade effluents and sewage effluents and other matter to waters or to sewers, as the case may be, as it considers necessary for the performance of any of its functions under the Act.

It also may collect, or cause to be collected, such information as it considers necessary for the performance of any of its functions under the Act. Section 22(2) gives a local authority or a sanitary authority the power to provide meters, manholes or inspection chambers, or any other apparatus for any of these purposes.

### 8.2.58 Notice requiring information about activities or practices

Section 23(1) of the Act, as substituted by s 17 of the 1990 Act, provides that a local authority may serve a notice in writing on certain persons requiring them to give to the local authority in writing, within a specified period of not less than 14 days beginning on the date of the giving or serving of the notice, such details as may be so specified in relation to any such activities or practices and such other information (if any) as it may consider necessary for the purposes of these functions.

The persons on whom such a notice may be served are persons who:

(a) are abstracting water from any waters in the area of the local authority;

(b) are discharging, or causing or permitting the discharge of, trade effluent or sewage effluent or other matter to such waters;

(c) have custody or control of any polluting matter in the local authority's area; or

(d) are engaged in activities or practices that, in the opinion of the local authority, may cause or permit polluting matter to enter waters.

### 8.2.59 Notice requiring information about discharges

A similar power is given by s 23(2) of the Act, as substituted by s 17 of the 1990 Act, to a sanitary authority, for the purpose of its functions under the Act, to require a person by notice in writing who is making, causing or permitting a discharge to a sewer to provide such details of the discharge as may be specified in the notice, and any other relevant information, within a specified period of not less than 14 days beginning on the date of the giving or serving of the notice.

Section 23(3), which was also substituted by s 17 of the 1990 Act, provides that a notice served under s 23(1) or s 23(2), as substituted, may require maps, plans, drawings or photographs showing the location, nature and extent and condition of:

(a) any facilities for the collection, treatment or disposal of the effluent or other polluting matter;
(b) any other premises from which polluting matter may enter waters;
(c) any sewer,

and showing the relationship of those evidential exhibits to any waters.

Details may also be requested of the systems, methods and arrangements in use or proposed for the disposal of the effluent or other polluting matter and of the times and rates at which such disposal is effected.

#### 8.2.60 Offence to fail to give information or to give misleading information

Section 23(4) of the Act, as substituted by s 17 of the 1990 Act, provides that it is an offence to fail or refuse to comply with such a notice or to give information which, to the knowledge of the person giving it, is false or misleading in a material respect.

## 8.3 The Local Government (Water Pollution) (Amendment) Act 1990

### 8.3.1 Introduction

This Act (the 1990 Act) amends and extends the Act and the Fisheries Act 1959 (in so far as the Fisheries Act 1959 relates to water pollution).

### 8.3.2 Civil liability for pollution

Section 20 of the 1990 Act deals with civil liability for pollution. Section 20(1) provides that where trade effluent, sewage effluent or other polluting matter enters waters and causes injury, loss or damage to a person or to the property of a person, the person may recover damages. Damages may be recovered in any court of competent jurisdiction for such injury, loss or damage:

(a) from the occupier of the premises from which the effluent or matter originated unless the entry was caused by an act of God or an act or omission of a third party over whose conduct such occupier had no control, being an act or omission that such occupier could not reasonably have foreseen and guarded against; or
(b) if the entry was occasioned by an act or omission of any person that, in the opinion of the court, contravenes a provision of the Act or the 1990 Act, from that person.

### 8.3.3 Non-application of s 20(1) of the 1990 Act

Section 20(2) provides that s 20(1) does not apply to the entry of trade effluent, sewage effluent or other polluting matter to waters which is under and in accordance with a licence under s 4 of the 1977 Act or s 171 of the Fisheries Act 1959 or is exempted from the application of s 3(1) of the Act by s 3(5) of that Act.

### 8.3.4 Bye-laws relating to the carrying on of a specified activity

Under s 21(2) of the 1990 Act a local authority may make bye-laws prohibiting the carrying on of a specified activity in all or part of its area, or providing for the regulation of a specified activity, if it considers it necessary to do so for the purpose of preventing or eliminating the entry of polluted matter to waters.

The activities to which s 21 applies are those listed in s 21(1) of the 1990 Act, including any one or more of the following:

(a) the collection, storage, treatment and disposal of any polluting matter used in connection with, or arising from any operation, activity, practice or use of land or other premises carried on for the purposes of agriculture, horticulture or forestry;

(b) any activity that involves the application to land or to growing crops, or the injection into land, of any silage effluent, animal slurry, manure, fertiliser, pesticide or other polluting matter; or

(c) any other operation, activity, practice or use of land or other premises for the purposes of agriculture, horticulture or forestry.

### 8.3.5 Offence to contravene any bye-law

Section 21(3) of the 1990 Act provides that it shall be an offence to contravene or fail to comply with any bye-laws made under s 21.

### 8.3.6 Declaration that a combined drain shall become a sewer

Section 22(1) of the 1990 Act provides that a sanitary authority may declare by order that a specified combined drain shall become and be a sewer for the purposes of the Act and the 1990 Act. Whenever it does so the drain concerned shall, on commencement of the order, become and be a sewer for those purposes.

Section 22(2) of the Act requires the sanitary authority to give written notice to the owner of the drain and to the occupier of premises from which effluent is being discharged to the drain of its intention to make such an order. The owner and the occupier may, within 30 days of receipt of the notice, then make written representations to the sanitary authority in relation to the proposed order. These representations, if any, must be considered by the sanitary authority before the order is made.

### 8.3.7 Offences by bodies corporate

Under s 23 of the 1990 Act, where an offence under the Act or the 1990 Act has been committed by a body corporate and is proved to have been committed with the consent or connivance of, or is to be attributable to any neglect on the part of, a person being a director, manager, secretary or other officer of that body corporate, or a person who was purporting to act in such capacity, that person shall also be guilty of an offence.

### 8.3.8 Payment of fines to local authority, sanitary authority or regional board

Where a prosecution is brought by a local authority, sanitary authority or regional board, s 26 of the 1990 Act empowers the court, on the application of the local authority, sanitary authority or regional board concerned, to provide for payment of the fine imposed by the court to the relevant local authority, sanitary authority or regional board.

### 8.3.9 Prosecution of offences

Section 27 of the 1990 Act deals with a number of matters relating to prosecution of offences under the Act. Section 27(a) and (b) stipulate the persons who may bring prosecutions under various sections of the Act. Section 27(c) of the 1990 Act provides that a summary offence under s 21 of the 1990 Act may be prosecuted by the local authority concerned.

According to s 27(d) of the 1990 Act, summary proceedings may be commenced within a period of six months from the date on which evidence sufficient to initiate proceedings comes to the knowledge of the person prosecuting those proceedings. Proceedings may not be initiated later than five years from the date of commission of the offence.

A certificate signed by, or on behalf of, the person bringing the proceedings, setting out the date or dates on which the relevant evidence came to his knowledge would provide *prima facie* evidence of those dates, unless the contrary is shown.

### 8.3.10 Payment of costs of local authority, sanitary authority or regional board

According to s 28 of the 1990 Act where a person is convicted of an offence under the Act 1977 or the 1990 Act, or s 171 or s 172 of the Fisheries Act 1959, the court shall, unless it is satisfied that there are special and substantial reasons for not doing so, order the person to pay to any local authority, sanitary authority or regional board concerned the costs reasonably incurred by that local authority, sanitary authority or regional board in relation to the investigation, detection and prosecution of the offence, including the costs incurred in taking samples, carrying out tests and examinations and in respect of the remuneration and other expenses of employees, consultants and advisors.

## 8.4 The Sea Pollution Act 1991

### 8.4.1 Introduction

The Sea Pollution Act 1991 gives effect to the London Convention for the Prevention of Pollution from Ships 1973 (the MARPOL Convention), as amended by the London Protocol of 1978. It also gives effect to the London Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil 1973 (the Intervention Protocol). The Sea Pollution Act 1991 also repeals the Oil Pollution of the Sea Acts 1956 to 1977 and provides for other related matters.

### 8.4.2 Definitions

Section 3 of the Sea Pollution Act 1991 provides a number of definitions, the most important of which are as follows:

'Discharge' is defined for the purposes of the Sea Pollution Act in relation to oil, oily mixtures, noxious liquid substances, harmful substances, sewage or garbage or any effluent containing any of those substances as meaning:

> any release, howsoever caused, from a ship and includes any escape, disposal, spilling, leaking, pumping, emitting or emptying of any substance from a ship, but does not include
>
> (a) dumping, within the meaning of the Dumping at Sea Act 1981; or
>
> (b) the release of oil, oily mixtures, noxious liquid substances or harmful substances directly arising from the exploration exploitation and associated offshore processing of sea bed mineral resources; or
>
> (c) the release of oil, oily mixtures, noxious liquid substances, or harmful substances for the purpose of legitimate scientific research into pollution abatement or control.

'Garbage' is defined as meaning:

> all kind of victual, domestic and operational waste (excluding fresh fish and parts thereof) and any other substance generated during the normal operation of a ship and liable to be disposed of either continuously or periodically other than a substance specifically regulated by [the] Act.

'Harbour' is defined as including:

> any dock, pier, wharf, jetty, boatslip, offshore terminal, installation or place intended or used for the accommodation, berthing or anchorage or for the shipping, unshipping or transhipping of goods.

'Harmful substance' means:

> any substance which, if introduced into the sea, is liable to:
>
> (a) create hazards to human health;
>
> (b) harm living marine resources;
>
> (c) harm flora and fauna;

(d) damage amenities; or

(e) interfere with legitimate uses of the sea,

and any substance subject to control by the MARPOL Convention or prescribed under s 10 as a harmful substance and includes any such substance carried at sea, however carried.

'Inspector' is defined as:

a person being:

(a) a surveyor of ships; or

(b) a person appointed to be an inspector by warrant of the Minister for Communications and Natural Resources (the 'Minister') under s 20; or

(c) an officer holding a commissioned naval rank in the Defence Forces; or

(d) a member of the Garda Síochána.

The 'Intervention Convention' means:

the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969, done at Brussels on the 29th day of November, 1969.

The 'Intervention Protocol' means:

the Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil done at London on the 2nd day of November, 1973.

'Maritime casualty' means:

a collision of ships, stranding or other incident of navigation, or other occurrence on board a ship or external to it resulting in material damage or imminent threat of material damage to a ship or cargo.

'Master' is defined as:

the person having, for the time being, the command or charge of the ship.

'Noxious liquid substance' means:

any liquid substance which, if introduced into the sea, is liable to:

(a) create hazards to human health;

(b) harm living marine resources;

(c) harm flora and fauna;

(d) damage amenities; or

(e) interfere with legitimate uses of the sea;

and any liquid substance prescribed under s 10 as a noxious liquid substance.

'Oil' is defined as meaning:

(other than in s 26) ... petroleum in any form including crude oil, fuel oil, diesel oil, lubricating oil, sludge, oil refuse and refined products and any oil or oily mixture prescribed as such under s 10 but does not include any substance prescribed as a noxious liquid substance.

'Oily mixture' means:

> a mixture which has any oil content.

'Owner', in relation to a ship, is defined as:

> the person registered as the owner of the ship, the person who owns the ship, and, in the case of a ship which is owned by a state (including the state) and is operated by a person who in that state is registered as the ship's operator, 'owner' means the person registered as such operator.

'Pollution' is defined as including:

> when used without qualification, ... pollution by oil, by an oily mixture, by a noxious liquid substance, by a harmful substance, by sewage or by garbage.

'Sewage' means:

> (a) drainage and other wastes from any form of toilets, urinals and water closet scuppers on board a ship; or
>
> (b) drainage from medical quarters on board a ship by way of wash basins, wash tubs and scuppers located in such quarters; or
>
> (c) drainage from spaces containing live animals on board a ship; or
>
> (d) any other waste water discharged from a ship when such water is intermingled with any of the drainages specified at paragraphs (a), (b) or (c).

'Ship' is defined as:

> a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushioned vehicles, submersibles, floating craft and fixed or floating platforms and includes fixtures, fittings and equipment.

### 8.4.3 Application of the Sea Pollution Act

Section 4(1) provides that the Sea Pollution Act shall not apply to any warship or to any ship for the time being used by the government of any country for purposes other than commercial purposes.

The Minister may make regulations exempting, subject to such conditions (if any) as may be specified in the regulations, any class or classes of ships registered in the state from compliance with any provision of the Sea Pollution Act or of any of the regulations made under the Sea Pollution Act, where he is satisfied that such an exemption would not result in a mere risk of pollution.

### 8.4.4 Discharge of oil, oily mixture and related substances

Part II of the Sea Pollution Act deals with the prevention of pollution. Section 10(1) gives the Minister power to make regulations prohibiting or regulating the discharge anywhere at sea from a ship registered in the state, or the dis-

charge in the state from any ship, of any oil, oily mixture, noxious liquid substance, harmful substance, sewage or garbage. The Minister may also make regulations, pursuant to the section, governing prescribed operations on board ship relating to any such substance carried on the ship.

Section 10(3) of the Sea Pollution Act provides that regulations made under s 10 may relate to ships generally or to any class of ship, to substances generally or any description of substance and may be made subject to such conditions and such exemptions as may be prescribed.

Section 10(4) of the Sea Pollution Act gives the Minister power to provide by regulations that any prescribed substance shall be a harmful substance, a noxious liquid substance, an oil or oily mixture, sewage or garbage, for the purposes of the Sea Pollution Act.

The Minister may also, by regulations made under s 10(5) of the Sea Pollution Act, require the notification at such time and in such manner as may be prescribed, by the master or owner of a ship carrying any prescribed substance of any intent to load or unload any such substance in the state.

### 8.4.5 Offence to contravene regulations made under s 10(1) of the Sea Pollution Act

Where any regulations made under s 10 are contravened, the owner and the master of the ship in respect of which there is a contravention shall be guilty of an offence under s 10(2) of the Sea Pollution Act.

### 8.4.6 Matters not covered by regulations made under s 10 of the Sea Pollution Act

Section 11 provides that regulations made under s 10 of Sea Pollution Act shall not apply:

(a) to the discharge into the sea of any oil, oily mixture, noxious liquid substance, harmful substance, sewage or garbage for the purpose of securing the safety of a ship, or saving life at sea, if such discharge was, having regard to all the circumstances, necessary and reasonable; or

(b) to the discharge into the sea of any oil, oily mixture, noxious liquid substance, harmful substance, sewage or garbage which resulted from any damage to the ship, or to its equipment provided that all reasonable steps have been taken after the occurrence of the damage, or, as the case may be, the discovery of the discharge, to prevent or minimise the discharge and the owner or the master did not act with intent to cause damage or recklessly; or

(c) to the discharge into the sea of any prescribed substance for the purpose of minimising the damage from pollution, provided that the discharge was sanctioned by or on behalf of the Minister.

### 8.4.7 Provision of facilities for discharge or disposal of oil and related substances

Where the Minister is of the opinion that the facilities in any harbour in the state for the discharge or disposal of oil, oily mixtures, noxious liquid substances, harmful substances, sewage or garbage are necessary or that the facilities which exist at that harbour for such discharge or such disposal are inadequate, he may make regulations under s 12(1) of the Sea Pollution Act requiring where there is a harbour authority in charge of the harbour, the harbour authority, and in any other case, the person under whose control the harbour is to make such provision as may be specified in the regulations for such discharge or such disposal.

According to s 12(2), regulations made under s 12(1) may provide for such matters as the manner in which oil, oily mixture, noxious liquid substances, harmful substances, sewage and garbage may be discharged from a ship, the disposal of any such substance so discharged, the facilities for such discharge or such disposal to be provided by a harbour authority or, as the case may be, the person having control of the harbour and the time within which such facilities are to be provided.

### 8.4.8 Offence to contravene a regulation made under s 12 of the Sea Pollution Act

Section 12(4) of the Sea Pollution Act provides that a person who contravenes a regulation made under s 12 shall be guilty of an offence.

### 8.4.9 Duty to report a discharge or probable discharge

A duty is imposed by s 13(1) of the Sea Pollution Act on the owner or the master of a ship to report a discharge or probable discharge in the state, or in any prescribed area outside the state, of any oil, oily mixture, noxious liquid substance, harmful substance, sewage or garbage:

(a) resulting from damage to the ship; or

(b) for the purpose of securing the safety of the ship; or

(c) for the purpose of saving human life.

A report must also be made where there is, during the operation of a ship in the state or any such prescribed area, a discharge or probable discharge of any such substance in excess of the quantity (if any) permitted by regulations made under s 10 of the Sea Pollution Act.

If the discharge or probable discharge occurred in the state or in any prescribed area outside the state other than in a harbour, the Minister must be notified of the fact and cause of the incident. If the discharge or probable discharge occurred in a harbour, the harbour-master or person having control of the harbour must be notified of the fact and cause of the incident and such person must then report the incident to the Minister under s 13(2).

Section 13(3) specifies that every report made under s 13 must give details of the nature of the incident, the identity of the ship or ships concerned, the time, type and location of the incident, the quantity and type of substance

involved in the discharge, and any assistance or salvage measures involved in the incident.

The Minister is given power by s 13(4) to make regulations in relation to the making of a report under s 13 of the Sea Pollution Act.

### 8.4.10 Regulations as to construction, fitting or operation of ships

The Minister may make regulations under s 14(1) of the Sea Pollution Act requiring the owner or master of a ship, or ship of a prescribed class, which is registered in the state, to have such ship constructed, fitted or operated in such manner as may be specified in the regulations and the owner or master must comply with such other requirements as may be so specified, so as to prevent, control or reduce the discharge into the sea of oil, oily mixtures, noxious liquid substances, harmful substances, sewage or garbage.

It shall be an offence under s 14(2) for the owner or master of a ship to contravene any regulation made under s 14 of the Sea Pollution Act.

### 8.4.11 Records to be kept by the master relating to prescribed substances

Section 15(1) of the Sea Pollution Act requires the master of a ship to which s 14 of the Sea Pollution Act applies to keep such records as may be prescribed of operations on board his ship in relation to any prescribed substance and of the discharge of any prescribed substance resulting from damage to a ship, or for the purpose of securing the safety of a ship or saving life at sea. Records must also be kept by the master of the discharge of any substance, in excess of the quantity (if any) permitted by regulations under s 10 of the Sea Pollution Act.

Section 15(2) provides that the Minister may make regulations under s 15(1) in relation to the manner and form in which any records required under s 15 should be kept, the custody, preservation and disposal of any such records, the making available of any such records for inspection and such other matters as appear to the Minister to be necessary.

It shall be an offence under s 15(3) for any person to contravene s 15, or any regulation made under that section, or to make any entry or alteration in any record required to be kept under s 15 of the Sea Pollution Act which is to his knowledge false and misleading in a material respect.

### 8.4.12 Application of ss 14 and 15 of the Sea Pollution Act to ships not registered in the state

Section 16 extends the application of ss 14 and 15 to a ship and the owner and master of a ship registered in a country other than the state whilst that ship is in the state as if the ship was registered in the state.

### 8.4.13 Survey of ships

Part III of the Sea Pollution Act deals with enforcement. Section 17(1) gives the Minister power to make regulations requiring that any ship, or a ship of such

class as may be specified in the regulations, its equipment and fittings be surveyed, inspected or tested in such manner and at such times as may be prescribed.

Section 17(2) provides that all duties in respect of a survey, inspection or test for the purposes of regulations made under s 17 shall be performed in accordance with the directions of the Minister by a surveyor of ships, or an inspector appointed under s 20 of the Sea Pollution Act.

Section 17(3) of the Sea Pollution Act imposes a duty on the owner or master of the ship to submit the ship to such survey, inspection or test and to pay such fee as may be prescribed.

### 8.4.14 Certificate of compliance with requirements of the Sea Pollution Act

If the surveyor of ships or other person appointed for the purposes of s 17 surveys the ship and is satisfied that the ship, its equipment or fittings to which the survey relates complies with the requirements of the Sea Pollution Act, the Minister shall, on payment of the prescribed fee, cause a certificate of compliance to be issued under s 17(4). The certificate may be issued in such form and manner as the Minister may prescribe.

### 8.4.15 Fees for surveys, inspections and tests

The Minister may, with the consent of the Minister for Finance, make an order under s 17(5), prescribing the fees to be paid for surveys, inspections and tests carried and certificates issued under s 17 of the Sea Pollution Act.

### 8.4.16 No change in structure, equipment or fittings without Minister's consent

Where a certificate has been issued under s 17(4) of the Sea Pollution Act in relation to a ship, s 17(6) provides that no change, other than the replacement of any defective equipment or fittings, shall be made in the structure, equipment or fittings of the ship, without prior consent given by or on behalf of the Minister.

### 8.4.17 Offence to contravene s 17 of the Sea Pollution Act or relevant regulations

Section 17(7) states that the owner and the master of a ship in respect of which there is a contravention of s 17 or regulations made under that section shall be guilty of an offence.

### 8.4.18 Survey of ships registered in a MARPOL Convention country

Under s 18(1) of the Sea Pollution Act the government of another country which is a party to the MARPOL Convention may request the Minister to have a ship registered in that country surveyed and the Minister may comply with such a request. Where such a request is made, ss 14 and 17 shall apply to such ship as if it were a ship registered in the state and the owner had submitted to the survey.

Section 18(2) provides that any certificate issued under s 17 of the Sea Pollution Act in respect of such a ship must contain a statement that it has been issued at the request of the government concerned. Section 18(3) provides that a copy of a survey report and a copy of a certificate made or issued in pursuance of s 18 must be transmitted as soon as possible to the government concerned.

### 8.4.19 Duties of a surveyor of ships

Section 19 of the Sea Pollution Act stipulates that a surveyor of ships shall be an inspector for the purposes of the Sea Pollution Act. The surveyor must report to the Minister generally on:

(a) whether the requirements of the Sea Pollution Act are being complied with;
(b) what measures have been taken for the prevention of pollution caused by the escape from ships of oil, oily mixtures, noxious liquid substances, harmful substances, sewage or garbage; and
(c) whether facilities exist in any harbour or any other place in the state for the discharge and disposal of such substances and whether such facilities are adequate.

### 8.4.20 Appointment of an inspector

The Minister is given power by s 20 of the Sea Pollution Act to appoint a person to be an inspector for the purposes of the Act to carry out such functions as are specified in his warrant of appointment.

### 8.4.21 Powers of an inspector

Section 21(1) of the Sea Pollution Act provides that an inspector may do all such things as he considers necessary for the purpose of carrying out his functions under the Sea Pollution Act.

Section 21(2) of the Sea Pollution Act sets out the powers of an inspector, which include a right to:

(a) at any time go on board any ship while the ship is in the state or an Irish ship anywhere and inspect the ship and all machinery, boats, equipment or fittings on that ship and test any equipment on board the ship with which the ship is required to be fitted;
(b) inspect any document on board the ship and require any person on board to produce to him any document in his possession or control;
(c) require that person to furnish him with his name and address;
(d) take samples of oil, oily mixtures, noxious liquid substances, harmful substances, sewage or garbage from any ship;
(e) copy any entry in any prescribed document or record or in any log book of the ship and require the person by whom the document or record is kept to certify the copy as a true copy of the entry;

(f) enter any place, at any time, whether on land or at sea, and inspect in that place any container for the storage of oil, oily mixtures, noxious liquid substances, harmful substances, sewage or garbage, or any apparatus for the transfer of such matter to or from a ship;

(g) require by summons any person to attend before him and examine him on oath;

(h) require a witness to make and subscribe a declaration of the truth of any statements made at his examination.

### 8.4.22 Taking of evidence

Section 21(3), (4), and (5) of the Sea Pollution Act contain procedural provisions as to the taking of evidence.

### 8.4.23 Offences relating to evidence

Section 21(6) of the Sea Pollution Act states that any person who is summoned as a witness before an inspector and tendered his expenses but fails to attend or who refuses to take an oath legally required by the inspector to be taken, or refuses or neglects to make any answer, or to produce any document, or certify a copy of any entry, or, on being requested by an inspector to stop a ship for the purpose of enabling the inspector to board the ship, shall be guilty of an offence.

### 8.4.24 Inspector may order master to remedy defects in ship

Section 22(1) of the Sea Pollution Act provides that where an inspector determines, having inspected a ship, that the ship or any equipment or fitting on that ship does not correspond substantially with the particulars specified in a certificate under s 17 or an equivalent certificate issued by another party to the MARPOL Convention, or is so defective that the ship is not fit to be put to sea without presenting a serious threat of damage to the marine environment, he may direct the master of the ship to take all action necessary to ensure that the ship or its equipment corresponds with those specified particulars, or that any defect is remedied.

### 8.4.25 Power of an inspector to detain a ship

Section 22(2) of the Sea Pollution Act gives an inspector power to detain a ship to which s 22(1) applies until there has been compliance with any directions given by him under s 22 in relation to the ship.

Section 22(3) imposes a duty on an inspector to take all such steps as appear to him to be necessary to ensure that a ship in relation to which he has given directions under s 22 of the Sea Pollution Act will not put to sea or leave harbour for the purpose of proceeding to the nearest repair yard without presenting an undue threat of damage to living marine resources.

### 8.4.26 Offences relating to a ship which has been detained under s 22 of the Sea Pollution Act

It shall be an offence under s 22(4) of the Sea Pollution Act for any person to fail to comply with a direction of any inspector under s 22, or to put to sea, or attempt to put to sea, otherwise than in accordance with the Sea Pollution Act, a ship which has been detained by an inspector under s 22(2).

### 8.4.27 Duty of an inspector to report non-compliance to the Minister

If the master of a ship registered in the state does not comply with the direction of an inspector under s 22, s 22(5) provides that the inspector must immediately report the fact to the Minister who may direct that a certificate issued under s 17 of the Sea Pollution Act, in relation to the ship be withdrawn.

### 8.4.28 Power of a harbour-master to refuse entry of a ship into a harbour

Section 23(1) of the Sea Pollution Act gives a harbour-master power to refuse entry into the harbour over which he has control to a ship where he has reasonable cause to believe that the ship does not comply with the requirements of the Sea Pollution Act, or that it would cause a serious threat of damage to flora or fauna, living marine resources, the harbour or other ships, unless the entry of the ship is necessary for the purpose of saving life.

Section 23(2) gives the Minister, or a person appointed by him under s 23(4) to act on his behalf, a similar power to refuse entry to a ship into the state, or into a harbour or to require the ship to leave the state or harbour and to comply with such conditions as may be specified, where he is satisfied that the ship does not comply with any of the specified conditions as may be specified.

### 8.4.29 Minister may direct a harbour-master to permit entry of ship

If a harbour-master has refused entry under s 23(1) of the Sea Pollution Act, the Minister, or a person appointed by him to act on his behalf, may direct the harbour-master under s 23(3) to permit the ship to enter, and to comply with such conditions as may be specified, following consultation with the harbour-master. Where such a direction is issued, the harbour-master must permit the ship to enter the harbour upon such conditions, and the master of the ship must comply with those conditions.

### 8.4.30 Power of the Minister to appoint a person to act on his behalf

Section 23(4) of the Sea Pollution Act gives the Minister power to appoint by warrant a person to act on his behalf for the purposes of s 23(2) and (3). Such a person will be provided with a warrant which he must produce on request for inspection when exercising a function under s 23 of the Sea Pollution Act.

### 8.4.31 Regulations relating to entry and destination of ships

The Minister is given power by section 23(5) of the Sea Pollution Act to make regulations providing, in respect of ships generally or ships of any prescribed class, for the giving by the owner or master of a ship of notice of the entry or intended entry of the ship into the state and of its passage and destination while in the state and such other information relating to the ship and its cargo as may be prescribed.

The Minister may also make regulations preventing the entry of a ship or of a ship carrying a specified cargo into the state if he has reasonable cause to believe it will cause serious threat of hazards to human health, damage to human life, harm to living marine resources or to flora or fauna or damage to amenities, or interference with legitimate uses of the sea.

### 8.4.32 Offence to fail to comply with a direction under s 23 of the Sea Pollution Act

Section 23(6) makes it an offence for the owner, master or any person to fail to comply with a direction, or the requirements of regulations, under s 23 of the Sea Pollution Act.

### 8.4.33 Power to stop and detain a ship which has caused or may cause pollution

Section 24(1) of the Sea Pollution Act gives an inspector or a harbour-master power to stop and detain a ship where he has reasonable cause to believe that the ship has caused, or may cause, pollution and the ship is in the state.

However, s 24(2) of the Sea Pollution Act states that a harbour-master may only exercise such power whilst the ship concerned is within the harbour over which he has control.

### 8.4.34 Release of a detained ship

Section 24(3) of the Sea Pollution Act provides that any ship detained pursuant to s 22(2) or s 24(1) must be released if:

(a) the inspector or the harbour-master is reasonably satisfied that the ship no longer presents a serious threat to living marine resources or has ceased to be a cause of pollution; or

(b) the inspector is of the opinion that the ship can put to sea or leave the harbour for the purpose of proceeding to the nearest repair yard without presenting an undue threat of damage to flora or fauna or to living marine resources, and

- the master of the ship has undertaken to have the defect in the ship, or its equipment, whereby the ship is a cause of pollution, remedied, and
- the owner of the ship has put forward security which is satisfactory for the payment of the cost of remedying any pollution damage which may be caused by the ship once it is on its voyage to the nearest repair yard.

### 8.4.35 Offences relating to a ship detained under s 24 of the Sea Pollution Act

According to s 24(4) of the Sea Pollution Act, if a ship which has been detained under s 24 leaves or attempts to leave any harbour or other place otherwise than in accordance with s 24, the owner and the master of the ship shall each be guilty of an offence and the ship, wherever it may be, may be detained, or further detained, by an inspector or by a harbour master in his harbour.

### 8.4.36 Ship must not be unduly detained

Section 24(5) of the Sea Pollution Act provides that an inspector or a harbour-master who detains a ship must not unduly detain or delay it.

### 8.4.37 Powers of the Minister to prevent, mitigate or eliminate pollution

Section 26 of the Sea Pollution Act deals with the powers of the Minister to prevent, mitigate or eliminate pollution.

Section 26(1) provides that the Minister or any person authorised by him may for the purpose of preventing, mitigating or eliminating danger from pollution or threat of pollution by oil, or any substance other than oil (as defined in s 26(10) of the Sea Pollution Act) following on a maritime casualty or acts related to such a casualty, give directions to the owner or master of the ship or any person who is, or who in the reasonable opinion of the Minister or any person authorised by him, is in charge of the ship, or any salvor who is in possession of the vessel and is in charge of a salvage operation.

Directions may also be given to such other person to whom it may appear reasonable and necessary to the Minister or authorised person to give directions. In giving such directions the Minister or authorised person must not unduly detain or delay the ship from proceeding on its voyage.

Section 26(3) of the Sea Pollution Act provides that if, in the opinion of the Minister, the powers conferred by s 26(1) are, or have proved to be, inadequate for the purpose, the Minister or authorised person may take such action and do such things in relation to the ship concerned or its stores, equipment or cargo as appear to be necessary and reasonable for the purpose of preventing, mitigating or eliminating the effects of pollution arising from a maritime casualty.

### 8.4.38 Definitions of 'oil' and 'substances other than oil'

Section 26(10) of the Sea Pollution Act defines 'oil' as meaning:

> crude oil, fuel oil, diesel oil and lubricating oil.

'Substance other than oil' is defined as meaning:

> any substance in a list annexed to the Intervention Protocol and any other substance which is liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea.

### 8.4.39 Recovery of compensation from the Minister

Section 27(1) of the Sea Pollution Act gives a right to recover compensation from the Minister to any person who establishes that any measures taken outside the territorial waters of the state under s 26 of the Sea Pollution Act in relation to a ship registered in the state, or in a country which is a party to the Intervention Convention, went beyond what was reasonably necessary to achieve their purpose.

Such compensation shall be recoverable either by an arbitration award under the Intervention Convention, or in any court of competent jurisdiction for any loss or damage caused to that person by reason of the fact that such measures went beyond those reasonably necessary to achieve that purpose.

### 8.4.40 Matters to be considered when deciding on entitlement to compensation

Section 27(2) of the Sea Pollution Act provides that in considering whether a person is entitled to recover compensation from the Minister under s 27(1) of the Sea Pollution Act, account shall be taken of:

(a) the extent and probability of imminent danger if those measures had not been taken;

(b) the likelihood of those measures being effective; and

(c) the extent of the damage caused by such measures.

### 8.4.41 Declarations of acceptance or renunciation of Conventions or Protocols

Under s 28 of the Sea Pollution Act if the Minister is satisfied that any country (other than the state) has accepted or denounced the Intervention Convention, the Intervention Protocol or the MARPOL Convention or any Convention or Protocol which has been ratified by the state and which amends or extends any such Convention or Protocol he may by order so declare. He may also declare by order that any such Convention or Protocol extends, or ceases to extend, to any territory.

### 8.4.42 Prosecution of offences

Section 30(1) of the Sea Pollution Act provides that summary proceedings for any offence under the Sea Pollution Act may be brought and prosecuted by the Minister. Where an offence is committed in relation to a particular harbour or particular harbour-master, s 30(2) provides that summary proceedings for such an offence may be brought and prosecuted by the harbour authority.

Section 30(3) provides that summary proceedings in relation to an offence under the Sea Pollution Act may be brought, in every case, within two years from the date of the offence, or if, at the expiry of that period, the person to be charged is outside the state, within six months of the date on which he next enters the state.

According to s 30(4), proceedings in relation to an offence under the Sea Pollution Act may be taken at any place in the state and the offence may be treated as having been committed in that place.

By virtue of s 30(5) such proceedings may be brought against a person wherever he may be.

### 8.4.43 Payment of fines

Section 33(1) of the Sea Pollution Act provides that, subject to s 33(3), all fines in respect of offences under the Sea Pollution Act shall be paid into the Exchequer in accordance with such directions as may be given by the Minister for Finance.

Where a fine imposed on the owner or master a ship is not duly paid, s 33(2) of the Sea Pollution Act provides that the court may, without prejudice to any other powers for enforcing payment, direct that any amount of the fine remaining unpaid be levied by the distress and sale of such property, comprising the ship, its equipment and stores as the court thinks necessary.

Section 33(3) of the Sea Pollution Act provides that, where it appears to the court imposing the fines that any person has incurred, or will incur, expense in removing any pollution, or making good any damage attributable to the offence, the court may order that the whole or part of the fine be paid to that person for or towards defraying the expense.

### 8.4.44 Offences by bodies corporate

Sections 31 and 32 of the Sea Pollution Act deal with the prosecution of offences committed by bodies corporate. Section 33 concerns payment of fines and s 34 deals with proof of certain documents.

### 8.4.45 Discharges in vicinity of a ship

Section 35 of the Sea Pollution Act provides that where a discharge of any substance to which the Sea Pollution Act applies is sighted, and a ship registered in the state, or a ship wherever registered while in the state, is sighted in close proximity to the discharge, it shall be presumed, until the contrary is proved, that it was discharged from the ship.

### 8.4.46 Court order requiring detention of master on board ship

Section 39 of the Sea Pollution Act provides that whenever an inspector or harbour-master detains a ship in the exercise of the powers conferred on him under s 22(2) or s 24, he must as soon as possible bring the master of the ship against whom proceedings for an offence under the Sea Pollution Act have been, or are about to be, instituted before a District Court judge.

If the District Court judge is satisfied that such proceedings have been or are about to be issued against the master of the ship, he may by order directed to an inspector, or, as the case may be, harbour-master, require the inspector or harbour-master to detain the master on board the ship or such other person as

he may direct at a specified place in the state until such proceedings have been adjudicated upon by a court in the exercise of its criminal jurisdiction, or until a further order has been made.

### 8.4.47 Detention of ship pending determination of appeal

Section 40(1) of the Sea Pollution Act states that where a person is convicted of an offence under the Sea Pollution Act, or proceedings in relation to an offence are dismissed, and the ship in relation to which the offence has been committed has been detained under the Sea Pollution Act, the judge concerned shall order the inspector or harbour-master in the event of an appeal from, or other proceedings in relation to, the order of the court hearing the matter, to detain the master on board the ship pending the determination of the appeal or other proceedings at a specified place in the state or until a further order has been made.

### 8.4.48 Release of the master if satisfactory security given

Section 40(2) of the Sea Pollution Act provides that where an order for the detention of the master of the ship is made under s 40 or s 39, a District Court judge may order an inspector or harbour-master, as the case may be, to release the master unless the ship has been detained under ss 22, 24 or 26, if security is given which, in the opinion of the District Court judge, is sufficient to cover payment of:

(a) the maximum fine or fines which may be imposed, or such lesser sum as the District Court judge may decide; and
(b) the estimated amount of the costs (if any) of any trials, appeals or other proceedings which may be awarded,

in the event of conviction of the defendant in respect of the offence or offences with which he was charged, or in the event of his failure to attend before any court when such attendance is required for the purposes of any preliminary examination under the Criminal Procedure Act 1967.

### 8.4.49 Fine and costs to be paid out of security

Section 41 of the Sea Pollution Act provides that whenever security is given by a defendant under s 40, the court may, when the trial, appeal or other proceedings, as the case may be, has or have been finally determined, direct that the amount of the fine imposed in respect of the offence, together with the amount of any costs awarded, be paid to the Minister out of the security.

### 8.4.50 Liability for costs and expenses of the Minister or harbour authority

Section 42 of the Sea Pollution Act states that where a person is convicted of an offence under the Sea Pollution Act, the court shall, unless it is satisfied that there are special and substantial reasons for not doing so, order the person to

pay to the Minister, or to the harbour authority concerned, the costs and expenses reasonably incurred by the Minister or authority in relation to the investigation, detection and prosecution of the offence. Such costs may also include costs incurred in the taking of samples, the carrying out of tests, examinations and analyses and the remuneration and other expenses of employees, consultants and advisers.

CHAPTER 9

# AIR POLLUTION, NOISE POLLUTION AND TOXIC TORTS

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## 9.1 Air pollution

### 9.1.1 Relevant definitions

The definition of air pollution is found at s 4 of the Air Pollution Act 1987 (the 1987 Act), which states as follows:

> 'Air pollution' in this Act means a condition of the atmosphere in which a pollutant is present in such a quantity as to be liable to:
>
> (i) be injurious to public health; or
>
> (ii) have a deleterious effect on flora or fauna, or damage property; or
>
> (iii) impair or interfere with amenities or with the environment.

The definition of air pollution in the 1987 Act was imported into the definition of 'environmental pollution' by virtue of the Environmental Protection Agency Act 1992, s 4(2)(a). In addition, environmental pollution is also defined in s 4(2)(d) of the Environmental Protection Agency Act 1992 to mean:

> Noise which is a nuisance, or would endanger human health or damage property or harm the environment.

### 9.1.2 Statutory noise nuisance

For the first time under the Environmental Protection Agency Act 1992 (the EPA Act) a statutory remedy was created which is set out at s 108 of the EPA Act, which is misleadingly entitled in the margin as 'Noise as a Nuisance'. This is not nuisance in the sense of the common law tort of nuisance, but rather represents a new statutory nuisance provision.

Section 108 provides as follows:

> 108(1). Where any noise which is so loud, so continuous, so repeated, of such duration or pitch or occurring at such times as to give reasonable cause for annoyance to a person in any premises in the neighbourhood or to a person lawfully using any public place, a local authority, the Agency or any such person may complain to the District Court and the court may order the person or body making, causing or responsible for the noise to take the measures necessary to reduce the noise to a specified level or to take specified measures for

the prevention or limitation of the noise and the person or body concerned shall comply with such order.

This provision also provides for a statutory defence as follows:

> 108(2). It shall be a good defence, in the case of proceedings under subsection (1) or in a prosecution for a contravention of this section, in the case of noise caused in the course of a trade or business, for the accused to prove that –
>
> (a) he took all reasonable care to prevent or limit the noise to which the complaint relates by providing, maintaining, using, operating and supervising facilities, or by employing practices or methods of operation, that, having regard to all the circumstances, were suitable for the purposes of such prevention or limitation; or
>
> (b) the noise is in accordance with
>
> (i) the terms of a licence under this Act, or
>
> (ii) regulations under s 106.

The section also provides for exceptions so that it shall not apply to noise caused by aircraft or statutory undertakers or local authorities in the exercise of the powers conferred on them by or under any enactment (s 108(4)(a) and (b) of the Environmental Protection Agency Act 1992).

### 9.1.3 General obligation not to cause harmful emissions

The Air Pollution Act 1987 imposes a statutory prohibition on creating environmental pollution as follows:

(a) The occupier of any premises other than a private dwelling shall use the best practicable means to limit and, if possible, to prevent an emission from such premises (s 24(1) of the Air Pollution Act 1987).

(b) The occupier of any premises shall not cause or permit an emission from such premises in such a quantity or in such a manner, as to be a nuisance (s 24(2) of the Air Pollution Act 1987).

(c) Under both the 1987 Act and the EPA Act there are specific provisions which make it an offence to contravene any provision of either Act or any regulations made under them or of any notice served under the Act.

### 9.1.4 Statutory penalty

Specifically in relation to air pollution, the statutory penalty is set out in s 11(1)–(3) inclusive of the Air Pollution Act 1987:

> (1) Any person who contravenes any provision of this Act or of any regulation made under this Act or of any notice served under this Act shall be guilty of an offence.
>
> (2) Where an offence under this Act is committed by a body corporate or by a person acting on behalf of a body corporate and is proved to have been so committed with the consent, connivance or approval of, or to have been

facilitated by any neglect on the part of, any director, manager, secretary or other official of such body, such person shall also be guilty of an offence.

(3) In this section, a reference to the contravention of the provision includes, where appropriate, a reference to a refusal, or a failure, to comply with that provision.

### 9.1.5 Air pollution case law

The best known and most detailed air emissions case in Ireland is that of *Hanrahan v Merck, Sharp & Dohme Ltd* [1988] ILRM 629, which was a case decided ultimately in favour of the plaintiffs, not on the grounds of negligence, which was not proven, but on the grounds of (malodorous) nuisance, which is a strict liability tort. In that particular case, the Hanrahan family claimed not only in respect of property damage but also damage to their cattle and to themselves individually in terms of personal injuries. The evidence was painstakingly gone through by each court, including the Supreme Court, which ultimately remitted the case to the High Court. It did so on the basis that, although negligence had not been proven, no amount of scientific or theoretical evidence, no matter how expert and learned the witnesses, could displace the empirical evidence on oath of the numerous witnesses who gave evidence on oath of their physical discomfort and medical conditions arising at times when sharp, chemical-type smells were noted in the air in the vicinity of the defendants' factory.

On the facts, causation was found and therefore, nuisance being a strict liability tort, the Supreme Court ultimately found in favour – at least in part – of the plaintiffs.

## 9.2 Noise

### 9.2.1 Noise as a pollutant

The definition of noise as a nuisance in the EPA Act is the most practical guide available to the ordinary person on the type of noise which one can successfully prosecute. However, it should be noted that compensation does not arise as a remedy under this statutory provision. In addition there are other specific reference and guidance documents on what is or is not acceptable noise and, in particular, the EPA has issued Guidance Notes for Noise in relation to its IPPC licensed activities as well as Environmental Noise Survey Guidance documents, created to assist IPPC licensed facilities in complying with the atmospheric emissions and noise conditions of their licences. Typically, noise sensitive locations are agreed/stipulated by the EPA. These locations become the monitoring points for compliance by the IPPC licence holder with its noise emissions conditions. As with other emission monitoring data, the information gathered is publicly available both at the EPA's offices and at the IPPC licensed site premises.

In the *Environmental Noise Survey Guidance Document* most recently issued by the EPA (ISBN 1-84095-113-3) the definition of noise is:

> Any sound that has the potential to cause disturbance, discomfort or psychological stress to a subject exposed to it, or any sound that could cause actual physiological harm to a subject exposed to it, or physical damage to any structure exposed to it, is known as noise.

For all IPPC licence holders, noise sensitive locations are defined as:

> Any dwelling house, hotel or hostel, health building, educational establishment, place of worship or entertainment, or any other facility or other area of high amenity which affords proper enjoyment requires the absence of noise at nuisance levels.

### 9.2.2 How noisy can it get?

The EPA accepts that in a modern world, noise is almost ubiquitous. Most normal everyday activities lead to the production of noise. Noise from traffic, lawnmowers, household appliances, concerts, industrial activities and so on, are considered commonplace, particularly in the urban setting. In most cases the majority of people scarcely notice these noises and if they do, they are not bothered by them, but in some cases people can perceive the same noise as a nuisance. Such people may have more sensitive ears than others, or may be less reasonable than others. Some may be annoyed by noise because they have a personal particular need to sleep at a particular time or relax in a quiet atmosphere. In some cases, noise may present such a nuisance as to cause harmful effect on the health of those exposed to it. It inevitably depends on all the circumstances whether noise is a nuisance, and both subjective and objective criteria must be used when considering this question.

### 9.2.3 Noise measuring

In the Guidance Notes the EPA explains that, in order to assess whether intervention is needed to prevent, control or minimise noise, it is necessary to be able to quantify it, and ascribe a scale of measurement to it. This is not as simple or straightforward a science as one might think. Noise is usually measured on the decibel scale, which is a logarithmic scale of sound intensity. For human noise response, the decibel scale is adjusted slightly to compensate for slight aberrations in the way the human ear 'hears' sound along the scale. This adjusted scale is known as the A weighted decibel scale, and the units of the scale are dBa.

The EPA Guidance Notes include a table, set out below, which illustrates examples of everyday sound levels:

| dBa | Description |
|---|---|
| 0 | Absolute silence. |
| 25 | Very quiet room. |
| 35 | Rural nighttime setting. No wind. |
| 55 | Daytime, busy roadway 0.5 km away. |
| 70 | Busy restaurant. |
| 85 | Very busy pub. Voice has to be raised to be heard. |
| 100 | Disco or rock concert. |
| 120 | Uncomfortably loud. Conversation impossible. |
| 140 | Noise causing pain in ears. |

As a general rule, the sensitivity to noise is usually greater at nighttime than it is during the day and this has been worked out as by about ten decibels A weighted dBa. Audible tones and impulsive tones at sensitive locations should be avoided irrespective of the noise level. In addition, it should be noted that noise includes vibration, under s 3 of the EPA Act.

### 9.2.4 Recent noise nuisance case law

A recent decision of the High Court is useful, if not salutary: *Sheeran and Another v Meehan and Another* (High Court Appeal No 2001/202CA, judgment of Mr Justice Herbert, delivered 6 February 2003). This case concerns a long-running dispute between the neighbouring occupiers of numbers 20 and 21 Belleview Park Avenue, Blackrock, County Dublin.

In this case the definition of nuisance approved by the Supreme Court in the case of *Hanrahan v Merck, Sharp & Dohme* referred to above was adopted. The test is found in the following excerpt (Henchy J in *Hanrahan v Merck, Sharp & Dohme* [1988] ILRM 629 at p 640):

> As I have pointed out earlier in this judgment, by reference to the cited passage from the judgment of Gannon J in *Halpin & Others v Tara Mines Ltd*, where the conduct relied on as constituting a nuisance is said to be an interference with the plaintiff's comfort in the enjoyment of his property, the test is whether the interference is beyond what an objectively reasonable person should have to put up with in the circumstances of the case. The plaintiff is not entitled to insist that his personal nicety of taste or fastidiousness of requirements should be treated as inviolable. The case for damages and nuisance – we are not concerned here with the question of an injunction – is made out if the interference is so pronounced and prolonged or repeated that a person of normal or average sensibilities should not be expected to put up with it.

Essentially the case concerned the Meehans using their hi-fi radio stereo system to interfere with the Sheerans' comfort and the enjoyment of their home. The extent of personal evidence was copious, including Mrs Meehan accepting in cross-examination that her response to Mr Sheeran's complaint about the noise (when she had the radio playing from the kitchen of her house while she cleaned her car from 20 or more feet away from where she was working outside the house) was that Mr Sheeran 'should turn up his own radio and then he would not be so conscious of theirs'. Acoustic engineers on both sides carried out detailed technical tests. Both experts considered that when the Meehans' radio was played at a particular sound setting, it was non-intrusive and could not be heard in the Sheerans' kitchen and master bedroom. It was ultimately accepted that the Meehans did not keep their hi-fi stereo radio system at the agreed limited sound setting (despite the placing of a physical limiter on their stereo). It would appear that from time to time the radio was turned up full blast and the family would leave the house and let it play all day or early in the morning at weekends.

The High Court judge, in describing this case as tragic, remarked that there were many aspects which were extremely distasteful. In a 19-page judgment, the High Court exercised its discretion to make no order for costs in favour of the extraordinary and unjustifiably belligerent defendants/appellants, having regard to what the court found to have been the altogether unsatisfactory manner in which they acted throughout the matter. The plaintiffs/respondents were found to have successfully established their claim as to approximately one-half only of the period of alleged nuisance, and were accordingly limited in their costs recovery.

### 9.2.5 European law

Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relates to the assessment and management of environmental noise. It is due to be implemented in Ireland by 18 July 2004.

It sets out in its recitals those categories of products already controlled by Community legislation on their noise emission limits. These include permissible sound levels for motor vehicles and their exhaust systems, the noise levels of tractors from the driver's perception, subsonic aircraft, two and three-wheel motor vehicles and noise emissions in the environment from equipment for use outdoors.

The key driver of the legislation is that the Community intends to achieve a high level of health protection and environmental protection from noise. The stated aim of the Directive at Art 1 is to avoid, prevent or reduce on a prioritised basis the harmful effects, including annoyance, due to exposure to environmental noise. In this piece of legislation, the decision has been made to establish a common assessment method throughout the EU for environmental noise and a definition for limit values. This will undoubtedly assist those in the future who wish to bring claims arising from noise pollution. European-wide common noise indicators are to be put in place: Lden which will assess annoyance, and Lnight which will assess sleep disturbance, amongst other things.

Competent authorities in each Member State are required to draw up action plans addressing priorities for noise reduction in areas of interest.

For the purposes of the Directive, Art 3 defines environmental noise as:

> Unwanted or harmful outdoor sound created by human activities, including noise emitted by means of transport, road traffic, rail traffic, air traffic, and from sites of industrial activity such as those defined in Annex I to Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control.

Harmful effects are defined as 'negative effects on human health'.

It is envisaged under Art 4 that each Member State will designate the competent authority to make and approve noise maps and action plans for agglomerations, major roads, major railways and major airports, all of which are defined; and for collecting noise maps and action plans.

Annex I sets out the noise indicators which shall be applied and commonly assessed throughout the EU. The remaining five Annexes set out minimum requirements for strategic noise mapping and for action plans, detail the assessment methods for harmful effects and for the noise indicators and list the data to be sent to the Commission.

## 9.3 Toxic torts

### 9.3.1 Defining toxic torts

There is no agreed definition of this class of tort, if it can be called a class on its own. It is a descriptive, alliterative phrase which currently is applied to a class of largely asbestos-related claims based on physical harm incurred or, on the effect of the fear of such harm. It can refer to any number of tortious claims based on injury (whether physical or psychological) as a result of exposure to, or coming into contact with, toxic or harmful material. In this regard, again see *Hanrahan v Merck, Sharp & Dohme Ltd*.

Because one is in the area of tort, there remains the obligation to prove first, causation and secondly, reasonable foreseeability of the harm caused. It was this joint test which ultimately resulted in the plaintiffs in the case being unsuccessful in their negligence claim. They were able to claim a limited success, however, on the nuisance front.

By contrast, the difficulty in establishing causation is made much easier in asbestos-related cases, as certain forms of injury are known to be more than 95% due to asbestos. In other words, it cuts down on the number of other possible causation factors to such an extent that all that remains to be decided is who will share liability, and in what proportion. Again, asbestos-related diseases assist courts in this regard. That is because there is a distinct difference between the different types of injuries sustained as a result of exposure to asbestos. There may now be added to this class of claim the additional claim based not on any proven injury from that exposure, but based on fear of injury, which may occur in the future from a historic exposure to asbestos dust.

### 9.3.2 Recent Irish case law

The recent Supreme Court decision in *Fletcher v Office of Public Works* (unreported, 21 February 2003, Supreme Court) concerned Mr Fletcher's morbid and (ultimately found to be) irrational fear of contracting a fatal disease following prolonged exposure to asbestos. His job was as a general operative for the OPW, involving frequently stripping old lagging from heating pipes. The lagging was crumbling, dusty and friable asbestos-based material. He worked in confined spaces. His morbid fear resulted in his contracting the recognised psychiatric illness known as 'reactive anxiety neurosis'. This is a known psychiatric injury.

In the High Court, the trial judge found that Mr Fletcher contracted a psychiatric illness as a result of his exposure to the asbestos dust and that it was reasonably foreseeable that this would result in a psychiatric illness in a person of normal fortitude. The defendants appealed not on the facts, but on the application of the law. They claimed the judge erred at law in awarding damages to Mr Fletcher since he had not suffered any physical injury. They argued he should not be entitled to recover damages for mere psychiatric illness.

There is a need to briefly mention the differences between asbestosis, mesothelioma and lung cancer. With asbestosis, which is a form of cancer, it is usually based on a cumulative prolonged period of exposure to asbestos dust and fibres with a latent period of anything between 10 and 40 years for the cancer to develop. By contrast, mesothelioma is a rarer form of asbestos-based cancer and can be contracted in only one exposure to one fibre of asbestos.

It is therefore described as an indivisible disease. Again, there is a very long latency period of at least 10 years, with the average being 34 years before the cancer develops. It is therefore not a cumulative or divisible type of cancer (where all asbestos dust contributes to the final disability) in terms of its aetiology or history of progression. One of the well known indicators of exposure to asbestos is the existence of pleural plaques and pleural thickening.

In Mr Fletcher's particular case, all of the expert evidence was to the effect that no pleural plaques or scarring were evident. The expert advice was that Mr Fletcher was at some risk of contracting mesothelioma in later life but the conclusion was that this risk was 'very remote'.

The medical basis for this was the rare occurrence of mesothelioma according to the expert (Prof Luke Clancy, Consultant Respiratory Physician), who encountered no more than three or four cases a year, despite the fact that exposure to asbestos by members of the public and employees is widespread. In addition, the absence of pleural plaques was noted, together with the fact that there was no manifestation of scarring or other patent evidence of harm to Mr Fletcher's lungs caused by asbestos fibres.

### 9.3.3 The Supreme Court

The Supreme Court (Keane CJ and Geoghegan J) considered all of the aspects of the case, including the extensive UK and US case law. In determining whether the defendants ought to have foreseen that the plaintiff would be at risk of psychiatric injury, the test was not to consider whether the injury was one which would have been suffered by a person of 'ordinary fortitude', but

that the defendant had to take their victim as they found him. This is what is known as the 'eggshell skull rule'. The Supreme Court also considered whether, similar to nervous shock cases, a distinction needed to be drawn between a primary victim and a secondary victim. Because the plaintiff was an employee of a defendant, the Chief Justice formed the view that the plaintiff was not in any sense a secondary victim and in effect discarded the concepts of primary or secondary victims when considering employees who suffer nervous shock as a result of negligence in the work place: see Circuit Court decision of Bryan McMahon J in *Curran v Cadbury (Ireland) Ltd* [2000] 2 ILRM 343.

Keane CJ considered as a key issue whether Mr Fletcher had suffered a 'nervous shock' which would entitle him to recover damages for what in this case was a specific medical illness – the psychiatric disorder of 'reactive anxiety neurosis' – without the need to have an accompanying physical injury, provided the conditions for recovery in that instance had been met. (These conditions were set out by Hamilton CJ in *Kelly v Hennessy* [1995] 2 IR 253.)

Having considered all the particular circumstances of this case, the Chief Justice found that this was not a similar type of shock case – there was no sudden perception of a frightening event or its immediate aftermath which disturbed the mind of the witness (in this case, Mr Fletcher) to such an extent that a recognisable psychiatric illness supervened. Accordingly, the Chief Justice formed the view that he was in 'uncharted territory'. By this he meant that the issue which arose for decision in this case was novel.

The issue was whether there could be liability in the tort of negligence for a plaintiff who suffers a psychiatric illness brought about otherwise than by nervous shock or physical injury. There then followed an extensive consideration of public policy issues. This case is an excellent example of the exposition of the sort of public policy arguments which can and do persuade the judiciary in the Irish Supreme Court. This case was ultimately decided on public policy grounds.

Mr Fletcher's state of nervous anxiety was based on what was found to be an irrational fear of contracting mesothelioma in the future as a result of what was found to be the grossly negligent exposure by his employer to him of asbestos. The question posed by the court to itself was whether public policy should exclude this type of claim as a valid claim under which damages could be claimed. Note the question it posed was phrased in the negative.

### 9.3.4 Policy considerations

Both general and specific policy considerations were brought into play. The main general policy consideration was whether one should reward ignorance about disease and its causes, or as the court stated, should the plaintiff be rewarded who prefers to rely on the ill-informed comments of friends or acquaintances or inaccurate and sensational media reports rather than on the considered views of an experienced physician?

More specific policy considerations were the potential negative effects on the pharmaceutical and healthcare industry, involving the potential cessation or retardation in the development of new drugs because lawsuits would be

filed by patients currently suffering from no physical injury or illness but with a fear of the risk of an adverse effect, and the pharmaceutical industry's insurance ramifications were also considered.

The court held that these public policy considerations resulted in the need for meaningful restrictions to be placed on the scope of the law. The court also reviewed the relevant US law where it was found that mental anguish or emotional distress claims without physical impact had failed. Having considered and reviewed the existing 'fear of disease' cases, the ultimate decision was that Mr Fletcher ought not be compensated because he was suffering from something which was described as 'not a rational fear'.

The list of policy considerations ultimately included insurance availability – its high cost; its possible less availability; the inadequacy of monetary damages; the difficulty in measuring damages; the impediment to testing of new drug products; and finally, the desire not to reward ignorance.

It is important to note that there will be an outright ban on asbestos under the 2003 Asbestos Directive which is due to come into force in 2005 and is due to be implemented in Ireland in 2006 (European Directive 2003/18/EC).

### 9.3.5 Expanding scope

It remains to be seen how far the doctrine of toxic torts will be applied and to what areas of physical injury it may be extended. Given the ever-expanding scope of environmental protection being afforded, not only to individuals but to the environment, it may only be a matter of time until this doctrine will be sought to be relied upon by environmental campaigners to apply to harm to the environment, for example, in the areas of ozone depletion, radiation in fish and fish food, and acid rain. If it were held that this case-law could apply by analogy to such claims, how rational, for instance, are fears of Sellafield contamination for its neighbours? Perhaps the Natura Sites system of protection set out under the web of legislation involving the Habitats Directive, the Wildlife Acts and the Wild Birds Directive will be found to provide a sufficiently self-contained system of redress. Once the Civil Liability for harm to the Environment Directive ultimately comes into play, perhaps this will afford the additional protection needed. In the meantime, however, this area of law remains to be further explored.

CHAPTER 10

# WASTE MANAGEMENT

*Margaret Austin*

## 10.1 Introduction

The last seven years have seen no less than two waste management Acts and 31 statutory instruments relating to waste management. While this reflects an extraordinary pace of change in the regulation of the waste industry, Ireland has been playing catch up with other European countries, many of which have more highly developed waste infrastructure and systems of regulation. The first EU Waste Directive was introduced in 1975; the first Irish Waste Management Act was enacted in 1996. The ultimate aim of waste regulation is to maintain a clean and healthy environment and to develop approaches to protect human health and the environment. (See Decision 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme for an overview of EU policy on the environment.)

The Waste Management Acts 1996 to 2001 (WMA) and the regulations made pursuant to the WMA are the cornerstone of Irish waste management legislation. However, reference often needs to be made to various other Acts governing the environment and land use control, in particular the Planning and Development Acts 2000 to 2002, the Environmental Protection Agency Act 1992, the Protection of the Environment Act 2003 and the Litter Pollution Act 1997. In particular, the Protection of the Environment Act 2003 makes a number of significant amendments to the WMA 1996.

As with much Irish legislation concerning the environment, the WMA are largely driven by EU legislation. The WMA provide that one of their purposes is to give effect to a number of specified community acts. These include Council Directive 75/442 (OJ L194/39) (the 1975 Directive) and Council Directive 91/156/EEC of 18 March 1991 (OJ L78/32) amending Council Directive 75/442 on waste (the 1991 Directive). (The 1975 Directive, as amended by the 1991 Directive is hereafter referred to as the Waste Directive.)

### 10.1.1 The Waste Directive

For interesting background information on the Waste Directive refer to Professor Jan H Jans, *European Environmental Law*, Europa Law Publishing, 2000.

The 1975 Directive is the framework Waste Directive and defined waste for the first time in European law. The definition of waste under the 1975 Directive

was a very broad one giving rise to differences amongst Member States in their respective definitions of waste. This in turn affected the internal market, trade and the treatment of waste in the Member States, and was undermining the harmonisation of environmental pollution control. The 1991 Directive attempted to address the difficulties by extensive amendment of the 1975 Directive.

The 1991 Directive recognised:

(a) that Member States needed to take action to ensure the responsible removal and recovery of waste;

(b) the necessity to restrict production of waste in particular, by promoting clean technologies and products which can be recycled and reused;

(c) that disparity in Member States rules could affect the quality of the environment; and

(d) the importance of self-sufficiency in waste.

The self-sufficiency principle is one of a number of important principles informing EU environmental policy and legislation; the prevention principle, the proximity principle and the polluter pays principle are other such principles. The principles may be roughly summarised as follows:

- the self-sufficiency principle requires that Member States should become self-sufficient in waste recovery and disposal facilities;
- the prevention principle requires that waste be prevented at source;
- the proximity principle requires that waste disposal facilities be located close to the areas where waste is generated;
- the meaning of the polluter pays principle is self-evident.

The Waste Directive defines 'waste' as follows:

> 'waste' shall mean any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard.

The Waste Directive also provided that the Commission was to draw up a list of wastes belonging to the categories listed in Annex I. That list is known as the European Waste Catalogue (Commission Decision 2001/119/EC, 22 January 2001, OJ L047, 16/2/2003).

The Waste Directive obliges Member States to establish an integrated and adequate network of disposal installations. The network must enable the EU to become self-sufficient in disposal and each Member State should achieve that aim individually. The network of installations must enable waste to be disposed of in one of the nearest appropriate installations.

The Waste Directive's other main provisions are as follows:

(a) the hierarchy of waste management principles: waste prevention, recovery, safe disposal (Arts 3 and 4);

(b) the principles of proximity and self-sufficiency applying to waste for final disposal (Art 5);

(c) the obligation on Member States to establish waste management plans (Art 7);

(d) permits must be required for establishments and undertakings carrying out disposal and recovery operations (Arts 9 and 10);
(e) record keeping requirements (Art 14);
(f) the polluter pays principle (Art 15); and
(g) reporting requirements (Art 16).

## 10.2 Definition of waste under the WMA

The Waste Directive provides in Art 1 of Council Directive 91/156/EEC that:

> 'waste' shall mean any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard.

Section 4 of the WMA 1996 includes a definition of waste largely similar to that of the Waste Directive:

> In this Act 'waste' means any substance or object belonging to a category of waste specified in the First Schedule or for the time being included in the European Waste Catalogue which the holder discards or intends or is required to discard and anything which is discarded or otherwise dealt with as if it were waste shall be presumed to be waste until the contrary is proved.

There are a number of points to be emphasised on the definition of waste in the WMA:

(a) the substances or objects must fall into one of the categories set out in the First Schedule or be listed in the European Waste Catalogue;
(b) it must be 'discarded' by the holder;
(c) the burden of proof is on the holder to establish that a substance or object is not waste.

Section 5(1) of the WMA 1996 provides that the holder of waste is:

> the owner, person in charge, or any other person having for the time being possession or control of the waste.

Section 3 of the WMA 1996 specifically provides that the WMA do not apply to:

(a) an emission into the atmosphere other than an emission for the holding, recovery or disposal of waste;
(b) sewage and sewage effluent (other than sludge from a facility for the treatment of sewage);
(c) the treatment of effluent or the discharge thereof to waters, other than treatment at, or the discharge from a facility for the holding, recovery or disposal of waste;
(d) the dumping of waste at sea; or
(e) a radioactive substance within the meaning of the Radiological Protection Act 1991 (including a radioactive waste product).

The exclusions from the WMA largely mirror the exclusions in the Waste Directive (the WMA do not exclude mining and quarrying activities).

### 10.2.1 Disposal and recovery

The Waste Directive and the WMA distinguish between waste recovery and waste disposal.

### 10.2.2 Disposal

The Waste Directive defines 'disposal' as 'any of the operations provided for in Annex IIA'.

Under the WMA 1996, 'disposal' is defined as follows:

> In this Act, 'disposal', in relation to waste, includes any of the activities specified in the Third Schedule and 'waste disposal activity' shall be construed accordingly.

The Third Schedule to the WMA 1996 largely mirrors Annex IIA of the Waste Directive. Examples of waste disposal activities included in the Third Schedule of the WMA 1996 are: deposit on, in or under land; land treatment, including biodegradation of liquid or sludge discards in soils; and incineration on land or at sea.

### 10.2.3 Recovery

The Waste Directive defines 'recovery' as 'any of the operations provided for in Annex IIB'.

'Recovery' is defined under the WMA as follows:

> In this Act, 'recovery' in relation to waste, means any activity carried on for the purposes of reclaiming, recycling or reusing, in whole or in part the waste and any activities related to such reclamation, recycling or reuse, including any of the activities specified in the Fourth Schedule, and 'waste recovery activity' shall be construed accordingly.

The Fourth Schedule of the WMA 1996 largely mirrors Annex IIB of the Waste Directive. Examples of the activities listed in the Fourth Schedule of the WMA 1996 include solvent reclamation or regeneration, recycling or reclamation of metals and metal compounds and use of any waste principally as a fuel or other means to generate energy.

Interesting and complex questions can arise when ascertaining whether certain operations constitute waste recovery operations or waste disposal operations. These issues arose recently in two cases before the ECJ.

In Case C-228/00 *Commission v Germany*, 13 February 2003, the question which arose was whether the use of waste as a fuel in cement kilns was a waste disposal or a waste recovery operation within the meaning of the Waste Directive and the Council Regulation on transfrontier shipment of waste (Council Regulation 259/93/EEC of 1 February 1993 on the supervision and control of shipments of waste). The waste was being exported from Germany for use in Belgium. The relevant German authorities objected to the transport of the waste, basing their objections on circulars issued by regional German Ministries of the Environment. The procedures in the Council Regulation applicable to waste destined for recovery are less restrictive than the proce-

dures applicable to waste destined for disposal. Countries from which waste is dispatched or countries to which waste is destined have much broader grounds of objection if the waste is destined for disposal than if the waste is destined for recovery. The key question was whether the waste was being sent for recovery or disposal. Countries from which waste is dispatched or countries to which waste is destined have much broader grounds of objection, if the waste is destined for disposal than if the waste is destined for recovery. The key question was whether the waste was being sent for recovery or disposal. The Waste Directive (Annex IIB), lists recovery operations. This includes '[use of waste] principally as a fuel or other means to generate energy'. The court found that it follows from the use of the term 'principally' that the waste must be used principally as a fuel or other means of generating energy. This means that the greater part of the waste must be consumed during the operation and the greater part of the energy generated must be recovered and used. The court found that the essential characteristic of a waste recovery operation was that its principle objective is that the waste serves a useful purpose by replacing materials which would have had to be used for that purpose, thereby conserving natural resources.

In Case C-458/00 *Commission v Luxembourg*, 13 February 2003, on very similar facts, a Luxembourg company notified the competent authorities of Luxembourg seeking authorisation to ship household and similar waste to France. The company notified the shipment as waste destined for recovery. The Luxembourg competent authority reclassified the shipment as a shipment of waste intended for disposal. The competent authorities of Luxembourg had justified its reclassification on the basis that incineration of waste in a plant, the primary purpose of which was thermal treatment with a view to the mineralisation of the waste, whether or not there would be reclamation of the heat produced, was a disposal operation within the meaning of the Waste Directive. The court stated that the shipment of waste, in order for it to be incinerated in a processing plant designed to dispose of waste, cannot be regarded as having the recovery of waste as its principal objective, even if, when that waste is incinerated, all or part of the heat produced by the combustion is reclaimed. Where the reclamation of the heat generated by the combustion constitutes only a secondary effect of an operation, the *principal objective* of which operation is the disposal of waste, it cannot affect the classification of the operation as a disposal operation. The court found that the Commission had failed to adduce any evidence to rebut the Luxembourg competent authorities' contention that it was waste destined for disposal or to show that the principal objective of the operation in question was the recovery of waste rather than the disposal of waste.

## 10.3 Importance of defining waste

Waste and waste holders will be subject to the application of the WMA. Waste disposal and recovery activities will be subject to the waste management requirements under the WMA. Holders of waste will be required to hold licences or permits as appropriate under the terms of the WMA. The sanctions of court orders, fines and imprisonment may be invoked against the holders of waste and those engaged in illegal dumping under the WMA.

The classification of a substance or object as waste has implications for any subsequent purchaser or transferee of the waste, as they will be classified as the 'holder' of the waste within the meaning of the WMA. In most instances, it will be clear whether or not a substance or object constitutes waste. However, the question of whether a substance or object constitutes waste and is therefore subject to the waste licensing or permitting regime under the WMA in some instances is not clear cut and can give rise to vexed questions in law. For example, sludge, a by-product of a trade effluent treatment process, may be used as a fuel in industry or as a fertiliser. This sludge has re-saleable value. Is it waste? Interesting questions also arise in relation to by-products of industrial processes. Such by-products have a reuse value, but may have to be stored for a certain period of time before re-use. However, while in storage, they do not create any threat to the environment. Are these substances or objects to be classified as waste?

For an interesting discussion on the subject and a review of earlier cases on waste see Duncan Laurence, *Swallows and Fishes: The Definition of Waste in the Waste Management Act 1996*, IPELJ Vol 7, No 2.

## 10.4 ECJ judgments on waste

The ECJ has wrestled with the question of the definition of waste and a number of the ECJ judgments deal with the type of questions raised above.

The ECJ has interpreted the concept of waste very broadly (although not always clearly) and has stressed the need to have regard to the aim of the Waste Directive, namely, the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste.

In its judgment in Case C-206, 207/88 *Criminal proceedings against G Vessoso and G Zanetti* [1990] ECR I-1461, the court held that the concept of waste does not exclude substances which are capable of economic reutilisation nor does it presume that the holder disposing of a substance intends to exclude all economic reutilisation of the substance by others. Further, the term 'discard' used in the definition of waste has a special meaning encompassing both the disposal of a substance and its consignment to a recovery operation: see Case C-139/96 *Inter-Environnement Wallonie ASBL v Region Wallone* [1998] Env LR 623. Two recent decisions of the ECJ, referred to below, also reaffirm that a substance can go through some kind of recovery operation and yet remain waste.

In Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 *Tombesi* [1997] ECR I-3561, the court (also) stated that the system of supervision and control established by the Waste Directive was intended to cover all objects and substances discarded by their owners, even if they have a commercial value and are collected on a commercial basis for recycling, reclamation or reuse.

### 10.4.1 The *Arco* case

The ECJ gave some guidance on the relevant criteria for determining whether a substance constitutes waste in Cases C–418/97 and 419/97 *Arco Chemie Nederland and Epon* [2000] ECR I-04475 (the *Arco* case). In this case, the ECJ con-

sidered whether 'LUWA – bottoms', a by-product of the manufacturing process used by Arco, constituted waste. The by-product was destined for use as a fuel in the cement industry.

The ECJ emphasised that the question as to whether substances are waste, within the meaning of the Waste Directive, must be determined *in light of all the circumstances*, regard being had to the aim of the Waste Directive and the need to ensure that its effectiveness is not undermined. The ECJ also noted that EC environmental policy is to aim at a high level of protection and is based, in particular, on the precautionary principle and the principle that preventive action should be taken.

The ECJ held that it may not be inferred from the mere fact that a substance undergoes a recovery operation listed in Annex IIB of the Directive (in the *Arco* case, use principally as a fuel) that the substance has been discarded so as to enable it to be regarded as waste.

The ECJ also held that the concept of waste does not exclude substances and objects which are capable of being recovered as a fuel in an environmentally responsible manner and without substantial treatment (although the ECJ noted that the fact that substances may be recovered as fuel in an environmentally responsible manner and without substantial treatment is material to the question whether the use of that substance as a fuel should be authorised or encouraged or the decision as to the degree of control to be exercised).

### 10.4.2 The *Palin Granit* case

The case of *Palin Granit OY v Vehmassalon Kansanterveystyon Kuntayhtyman Hallitus*, judgment of the sixth chamber of the Court of Justice, 18 April 2002, concerned stone quarrying. Palin Granit, a Finnish company, applied for an environmental licence under Finnish legislation for a stone quarry. The application stated that the leftover stone resulting from the quarrying activity (50,000 $m^3$ per annum which represented 65%–80% of the total stone quarried) would be stored on an adjacent site. The Supreme Court of Finland asked the ECJ for guidance as to the criteria relevant for determining whether, in a series of defined circumstances, leftover stone resulting from granite quarrying is to be regarded as waste within the meaning of the Waste Directive.

The ECJ found that the holder of leftover stone resulting from stone quarrying which is stored for an indefinite period of time to await possible use, discards or intends to discard that leftover stone and therefore such leftover stone is to be classified as waste within the meaning of the Waste Directive. The ECJ stated that the place of storage of leftover stone, its properties and the fact, even if proven, that the stone does not pose any risk to human health or the environment, were not relevant criteria for determining whether the stone was to be regarded as waste.

The court found that neither the fact that the leftover stone had undergone a treatment operation, nor the fact that it could be reused, sufficed to show that stone is waste for the purpose of the Waste Directive; there were other criteria which were more decisive. The court noted that one of the relevant criteria for determining whether a substance is waste, for the purposes of the Waste Directive, is the degree of likelihood that the substance will be reused without any further processing prior to its reuse.

The court referred to its decision in *Arco* and the importance of determining whether the substance is a production residue. The court stated that materials resulting from a manufacturing or extraction process, the primary aim of which is not the production of those materials, may nonetheless be regarded as by-products. Materials may be regarded as by-products and not production residues where the undertaking does not intend to discard but intends to exploit or market them on terms which are advantageous to it, in a subsequent process, without any further processing prior to reuse. However, the ECJ held that this reasoning applicable to by-products only applies where reuse of the materials is:

> not a mere possibility, but a certainty, without any further processing required to reuse and as an integral part of the production process.

The ECJ also noted that the production of leftover stone was not Palin Granit's primary objective; the leftover stone was only a secondary product of which Palin Granit sought to limit the quantities produced. The ECJ held that the holder of leftover stone, resulting from the stone quarrying, which is stored for indefinite lengths of time to await a possible use, discards or intends to discard that stone. Therefore, the leftover stone was waste within the meaning of the Waste Directive.

It is clear from the *Arco* and *Palin Granit* decisions that regard must be had to all the circumstances of the case and that there are no decisive criteria which determine whether or not a substance or object constitutes waste. One of the criteria which may assist in determining the question is the degree of likelihood that the substance or object will be reused without further processing prior to reuse. If there will also be a financial advantage to the holder in reusing the substance or object, then it may no longer be regarded as a burden (and probably waste) which the holder seeks to discard, but instead a valuable commodity.

It is also clear that the concept must not be interpreted restrictively and must be interpreted in accordance with and in furtherance of the aims of the Waste Directive. Article 174(2) of the EU Treaty provides that community policy on the environment is to aim at a high level of protection and is to be based in particular on the precautionary principle and the principle that preventative action should be taken, that environmental damage should, as a priority, be rectified at source and that the polluter should pay. Therefore, as held in the *Palin Granit* case, it follows that the concept of waste cannot be interpreted restrictively and must be interpreted in such a way that the effectiveness of the Waste Directive is not undermined.

## 10.5 Holding, collection and movement of waste

Part IV of the WMA 1996 contains the provisions in relation to the holding, collection and movement of waste. Section 32(1) of the WMA 1996 provides as follows:

> a person shall not hold, transport, recover or dispose of waste in a manner that causes or is likely to cause environmental pollution.

This is an important statement of principle in the WMA.

Section 5(1) of the WMA 1996 defines environmental pollution as:

> in relation to waste, the holding, transport, recovery or disposal of waste in the manner which would, to a significant extent, endanger human health or harm the environment and in particular:
>
> (a) create a risk to waters, the atmosphere, land, soil, plants or animals;
>
> (b) create a nuisance through noise, odours or litter;
>
> (c) adversely affect the countryside or places of special interest.

Section 32(2) of the WMA 1996 provides that a person must not transfer the control of waste to any other person other than:

(a) an appropriate person (s 32(5) of the WMA 1996 provides that 'an appropriate person' means a local authority including the corporation of a borough that is not a county borough and the council of an urban district); or

(b) a person otherwise authorised under the WMA; or

(c) a person authorised under the Environmental Protection Agency Act 1992 to undertake the collection, recovery or disposal of waste.

A person who transfers waste otherwise than in accordance with these provisions will be guilty of an offence. If a person purports to transfer the control of waste to another person in contravention of the WMA then any act or instrument to transfer that title will not operate to transfer the title and the person who transfers the waste will be deemed to be a holder under the WMA as well as the person to whom the waste is transferred. Being the 'holder' of the waste in these circumstances has consequences under the WMA in accordance with s 32(7)(a) of the WMA 1996.

Section 39 of the WMA 1996 provides that a person must not dispose of or undertake the recovery of waste at a facility unless such disposal or recovery is in accordance with a licence or a permit granted in relation to that activity. A facility is defined in s 5(1) of the WMA 1996:

> 'facility' means in relation to the recovery or disposal of waste, any site or premises used for such purpose.

Different dates were applicable to the obligation to apply for a licence in respect of non-existing activities and in respect of new activities. The prescribed date for certain *non-existing activities*, eg disposal of waste at a landfill, disposal of hazardous waste and disposal of waste at a facility with an annual intake exceeding 25,000 tonnes, was 1 May 1977. Various dates in 1998 were prescribed in respect of *existing activities*. Transitional provisions were provided for the period of a valid application for a licence, provided that the waste disposal activity was being carried on in accordance with a permit under EC (Waste) Regulations 1979 (SI 388/1979) or EC (Toxic and Dangerous Waste) Regulations 1982 (SI 33/1982). The activities for which a waste licence is required are set out in the Third Schedule of the WMA. Examples of such activities would include the deposit of waste on, in or under land and land treatment, including the biodegradation of liquid or sludge discards in soil.

The Environmental Protection Agency (the EPA) is the licensing authority for waste licences. The WMA provide for a number of exceptions to the requirement to obtain a waste licence.

## 10.6 Waste permits

The exempted activities which do not require a waste licence are set out in the Waste Management (Permit) Regulations 1998 (SI 165/1998) (the Permit Regulations). The Permit Regulations provide that the carrying on by a person (other than a local authority) at a facility (other than a facility located in whole or in part in an area which is not within the functional area of a local authority) of any of the scheduled activities must be in accordance with a permit.

The scheduled activities for which a permit is required are as follows:

(a) the incineration of waste (other than hazardous or hospital waste) at a facility which is equal to or less than one tonne per annum;

(b) the recovery of scrap metal or other metal waste;

(c) the dismantling of recovery of vehicles;

(d) the recovery of waste which is composed of or contains mercury or its compounds (including electric lamps, light bulbs and fluorescent tubes);

(e) the recovery of waste (other than hazardous waste) at a facility (other than a facility for the composting of waste when the amount of composting waste held at the facility exceeds 1,000 cubic metres at any time);

(f) the disposal of waste (other than hazardous waste) at a facility (other than a landfill facility) where the annual intake does not exceed 5,000 tonnes per annum.

Local authorities are the licensing authorities for waste permits. There is no public participation process in the granting of a waste permit. The exception to the requirement of having a waste licence, for the activities set out above, will only apply where, in addition, the activity is being carried on in a manner which does not cause, and is not likely to cause environmental pollution and the activity is being carried on in accordance with the conditions attached to the permit.

The Permit Regulations also provide that the temporary storage of hazardous waste, where the quantities do not exceed the thresholds laid down in the Permit Regulations, are subject to a registration procedure. The registration procedure does not apply to any facility in respect of which an Integrated Pollution Control licence (IPC licence) has been granted by the EPA.

Certain local authority activities are also exempt from the requirement to obtain a waste licence. However, a Certificate of Registration will be granted by the EPA in respect of these. These activities are the recovery of waste by a local authority other than:

(a) recovery of waste at a facility where the annual intake exceeds 5,000 tonnes; or

(b) the composting of waste at a facility where the amount of waste and compost held at the facility at any time exceeds 1,000 tonnes.

Section 51 of the WMA 1996 specifically provides that a waste licence shall not be required for the recovery of:

(a) sludge from a facility for the treatment of water or waste water;
(b) blood of animal or poultry origin;
(c) faecal matter of animal or poultry origin in the form of manure or slurry; or
(d) such natural agricultural waste as may be prescribed.

## 10.7 Waste licences

As already mentioned, significant waste disposal and recovery activities and the recovery of hazardous waste will require a waste licence. Schedule 3 to the WMA 1996 sets out those waste disposal activities for which a waste licence is required. Provisions regarding applications for waste licences are dealt with in ss 40–50 of the WMA 1996. The application procedure for a licence allows for public participation. The detailed procedural requirements for the application of a waste licence are set out in the Waste Management (Licensing) Regulations 2000 (the Licensing Regulations) (SI 185/2000). Application for a waste licence is made to the EPA. In considering an application for a waste licence the EPA must have regard to certain considerations. These include the following:

(a) an air quality management plan;
(b) a water quality management plan;
(c) a hazardous waste management plan;
(d) any Environmental Impact Statement (EIS) (s 40(3)(a) of the WMA 1996 provides that the EPA may only have regard to matters mentioned in the EIS in so far as they relate to the risk of environmental pollution from the activity in question. The Protection of the Environment Act 2003 clarifies this by making provision for an amendment that the EPA would only have regard to matters mentioned in the EIS in so far as the EIS relates to the risk of environmental pollution from the waste activity concerned);
(e) submissions or observations with respect to the EIS;
(f) any supplementary information from the applicant;
(g) the views of other Member States where appropriate; and
(h) other matters related to the prevention, limitation, elimination, abatement or reduction of environmental pollution from the activity concerned as the EPA considers necessary.

The EPA is not to grant a waste licence unless it is satisfied that:

(a) the emissions will not contravene emissions and standards set out in other legislation;
(b) the activity will not cause environmental pollution;

(c) best available technology not entailing excessive costs (BATNEEC) will be used to prevent or eliminate, or where that is not practicable, generally to reduce an emission from an activity. (The Protection of the Environment Act 2003 provides for amendment to the WMA by substituting references to 'best available technology not entailing excessive costs', which was the technical basis of the licensing system, for 'best available techniques'. The concept of BAT is broader than BATNEEC, as techniques are defined to include both the technology used and the way in which the installation is designed, built, managed, maintained, operated and decommissioned.);

(d) the applicant is a 'fit and proper person' to hold a waste licence.

The Protection of the Environment Act 2003 provides for additional matters on which the EPA must be satisfied:

(a) waste production will be prevented or minimised and where waste is produced, it will be recovered or where this is not technically and economically possible, it will be disposed of in a manner which will prevent or minimise any impact on the environment;

(b) energy will be used efficiently in the carrying on of the activity;

(c) necessary measures will be taken to prevent accidents in the carrying on of the activity, and, where an accident occurs, to limit its consequences for the environment and remedy those consequences; and

(d) necessary measures will be taken upon the permanent cessation of the activity to avoid any risk of environmental pollution and to return the site of the activity to a satisfactory state.

It also provides that prior to the commencement of a licensed waste activity, the EPA must ensure that the facility is capable of compliance with the licence.

In practice, there may occasionally be some difficulty in deciding whether an activity is licensable under the IPC licensing regime or under the WMA. The Waste Management (Amendment) Act 2001 attempted to remedy this by providing that recovery or disposal of waste in a facility 'connected or associated' with an activity licensable under the IPC regime would be licensable under the IPC regime and not under the WMA. The Protection of the Environment Act 2003 provides that where the recovery or disposal of waste is carried on in a facility connected with an activity which requires an IPC licence, then either a waste licence or an IPC licence, but not both, will be required. The EPA can make a written declaration on which licence will be required.

### 10.7.1 Fit and proper person

As referred to earlier, one of the criteria on which the EPA must be satisfied before granting a waste licence is that the applicant is a 'fit and proper' person.

The criteria for 'a fit and proper person' are that:

(a) neither the licence applicant nor any other relevant person has been convicted of a prescribed offence;
(b) the applicant has the requisite technical knowledge to carry on the activity; and
(c) the applicant has the capacity to meet any financial commitments that the EPA might require in carrying on or ceasing to carry on the activity.

Section 41 of the WMA 1996 (as amended by s 36 of the Protection of the Environment Act 2003) provides that conditions may be attached to a licence and sets out in detail the types of conditions which may be attached.

It should be noted that there is no provision under the WMA for an appeal in connection with the decision of the EPA on a waste licence application. Any challenge to the decision of the EPA must be made by way of application for judicial review and must be made within two months of the decision. The EPA is required to give notice of their proposed decision to the applicant and any person who has made a written submission on the application. Any person may object in writing within 28 days of notification to the proposed decision.

## 10.8 Review of licences

Waste licences are open to review. Licences may be reviewed after three years or earlier on the consent of the holder of the licence or where:

(a) there is a material change in the nature of the activity, emission or location;
(b) there is a material change in the condition of the environment; or
(c) new evidence becomes available;
(d) new standards or requirements are prescribed under the WMA or under EU legislation.

The EPA had a discretion to review on grounds (a)–(d). However, the Protection of the Environment Act amends s 46 of the WMA 1996 and provides for new mandatory circumstances in which a waste licence must be reviewed by the EPA .

The EPA shall review a waste licence if it considers:

(a) that pollution arising from or as a result of the activity to which the waste licence relates is of such significance that the existing limit values specified in the waste licence need to be revised or new such values need to be specified in the waste licence;
(b) that substantial changes in best available techniques make it possible to reduce emissions from the said activity significantly without imposing excessive costs;
(c) that the operational safety of the said activity requires techniques, other than those currently being used in respect of it, to be used; or
(d) new requirements (whether in the form of standards or otherwise) are prescribed, by or under any enactment or Community act, being requirements that relate to:

- the conduct or control of the activity to which the waste licence relates;
- the content or nature of an emission concerned; or
- the effects of the activity on such an emission.

Therefore, a licensee is subject to the possibility that the licence may be reviewed in the above circumstances, at any time, and otherwise at three year intervals. A revision of the licence could result in potentially significant capital expenditure being required by the licence holder in order to make any modification required by the EPA. Waste licences must be reviewed upon the cessation of the activity or following the EPA's refusal to accept the surrender of the licence.

## 10.9 Transfer of a waste licence

Section 47(1) of the WMA 1996 provides that a waste licence may be transferred. However, the WMA restrict the ability to transfer. The holder and the proposed transferee must make a joint application to the EPA for the transfer. A waste licence is personal to the licence holder, it does not enure for the benefit of the land (in the same way as a planning permission so enures).

Before the EPA transfers the licence, the EPA must be satisfied:

(a) that the proposed transferee is a fit and proper person;

(b) that the proposed transferee has provided any financial security which might be required by the EPA; and

(c) regarding any other matters as may be prescribed under the WMA.

Where the EPA is satisfied on these matters, it must transfer the licence in accordance with s 47(5) of the WMA 1996. A person to whom a waste licence is transferred is deemed to have assumed and accepted all liabilities, requirements and obligations provided for in or arising under the licence, regardless of how and in respect of what period, including the period *prior to* the transfer of the licence. This will be of particular importance in respect of mergers and acquisitions of waste companies and companies with a poor or suspect environmental compliance record and a full environmental due diligence will be very important for clients who may be acquiring companies which may have been dumping waste (including hazardous waste) illegally.

## 10.10 Surrender of a waste licence

Provision is made in the WMA for the surrender of a waste licence. However, the EPA may only accept a surrender where it is satisfied that the condition of the relevant facility is not causing or likely to cause environmental pollution. If the EPA refuses to accept the surrender, the EPA must then review the licence. In practice and in particular in the UK, it has been difficult for waste licensees to surrender a licence. Most waste licences will contain conditions providing what is to happen in the event of the activity ceasing. The EPA will be concerned to ensure compliance with such conditions. In the event that the licence

holder fails to comply with these, the EPA, if it has required the placing of security by the licence holder, may call upon or enforce the security in order to ensure that any remediation required is carried out. Formerly, the EPA did not have power to revoke or suspend the operation of a waste licence, although the EPA could make application for an injunction to suspend the activities of a waste licensee who was not in compliance with the conditions of its licence. The Protection of the Environment Act 2003 now provides the EPA with powers to revoke or suspend the operation of a waste licence if the EPA considers that the licence holder no longer constitutes 'a fit and proper person'.

## 10.11 Waste collection permits

The WMA provide that no one other than a local authority shall, with a view to profit, or otherwise in the course of its business, collect waste, unless they hold a waste collection permit. The granting authority for such permits will be either:

(a) the local authority in whose functional area the waste is collected;
(b) such other local authority as may be nominated pursuant to a joint waste management plan; or
(c) such other body as may be prescribed under the WMA.

The Waste Management (Collection Permit) Regulations 2001, SI 402/2001 (the Waste Collection Permit Regulations), govern the procedural requirements for an application for a waste collection permit. These include a public consultation procedure.

The Waste Collection Permit Regulations include provisions inviting submissions from the public, other local authorities and the EPA on receipt of an application for a waste collection permit. However, there does not appear to be any stated obligation to have regard to those submissions in making its decision. The Waste Collection Permit Regulations also make provision for a review of the waste collection permits by a local authority every two years.

The Waste Collection Permit Regulations set out exceptions to the requirement to apply for a waste collection permit. These include:

(a) the gathering, sorting or mixing of waste
    - on the premises on which the waste arose, or
    - which is carried on in accordance with a waste licence or waste permit;
(b) transport of waste by a person where that transport is incidental to the main business activity of the person concerned and the waste is transported in or on a vehicle which has a laden axle weight of less than one tonne, other than a vehicle designed for the carriage of a skip or other demountable container;
(c) transport of specified risk material;
(d) collection of animal by-products;
(e) collection of packaging waste by a major producer (see SI 61/2003);

(f) collection of farm plastic waste by a producer (see SI 341/2001); and

(g) collection of waste at a bring facility.

The WMA and the Waste Collection Permit Regulations make no specific reference to transfers of waste collection permits. However, considerable detail is required upon application for a permit from the applicant. A holder of a waste collection permit must give notice in writing of *any* change in the information provided to the local authority on the application, within four weeks of the change. However, the wording of many permits as issued by local authorities only requires notification of 'material' or 'significant' changes. If the transfer involves changes in such data, then notification will be required. The WMA provide that a local authority may, at any time, decide to amend the conditions or revoke the permit. Therefore, if the transfer involves a change in any of the information provided, the local authority must be informed and the local authority could decide to exercise its powers to amend or revoke the waste collection permit. Under s 34(7)(h) of the WMA 1996, the holder of a waste collection permit will be required to put insurance in place. The permits issued by local authorities in practice require motor, public liability and property damage insurance but do not require the putting in place of environmental impairment or liability insurance.

## 10.12 Waste management plan

The WMA provide that a local authority is obliged to make a waste management plan with regard to the prevention, minimisation, collection, recovery and disposal of non-hazardous waste within its functional area. The WMA also provide that one or more local authorities may come together for the purposes of making such plans. Local authorities throughout the country have grouped together and formulated regional waste management plans in respect of their functional areas. The Waste Management (Amendment) Act 2001 provides that the duties of a local authority with respect to the making of a waste management plan are to be carried out by the manager of the local authority and therefore the making of such a plan is an executive function. The Protection of the Environment Act 2003 provides, in addition, that the review, variation or replacement of a waste management plan is an executive function and also provides that in the event of a conflict between an objective in a development plan and a waste management plan the objective in the waste management plan is to prevail. Notification of an intention to commence the preparation, variation or replacement of a plan must be published in a newspaper notice and representations invited within at least two months from the date of publication of the notice. Such representations must be taken into account before making or varying the plan.

## 10.13 Contents of a plan

A waste management plan must contain such objectives as seem to the local authority to be reasonable and necessary:

(a) to prevent or minimise the production or harmful nature of waste;
(b) to encourage and support the recovery of waste;
(c) to ensure that such waste that cannot be prevented or recovered is disposed of without causing environmental pollution; and
(d) to ensure in the context of waste disposal that regard is had to the need to give effect to the polluter pays principle.

The plan should also specify the measures to be entered into with a view to securing those objectives and a local authority must take such steps as are appropriate and necessary to obtain the objectives.

The WMA set out in detail the information to be included in waste management plans. There has been some criticism of the regional waste plans on the basis that they prevent economies of scale. It has been argued that the arbitrary regional boundaries are not consistent with the proximity principle and it has been suggested that the plans should, more realistically, be drawn in accordance with the National Spatial Strategy.

## 10.14 Hazardous waste management plan

The WMA provide that the EPA is to prepare a national hazardous waste management plan with regard to:

(a) the prevention and minimisation of hazardous waste;
(b) the recovery of hazardous waste;
(c) the collection and movement of hazardous waste; and
(d) the disposal of such hazardous waste as cannot be prevented or recovered.

Section 26(2) of the WMA 1996 sets out various matters which the EPA must have regard to and incorporate in any hazardous waste management plan. Regard must also be had to the polluter pays principle.

## 10.15 Collection of household waste

Section 33 of the WMA 1996 provides that a local authority is under a general obligation to collect or arrange for the collection of household waste within its functional area. This obligation does not apply where:

(a) there is an adequate waste collection available in the relevant part of the local authority's functional area;
(b) the estimated cost of the collection of the waste concerned by the local authority would, in the opinion of the authority, be unreasonably high;
(c) the local authority is satisfied that adequate arrangements for the disposal of the waste concerned can reasonably be made by the holder of the waste.

The local authority is empowered to make bye-laws in relation to the proper management of waste or the prevention or control of environmental pollution.

Under the WMA, a local authority is obliged to provide and operate or arrange for provision and operation of facilities necessary for the recovery and disposal of household waste arising within its functional area. In *O'Connell v Cork Corporation* (unreported, Supreme Court, 31 July 2000), the Supreme Court found that the local authority could not refuse to collect waste where charges, imposed by bye-laws, had not been paid. The court found that the WMA permitted the introduction of bye-laws for the effective administration of waste collection and management, but the WMA did not specifically provide for the imposition of waste charges and therefore the bye-laws were *ultra vires*. The Protection of the Environment Act 2003 provides that local authorities may impose charges for waste collection services. The Protection of the Environment Act 2003 also includes a provision that the local authority shall not be obliged to collect waste where waste charges have not been paid. Local authorities are empowered to enter into arrangements with any other local authority or other person for the recovery or disposal of waste. This empowers local authorities to enter into contracts with private contractors for such purposes. Local authorities throughout the country are entering into contracts with private contractors for the collection of dry recyclable wastes (the green bin collections) with a view to recovery of these wastes.

## 10.16 Waste and hazardous waste – recovery and disposal

Increasingly, in EU legislation, specific waste streams are subject to regulation on the recovery and disposal of those wastes. For example, European Parliament and Council Directive 94/62/EEC of 20 December 1994 on Packaging and Packaging Waste (the Waste Packaging Directive) deals with packaging and packaging waste; Council Directive 91/689/EEC of 12 December 1991 on hazardous waste (the Hazardous Waste Directive) deals with hazardous waste; European Parliament and Council Directive 2002/96/EC (the Waste Electronic and Electrical Equipment Directive) deals with electrical and electronic equipment waste; and other directives deal with end-of-life vehicles, waste oils and sewage sludge.

## 10.17 The Waste Packaging Directive

The Waste Packaging Directive was introduced to harmonise Member States' national measures concerning management of packaging and packaging waste, to prevent any impact on the environment and to ensure the functioning of the internal market and to avoid obstacles to trade and distortion and restriction of competition within the community. The *prevention* of packaging waste is an important theme throughout the Directive. The Waste Packaging Directive is also based on the principle of re-using packaging, on recycling and other forms of recovering packaging waste and thereby reducing the final disposal of such waste. The Waste Packaging Directive covers all packaging placed on the market in the EU whether it is used or released at industrial, commercial, office, shop, service, household or any other level regardless of the

material used. The Waste Packaging Directive requires Member States to take the necessary measures to ensure that systems are set up to provide for:

(a) the return and/or the collection of used packaging and/or packaging waste from the consumer;

(b) the reuse or recovery of packaging and/or packaging waste collected.

The Waste Packaging Directive requires waste packaging recovery and recovery means any of the operations provided for in Annex IIB of the Waste Directive.

The measures introduced by the Waste Packaging Directive include:

(a) prevention, ie national measures to prevent waste (Art 4);

(b) re-use to be encouraged with national measures (Art 5);

(c) recovery and recycling targets (Art 6);

(d) attainment of defined targets by defined dates (Greece, Ireland and Portugal were given until 31 December 2005 due to the larger number of small islands, the presence of rural and mountain areas and the current low level of packaging consumption);

(e) return, collection and recovery systems to be set up by Member States to provide for return and collection of packaging waste (Art 7);

(f) limits for heavy metals in packaging (Art 11);

(g) marking and identification systems to be established (Art 8);

(h) information systems and data formats to be adopted;

(i) economic instruments: national measures may be adopted in accordance with the polluter pays policy and the EU Treaty.

The Waste Packaging Directive required Ireland to achieve a 25% recovery rate of packaging waste by 2001, increasing to 50% by the end of 2005. The Waste Packaging Directive may be subject to further amendment. The EU Council has adopted a Common Position (EC) No 18/2003 of 6 March 2003 with a view to amending the Waste Packaging Directive. The proposed directive would clarify the definition of 'packaging', set targets for cycling and recovery and encourages the recycling and recovery of packaging waste.

## 10.18 Waste Management (Packaging) Regulations 2003 (SI 61/2003)

One of the stated purposes of the Waste Management (Packaging) Regulations (the Packaging Regulations) is to give effect to the Waste Packaging Directive. The Packaging Regulations came into operation on 1 March 2003. In defining packaging, a distinction is made between different types of packaging waste (Art 4(3) of SI 61/2003).

The Regulations distinguish between 'a producer' and 'a major producer'. A 'producer' is:

> a person who for the purpose of trade or otherwise, in the course of business, sells or otherwise supplies to other persons packaging material, packaging or packaged products, and produce shall be construed accordingly.

A 'major producer' within the meaning of the Packaging Regulations is:

> a producer who, for the purpose of trade or otherwise in the course of business sells, or otherwise supplies to other persons packaging material, packaging or packaged products;
>
> the aggregate weight of the packaging material and packaging supplied exceeds 25 tonnes, in a calendar year; and
>
> who has an annual turnover of more than €1 million.

In assessing the 25 tonne threshold, account will be taken of any packaging supplied to consumers in association with goods sold or consumed on a producer's premises. Therefore, licensed premises, clubs and restaurants can come within the definition of a major producer if they also fulfil the other two criteria referred to.

## 10.19 Obligations of all producers

Part II of the Packaging Regulations set out the primary obligations of all producers in relation to packaging waste arising at their premises. All producers are obliged to segregate waste aluminium, fibreboard, glass, paper, plastic sheeting, steel and wood and send it for recovery or return it to the supplier. Therefore, such materials cannot be disposed of by producers. In the case of all other packaging waste, the producer must either have it recovered or disposed of or must transfer it to the supplier. Alternatively, a producer may recover such packaging waste on site where it is to be used principally as a fuel or other means to generate energy effectively and where such use is carried out in accordance with a licence or permit under the WMA.

A producer is obliged to ensure that the person to whom he transfers the waste holds all necessary licences or permits required under the WMA or that such a person is exempt from the requirement to hold a permit or licence under the WMA.

## 10.20 Obligations of major producers

The Packaging Regulations set out additional obligations on major producers. These are self-compliance obligations which require major producers to provide facilities for the taking back of packaging from products purchased at their premises. These obligations can be very onerous on major producers. Alternatively, a major producer may participate in a scheme for the recovery of packaging and packaging waste, in which event the major producer will be exempt from the onerous self-compliance procedures set out in the Packaging Regulations. To date, the Repak scheme is the only such scheme that has been approved by the Minister under the Packaging Regulations. Where a major producer has been granted a certificate by Repak stating that the producer is

participating in a satisfactory manner in the scheme, then the producer is exempt from the onerous self-compliance requirements of the Packaging Regulations. However, the major producer is obliged to display in a conspicuous position at each of its premises a notice stating that the major producer participates in a scheme operated by Repak. Repak recovered 323,000 tonnes of packaging waste in 2002. In 2002, Repak received €13.5 million in membership fees. Repak funds bring bank infrastructure and the recovery and recycling of waste. For further information on Repak, see www.repak.ie.

The Packaging Regulations also set out certain essential requirements of packaging. These relate to its physical properties; it should be designed in such a way as to permit its re-use or recovery, including recycling, and to minimise its impact on the environment when it is disposed of.

Pursuant to the Packaging Regulations, a local authority is not obliged to arrange for the collection of packaging waste from a producer where the local authority considers that the producer is not in compliance with the Packaging Regulations. In addition, a commercial recovery operator must not accept packaging waste, until he has received a written declaration signed by the person in charge of the premises from which the packaging waste is to be collected stating that the producer will present the packaging waste for collection in compliance with the segregation requirements of the Packaging Regulations.

## 10.21 Hazardous Waste Directive

Council Directive 91/689 EEC (the Hazardous Waste Directive) supplements Council Directive 75/442/EEC (the Waste Directive) and includes stricter management and monitoring requirements in respect of hazardous waste. The Waste Directive will also apply to hazardous waste, except where its provisions conflict with the Hazardous Waste Directive. The Hazardous Waste Directive provides that hazardous waste means waste featuring on a list to be drawn up by the Commission. The Commission has drawn up that list and it is known as the European Waste Catalogue (Commission Decision 2001/119/EC of 22 January 2001 amending decision 2000/532/EC replacing Decision 94/3/EC establishing a list of wastes pursuant to Art 1(a) of Council Directive 1975/442/EEC on waste and Council Decision 94/904/EC establishing a list of hazardous wastes pursuant to Art 1(4) of Council Directive 91/689/EC on hazardous waste). One of the stated intentions of the Hazardous Waste Directive is to improve the conditions under which hazardous waste is disposed of and managed. The Hazardous Waste Directive recognised that proper management of hazardous waste necessitated more stringent rules to take into account the special nature of hazardous waste and that in order to improve the effectiveness of management of hazardous waste throughout the Member States, it was necessary to use a precise and uniform definition of hazardous waste. The main provisions of the Hazardous Waste Directive are as follows:

(a) the prohibition of mixing of hazardous waste with other hazardous or non-hazardous waste (Art 2);

(b) permit requirements for establishments and undertakings dealing with hazardous waste (Art 3);

(c) the requirement of periodic inspections for establishments and undertakings dealing with hazardous waste and a requirement of the producer of hazardous waste to keep records (Art 4);

(d) the requirement for appropriate packaging and labelling of hazardous waste during collection, transport and temporary storage (Art 5);

(e) the requirement that competent authorities draft waste management plans for hazardous waste (Art 6);

(f) the requirement that hazardous domestic waste be excluded from the provisions of the Hazardous Waste Directive.

## 10.22 The WMA and hazardous waste

Section 4(1) of the WMA 1996 provides that a reference in the WMA to waste includes hazardous waste unless a contrary intention appears. The WMA include a definition of hazardous waste. This replaces the earlier concept of toxic and dangerous waste in former legislation. Hazardous waste has a complex and two tier definition. It is defined primarily by reference to *properties* which render waste hazardous, ie explosive, oxidising, highly flammable, harmful, carcinogenic, corrosive and infectious. The European Waste Catalogue includes lists of hazardous waste on the basis of these properties. Waste itself is further defined as:

- types of waste to be regarded as hazardous if displaying any of the hazardous properties mentioned above, ie explosive, oxidising, flammable, etc. This category includes, for example, hospital or other clinical waste, pharmaceutical, medicinal or veterinary compounds, wood preservatives, residue from substances employed as solvents, inks, dyes and substances containing PCBs;
- types of waste to be regarded as hazardous if they contain any of 50 prescribed substances or materials and displays any of the hazardous properties as mentioned above (eg oxidising, flammable, harmful, etc.). This category would include, for example, animal and vegetable soaps, fats or waxes, soil, sand or clay (including dredging spoils), liquids or sludges containing metals or metal compounds, sludges from water purification plans, sewage sludges, untreated or unsuitable for use in agriculture.

There is a further catch-all provision, including in the definition of hazardous waste, any other waste having any of the properties referred to above, ie explosive, oxidising, flammable, harmful, etc.

The *disposal* of hazardous waste at a facility will require a waste licence. As already noted, the *recovery* of hazardous waste at a facility must be licensed under the WMA.

The EPA, in accordance with the requirement of the Hazardous Waste Directive and the WMA has drafted a hazardous waste management plan for Ireland (the plan): see www.epa.ie for the EPA's summary of the plan. The plan

recognises that large quantities of hazardous waste are exported for recovery and disposal and it identifies a need for Ireland to become self-sufficient in the management of hazardous waste and that infrastructure will be required to achieve this. The hazardous waste recovery industry in Ireland is growing; however, there are major difficulties in the provision of hazardous waste disposal facilities. EU Member States can restrict imports of hazardous waste for disposal. Self-sufficiency in waste disposal is an important precept in the Waste Directive. The plan provides that self-sufficiency is most important in terms of hazardous waste disposal. The plan recommended the establishment of thermal treatment and landfill facilities for the disposal of hazardous waste. However, there is huge public opposition to any such proposals. It remains to be seen how successful Ireland will be in achieving self-sufficiency in this regard.

## 10.23 Movement of waste

Council Regulation (EEC) 259/93 on the Supervision and Control of Shipments of Waste within, into and out of the European Community, governs the movement of waste within, throughout and outside the EU.

### 10.23.1 Waste Management (Transfrontier Shipment of Waste) Regulations 1998

The Waste Management (Transfrontier Shipment of Waste) Regulations 1998, SI 149/1998 (the TFS Regulations) introduced, for Ireland, certain requirements based on Council Regulation 259/1993/EEC for the supervision and control of shipments of waste. Council Regulation 259/93/EEC requires that Member States designate competent authorities to control shipments of waste within, into and out of the EU.

The TFS Regulations designate 'competent authorities' for the purposes of Council Regulation 259/93. The competent authorities control waste shipments. The 'competent authority of destination' and the 'competent authority of transit' in respect of the import of waste into or passage of waste in transit through the State is the EPA. The 'competent authority of dispatch' in respect of export of waste from the State will be the local authority in whose functional area the waste is held prior to its export. The Regulations oblige a person who is a 'notifier' or 'consignee' (as defined in Art 2(g) and (h) of Council Regulation 259/93) to comply with:

(a) the requirements of Council Regulation 259/93;

(b) the TFS Regulations; and

(c) any requirements imposed by a competent authority.

The TFS Regulations empower competent authorities of dispatch to give directions to the notifier of a shipment of waste or to the producer of the waste, in relation to the disposal or recovery of the waste in such a manner as to protect the quality of the environment. The TFS Regulations make provision for the issuance of a certificate for waste shipments. The competent authority must not issue the certificate until it is satisfied that a financial guarantee or other equiv-

alent insurance to cover the costs for shipment and for disposal or recovery of the waste is put in place. Application for the certificate must be made to the competent authority of dispatch or the EPA (in its role as the 'competent authority' of transit and destination), as the case may be. Much of Ireland's hazardous waste is shipped abroad for recovery or disposal and will be shipped in accordance with the TFS Regulations.

### 10.23.2 Waste Management (Movement of Hazardous Waste) Regulations 1998

The Waste Management (Movement of Hazardous Waste) Regulations 1998 (SI 147/1998) were introduced to give effect to Council Directive 91/689 of 12 December 1991 on hazardous waste and Council Regulation 259/93/EEC on the supervision and control of shipments of waste within, into and out of the European Community. These Regulations provide for a system of consignment notes in respect of the movement of hazardous waste within the State. The object of consignment notes is to ensure that local authorities can monitor and record all collections and the transport and disposal of hazardous waste in their functional areas. This enables the tracking of hazardous waste from cradle to the grave. In practice, consignment notes must be sent to the appropriate local authority, as soon as the waste is consigned or received and must be kept by local authorities. The consignment note procedure is used for all consignments of hazardous waste moved within the State; however, the consignment note procedure will not apply in respect of the consignment of hazardous waste:

(a) in relation to which a certificate has issued under the TFS Regulations;
(b) the movement of which is undertaken by or on behalf of a local authority or the EPA;
(c) the movement of which is undertaken on foot of a direction given by an authorised person under s 14(5)(a) of the WMA 1996. (Where an authorised person enters a premises and considers that waste is being handled or transported in such a manner as to constitute a risk of environmental pollution, he may direct the holder to remove the risk, including the disposal of the waste in such a manner as he may specify.)

The effect of the consignment note procedure is that the consignor, the carrier, the consignee, the local authority in the functional area the consignment of waste originated and the local authority in the functional area where the consignee is situated will all hold a consignment note.

### 10.23.3 Waste Management (Hazardous Waste) Regulations 1998

One of the purposes of the Waste Management (Hazardous Waste) Regulations, SI 163/1998 (the Hazardous Waste Regulations) is to give effect to a number of Council Directives in relation to hazardous waste, including EU Directives on asbestos, batteries and accumulators containing dangerous substances and on the disposal of PCBs.

The Hazardous Waste Regulations include general obligations relating to record keeping, labelling and mixing of hazardous waste. A producer of hazardous waste must keep records on the nature of the waste produced, any treatment carried out by the producer and the quantity, nature, destination, frequency and collection and mode of transport of hazardous waste which is transferred to another person and must preserve such records for a minimum of three years.

The Hazardous Waste Regulations also include obligations on producers of hazardous waste to label containers of hazardous waste in accordance with EU standards and to ensure that hazardous waste of one category is not mixed with hazardous waste of any other category or with non-hazardous waste (unless a local authority has approved such mixture, however, local authorities shall not grant an approval unless they are satisfied that the mixture of waste will not cause or be likely to cause environmental pollution).

It should be noted that the consignment note procedure provided for in the Movement of Hazardous Waste Regulations (SI 147/1998) does not have to be used in respect of movement within the State of waste oils, end of life vehicles or hazardous household, commercial or agricultural waste which are collected at a bring facility or collected by means of a segregated collection service provided to members of the public.

## 10.24 Enforcement provisions under the WMA

The WMA include a very broad ranging and powerful armoury against unauthorised waste disposals and to ensure environmental protection. These include powers as follows:

(a) an 'authorised person' can inspect and seek information (s 5(1) of the WMA 1996);

(b) notices can be issued requiring actions to be taken or ceased;

(c) a local authority can carry out the steps required by the notice and recover the cost;

(d) a local authority can, of its own volition take action;

(e) any person can apply to the court for a range of orders.

Section 55 of the WMA 1996 provides that local authorities may serve a notice on any person who is or was holding, recovering or disposing of waste where the local authority considers that it is necessary to do so in order to prevent or limit environmental pollution caused or likely to be caused by the holding, recovery or disposal of such waste. This provision is similar to the provision for s 12 notices issued under the Local Government (Water Pollution) Acts 1977 and 1990. The WMA provide that a local authority is not entitled to serve such a notice in respect of an IPC licensed activity. The Protection of the Environment Act 2003 provides that the EPA would be entitled to serve such notices in respect of Integrated Pollution Prevention Control (IPPC) licensed activities. The person on whom the notice is served must, within the period specified in the notice, comply with its terms. If they fail to do so, the local

authority can take such steps as it considers are necessary to secure compliance with the notice. The local authority may recover any expenses incurred by it in securing such compliance as a simple contract debt in any court.

The notice empowers local authorities to require:

(a) the removal of waste;
(b) the disposal of waste;
(c) the taking of measures to prevent the continuance of an activity;
(d) the treatment of affected lands or waters so as to mitigate or remedy the affects of the activity;
(e) the taking of such other action as may be necessary to counteract any risk of environmental pollution arising from the activity.

Failure to comply with a notice is an offence under the WMA. Clearly this provision is a very useful tool for a local authority in securing remediation of environmental pollution.

## 10.25 Powers of local authorities

Under s 56(1) of the WMA 1996, a local authority is empowered to take steps to prevent or limit environmental pollution caused or likely to be caused by the holding, recovery or disposal of waste. Under the WMA, the local authority may take whatever steps are necessary to prevent or limit such pollution or to mitigate or remedy the effects on the environment of any such activity and can recover the costs of any steps from such person whose act or omission necessitated the taking of such action as a simple contract debt.

## 10.26 High Court orders – ss 57 and 58

The WMA give very broad ranging powers to the High Court in relation to environmental pollution caused or likely to be caused by waste. Any person may apply to the High Court and on satisfying the court that waste is being held, recovered or disposed of in a manner that causes or is likely to cause environmental pollution may obtain a court order:

(a) requiring the person holding, recovering or disposing of waste to carry out certain measures to prevent or limit or to prevent a recurrence of such pollution within a specified period;
(b) requiring the person holding, recovering or disposing of such waste to do or refrain from or cease doing any specified act or omission;
(c) in relation to the payment of costs as the court considers appropriate.

An application under s 57 of the WMA 1996 may be made in respect of potential pollution and an order under s 57 is directed towards any person currently holding, recovering or disposing of the waste. An application under s 58 of the WMA 1996 is the appropriate application in respect of past holding, recovery or disposal.

## 10.27 Remedies for unauthorised holding, recovery or disposal of waste

Section 58 of the WMA 1996 provides that, on application by any person to the appropriate court, where the court is satisfied that a person is holding, recovering or disposing of or has held, recovered or disposed of waste in a manner that is causing or has caused environmental pollution, the court will make an order requiring a number of steps, including:

(a) the discontinuance of the said holding, recovery or disposal of waste within a specified period;

(b) the mitigation or remedying of the effects of the said holding, recovery or disposal of waste in a specified manner within a specified period.

The application may be made to the District, Circuit or High Court. The appropriate court will depend upon the estimated costs of the remediation or steps required. Section 58 provides that an order shall not be made unless the person named in the order has been given an opportunity of being heard in relation to the application. An application for an order under s 58 must be brought in a summary manner (ie by way of special summons) and the court will make such interim or interlocutory order as it considers appropriate. A court may also make any order as to costs. In *Wicklow County Council v Fenton*, High Court, unreported, O'Sullivan J, 14 June 2002, the court found that potential respondents to s 57 and s 58 applications were not concurrent wrongdoers within the meaning of the Civil Liability Act and the third party procedure was not available to respondents in such applications.

It should be noted that pursuant to ss 57 and 58, it is necessary to satisfy the court that an unauthorised activity causes or is likely to cause environmental pollution. In practice, it is believed that it was difficult for local authorities to demonstrate this. However, the Protection of the Environment Act 2003 provides that failure to hold a requisite waste collection permit or waste licence would be grounds for an order of the High Court in relation to the holding, recovery or disposing of waste or the mitigation or remedying of any affects of such activity and this would dispense with the requirement of showing that the activity causes or is likely to cause environmental pollution.

## 10.28 *Wicklow County Council v Fenton and Others*

The very far-reaching impact of s 57 and s 58 orders was illustrated in *Wicklow County Council v Fenton*. The decision is a landmark decision in waste regulation in Ireland and is important for a number of reasons.

The case related to the unauthorised disposal of hazardous clinical waste in an unauthorised landfill on lands owned by Mr and Mrs Fenton in County Wicklow. The waste company held a waste licence issued by the EPA.

The case gave the 'polluter pays' principle an elevated importance in Irish law. The principle is enshrined in the EU treaty and in the WMA. It informs key EU Waste Directives and policy documents. However, in this case, the principle was given real teeth. Mr Justice O'Sullivan stated that the WMA

should be interpreted using a teleological approach to ensure that the objectives of the WMA and the Waste Directives were achieved.

The remedies available in an application under ss 57 and 58 of the WMA 1996 are subject to the pre-condition that environmental pollution has been, is being or is likely to be *caused* by the manner in which the waste is being held, recovered or disposed of. The issue of causation could be interpreted in a number of ways; however, in English and Irish case law the concept has been regarded as being one of virtually strict liability. Mr Justice O'Sullivan adopted a similar approach holding that a court could be satisfied that a particular person 'causes or is likely to cause environmental pollution' if it is established that an activity or omission of such a person brings about or contributes to the bringing about of such pollution, notwithstanding the absence of proof of intention, foreseeability or recklessness and notwithstanding that the act of a third party or some natural event might have intervened in the causal chain linking the person to the environmental pollution. Mr Justice O'Sullivan found that the polluter pays principle would be offended if a concept such as recklessness, foreseeability or deliberate intention were required to be proven. He noted that someone would have to pay for the pollution (either in the cost of the clean up or through un-remediated damage borne by the community) and it was preferable that it would be the person responsible for the pollution. However, the court was alert to the potential hardship caused by such a strict interpretation of the law and left open the question of whether in a future, perhaps more meritorious case, the offender might be subject to strict liability.

The court held the waste company liable for the entirety of the waste deposited on Mr Fenton's lands, even though it had deposited, at most, 10% of the waste. The hazardous clinical waste deposited by the waste company had become admixed with the construction waste already present in the landfill. Mr Fenton had allowed the waste to be dumped on his land and had not policed the illegal activities to ensure that the waste was entirely non-hazardous. The court found that Mr Fenton, as landowner, had to accept the consequences of his actions and failures as such consequences were foreseeable. The fact that others may have had to take a share of the responsibility did not mean that Mr Fenton would be relieved of blame, as to do so would offend the polluter pays principle. Mr Justice O'Sullivan stated:

> there is an analogy between the landowner and the illegal dumper on the one hand and on the other the receiver and the thief. The thief cannot operate without the receiver, nor can the illegal dumper operate without the illegal dump.

The waste company had been negligent in failing to comply with the conditions of its licence by not segregating wastes and not ensuring that they were disposed of by their truck drivers at an authorised facility.

The case is noteworthy for a further reason. The court felt that it was an appropriate case in which to pierce the corporate veil. An order was made directing remediation of the landfill, as against the waste company and its directors. The landowner was directed to facilitate the remediation and to contribute towards the costs of remediation. The court ordered that the costs and

expenses of the action and of managing the unauthorised landfill should be paid by the landowner and the waste company jointly and severally. If the waste company failed to pay, the directors would be liable to pay.

## 10.29 The WMA and contaminated land

Ireland does not have a distinct body of law in relation to contaminated land. However, the WMA and the Local Government (Water Pollution) Acts 1977 and 1990 (the Water Pollution Acts) and the Derelict Sites Act 1990 will come into play in considering the issue of liability arising in relation to contaminated land.

### 10.29.1 Waste Management Acts

As referred to above, the WMA contain very broad-ranging provisions allowing the regulatory authorities and any person to make application to court in relation to environmental pollution. The fines under the WMA for an offence are significant. Liability on summary conviction is for €3,000 and/or 12 months imprisonment and on indictment, €15,000,000 and/or 10 years imprisonment.

### 10.29.2 Water Pollution Acts

Under s 3(1) of the Local Government (Water Pollution) Act 1977:

> a person shall not cause or permit polluting matter to enter waters.

Section 1 of the Local Government (Water Pollution) Act 1977 defines 'waters' as including any water course or other area which is contiguous to a water course and also an aquifer which is any stratum or combination of strata which stores or transmits groundwater.

Section 1 also includes a definition of 'polluting matter':

> any poisonous and noxious matter and any substance (including any explosive liquid or gas) which would render water poisonous or harmful or detrimental to public health or domestic commercial industrial uses.

The Water Pollution Acts provide a very wide remedy where a person is causing or permitting polluting matter to enter waters, or discharging or permitting to be discharged trade or sewage effluent to waters, in breach of a licence. Where this occurs, any person may seek an order from the appropriate court directing the person who is causing the pollution to terminate the pollution, to mitigate or remedy its effects, or to pay the applicant or any other specified person the costs of investigating, mitigating or remedying the effects of the pollution, or any combination of the above.

Should the person to whom the court order is directed fail to comply with it, then the relevant local authority may take steps to mitigate or remedy the effects of the pollution and recover the costs as a simple contract debt from the relevant person. This remedy might be used by the owner of an adjoining property if it was felt that an adjoining site was causing pollution.

The Water Pollution Acts give a right to any person to apply to the High Court, whether or not that person has an interest in the waters concerned, for an order to prohibit or terminate the entry or discharge of polluting matter, trade effluent or sewage to waters where such entry has been, or is likely to be, discharged or caused or permitted to be discharged to waters or has escaped, is escaping, or is likely to escape accidentally from premises to waters. The court may require the person who has charge of the pollutant to take steps to prevent its discharge. This provision may clearly be used to prevent or remedy *potential* pollution. A High Court order may be addressed to any person who has custody or control of polluting matter liable to cause water pollution.

As Dr Yvonne Scannell notes, this section may provide an appropriate remedy where water pollution is liable to be caused by improper waste disposal, underground storage tanks or contaminated land: Yvonne Scannell, *Environmental and Planning Law in Ireland* (1994). It would be important therefore in any purchase of land that purchasers ensure that they will not be incurring any clean-up liabilities which could involve very significant capital expenditure or that they are aware of the liability and can price the costs of dealing with it.

The Water Pollution Acts provide for civil liability for pollution and give a right to recover damages in any court of competent jurisdiction to any person who suffers injury, loss or damage (either personal or to his property) which has been caused by trade effluent, sewage effluent or other polluting matter entering waters. The measure of damages recoverable would be the damages foreseeable at the time the event which caused the pollution occurred. In the case of damage to property, the damages would include the diminution in value of the property or the cost of remedying the damage, whichever would be the more appropriate. However, it is unlikely to include consequential loss, ie loss of profit, or business interruption costs.

### 10.29.3 Common law

Damages and other remedies might also be obtained pursuant to common law – in negligence, nuisance, trespass or under the rule in *Rylands v Fletcher*. However, the common law remedies can be difficult to pursue due to the necessity of proving causation and establishing all of the steps to show negligence or to show that a defendant caused or permitted the environmental pollution; these difficulties are well illustrated in *Environment Agency v Empress Car Co (Artillery) Ltd* [1998] 1 All ER 481 and *Cambridge Water Company v Eastern Counties Leather Plc and Hutchings and Harding Ltd* [1994] 1 All ER 53.

## 10.30 Waste considerations in property transactions

### 10.30.1 Remediation

Increasingly development, particularly in major towns or cities, is occurring on 'brown field' sites (as distinct from 'green field' sites, which have never been developed or contain no contaminants or on which no polluting activities have been carried out). It may be necessary, perhaps as a requirement of the plan-

ning permission, to remediate the site. In practice, planning authorities have in the past attached conditions to planning permissions requiring the carrying out of certain remediation works as part of the development. However, clearly, the owner or occupier of a site as 'the holder' of waste within the meaning of the WMA, may be subject to the varying orders which can be applied for and made under the WMA and as the owner or occupier or the person causing or permitting pollution under the Water Pollution Acts.

It should also be noted that construction work can create a pathway between pollutants and a vulnerable target (ie aquifer) and this can give rise to unforeseen problems and potential liabilities. For example, pollutants below ground may be contained either by a cap or an impermeable layer beneath; however, construction ground works may open a pathway either to the surface or to an underground aquifer giving rise to potential liabilities under the WMA and the Water Pollution Acts. In carrying out any remediation activities, it may also be necessary to consider whether any waste licences or permits are required in respect of the remediation activity.

### 10.30.2 Licences and permits

As referred to earlier, disposal in relation to waste includes any of the activities specified in the Third Schedule to the WMA 1996. These waste disposal activities include:

> land treatment, including bio-degradation of liquid or sludge discards in soils; biological treatment which results in final compounds and mixtures being disposed of by deposit on, in or under land and physico-chemical treatment resulting in final compounds or mixtures being disposed of on, in or under land.

Remediation activities may include some of these waste disposal activities and therefore, in advising any clients in relation to a development of brown field sites, it will be necessary to consider whether or not the remediation process will require a waste licence. In general, a waste licence will be required when soil or ground water which is contaminated with hazardous concentrations of pollutants is treated *on site* or when the removal of hazardous contaminated soil from a site necessitates some linked process, such as soil blending or mixing or groundwater treatment. These works are termed 'brown field remediation'. A number of waste licences have been issued by the EPA for brown field remediation in the context of recovery/disposal of hazardous waste activity, including facilities on Sir John Rogerson's Quay, Dublin. The recovery of hazardous waste is a licensable activity.

The assessment of whether contaminated soil is hazardous or not is based on criteria set out in the Second Schedule, Part Three of the WMA 1996 and the European Waste Catalogue. The EPA has also published a 'Procedure for Identification of the Hazardous Components of Waste; see www.epa.ie/techinfo/default.htm. If the constituents of the waste are hazardous, it will also be necessary to have regard to the various regulations referred to earlier in this chapter on movement of hazardous waste and to ensure that the collection of any waste from the site is by a person authorised

pursuant to the WMA. Where, however, remediation is being carried out by the removal of non-hazardous materials which are destined for recovery, then it may be a waste permit that will be required.

### 10.30.3 Surrender of waste licence

If the remediation process has required a waste licence, then once the remediation activity has ceased, the licensee will wish to surrender the licence to the EPA. However, as referred to earlier, it may be difficult to surrender a licence. The EPA may require the licensee to carry out ongoing monitoring and investigations. However, where the EPA is satisfied that the condition of the relevant facility is not causing or likely to cause environmental pollution, it is obliged to accept the surrender of the waste licence.

### 10.30.4 Polluter pays

The 'polluter pays' principle which was given such force by Mr Justice Sullivan in *Wicklow County Council v Fenton* (unreported, 31 July 2002, High Court) and referred to earlier in this chapter is of some concern for owners and occupiers of contaminated land. Liability may be visited upon an owner or occupier of land, even though they have not caused or contributed to its contamination in any way. The Protection of the Environment Act 2003 is also of some concern in its requirement that an IPPC licensed site be returned to a 'satisfactory state' after the cessation of the licensed activity. A 'satisfactory state' appears to be a subjective concept and no guidance has been given in the Act as to what is meant by this term. It appears that it may well require that the site be remediated to a level cleaner than that existing at the time the activity was commenced by the operator. In addition, the Protection of the Environment Act 2003 now includes a presumption that a landowner consented to the illegal dumping of waste on his land.

### 10.30.5 Transfer of title

Section 32 of the WMA 1996 provides that a person must not transfer the control of waste to any person other than an appropriate person. It also provides that where a person transfers control of waste to anyone other than an 'appropriate person' any act and/or instrument made to transfer title in the waste shall not operate to transfer that title and the person who attempts to transfer title will be deemed to be a holder in addition to the person to whom it has been attempted to transfer title. This provision was of particular significance in the context of the *Silvermines* case.

### 10.30.6 The *Silvermines* case

In this case, the vendor of land sold a former mine tailings facility in County Tipperary to a local farmer. After completion of the sale the farmer put livestock on the facility and carried out some structural works. The EPA conducted an investigation into the works and in its report published in January 1999 found that the land was contaminated and constituted a potential liability. The pur-

chasing farmer, at the time of purchase, had not carried out any environmental due diligence and was not aware of the environmental liability that he had incurred. The vendor alleged that they had fully disclosed to the purchaser the nature of the site prior to completion of the sale and the vendor was of the view that all liability therefore should pass to the purchaser. The EPA regarded the extraction residues on the site as 'waste', within the definition of waste under the WMA. The vendor had control of the waste when the WMA came into effect. As referred to earlier in this chapter, the holder of waste cannot transfer waste to a person who is not an 'appropriate person' within the meaning of the WMA. Clearly the purchaser was not an 'appropriate person'. In the EPA's view, the transfer of control of the waste by the vendor was in breach of the WMA and an offence under the WMA. In light of the provisions of the WMA on transfer of title, the EPA was of the view that the transfer was invalid and the vendor remained the legal owner of the waste. This case gives rise to considerable concern to vendors of property. It also underlines the importance, when proposing to acquire a suspected contaminated site, of raising pre-contract environmental requisitions, carrying out environmental due diligence and considering whether the conditions of the contract for sale require amendment.

### 10.30.7 Asset sales and share purchase acquisitions

In an asset sale, a purchaser needs to be aware that contaminated land liabilities may attach to the purchaser as:

(a) the innocent owner or occupier of historically contaminated land;
(b) for causing or permitting pollution at historically polluted property (ie the property is still polluting in an ongoing manner).

Where shares are being acquired, all the liabilities of the target company remain with that target company. Therefore, in a share purchase, the purchaser will acquire the target with all its historic liabilities.

In an asset acquisition, only those historic liabilities agreed to be acquired or assumed are taken over by the purchaser. Where the transaction is a share purchase acquisition, a purchaser should bear in mind that contaminated land liabilities may attach to the target company because:

(a) the target has polluted its current or former properties;
(b) the target is 'causing or permitting pollution' at its current or former properties.

### 10.30.8 Warranties

Environmental warranties will assist in the disclosure of important information in relation to the environmental practices of the vendor. The purchaser will have contractual recourse for any breach of warranties identified by the purchaser before the period of expiry of the warranties. Where there is a breach of any warranty, the purchaser will be entitled to the difference

between the actual value of the shares or assets and their value as warranted. To avoid liability for breach of warranty, the vendor will attempt to disclose breaches to the buyer at or before signing (usually by way of disclosure letter and supporting documentation). This enables the purchaser to factor any environmental liabilities into the purchase price. Examples of standard environmental warranties are:

(a) that all consents, permits and authorisations required under environmental law are in place and have been complied with;
(b) that all environmental laws have been complied with, that there has been no environmental pollution at the relevant properties;
(c) that the company or the site has not received any regulatory notices or complaints.

The extent and nature of the warranties may vary greatly depending upon the nature of the transaction, the scale of the risk, the negotiating position of the parties and the purchase price.

### 10.30.9 Indemnities

Where a purchaser cannot fully quantify the potential risk or liability which he may be taking on, an environmental indemnity may be required. The indemnity is an undertaking to indemnify the purchaser and/or specified persons in respect of losses incurred in relation to environmental liabilities. Indemnities differ from warranties in that:

(a) indemnities are not qualified by disclosure;
(b) indemnities provide euro for euro recovery (thus making indemnities easier to claim under than warranties which require a difference in the warranted value of the shares, as opposed to the actual value of the shares);
(c) indemnity liabilities are usually only triggered when a specified event occurs, whereas a warranty usually expires on a defined date.

Vendors in asset sales or in share purchase transactions may seek to limit their liability by disclosing as much information as possible against any warranties being given to the potential purchaser in relation to any waste or contamination on the properties. The vendor might also attempt to seek an indemnity from the purchaser so that, if the vendor is subject to action by the regulatory authorities and is liable to any fines, he may seek to pursue the purchaser for same. Such an indemnity would have to be very clearly and carefully drafted, as indemnities which endeavour to indemnify a party in respect of any criminal liability or fines or penalties may not be enforceable for various public policy reasons.

Similarly, in share purchase acquisitions, a purchaser may wish to limit his liability in respect of the vendor's past activities. In particular, where a purchaser is acquiring a waste company or a company with a poor waste management record, under a share purchase agreement, the purchaser will be particularly anxious to ensure that it will not become liable for or will limit its liability for any past misdeeds or illegal dumping carried out by the company

(or its sub-contractors, agents or employees). A purchaser may seek a reduction in the consideration for the transaction on account of potential future liabilities or may seek to retain part of the purchase monies over a period of time until the likelihood of environmental pollution occurring has diminished.

A purchaser may insist upon receiving indemnities from the vendor in relation to past polluting activities or any unauthorised waste disposals. The drafting of the indemnities may be subject to considerable negotiation. The parties will need to consider what events will trigger the indemnity, ie will it only operate where legal action is commenced by the regulatory authorities or will it operate if any environmental pollution is discovered? The standard to which a *clean up* or remediation is required can also be problematic. If it is a remediation carried out pursuant to a requirement of the regulatory authorities, the regulatory authorities will usually prescribe a standard. However, if it is simply one party remediating so as to *avoid* any *potential* liability (as opposed to pursuant to a statutory requirement), it would obviously prefer to clean up to a high level, which costs would be payable by the indemnifier. The indemnifier may be trying to minimise the indemnity payment and will seek to argue that a lower standard of *clean up* would suffice. The parties should endeavour to address this situation in the indemnity. Where an indemnity is required, a separate environmental deed of indemnity will usually be drafted.

### 10.30.10 Insurance

It should also be borne in mind that indemnities will only usually be as good as the financial worth of the person providing them and it might be necessary to seek that the indemnity be backed up by insurance.

Traditionally, environmental impairment liability or environmental pollution insurance has been very expensive and difficult to obtain; however, in light of increasing concerns on exposure to potentially considerable remediation costs, such insurance is becoming increasingly available.

### 10.30.11 Environmental consultants and due diligence reports

There are a number of investigations which may be carried out by environmental consultants to assist in assessing the degree of environmental risk associated with a property or business sale or acquisition.

Phase I Report – this provides an overview on the history of the activity and the land or premises and will assess the extent of regulatory compliance and advise on the possibility of contamination risk posed by the property.

Phase II Report – this is a more detailed examination of the property and may involve the excavation and installation of bore holes on the property. Soil and ground water samples may be taken and analysed. The study should quantify the level and extent of contaminants present. The study may make recommendations for remedial action on the basis of whether the land is suitable for its current use. The report should provide an interpretation of the information in order to assist the reading of the report, as the client and the solicitor may not have the expertise to interpret technical findings on examination of soil or ground waters.

It should be ascertained that the environmental consultant has professional indemnity insurance in relation to the carrying out of the report and will hold it for a number of years.

### 10.30.12 Lender liability

There is no specific lender liability legislation in Ireland. However, lenders who are providing facilities in relation to the purchase of land or premises may be concerned about environmental liability reducing the value of their security. Lenders may also be concerned to ensure that they would not have liability for environmental pollution and will wish to ensure that the loan facilities are structured in such a way that the lender does not effectively take possession or control of the property or business. A lender will be concerned to ensure that the loan facilities are structured in such a way that it does not become a mortgagee in possession, as in doing so, it could assume a degree of possession and control and thereby acquire an environmental liability. Normally however, the appointment of a receiver will not involve the lender in assuming sufficient control so as to acquire environmental liability. The proposal for a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and restoration of environmental damage provides that lenders will be exempt from liability unless they have some form of control over the activity which caused the damage.

### 10.30.13 Liability for contaminated land

As discussed, liability can arise in a number of ways and these may be summarised as follows:

(a) criminal liability for an offence under the Water Pollution Acts and under the WMA;

(b) liability under the Water Pollution Acts and the WMA to remediate (either as the owner and occupier of lands for causing and permitting matter to enter waters or as the holder of waste);

(c) civil liability to third parties under the Water Pollution Acts;

(d) liability at common law in nuisance, negligence, trespass and under *Rylands v Fletcher* (primarily for any nuisance caused by migrating contaminants);

(e) liability under any environmental licences or permits.

## 10.31 Landfill

The EU Landfill Directive (Council Directive 1999/31/EEC) regulates the provision of landfill facilities in Member States. The Landfill Directive classifies landfill as follows:

(a) landfill for hazardous waste;

(b) landfill for non-hazardous waste;

(c) landfill for inert waste.

The general thrust of the Landfill Directive is that Member States minimise the amount of waste going to landfill. Member States should ensure that only waste that has been subject to treatment is landfilled and that only hazardous waste that fulfils certain criteria is assigned to a hazardous landfill. Member States are obliged to ensure that application for a permit must be made for a landfill and the application should include a plan for the closure and after care procedure, the ongoing monitoring and control plan and financial security provisions. The Landfill Directive specifically provides that Member States are to take measures to ensure that all of the costs in operating landfill are passed on to the consumer by ensuring that the costs are covered by the price to be charged by the operator. The Landfill Directive includes provisions in relation to waste acceptance procedures, the control and monitoring procedures in the operation of the landfill and the closure and aftercare of the landfill facility.

### 10.31.1 Landfill Regulations

The Regulations collectively known as the Landfill Regulations are as follows:

(a) the Waste Management (Landfill Levy) Regulations 2002, SI 86/2002;

(b) the Waste Management (Licensing) Regulations 2000, SI 185/2000; and

(c) the European Communities (Amendment of Waste Management (Licensing) Regulations 2000) Regulations 2002, SI 337/2002.

The Landfill Regulations were introduced to implement the provisions of the Landfill Directive. The Landfill Regulations provide that a landfill levy will be payable in respect of disposal of waste at a landfill facility. The levy is €15 for each tonne of waste disposed of and is payable by the operator of the landfill facility.

There are certain exemptions from the levy (see Art 5(1), SI 86/2002).

Records must be kept in respect of the loads of waste accepted at a landfill and must be retained for six years. The Landfill Regulations also include procedures for estimation of the levy in the case of non-payment or under payment. The EPA is obliged to classify landfill facilities into:

(a) landfill for hazardous waste;

(b) landfill for non-hazardous waste;

(c) landfill for inert waste,

and must specify the class of landfill in the waste licence or IPPC licence granted in respect of the landfill. Only hazardous waste that fulfils relevant waste acceptance criteria may be accepted for disposal at a landfill for hazardous waste. The Landfill Regulations also prescribe that landfill for non-hazardous waste may only be used for disposal of certain types of waste, being municipal waste, non-hazardous waste, stable non-reactive waste and any other waste that may be specified in accordance with the landfill Directive. A landfill for inert waste may only be used for the disposal of inert waste.

CHAPTER 11

# HABITATS, WILDLIFE AND NATURAL HERITAGE

*Rachel Minch*

## 11.1 Introduction

The purpose of nature conservation law is to halt the decline in biodiversity. This decline has been attributed to five main causes (see David Attenborough, *State of the Planet* (2001)):

(a) excessive consumption of natural resources;

(b) destruction of habitats;

(c) islandisation/fragmentation of habitats;

(d) introduction of alien species; and

(e) pollution and climate change.

The preservation of biodiversity is considered significant, not only for the preservation of resources for human use (such as food and medicine) and the maintenance of the biosphere but also for non-scientific, non-utilitarian reasons of an ethical and aesthetic nature.

There are many important international treaties in the area, the best known perhaps being the 1992 Rio Convention on Biological Diversity and the 1973 Convention on International Trade in Endangered Species (CITES): see www.biodiv.org and www.cites.org. For further information on international conservation law, see D Hunter, J Salzman and D Zaelke, *International Environmental Law and Policy* (New York, Foundation Press, 1998) and P Sands, *Principles of International Environmental Law* (Manchester University Press, 1995).

The purpose of this chapter is to give an overview of European nature conservation law and its implementation in Ireland.

## 11.2 European nature conservation law

The European Environment Agency has found that many European species are in decline: in recent years, 64 endemic plants have become extinct in nature; 38% of bird species and 45% of butterflies are threatened with vulnerable or endangered populations. Europe has also witnessed the first case of extinction of a species listed for protection in the Habitats Directive. Pressures on habitats and ecosystems are also intense; for example, wetlands have been reduced by

some 50% in recent decades. However, the Sixth Environment Action Programme of the European Community (OJ L242 2002 p 1) has identified nature and biodiversity as one of the four key environmental priorities in the programme which aims to halt biodiversity decline by 2010. Directive 79/409/EEC on the conservation of wild birds (OJ L103 p 1), as amended (the 'Wild Birds Directive'), and Directive 92/43/EC on the conservation of natural habitats and of wild fauna and flora (OJ L206 92 p 7), as amended (the 'Habitats Directive'), are the principal European legal instruments which will be used to address this challenge. Other Community legislation will also promote nature conservation, such as the Water Framework Directive 2000/60/EC and the Environmental Impact Assessment Directive 85/337/EEC as amended.

## 11.3 The Wild Birds Directive

The Wild Birds Directive applies to all wild birds in the European territory of the Member States (save for Greenland) and covers their protection, management, control and exploitation at a level appropriate to the particular situation of the various species (Art 1). The Directive applies to these birds, their eggs, nests and habitats. Article 2 provides that Member States must take the requisite measures to maintain or adapt wild bird populations at a level which corresponds to:

> ecological, scientific and cultural requirements while taking account of economic and recreational requirements.

The Directive provides for both site conservation and species protection measures.

### 11.3.1 Site conservation: Arts 3 and 4

#### *11.3.1.1 Site designation*

Member States are under a general obligation to preserve, maintain or re-establish sufficient habitats and biotopes for all wild birds covered by the Directive (Art 3). For example, in Case C-117/2000 *Commission v Ireland* [2002] ECR I-05335 the ECJ found Ireland to be in breach of Art 3 of the Directive by failing to take all the necessary measures to safeguard a sufficient diversity in area of habitats for the Red Grouse. (Red Grouse populations had been particularly affected by the consequences of overgrazing on their habitat.)

Member States must take special conservation measures in respect of the habitat of Annex I species (Annex I lists 181 particularly threatened species of wild bird). In particular, Member States must classify the most suitable territories for the conservation of Annex I species as Special Protection Areas (SPA): Art 4(1). Article 4(2) provides that Member States must take similar measures for regularly occurring migratory species not listed in Annex I, paying particular attention to the protection of wetlands.

The ECJ has consistently held that, whilst Member States do have a certain margin of discretion with regard to the choice of SPA, the classification of these areas is subject to ornithological criteria determined by the Directive, such as the presence of Annex I birds or wetlands (Case C-355/90 *Commission v Spain* [1993] ECR I-421, the *Santona Marshes* case). Any grounds of derogation must

correspond to a general interest, which is superior to that represented by the ecological objective of the Directive. The interests referred to in Art 2, namely economic and recreational requirements, cannot enter into consideration, ie they cannot constitute a general interest superior to that represented by the ecological objective of the Directive (Case C-57/89 *Commission v Germany* [1991] ECR I-883, the *Leybucht Dyke* case).

In the *Santona Marshes* case, Spain was found to be in breach of the Directive by failing to classify the marshes as a SPA. The ECJ held that Spain was not entitled to take into account social and economic interests in deciding whether to designate the area. This approach was again taken by the ECJ in the *Lappel Bank* case (Case C-44/95 *R v Secretary of State for the Environment ex p the RSPB* [1996] ECR I-03805). The ECJ held that the UK was in breach of the Directive by excluding an area known as Lappel Bank from a SPA on the basis that this was the only area into which the Port of Sheerness could envisage expanding. The ECJ reaffirmed its view that a Member State was not authorised to take account of economic interests when designating a SPA and defining its boundaries. Article 2 did not constitute an autonomous derogation from the general system of protection established by the Directive.

#### *11.3.1.2 Site conservation measures*

The first sentence of Art 4(4) originally provided that Member States had to take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds in SPA, in so far as these would be significant having regard to the objectives of Art 4. Member States also have to strive to avoid pollution or deterioration of habitats outside SPA.

Again, the ECJ has interpreted these provisions very strictly. Although Member States do have a certain discretion with regard to the choice of SPA, the ECJ has held that they do not have the same discretion under Art 4(4) in modifying or reducing the extent of those areas (see the *Leybucht Dyke* case):

> since they themselves acknowledge in their declarations that those areas contain the most suitable environments for the species listed in Annex I to the Directive.

For example, in the *Santona Marshes* case, the ECJ found that considerations relating to economic problems could not justify derogation from the protection requirements laid down in Art 4(4). Spain was therefore in breach of the Directive by constructing road development that resulted in a considerable reduction in the area of the SPA and in significant disturbances to wild birds protected by the Directive.

The Habitats Directive has, however, reduced the level of protection afforded to SPA under the first sentence of Art 4(4). This has been replaced by the obligations contained in Art 6(2) to (4) of the Habitats Directive. These provisions permit development which compromises a SPA where the development can be justified by:

> imperative reasons of overriding public interest, *including those of a social or economic nature*.

This is discussed further below.

### 11.3.2 Protection of species: Arts 5 to 9

Member States must establish a general system of protection for all wild birds. These measures must prohibit in particular the deliberate killing or capture of such birds, the deliberate destruction of or damage to their nests and eggs, the taking of their nests or eggs and the deliberate significant disturbance of birds particularly during the breeding and rearing seasons (Art 5).

Member States must also prohibit the sale, transport, keeping and offering for sale of all wild birds, save for those species listed in Annex III/1 and Annex III/2 (Art 6). However, Member States must first consult with the Commission as to whether the sale of species in Annex III/2 would result in the species being or possibly being endangered.

Species listed in Annex II may be hunted under national legislation, provided that this complies with the principle of wise use and ecologically balanced control. However, they must not be hunted during the breeding or rearing seasons (Art 7). The Commission has recently sent Ireland a reasoned opinion for allowing a hunting season for wood pigeons during the breeding season, in contravention of Art 7 of the Directive.

The Directive also prohibits large scale or non-selective methods of capture and killing of birds or methods capable of causing the local disappearance of a species, in particular the use of those listed in Annex IV(a) (Art 8).

Member States may derogate from these species protection measures where there is no other satisfactory solution, but only on certain specified grounds, for example in the interests of public health and safety and to prevent serious damage to crops or livestock (Art 9). The Commission must ensure that such derogations are not incompatible with the aims of the Directive.

The Directive also contains various miscellaneous provisions regarding research, the introduction of alien species and reporting requirements (Arts 10 to 14). Articles 15 to 17 set out the procedure whereby the Annexes to the Directive can be adapted to technical and scientific progress. Member States may also introduce stricter protective measures than those provided for under the Directive (Art 14).

## 11.4 The Habitats Directive

Like the Wild Birds Directive, the Habitats Directive provides for site conservation and species protection measures. However, the scope of the Directive is infinitely broader as it aims to protect the full range of wild flora and fauna in the European territory of the Member States and to conserve natural habitats for their own sake (Art 2(1)). Perhaps due to the Directive's broad reach, the derogation provisions are far wider than the provisions of the Wild Birds Directive. Professor Jan H Jans states, 'this must clearly be regarded as a retrograde step for conservation law' (*European Environmental Law*, Europa Law Publishing, 2000).

The Directive aims to restore or maintain natural habitats and species of wild fauna and flora of Community interest at a favourable conservation status (Art 2(2)).

'Favourable conservation status' is a key concept in the Directive. The conservation status of a species is favourable when population dynamics data indicate that the species is capable of maintaining itself on a long term basis, the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future and there is and will probably continue to be a sufficiently large habitat to maintain its populations on a long term basis (Art 1(i)). The conservation status of a natural habitat will be taken as favourable when its natural range and the areas it covers within that range are stable or increasing, the specific structure and functions necessary for its long term maintenance exist and are likely to continue to exist for the foreseeable future and the conservation status of its typical species is favourable (Art 1(e)).

A species is regarded as being of Community interest where it is endangered, vulnerable, rare or endemic and requiring particular attention (Art 1(g)). These are listed or may be listed in Annex II and/or Annex IV or V. A habitat is regarded as being of Community interest where it is in danger of disappearance, has a small natural range or presents outstanding examples of typical characteristics of one or more of the six following biogeographical regions: Alpine, Atlantic, Boreal, Continental, Macaronesian and Mediterranean (Art 1(c)). Such habitat types are listed or may be listed in Annex I.

The Directive identifies over 200 habitat types and 700 species of plants and animals of Community importance.

### 11.4.1 Conservation of natural habitats and habitats of species: Arts 3 to 11

Article 3 provides that a coherent ecological network of special areas of conservation (SAC) must be set up under the title Natura 2000. (For extensive information on Natura 2000, see DG environment's website at http://europa.eu.int/comm/environment/nature/natura.htm.) This network must comprise the following sites:

(a) sites hosting the natural habitat types of Community interest listed in Annex I;

(b) habitats of the species of Community interest listed in Annex II;

(c) SPA classified under the Wild Birds Directive.

According to the Commission, the long term conservation of these habitats and species cannot be achieved by protecting isolated pockets of nature, however great their individual value. By establishing a network of sites across the full distribution of these habitats and species, Natura 2000 is intended to be a dynamic and living network providing a guarantee for their conservation. However, Natura 2000 is not a system of strict nature reserves where all human activities are excluded. The Commission notes that, whilst Natura 2000 will no doubt include nature reserves, most of the land is likely to continue to be privately owned and the emphasis will be on ensuring that future management is sustainable ecologically, economically and socially. Indeed, Art 2(3) of the Directive provides that measures taken pursuant to the Directive must take account of:

economic, social and cultural requirements and regional and local characteristics.

#### *11.4.1.1 Site designation*

The SAC site designation procedure set out in Art 4 of the Directive is a complex process involving three stages.

**Stage 1:** On the basis of the criteria in Annex III (Stage 1) and relevant scientific information, each Member State must propose a list of sites which host the natural habitat types in Annex I and/or the species in Annex II that are native to its territory. As is the case with SPA, a Member State may *not* take account of the economic, social and cultural requirements or regional and local characteristics mentioned in Art 2(3) when selecting and defining the boundaries of proposed sites. The ECJ has consistently held that to produce a list of sites capable of leading to the creation of a coherent European ecological network of SAC, the Commission must have available an exhaustive list of sites which, at a national level, have an ecological interest that is relevant from the point of view of the Directive's objective: see Case C-371/98 *R v Secretary of State for the Environment, Transport and the Regions ex p First Corporate Shipping Ltd, interveners: Worldwide Fund for Nature UK and Avon Wildlife Trust* [2000] ECR I-09235. Only criteria of a scientific nature may therefore guide the choice of national lists of proposed sites. These lists, together with information on each site, must then be sent to the Commission. In exceptional cases, where the Commission considers that a national list fails to mention an essential site for the maintenance of a priority natural habitat type or priority species, the Commission can initiate a bilateral consultation procedure with the Member State with a view to including the site (Art 5). Priority habitat types and species are identified by the sign '*' in Annex I and II. These are known as '*Article 5 sites*'.

**Stage 2:** The Commission must establish, in agreement with each Member State, a draft list of sites of Community importance (SCI) on the basis of the criteria in Annex III (Stage 2). Not all sites proposed by Member States will be included in the list of SCI. However, all proposed sites which host one or more *priority* natural habitat types or priority species must be selected as SCI. Member States whose sites hosting one or more priority habitat types or priority species represent more than 5% of their territory can, in agreement with the Commission, request that the criteria listed in Annex III (Stage 2) be applied more flexibly in selecting all the SCI in their territory. The Commission must then adopt the lists in accordance with the procedure laid down by Art 21.

**Stage 3:** Once an SCI has been adopted in accordance with the Stage 2 procedure, Member States must designate that site as a SAC as soon as possible and within six years at most. When designating sites, Member States must establish priorities in light of the importance of the sites and the threats of degradation and destruction to which those sites are exposed.

There have been significant delays in the site designation process. Stage 1 should have been completed by June 1995, Stage 2 by June 1998 and Stage 3, the designation of SAC, by June 2004 at the latest. However, to date, only one list of SCI has been adopted by the Commission (for the Macaronesian region).

Delays have been due primarily to the failure of Member States to submit complete lists of sites to the Commission under Stage 1. Several Member States, including Ireland, have been condemned by the ECJ for failing to transpose the Directive into national law. For example, in Case C-67/1999 *Commission v Ireland* [2001] ECR I-5757, the ECJ held that the Irish list sent to the Commission in February 1998 was manifestly inadequate, going well beyond the margins of discretion available to Member States for the purpose of drawing up a national list of sites under the Directive. However, 16% of the EU's territory has now been proposed for conservation under the network. Most of the conservation measures adopted by Ireland also apply to proposed SAC and SCI, so the delays in the site designation process are less of a concern.

#### *11.4.1.2 Site conservation measures*

Article 6 sets out the legal consequences for a site once it has been designated as a SCI and/or SAC. The legal consequences of designation take effect as soon as a site has been adopted by the Commission as a SCI (Art 4(5)), save for Art 6(1), which only applies once an SCI has been designated by a Member State as a SAC. As noted above, Art 6(2) to (4) also apply to SPA and replace the first sentence of Art 4(4) of the Wild Birds Directive (Art 7).

For a detailed analysis of Art 6, see the Commission's Interpretation Guide on Art 6, *Managing Natura 2000 Sites – the provisions of Art 6 of the 'Habitats' Directive 92/43/EEC*, http://europa.eu.int/comm/environment/nature/art6_en.pdf.

The conservation measures provided for in Art 6 can be summarised as follows:

**Article 6(1) – general conservation measures**: Member States must establish proactive conservation measures for SAC to ensure that the habitat types and the species they contain are maintained or restored to a favourable conservation status. These measures must include appropriate management plans, if need be, and statutory, administrative or contractual measures. They can take various forms, for example, management plans (either as stand-alone documents or integrated into other development plans), legislation or contractual arrangements between authorities and landowners such as conservation easements and agri-environmental measures. The Directive contains Community co-financing provisions to enable Member States to meet their obligations under Art 6(1) (Art 8). For detailed information on co-financing, see *Commission Final Report on Financing Natura 2000* (November 2002), http://europa.eu.int/comm/environment/nature/final-report-en.pdf.

**Article 6(2) – avoidance of habitat deterioration and significant species disturbance**: The emphasis of Art 6(2) is on preventive action. Member States must take the appropriate steps to *avoid the deterioration of natural habitats* and habitats of species as well as the significant disturbance of species for which the areas have been designated. Such measures should also be implemented outside the sites if necessary. Deterioration or disturbance is to be assessed against the conservation status of the habitats or species concerned. As noted by the Commission, Art 6(2) applies permanently in SAC and can concern past, present or future activities or events. The Commission also considers that it is

not limited to intentional acts, but can also cover any chance event that could occur (such as fire or flood) as long as they are predictable.

**Article 6(3) and (4) – environmental assessment of proposed plans or projects**: A plan or project which is likely to have significant effects on a protected site, either individually or in combination with other plans or projects, must be subject to an appropriate assessment of its implications for the site, in light of the site's conservation objectives (Art 6(3)), unless the plan or project is directly connected with or necessary for the management of the site. A number of points should be noted:

(a) The terms 'plan' and 'project' are not defined. However, these terms should be given a broad interpretation in light of the objective of the Directive. Guidance can also be drawn from the definition of these terms in the EIA Directive and the SEA Directive. The environmental assessment procedure must apply to all plans and projects referred to in Art 6(3) of the Directive, ie: '… any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon.' The ECJ therefore held that Italy had failed to adequately transpose the Directive by confining the application of the assessment procedure to a number of listed projects (namely those listed in the Italian legislation implementing the EIA Directive) instead of extending it to all projects referred to in Art 6(3): see Case C-143/2002 *Commission v Italy* (judgment of 20 March 2003).

(b) The term 'significant' should be interpreted objectively and by reference to the site in question. The cumulative impacts of existing and proposed plans and projects must also be taken into account when considering whether the impact of the plan or project would be likely to be significant.

(c) An assessment is necessary where there is a likelihood of significant effects, ie it is not necessary that the plan or project will definitely have significant effects on the site.

An assessment under the EIA or SEA Directives could accommodate an assessment under Art 6(3) where the relevant Directive applies to the plan or project in question. Otherwise, the Commission advises that an 'appropriate assessment' should be recorded, should provide the basis for other steps and could draw on the methodology envisaged by the EIA Directive, such as an examination of possible mitigation measures and alternative solutions.

In light of the assessment's conclusions, the competent national authorities can only agree to the plan or project after having ascertained that 'it will not adversely affect the integrity of the site' and, if appropriate, after having obtained the public's opinion. Public consultation should be considered in light of the requirements of the EIA Directive and the recent Directive providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment. However, this is where the controversial Art 6(4) comes into play. A Member State can still authorise a plan or project which has adverse impacts on the site if:

(a) there are no alternative solutions;

(b) it must be carried out for imperative reasons of overriding public interest, including those of a social or economic nature (thus reversing the jurisprudence of the ECJ regarding Art 4(4) of the Wild Birds Directive). The concept of 'imperative reason of overriding public interest' is not defined in the Directive. However, the Commission considers that only public interests promoted either by public or private bodies can be balanced against the conservation aims of the Directive. Projects that lie entirely in the interests of companies or individuals would not therefore be covered. The Commission also notes that the public interest must be overriding and that it seems reasonable to assume that it can only be overriding if it is a long term interest; and

(c) the Member State takes all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. The Commission considers that measures required for the normal implementation of the Habitats or Wild Birds Directive cannot be regarded as compensation for damaging projects. Compensatory measures could consist of:

  (i) recreating a habitat on a new or enlarged site to be incorporated into Natura 2000;

  (ii) improving a habitat on part of a site or on another Natura 2000 site; or

  (iii) in exceptional cases, proposing a new site under the Directive.

Where the site hosts a priority natural habitat and/or priority species, the only considerations which may be raised are those relating to human health and safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest. In the *Leybucht Dyke* case, the ECJ held that the danger of flooding and coastal protection constituted sufficiently serious reasons to justify the dyke works and the strengthening of coastal structures, as long as those measures are confined to a strict minimum. This also suggests that any derogations are subject to a proportionality requirement.

Member States must also endeavour, in their land-use planning and development policies, to encourage the management of features of the landscape which are of major importance for wild fauna and flora, such as rivers with their banks, hedgerows, ponds and small woods (Art 10). For example, the Wildlife Acts regulate the cutting of hedgerows and burning of uncultivated vegetation. They must also undertake the surveillance of the conservation status of the natural habitats and species covered by the Directive, with particular regard to priority habitat types and species (Art 11).

### 11.4.2 Protection of species: Arts 12 to 16

The provisions of the Directive relating to the protection of individual species of flora and fauna apply to the species listed in Annex IV (in need of strict protection) and Annex V (whose taking in the wild and exploitation may be subject to management measures).

Animal and plant species listed in Annex IV are particularly endangered and are subject to a system of strict protection (Arts 12 and 13). The Directive prohibits the deliberate capture, killing, disturbance, taking of eggs or nests and

the deterioration or destruction of the breeding sites or resting places of Annex IV(a) animal species. In particular, Member States must prohibit the keeping, transport and sale of such species.

In Case C-103/2000 *Commission v Greece* [2002] ECR I-1147, the ECJ held that the Greek Government was in breach of Art 12 as it had failed to take the requisite measures to establish a system of strict protection for the sea turtle Caretta caretta, an Annex IV species. The ECJ found that the Greek Government had, first, failed to adopt a legislative framework which would ensure the strict protection of the sea turtle against any deliberate disturbance during its breeding period and against any deterioration or destruction of its breeding sites and, secondly, had failed to take specific measures to prevent such nuisances (the use of mopeds and the presence of pedalos and small boats on or around their breeding beaches constituted the deliberate disturbance of the species during its breeding period for the purposes of Art 12(1)(b) and the presence of buildings on a breeding beach was liable to lead to the deterioration or destruction of breeding sites within the meaning of Art 12(1)(d)).

Member States must also prohibit the deliberate picking, collecting, cutting, uprooting or destruction of the wild plant species listed in Annex IV(b) and their possession, transport and sale.

The species of wild fauna and flora listed in Annex V are less strictly protected and can be exploited. If Member States deem it necessary, they must take measures to ensure that the taking of such species and their exploitation is compatible with their being maintained at a favourable conservation status (Art 14). These may include regulations regarding access to property, temporary or local prohibition of the taking of specimens and the regulation of the periods and/or methods of taking specimens. Member States must, however, prohibit the use of all indiscriminate means of capture or killing of Annex V fauna which would be capable of causing the local disappearance of or serious disturbance to populations of such species. In particular, Member States must prohibit the methods listed in Annex VI(a), such as explosives, and the modes of transport referred to in Annex VI(b) (Art 15).

Member States may derogate from the provisions of Arts 12 to 15:

(a) where there is no satisfactory alternative;

(b) where the derogation is not detrimental to the maintenance of the species concerned at a favourable conservation status in their natural range; and

(c) on a number of specified grounds including: conservation; to prevent serious property damage particularly to crops, livestock, forest, fisheries and water; in the interests of public health and safety; or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment (Art 16).

As noted by McIntyre, the Habitats Directive once again permits an exemption to protection based on social and economic factors. See O McIntyre, 'EC Nature conservation law' [2002] 2 IPELJ 59. However, it is likely that the ECJ will construe Art 16 strictly and that any derogation will be subject to a proportionality requirement.

The Directive also contains miscellaneous provisions regarding reporting requirements, the encouragement of research and scientific work and a procedure for amending the Annexes to technical and scientific progress. Member States must also study the desirability of reintroducing Annex IV species if this will contribute effectively to re-establishing them at a favourable conservation status. The deliberate introduction into the wild of any non-native species is regulated and if necessary prohibited. Education and general information on the need to protect nature must also be promoted (Arts 17 to 22).

## 11.5 Irish nature conservation law

This part of the chapter looks at the main pieces of Irish legislation which seek to implement the Wild Birds and Habitats Directives: the Wildlife Acts 1976 and 2000 (the Wildlife Acts), the European Communities (Conservation of Wild Birds) Regulations 1985, as amended (the Wild Birds Regulations) and the European Communities (Natural Habitats) Regulations 1997, as amended (the Habitats Regulations). For an excellent article on this, see O McIntyre, 'Irish implementation of EC nature conservation law' [2002] 3 IPELJ 103. Dúchas, the Heritage Service, have also published a helpful practical guide to site conservation, *Living with Nature: the Designation of Nature Conservation Sites in Ireland*.

Irish legislation already contained provisions for site conservation prior to the introduction of the Wild Birds and Habitats Directives. For example, the Wildlife Act 1976 provided for the creation of nature reserves and refuges.

The Minister for the Environment, Heritage and Local Government (the Minister) can create nature reserves on land owned by the Minister or the State where he is satisfied that the lands include either a habitat, species or ecosystem of scientific interest or contain features of geological, geomorphological or other natural interest, and that such areas would be likely to benefit if measures are taken for their protection (s 15 of the Wildlife Act 1976 as amended by s 26 of the Wildlife (Amendment) Act 2000). A nature reserve is created by ministerial order, which must indicate the objectives for which the nature reserve is being established. The Minister must then manage the land to which the establishment order relates so as to secure these objectives in accordance with the general protection of the environment. The Minister can also recognise nature reserves on non-state lands. However, this can only be done with the agreement of the owner/occupier of the lands, who would be responsible for managing the reserve (s 16 as amended by s 27 of the Wildlife (Amendment) Act 2000). Over 70 nature reserves have been designated under the Wildlife Acts, eg the Nature Reserve (Glen of the Downs) Establishment Order 1980 (SI 178/1980) and the Nature Reserve (Lough Hyne) Establishment Order 1981 (SI 206/1981). Both Lough Hyne and Glen of the Downs have been proposed as SAC.

The Minister can also designate any lands as refuges for fauna and/or flora where he considers that they should be specially protected (s 17 as amended by s 28 of the Wildlife (Amendment) Act 2000). The Wildlife Acts contain a consultation process regarding their designation as refuges for fauna and flora can be created over any lands (unlike nature reserves, which can only be created

over state owned land or in agreement with a private landowner). Persons with an interest in the lands must also be compensated for any diminution in value of their interest in the lands, as must other persons who have otherwise suffered financial loss or other inconvenience, or disadvantage as a result of the designation. Seven orders have been made designating areas as refuges for fauna. For example, the Refuge for Fauna (Cliffs of Moher) Designation Order 1988 (SI 98/1988) creates a refuge for several species of birds and prohibits *inter alia* the wilful disturbance of such birds, the use of drift nets and littering.

## 11.6 Implementation of the Wild Birds Directive

### 11.6.1 Site conservation: designation

The Wildlife Act 1976 was considered inadequate to fully comply with the requirements of the Wild Birds Directive. The European Communities (Conservation of Wild Birds) Regulations 1985 (SI 291/1985) were therefore enacted and created the first four SPA. As noted by McIntyre, they do not contain any designation procedure. In practice, proposed sites have been advertised through a newspaper notice with the public being invited to make submissions prior to a final designation. This was required as a result of the Supreme Court decision in *MacPharthalian v Commissioners of Public Works* [1994] 3 IR 353 which held that a decision to designate the applicants' lands as an area of scientific interest (which adversely affected the value of their lands) without notifying them or giving them any opportunity to object, was in breach of the principles of natural justice. In this case, the applicants became disentitled to certain forestry grants and an application for planning permission was refused, as a result of the designation.

To date, 110 SPA have been designated by the Minister under the Wild Birds Regulations.

### 11.6.2 Site conservation measures

SPA are generally protected under the planning system. Development plans must include objectives for the conservation and protection of SPA and the planning authorities must also have regard to their status in deciding on planning permissions (see ss 10 and 34 of the Planning and Development Act 2000. These provisions also apply to proposed SAC, SCI, designated SAC and proposed and designated natural heritage areas (NHA)).

The Wild Birds Regulations also provide that a person must not dispose of or place any organic matter, rubbish or deleterious material which would create or tend to create pollution or deterioration of habitats or any disturbance whatsoever affecting the species to which Art 4 of the Wild Birds Directive relates in so far as such pollution, deterioration or disturbance would be significant having regard to the objectives of Art 4 (reg 4(1).

Contravention of the Wild Birds Regulations constitutes an offence carrying a maximum penalty of €1,270. SPA are also now protected under the Habitats Regulations discussed below.

### 11.6.3 Species protection

The Wildlife Acts contain provisions for the protection of wild birds whether they are inside or outside of a protected area. Section 19 (as amended by s 30 of the Wildlife (Amendment) Act 2000) provides that wild birds and their nests and eggs shall be protected. Section 22 then specifies that a person shall be guilty of an offence if they hunt or injure a protected wild bird, wilfully take, remove or injure their eggs or nests, or wilfully disturb a protected wild bird on or near a nest containing eggs or unflown young.

The provisions of ss 19 and 22 do not apply to the species listed in the Third Schedule (such as crows and magpies).

It is not an offence to contravene the provisions of s 22 in certain circumstances; for example, if a person disturbs a protected wild bird while engaged in ornithology, unintentionally injures or kills a protected wild bird in the course of agriculture, aquaculture, fishing, forestry or turbary or does so pursuant to a licence granted under the Wildlife Acts or any other enactment (s 22(5) as amended by s 30 of the Wildlife (Amendment) Act 2000).

The Minister can also issue licences for a variety of activities, for example, to capture or humanely kill a protected wild bird or for educational, scientific or other specified purposes (s 22(9) as amended by s 30 of the Wildlife (Amendment) Act 2000). He can also make open season orders providing that protected wild birds can be hunted in certain areas or during certain periods (s 24, as amended by s 33 of the Wildlife (Amendment) Act 2000). The Wildlife (Wild Birds) (Open Seasons) Order 1979 (SI 192/1979), as amended, provides that specified wild birds can be hunted during certain periods, as set out in the First Schedule, exclusive of the areas specified in the Second Schedule.

Like the Wild Birds Directive, the Wildlife Acts regulate the methods of capture and killing of wild birds including *inter alia* restrictions on the hunting with firearms, the use of traps and snares and hunting by night (s 34 as amended by s 42 of the Wildlife (Amendment) Act 2000).

## 11.7 Implementation of the Habitats Directive

The Habitats Regulations, in conjunction with the Wildlife Acts, seek to transpose the Habitats Directive into Irish law. For a thorough analysis of the Directive and the adequacy of Irish implementing legislation, see Scannell *et al*, *The Habitats Directive in Ireland* (Centre for Environmental Law and Policy, 1999).

The Minister for Arts, Culture and the Gaelteacht was originally responsible for the administration of the Habitats Regulations. His functions have now been transferred to the Minister for the Environment, Heritage and Local Government (Heritage (Transfer of Department Administrative and Ministerial Functions) Order 2002 (SI 356/2002)). The agency responsible for nature conservation is Dúchas, the Heritage Service, of the Department of the Environment.

### 11.7.1 Conservation of natural habitats and habitats of species

Parts II and IV of the Habitats Regulations deal with the conservation of natural habitats and habitats of species.

#### *11.7.1.1 Site designation: regs 3 to 12*

Chapter I of Part II sets out the procedure for the selection of sites to be transmitted to the Commission in accordance with Stage 1 of the Directive: see section 11.4.1.1 above.

The Minister must first draw up a 'candidate list of European sites' in accordance with the criteria laid down by the Directive (reg 3). A site on this list is known as a proposed candidate SAC, or 'pcSAC'. Under reg 4(1), the Minister must then send a copy of this list to various public bodies including government ministers, affected planning authorities and the Environmental Protection Agency. The Minister must also notify every owner and occupier of land mentioned in the list, and any holders of a prospecting or exploration licence which relates to the land, of its proposal to include the land in the candidate list. (As noted above, the Directive does not require that notice be given to affected persons. This is left to the discretion of the Member States.) Regulation 4(3) stipulates the information which these notices must contain, including the operations or activities which the Minister considers would be likely to alter, damage, destroy or interfere with the integrity of the site.

Recipients of these notices can object to the inclusion of a site on the candidate list but only on scientific grounds. They can object within a period of three months from the date the notice was served, in the manner specified in the notice. Similarly, the public bodies referred to in reg 4(1) can also seek a review or modification of the list. The Minister must consider these requests and can amend the candidate list (reg 5). However, as noted at section 11.4.1.1 above, Member States can only have regard to criteria of a scientific nature, when drawing up their national list of proposed sites.

There are two stages to the appeals process. The first stage is to make an informal appeal to the Appeals Section of Dúchas. Where an informal appeal is unsuccessful, the appellant may have the case referred to an Appeals Advisory Board which is independent of Dúchas. The Board makes a recommendation to the Minister who decides on the outcome of the appeal. A similar arrangement will operate for NHA appeals. In April 2003, the Government decided to abolish Dúchas. This coincides with the renaming of the Department of the Environment. It is not yet clear how the heritage functions of the Department will be defined and implemented once Dúchas is abolished. Once a proposed candidate SAC has been transmitted to the Commission it becomes known as a candidate site.

Chapter II of Part II of the Habitats Regulations contains the procedure for the designation of SAC in accordance with stage 3 of the Directive. Once the Commission has notified the Minister that a site has been adopted as an SCI in accordance with stage 2, the Minister must in turn notify the relevant owners and occupiers of land, any holders of a prospecting or exploration licence and the bodies referred to in reg 4(1) (reg 8). The Minister must then designate the sites as SAC within six years. He must also establish priorities for the designation of sites, having regard to:

(a) the importance of the sites for the maintenance or restoration of Annex I habitats and Annex II species at a favourable conservation status;
(b) the coherence of Natura 2000; and
(c) the threats of degradation or destruction to which the sites are exposed. Obviously, if a site is particularly threatened then priority should be given to its designation and to the implementation of conservation measures.

The Minister must publish every SAC designation in the *Iris Oifigúil*. He also has the power to have notices erected and maintained at suitable places, notifying that the land has been designated as a SAC.

To date, Ireland has transmitted 364 proposed sites to the Commission. The site designation process is ongoing. In June 2003, the Minister began the three-month consultation process for the fifth round of designations proposing 44 new SAC and 14 extended SAC. See Dúchas website at www.duchas.ie for site details on SPA and proposed SAC.

#### *11.7.1.2 Site conservation measures*

As noted above, Art 6 of the Directive sets out the legal consequences for a site once it has been designated as a SAC (although Art 6(2) to (4) also apply to SCI). The site conservation measures in the Habitats Regulations focus on activities rather than sites and seek to integrate controls into the existing planning and environmental control systems. The Habitats Regulations therefore make amendments to existing statutory provisions and also create a new regulatory framework for activities which had either been unregulated or inadequately regulated.

The Habitats Regulations seek to implement Art 6 of the Directive as follows:

**Article 6(1) – general conservation measures**: reg 13(1) and (2) provide that the Minister must establish proactive conservation measures in respect of designated SAC and effectively repeat verbatim the provisions of Art 6(1) of the Directive.

**Article 6(2) – avoidance of habitat deterioration and significant species disturbance**: reg 13(3) restates the requirements of Art 6(2) of the Directive. However, reg 13(3) only applies to designated SAC, whereas the Directive requires that SPA and SCI must also be protected by the provisions of Art 6(2). Although reg 34 provides that reg 13 shall where appropriate apply to SPA, the failure to clearly state that reg 13 applies to SPA appears to be a failure to adequately transpose the Directive. The omission of SCI is a clear failure to do so. Further, as noted by Scannell *et al*, it is questionable whether this word for word transposition of Art 6(1) and (2) is acceptable. A Directive by its nature sets out the aims to be achieved, leaving it to Member States to decide how to achieve those aims. Merely reciting the aims of Arts 6(1) does not therefore appear to adequately implement the Directive.

**Article 6(3) and (4) – environmental assessment of proposed plans and projects**: The Directive requires that a plan or project which is likely to have significant effects on a protected site must be subject to an appropriate assessment of its implications for the site, in light of the site's conservation objectives. If the plan or project would adversely affect the integrity of the site, then it can only

be authorised in certain specified circumstances. The Habitats Regulations seek to transpose the requirements of Art 6(3) and (4) by incorporating the assessment process into existing planning controls. They also establish general controls for operations and activities which are not already regulated.

- **General controls on operations and activities – regs 14 to 16**: reg 14 provides that it is an offence to carry out, cause to be carried out or continue to carry out an operation or activity mentioned in a notice issued under reg 4(2) on a candidate site or SAC, without reasonable excuse, unless it is carried out with the written consent of the Minister or in accordance with the terms of a management agreement under reg 12. However, it is questionable whether this approach adequately transposes the Directive particularly in light of the ECJ's ruling in *Commission v Italy* that Member States could not confine the application of the assessment procedure to a number of listed projects.

  Where the Minister considers that the operation or activity to which an application for a consent relates is neither directly connected with nor necessary to the management of the site and is likely to have a significant effect on the site, either alone or in combination with other operations or activities, the Minister must cause an assessment to be made of the implications for the site, in view of that site's conservation objectives.

  Having regard to the conclusions of the assessment, the Minister may only consent to the operation or activity if it will not adversely affect the integrity of the site. If, notwithstanding a negative assessment and in the absence of an alternative solution, the Minister considers that it must be carried out for imperative reasons of overriding public interest, which may be of a social or economic nature, the Minister may consent to the operation or the activity.

  However, in accordance with the Directive, where the site hosts a priority natural habitat type or species, the reasons are limited to those relating to human health, public safety, beneficial consequence of primary importance to the environment or other reasons which, in the opinion of the European Communities are imperative reasons of overriding public interest. If the Minister consents to a damaging operation or activity, he must ensure that the necessary compensatory measures are taken to ensure that the overall coherence of Natura 2000 is protected in accordance with the Directive. Regulations 14 to 16 therefore fully transpose Art 6(3) and (4).

  If the Minister refuses to give his consent, he must give reasons. The owner, occupier or user of the land may serve notice of appeal on the Minister within 30 days to an arbitrator appointed by the Minister under the Habitats Regulations. As noted by Scannell *et al*, it is undesirable, if not unconstitutional, for the Minister to appoint the arbitrator who will determine whether the Minister should in fact consent to the project.

  These general controls only apply to operations or activities which are not otherwise regulated. This is due to the way in which 'operation or activity' has been defined by reg 2 as any use of land (and water covering such land), other than:

- development which is not exempted development within the meaning of the Planning Acts (ie regs 14 to 16 do not apply to development which requires planning permission); or
- development by a local authority; or
- an operation or activity which requires consent or other authorisation, pursuant to any enactment set out in Parts I or II of the Second Schedule.

These operations or activities excluded from the definition under reg 2, and hence the general controls in regs 14 to 16, are regulated as follows:

- **Development requiring planning permission – reg 27**: reg 27 seeks to integrate the Art 6(3) and (4) assessment procedure into the planning decision-making process. It applies to development likely to have a significant effect on European sites. A European site is defined as including a site notified under reg 4, a proposed SAC included in the national list sent to the Commission, SCI, SAC and SPA (see reg 2, as amended by s 75 of the Wildlife (Amendment) Act 2000). In this case, the planning authority, or the Planning Board (the Board) on appeal, must ensure that the appropriate assessment is undertaken. An EIA shall be an appropriate assessment for the purposes of reg 27. If there is a negative assessment, the planning authority or Board can only then grant planning permission in accordance with Art 6(4) of the Directive.
- **Local authority development which requires EIA under Part X of the Planning and Development Act 2000 – reg 28**: Part X of the Planning and Development Act 2000 provides that the Board must approve local authority development which requires an EIA. Regulation 28 therefore incorporates the requirement of Art 6(3) and (4) into this approval process, ie the Board must carry out the appropriate assessment of a proposed local authority development which is likely to have a significant effect on a European site. The EIA will obviously be the appropriate assessment in this case.
- **Local authority development which is subject to self-regulation under Part XI of the Planning and Development Act 2000 – reg 29**: reg 29 incorporates the requirements of Art 6(3) and (4) into this regulatory process. Where Part XI applies, a local authority is bound to consider the effects of the development on a European site. If it considers that it is likely to have a significant effect on the site, it must carry out an EIA. A local authority may only proceed with the proposed development where it is satisfied that it will not adversely affect the integrity of the site, unless there are imperative reasons of overriding public interest and there are no alternative solutions.
- **Road development – reg 30**: An EIS must be prepared for a certain road development which is then submitted to the Board for approval under s 51 of the Roads Act 1993, as amended. Regulation 30 incorporates the assessment procedure for European sites into this process. In *Murphy v Wicklow County Council* (unreported, Supreme Court, 30 January 2000), the applicant sought an injunction restraining the Council from carrying out certain

works including the felling of trees at the Glen of the Downs for the purpose of road widening. At the time Glen of the Downs was a proposed candidate SAC. The Supreme Court rejected the applicant's contention that the Council was in breach of the Habitats Regulations. It noted that reg 14 (which applied to candidate sites) did not apply to local authority development and that regs 29 and 30 only applied to European sites (which at the time were defined to include only SCI and designated SAC and SPA). As Glen of the Downs had not yet been selected as a SCI, the Council was not in breach of the Habitats Regulations. The Supreme Court also rejected the argument that the Council should not be allowed to profit from the State's delays in transmitting sites to the Commission. There was no material before the Court upon which it could conclude that the site would be adopted as a SCI.

- **Miscellaneous operations or activities which require authorisation by Government Ministers – reg 31**: Part I of the Second Schedule to the Habitats Regulations lists enactments which require that government ministers authorise in some way the operations or activities of others (for example, under the Arterial Drainage Act 1945, the Fisheries (Consolidation) Act 1959 and the Foreshore Acts 1933 and 1992). Regulation 31 incorporates the assessment procedure into these enactments. The relevant minister must therefore carry out an assessment of the implications for a European site in accordance with Art 6(3) and (4).
- **Environmental licensing – reg 32**: reg 32 integrates the assessment procedure into the decision making processes for the grant of environmental consents or licences required under the legislation specified in Part II of the Second Schedule, ie for air pollution licences, IPC licences, waste licences and permits and trade effluent discharge licences. The relevant regulatory authority must therefore carry out an assessment procedure in respect of European sites which may be significantly affected.

#### *11.7.1.3 Enforcement*

**Criminal liability**: It is an offence to contravene the provisions of reg 14(1). Penalties for offences under the Habitats Regulations have recently been increased. On summary conviction there is now a maximum fine of €1,905 and/or maximum 12 months' imprisonment. On conviction on indictment there is a maximum fine of €63,487 and/or a maximum imprisonment of two years (s 68(d) of the Wildlife (Amendment) Act 2000).

**Injunctive relief**: Where the Minister considers that an operation or an activity is being carried out or may be carried out which is likely to have a significant effect on an Art 5 or European site, then he must carry out an EIA of the implications for the site in view of the site's conservation objectives. If the Minister is of the opinion that the operation or activity will adversely affect the integrity of the site concerned, he must apply to a Court of competent jurisdiction to prohibit the continuance of the operation or activity in accordance with reg 17 (ie to the Circuit Court within whose Circuit the lands or part of the lands concerned are situated or to the High Court). The Court can make such interim or interlocutory order (if any) as it considers appropriate, having regard to Art

6(4) of the Directive, the overall requirement to safeguard the integrity of the site and ensuring that the overall coherence of Natura 2000 is protected. The Minister's powers in this regard apply to both activities and operations on a European site as well as those carried on outside a European site, but which may have an adverse affect on it (reg 18). In *Minister for Arts v Kennedy* [2002] 2 ILRM 94, the then Minister for the Arts, Heritage, Gaeltacht and the Islands applied to the High Court for an order under reg 17 prohibiting the defendants from carrying out any works on the layout of a golf course on lands including Inch Spit, Dingle Bay. The site was proposed as a candidate SAC. The High Court held that the site was appropriately listed by the time the application was made and that the defendants were aware of this. However, Murphy J considered that the Minister had failed to satisfy the other preconditions for an application to Court under reg 17, namely (a) the Minister must consider that an operation or activity is being carried out or may be carried out which is likely to have significant effects on the site (Murphy J doubted whether the Minister in fact had credible evidence to this effect); and (b) an appropriate assessment of the implications for the site in view of the site's conservation objectives must have been undertaken. The Court refused to grant a perpetual injunction on the basis that the Minister had failed to establish any conservation measures for the site and accordingly an appropriate assessment of the implications of the development of a golf course in light of the site's conservation objectives could not have been carried out.

**Restoration of property**: The Minister can also require the restoration of an Art 5 site or a European site where an operation or activity has been carried out on such a site in contravention of the conditions of Chapter III of Part II of the Habitats Regulations. Failure to comply with directions from the Minister is an offence. If any steps required by the directions have not been taken, the Minister can take such action as he considers necessary, including authorising a person to enter on to the lands to take those steps. He may also recover any expenses incurred as a simple contract debt (reg 19).

The powers of the Minister under regs 17 to 19 only apply in respect of damaging operations or activities, as defined in reg 2. They do not therefore apply to operations or activities which require planning permission, to local authority development or to an operation or activity which requires ministerial consent or an environmental consent or licence under the enactments listed in the Second Schedule to the Habitats Regulations. This is a significant omission and may amount to a failure to implement the Directive. However, enforcement mechanisms under planning legislation may be used to protect sites from operations or activities not covered by regs 17 to 19. For detailed information on enforcement under planning legislation, see Yvonne Scannell, *Environmental and Planning Law* (Round Hall Press, 1995); John Gore Grimes, *Key Issues in Planning and Environmental Law* (Butterworths, 2002); and Maguire O'Reilly and Roche, *Irish Environmental Legislation* (Round Hall Sweet & Maxwell, 1999).

#### *11.7.1.4 Compensation*

Regulation 20 establishes a compensation scheme for persons who have been refused consent to carry out an operation or activity under reg 16 or whose

licence has been revoked under reg 15. However, compensation shall not be payable where:

(a) the Minister is in negotiation with the owner or occupier to purchase the land or to enter into a management agreement;

(b) proceedings for the compulsory purchase of the lands have been commenced; or

(c) the proposed operation or activity would 'significantly adversely affect' an Annex I habitat, an Annex II species or a bird species or habitat of such species under the Wild Birds Directive, unless the refusal or the modification or revocation of the licence results in the discontinuance of a use which has been in existence for a period of five years immediately preceding such refusal, modification or revocation.

Where restrictions on development are imposed under the planning system as a result of the Habitats Regulations, payment of compensation may be provided for under Part XII of the Planning and Development Act 2000. However, compensation is excluded if the proposed development would materially contravene a development objective indicated in the development plan for the conservation and preservation of a European site and would adversely affect:

(a) an Annex I habitat or an Annex II species (which have been proposed by the Minister as a SAC); or

(b) a species of bird or other habitat specified in Art 4 of the Wild Birds Directive.

### 11.7.2 Protection of species

Part III of the Habitats Regulations in conjunction with the Wildlife Acts seek to transpose the species protection measures of the Directive.

As noted at 11.4.2 above, Arts 12 and 13 of the Directive require a system of strict protection for Annex IV species of flora and fauna. Regulation 23 seeks to establish a system of strict protection for Annex IV fauna present in Ireland which are listed in Part I of the Second Schedule to the Habitats Regulations (eg otters and cetaceans). The Minister must take the requisite measures to establish such a system, although he has not yet done so. However, reg 23 does provide that it is an offence to deliberately capture, kill or disturb these species, to deliberately destroy or take their eggs or to damage or destroy their breeding sites or resting places. Section 45 of the Wildlife Act as amended restricts the sale, purchase or transport of such species. The protection afforded by reg 23 is in addition to s 23 of the Wildlife Act 1976 as amended which had already established a system of protection for fauna known as 'protected wild animals'. It is an offence under s 23 to hunt or injure a protected wild animal other than in accordance with a licence from the Minister which can be granted on any grounds. Regulation 25 restricts the circumstances in which derogations from the requirements of reg 23 are permitted in accordance with Art 16 of the Directive. Any derogation from s 23 should be similarly restricted in respect of Annex IV species but the legislation does not expressly state this.

There are no Annex IV plant species present in Ireland requiring strict protection. However, s 21 of the Wildlife Act 1976 (as amended by s 29 of the Wildlife (Amendment) Act 2000) established a system of protection for flora. The Minister can make orders protecting species of flora. The Flora (Protection) Order 1999 (SI 94/1999) lists 68 species of protected flora. It is an offence to cut, uproot or otherwise damage or destroy such protected flora. It is also an offence to buy, sell, transport or offer for sale or exchange or to possess protected flora or to wilfully alter, damage, destroy or interfere with their habitats. The Minister can licence the taking of specimens for scientific, educational or other purposes specified in the licence. However, in respect of flora to which the Habitats Directive relates, it appears that the Minister may only grant a licence on the grounds specified in reg 25 of the Habitats Regulations.

Annex V species are subject to the less stringent requirements of Art 14 of the Directive. Regulation 24 provides that the Minister can take measures to ensure that the taking in the wild of such species and their exploitation is compatible with their being maintained at a favourable conservation status. The Minister can also derogate from these requirements in accordance with reg 25. The provisions of reg 24 are in addition to the provisions of the Fisheries Acts and s 23 of the Wildlife Acts.

Part II of Chapter IV of the Wildlife Acts seeks to implement Art 16 of the Directive regarding the indiscriminate methods of capture and killing of species. However several of the methods listed in the Directive are not prohibited by the Wildlife Acts.

## 11.8 Other provisions regarding nature conservation

### 11.8.1 Natural heritage areas

Natural heritage areas (NHA) were a non-statutory designation. However, most local authority development plans contained an objective to protect NHA and an application for planning permission which could affect an NHA was in practice referred to the Minister/Dúchas for comment. (The Planning and Development Act 2000 now expressly provides that development plans shall include objectives for the conservation of proposed and designated NHA and that planning authorities must have regard to such sites when considering a planning application (ss 10(2)(c) and 34(3)(a)).) NHA were also afforded some protection under the Rural Environment Protection Scheme (REPS) and as a result of the ineligibility of NHA lands for certain grants such as forestry grants.

The Wildlife (Amendment) Act 2000 has now established a mechanism to give formal statutory protection to NHA. These protected areas are defined as areas worthy of conservation for one or more species, communities, habitats, landforms or geological or geomorphological features or for its diversity of natural attributes (s 3). In 1995, proposals for over 1,100 NHA were published, many of which have overlapping designations as SAC or SPA. The process of formal designation of these proposed NHA (pNHA) has now commenced. For example, over 60 statutory orders for raised bogs are currently being drawn up following the completion of a consultation process this June. NHA are legally protected from damage from the date they are formally proposed.

#### *11.8.1.1 Site designation*

The site designation process set out in ss 16 to 18 of the 2000 Act is very similar to the procedure for SAC under the Habitats Regulations. The Minister must first consult with various other Ministers and affected planning authorities and must also serve notices on owners and occupiers of lands which relate to the proposed NHA. These notices must specify the reasons why the site is of special scientific interest, indicate the works which it is considered would be liable to destroy or significantly alter, damage or interfere with the integrity of the proposed NHA and the protective measures which the Minister proposes to include in the order. As with proposed SAC, owners and occupiers of affected lands can only object on scientific grounds to the proposed designation. The Minister must also publish a public notice of his intention to designate an area as a NHA. Having considered any objections, the Minister can designate the land as a NHA, by way of ministerial order. The order can include such protective measures as the Minister thinks fit.

Section 19 prohibits works in designated NHA which are liable to destroy or to significantly alter, damage or interfere with the features by which the designation order was made unless:

(a) the person has notified the Minister of his intention to carry out the works; and

(b) the Minister has consented to the works (or six months have expired from the date of notification and the Minister has not refused) or the works are carried out pursuant to an agreement under s 11 or 18 of the Wildlife Act 1976.

The Minister can only consent to the works if he is satisfied that they are necessary for imperative reasons of overriding public interest, which may be of a social or economic nature, and there is no alternative and viable solution. A person can appeal the decision of the Minister, to refuse or revoke consent or to attach conditions, to an arbitrator appointed by the Minister. Again, this is unsatisfactory as the arbitrator is not independently appointed.

Sections 20 and 21 contain similar provisions to those applicable to SAC regarding applications to Court to prohibit works in NHA and Ministerial directions to restore lands in NHA. Section 22 provides for compensation in certain circumstances for the refusal of consent to carry out works (ss 20 to 22). It is also important to note the definition of 'works' in s 15. This excludes local authority development and development requiring planning permission. Sections 19 to 21 of the 2000 Act do not therefore apply to such development and the only remedy would appear to lie under the planning code.

### 11.8.2 Special amenity area

Where a planning authority considers that an area is of outstanding natural beauty or has special recreational value, it can, by order, designate that area as an area of special amenity (SAAO) (s 202, Planning and Development Act 2000). The Minister can also direct the planning authority to do so. Although the power to designate areas as Areas of Special Amenity was introduced by the Local Government (Planning and Development) Act 1976, only 3 areas in

Ireland have been designated: Howth Head, North Bull Island and the Liffey Valley. A public consultation process is required and objections can be made to the Board which must then hold an oral hearing. A planning authority must have regard to the provisions of a SAAO when considering an application for permission. The Planning and Development Regulations 2001 (SI 600/2001) restrict the classes of exempted development in areas to which a SAAO applies (Art 9(b), 2001 Regulations). A refusal of planning permission for a development within an SAAO does not attract compensation. A planning authority can also make a conservation order if it considers it necessary to preserve from extinction or otherwise protect any flora or fauna in an area to which an SAAO relates. However, none has been made to date.

### 11.8.3 Landscape conservation area

This is a new concept introduced by s 204 of the Planning and Development Act 2000. The planning authority can designate any area or plan as a landscape conservation area. Again, a public consultation process is necessary. The Minister can prescribe that certain types of development in a landscape conservation area shall not constitute exempted development. The Minister has not yet issued any such regulations. However, objectives to preserve the character of landscapes must be included in development plans where the planning authority considers that it is necessary for the proper planning and sustainable development of the area. Objectives in the development plan may also preserve views and prospects and the amenities of places and features of natural beauty or interest.

In June 2000, the Department for the Environment and Local Government issued draft guidelines for planning authorities on landscape and landscape assessment. The final guidelines are due to issue in the near future.

### 11.8.4 National parks

A Bill is under consideration to provide a legal basis for Ireland's six national parks. These are currently managed under a number of other enactments.

### 11.8.5 Wildlife trade Regulations

Part III of the Wildlife Act 1976, as amended, regulates wildlife dealing and the transport, import and export of wildlife. Regulations have been adopted pursuant to the Acts regulating the export and import of wild birds and wild animals (Wildlife Act 1976 (Control of Export of Fauna) Regulations 1979 (SI 235/1979) and the Wildlife Act 1976 (Control of Importation of Wild Animals and Wild Birds) Regulations 1989 (SI 296/1989). The Wildlife (Amendment) Act 2000 also makes provision to ensure compliance with Council Regulation 338/97/EC on the protection of species of wild fauna or flora by regulating trade therein, which in turn implements the provisions of CITES in the EU.

## 11.9 Conclusion

The Wild Birds and Habitats Directives establish a comprehensive framework for nature conservation in the European Union. Whilst their implementation in Ireland will make a significant contribution to nature conservation, there are numerous examples of our failure to implement their provisions adequately, in particular those of the Habitats Directive. Some of these are noted above.

Readers are advised to refer to Scannell *et al*, previously cited in this chapter, for a detailed analysis of the adequacy of our implementing legislation. This work also questions the constitutionality of the implementing legislation. It appears that constitutional challenges to the Habitats Regulations are currently being prepared on various grounds including restrictions on property rights and the limited circumstances in which compensation can be granted. Consideration is also being given to redrafting the Habitats Regulations.

Inadequate transposition also raises the question of whether the provisions of the Directives have direct effect. This is open to debate. In any event, Irish law should be interpreted in accordance with the Directives by virtue of the well-established principle of indirect effect: see Case 14/83 *Van Colson v Land Nordrhein-Westfalen* [1984] ECR I-1891. Ultimately, the success of these Directives will depend on the proper implementation and enforcement of their requirements.

CHAPTER 12

# ENVIRONMENTAL LIABILITY

*Orla Joyce*

## 12.1 Introduction

Environmental offences (whether causing pollution, threatening to cause pollution, breach of a local authority licence or permit, or breach of an IPC licence) may be committed by a range of people from a body corporate to an individual manager and the ensuing liabilities can be civil, criminal or both. Claims can be:

(a) constitutional;

(b) statutory (Irish and European); and

(c) common law based.

This chapter aims to deal with these liabilities in the environmental context and also to highlight some landmark cases and what is coming down the track in the future.

## 12.2 Constitutional law

There is no express provision in the Irish Constitution dealing specifically with environmental protection or the right to a safe and clean environment. However, environmental issues have been raised in the courts using the umbrella provision contained within Art 40 of the Constitution. This Article states:

> 40.3.1 The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen;
>
> 40.3.2 The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

The landmark case in this area is *Ryan v Attorney General* [1965] IR 294, which concerned fluoridation in the public water supply. The Health (Fluoridation of Water Supplies) Act 1960 provided for the water supply in the Dublin area to be fluoridated, as a result of the high levels of dental decay detected among school children in the area. The plaintiff, Mrs Ryan, challenged the provision on the basis that her right to bodily integrity, and that of her children, had been violated by the harmful effects of the additive. Although the High Court and subsequently the Supreme Court rejected her assertion that the additive was

harmful, they were prepared to accept that a personal right to bodily integrity existed under Art 40.3.2 of the Constitution.

The right to bodily integrity was invoked (albeit unsuccessfully) in another landmark case, that of *Hanrahan v Merck Sharp and Dohme Ltd* [1988] ILRM 629. This case concerned an injunction application arising from the alleged pollution of the plaintiff's farm by emissions from the defendant's factory. (This case is dealt with in more detail later in this chapter.) The plaintiff argued, *inter alia*, that requiring him to prove that the air quality had been harmed by the emissions from the factory, amounted to a failure to respect his bodily integrity. The Supreme Court rejected this argument on the basis that no right under Art 40 of the Constitution is absolute and that such rights can only be protected 'as far as practicable'.

In the case of *Attorney General v X* [1992] IR 1, Mr Justice Hederman raised the possibility of Art 40.3.2 being invoked by pregnant women to protect the unborn from injury by adverse environmental conditions, the use of various toxins in the air and other health or life-threatening situations.

## 12.3 Statute law

### 12.3.1 Statutory liability

Statutory liability enhances the common law right to damages for negligence or other torts. The provision of a statutory remedy for civil liability provides the plaintiff with an automatic right to damages where a breach of a statutory obligation has occurred and caused damage. For example, whilst polluters are liable at common law for damage caused by pollution to property or any person, s 20 of the Local Government (Water Pollution) (Amendment) Act 1990 puts this liability on a statutory footing. The Act aims to provide for the control of water pollution, by providing that a person shall not cause or permit any polluting matter to enter waters, save in accordance with a validly issued licence. Section 20 of the Act deals with civil liability for pollution and states the following:

> Where trade effluent, sewage effluent or other polluting matters enters waters and causes injury, loss or damage to a person or to the property of a person, the person may, without prejudice to any other cause of action that he may have in respect of the injury, loss or damage, recover damages in any court of competent jurisdiction in respect of such injury, loss or damage from the occupier of the premises from which the effluent or matter originated unless the entry to the waters was caused by an act of God or an act or omission of a third party over whose conduct such occupier had no control, being an act or omission that such occupier could not reasonably have foreseen and guarded against.

The Act goes on to state that this provision does not apply if the discharge which caused the harm was in accordance with a licence to emit, issued under the Act. This is a technical defence, but it should be noted that it does not rule out other forms of liability.

The statutory extent of the s 20 provision gives wider recourse than common law remedies, since it is not necessary for the plaintiff to prove any

proprietary connection with the polluted waters. However, there are various defences available for the polluter under this provision which would not be available at common law.

There are similar civil liability provisions under the Air Pollution Act 1987 (s 28B) and the Environmental Protection Agency Act 1992.

### 12.3.2 Remedies for statutory breach

The legal remedies available under statute law vary depending on who is seeking the remedy and the relevant Act applicable.

The following is an outline of some of the most common remedies:

(a) Fines: Under the Air Pollution Act 1987 and the Local Government (Water Pollution) Act 1977 the fines are not very significant. However, under the Waste Management Act 1996 the fine levied for disposing of or undertaking the recover of waste without a licence granted by the Environmental Protection Agency (EPA), is €126, 973.78 for conviction on indictment and €1,904.61 for summary conviction. In imposing the penalty, the court is required to have regard to the risk or extent of damage to the Environment, arising from the act or omission constituting the offence (s 10(4)).

(b) Imprisonment: Offences can either be tried summarily in the District Court where the maximum term of imprisonment varies from six months in water pollution offences to 12 months for waste offences and offences under the EPA 1992, or on indictment where the term can vary greatly depending on the offence and the relevant legislative provision.

(c) General damages for damage to property/person.

(d) Restitution, eg re-stocking of fish spawning grounds, alternative provision of unpolluted water.

(e) Clean-up costs: A local authority can go in and clean up a polluted site and then seek to recover costs on what was expended by them during the process. There is no ceiling in the legislation on the amount they can recover.

(f) Expert costs.

(g) Laboratory/technician costs.

(h) Legal costs: Even if a party to proceedings wins the case, they may face considerable legal costs and these will be awarded at the discretion of the court.

### 12.3.3 Officer liability under statute law

The Air Pollution Act 1987 (s 11), the Local Government (Water Pollution) (Amendment) Act 1990 (s 23), the Fisheries (Consolidation) Act 1959 (s 311), the Dangerous Substances Act 1972 (s 49), the Safety Health and Welfare at Work Act 1989 (s 48), the Environmental Protection Agency Act 1992 (s 8) and the Waste Management Act 1996 (s 9) all include a provision whereby personal criminal liability may be imposed on officers of a company.

A typical example of a standard statutory liability clause is the following, found in the EPA Act 1992, s 8:

> Where an offence under this Act has been committed by a body corporate and is proved to have been so committed with the consent, connivance or approval of, or to have been facilitated by any neglect on the part of any director, manager, secretary, or any other officer of such body, such person shall also be guilty of an offence.

Members of a company are also potentially liable under some of the above legislation if they become active in the running of the company.

The most recent landmark case of directors' responsibility is *Wicklow County Council v Fenton and Others* (unreported, 31 July 2002, O'Sullivan J).

The facts of the case, in brief, are that approximately 8,000 tonnes of material was dumped on lands at Coolamadra, Co Wicklow in or around August 2001. The lands were owned by Mr Fenton. The dumping was illegal, as no permit or licence existed, and whilst the dumping had been ongoing for some time up to that date, it had previously comprised of builders' rubble and household waste. However, it came to the attention of Wicklow County Council that on this particular occasion and on later occasions, hazardous waste was dumped on the site. An environmental investigation of the site revealed that the dumped material consisted of medical waste including blood stained swabs, syringes, bandages and surgical gloves. Expert opinion concluded that there was a significant risk of environmental pollution.

Evidence during the hearing established that the waste had been dumped by Dublin Waste, which held a licence to dump health care waste from the Mater Hospital and the Blackrock Clinic. However, there was also evidence that the respondents had been in breach of some of the conditions of their licence in the past.

The court made the following orders:

- An order directing the comprehensive remediation of the landfill by way of the stage process both on and off site in accordance with the scheme submitted by the applicant, Wicklow County Council.
- The order required Dublin Waste to carry out the work with a fall-back order directing the directors of Dublin Waste to carry out and/or complete those works in the event that Dublin Waste was unable to do so.
- The costs were to be borne by Dublin Waste with liberty for it to apply to the court for a contribution of up to 50% from the landowner.
- The application of the 'polluter pays' principle entitles the applicant (ie Wicklow County Council) to an order for any expenses incurred by the applicant in managing the environmental hazard of the site.
- An order was made that the applicant was to be reimbursed its costs and expenses involved in the management of the unauthorised landfill including providing security and the court made an order making the landowner and Dublin Waste jointly and severally liable to the applicant.
- The landowner was directed to facilitate the carrying out of the remediation works by making his land available to all relevant parties. The court was unimpressed by claims on the part of the landowner that he was not in a position financially to do or pay for any of those works himself.

The decision of the High Court has not been appealed.

The decision is significant because it heralds a new dawn of stricter liability for environmental pollution, with an increased responsibility for company directors to ensure that the activities of the company are not infringing environmental protection laws.

### 12.3.4 Who may prosecute generally under statute?

(a) The Health and Safety Authority (HSA) prosecutes for breaches of legislation under the Safety Health and Welfare at Work Act 1989 (the SHWWA), and other specific health and safety legislation governing the construction industry, factories and offshore drilling etc) which lead to accidents in the workplace, including spills, slips, trips, etc. The HSA details prosecutions it has taken recently in its Annual Report.

Under the SHWWA 1989, employers have a duty to ensure the safety, health and welfare at work of all their employees. This duty includes the provision of safe systems of work, plant and machinery and adequate supervision and training of employees. Equally, employees have a duty under the Act to take reasonable care of their own health safety and welfare at work and to co-operate with their employer in complying with the relevant legislation.

The 'place of work' has a wide definition under the Act, and includes any location at, in, upon or near which work is carried on, including but not limited to vehicles, vessels, aircraft, tents and temporary structures and off-shore installations.

(b) The Director of Public Prosecutions. The responsibility for the prosecution of indictable criminal offences is mostly in the hands of the DPP.

(c) Local authorities (eg Dublin City Council). For example, under the Waste Management Act 1996, an obligation is placed on local and regional authorities regarding licensing of waste disposal and waste management in general. The Act provides that in addition to responsibility for licensing, the local authority has an enforcement role in relation to the holding, recovery and waste within its area.

(d) The EPA. The EPA was set up under the Environmental Protection Agency Act 1992 and its functions include licensing and regulating and enforcement for the purpose of environmental protection. The Agency can prosecute any company/person holding an Integrated Pollution Control (IPC) waste licence.

(e) Regional Fisheries Board. Certain offences in relation to rivers or other waters can be prosecuted by this body.

(f) Any person. This is covered in greater detail below, but it is notable that any person can bring proceedings in respect of an offence under the Waste Management (Miscellaneous Provisions) Regulations 1998 (SI 164/1998), under the Local Government (Water Pollution) Act 1977 and under s 28(1)(a) of the Air Pollution Act 1987.

### 12.3.5 Statutory penalties

Section 10(1) of the Waste Management Act 1996 is a good example of statutory penalties. A person guilty of an offence under this Act, other than an offence referred to in s 10(2), shall be liable:

(a) on summary conviction to a fine not exceeding €1,904 or to imprisonment for a term not exceeding 12 months or to both such fine and such imprisonment; or

(b) on conviction on indictment to a fine not exceeding €12,697,380.78 or to imprisonment for a term not exceeding 10 years, or to both such fine and such imprisonment.

However, sometimes the negative publicity associated with such prosecutions can represent the biggest deterrent and most significant penalty for a company.

### 12.3.6 Continuing offences

An example is s 10(3) of the WMA 1996. If the contravention in respect of which a person is convicted of an offence under this Act is continued after the conviction, the person shall be guilty of a further offence on every day on which the contravention continues and for each such offence the person shall be liable on summary conviction to a fine not exceeding €253.95 or (in the case of an offence to which s 10(1) applies) on conviction on indictment to a fine not exceeding €126,973.80. In imposing any penalty under s 10(1) of the WMA 1996, the court shall in particular have regard to the risk or extent of environmental pollution arising from the Act or omission constituting the offence.

### 12.3.7 Who may prosecute under the WMA 1996?

Section 11 provides that summary proceedings for an offence may be brought by a local authority, whether or not the offence is committed in the local authority's functional area, or by the Environmental Protection Agency. It also provides at s 11(2) that the Minister may make regulations appointing such other persons as the Minister may decide would be entitled to bring proceedings. See the Waste Management (Miscellaneous Provisions) Regulations 1998, SI 164/1998, which provide at reg 4 that summary proceedings for an offence under the Act, may be brought by 'any person'.

### 12.3.8 Burden of proof

Beyond reasonable doubt is the criminal standard. On the balance of probabilities is the civil standard. Some statutory offences are 'strict liability offences'. For example, the case of *Shannon Regional Fisheries Board v Cavan County Council* examined s 171(1)(b) of the Fisheries (Consolidation) Act 1959. The High Court held on a 2:1 basis was that this was a strict liability offence, ie it did not matter if the defendant had taken reasonable care to avoid the offence.

## 12.4 Common law/equitable remedies

A brief resume of the common law and equitable remedies available to potential plaintiffs, and some case law examples, are outlined below.

### 12.4.1 Negligence

There are four elements in what is termed the 'tort' of negligence. The plaintiff, to be successful, must show that he or she was owed a duty of care; that that duty has not been discharged; that they have suffered loss or damage; and that there is a sufficiently close causal connection between what the defendant did or did not do, and the loss or injuries the plaintiff suffered. Liability is not absolute, or strict, therefore. The defendants' standard of behaviour must have been less than that generally considered acceptable, and the loss suffered as a result must have been reasonably foreseeable. Negligence is the tort most often pleaded in the context of, for example, occupational injury claims where an employee might allege that as a result of a failure on the part of the employer to ensure that sensitising chemicals were either not used or only used in a safe way, he or she has contracted asthma. There is a clear duty of care arising between the employer and the employee. If the recommended levels can be shown to have been exceeded, then it is clear that the standard of care has been breached, and if the plaintiff can show as a medical fact that they have suffered asthma (which on the balance of probabilities is occupational rather than constitutional in nature), then there will be a sufficiently close causal connection between the action of the employer and the injury suffered by the plaintiff to allow him to succeed in his claim.

### 12.4.2 Nuisance

Nuisance as a tort consists essentially of the ongoing unreasonable interference with another person in the exercise of his rights. Environmental nuisances are generally odour or noise related and thus make assessment very difficult, since by their nature they are very subjective. As a result of this, damages can vary from case to case. Noise is included as a statutory nuisance under the EPA Act 1992 and may be included as a condition under an IPC licence.

In the case of *Hanrahan v Merck Sharpe and Dohme (Ireland) Ltd* in 1988, the Supreme Court stated that it was clear from the authorities on the law of nuisance that what an occupier of land is entitled to as against his neighbour is the comfortable and healthy enjoyment of the land to the degree that would be expected by an ordinary person whose requirements are objectively reasonable in all the particular circumstances.

If, therefore, a neighbour can show that he has suffered injury, eg health complaints, and this has occurred as a result of the ongoing (rather than 'one-off') activities of his neighbour, then, irrespective of the negligence or otherwise of the defendant neighbour, he can be liable to compensate the injured plaintiff.

### 12.4.3 Trespass

The tort of trespass to the person (as opposed to land) could also be relevant in the context of an environmental claim. The essence of trespass is that wrongful conduct should cause a direct injury to the plaintiff for the plaintiff to have a case. In practice, most plaintiffs will sue for negligence rather than trespass although there can be some procedural advantages to proceeding on the basis of trespass.

### 12.4.4 *Rylands v Fletcher*

There is an old rule termed the rule in *Rylands v Fletcher*, which was a case decided in 1868 and which basically says that if you take something dangerous onto your land, you do so at your own risk such that if it escapes and does harm to adjacent land, it is your responsibility irrespective of your negligence or otherwise. Liability is therefore said to be strict. The facts in *Rylands v Fletcher* were that the plaintiff was mining coal with the permission of the landowner. The defendants obtained the same landowner's permission to build a reservoir to supply water to their mill on his land. This work was done by independent contractors. The contractors failed to discover that there was a disused shaft of a mine under the reservoir which communicated with the plaintiff's mine. In due course water from the reservoir broke into the shaft and flooded the plaintiff's mine. The plaintiff in launching his action faced some formidable difficulties. The defendants had not been negligent, the arbitrator found. No trespass had been committed since the damage by flooding had not been a direct consequence of the defendant's activities. The defendants were not guilty of nuisance as the incident had arisen as a result of a single escape and not over a period of time. This rule was quoted with approval in the *Hanrahan v Merck Sharpe and Dohme (Ireland) Ltd* case by the Supreme Court, which defined the rule by reference to 'a thing which is likely to do mischief if it escapes'. It is strongly arguable that the rule only applies where the user is a non-natural one, as defined by the cases. The rule is one of strict liability so that proof of negligence is not necessary. In the *Cambridge Water Company* case the House of Lords in England determined that for liability to be imposed under the rule of *Rylands v Fletcher*, the damage would have to be reasonably foreseeable. The *Hanrahan* case makes no such qualification.

### 12.4.5 Injunctive relief

An injunction is an equitable remedy awarded by the court to protect a legal right and maintain the status quo between the parties from the time of granting of the injunction until the final disposal of the action. Injunctions take one of two forms: either mandatory, where a party is obliged to do something, or prohibitory, where a party is restrained from doing something. Injunctions are classified based on the time frame involved: interim and interlocutory injunctions are temporary and continue to be effective only until the hearing of the action, whereas permanent injunctions are perpetual. Interim injunctions are usually sought in cases of great urgency and are *ex parte* applications.

Interlocutory injunctions are granted having a hearing with all parties present and are effective until the court makes alternative orders.

Injunctions are a discretionary remedy and the court will grant one only where it is satisfied that it is just and equitable to do so. In addition, the applicant must be able to prove *locus standi*, ie that they have sufficient interest in the legal right to be protected.

There are various types of injunctions designed to meet particular circumstances:

#### *12.4.5.1 Quia timet injunction*

These injunctions are granted where a party fears that their rights may be infringed, even though no such infringement has actually taken place yet. In these cases, the applicant must have 'sufficiently strong evidence' that the threatened infringement will occur but for the injunction.

For example, in *Szabo and Others v Esat Digiphone Ltd, Ireland and Others* [1998] 2 ILRM 102 an injunction was sought by a group of schoolchildren through their parents, to prevent the erection of a cellular mobile and personal communications base station mast within 60 metres of their national school. The plaintiffs argued that there was a risk to their health from the non-ionising radiation associated with the mast. Mr Justice Geoghegan refused to grant the injunction on the basis that there was not sufficiently strong evidence of a risk to health.

#### *12.4.5.2 Mareva injunction*

These type of injunctions are granted to restrain the other party from removing their assets from the jurisdiction, or otherwise dispose of them. The applicant must show that there is a 'good arguable case' and must provide full and frank disclosure of all the relevant facts.

#### *12.4.5.3 Anton Pillar orders*

These injunctions allow the plaintiff to enter the defendant's premises to inspect or remove documents or evidence which the applicant fears will be destroyed otherwise.

#### *12.4.5.4 Section 160 planning injunctions*

These injunctions require a party to act or refrain from acting in a certain way to ensure that unauthorised development or use of land is discontinued. These injunctions are unusual in that the applicant does not need to show *locus standi* to make the application: *Lancefort Ltd v An Bord Pleanála and Others (No 2)* [1999] 2 IR 270.

To secure an injunction, the applicant must satisfy the criteria set down in *American Cyanamid Company v Ethicon Ltd* [1975] 1 All ER 504, as adopted by the Supreme Court in *Campus Oil v The Minister for Energy* [1983] 1 IR 88. The criteria are:

(a) that damages would not be an adequate remedy;

(b) that the applicant has illustrated that there is a serious case to be tried;

(c) the balance of convenience lies with the granting of the injunction.

Once the three-pronged test has been satisfied, the applicant must satisfy the general rules of equity, including that the applicant has 'clean hands' and there has not been an inexcusable delay in bringing proceedings.

### 12.4.6 Some examples of decided cases

(a) *Hanrahan v Merck Sharpe v Dohme (Ireland) Ltd*. The plaintiff was a farmer. He and his family lived close to the Merck Sharpe and Dohme facility in South Tipperary. The Hanrahan family alleged that they and their animals had suffered ill health as a result of air emissions from the Merck Sharpe and Dohme facility. The plaintiffs pleaded that Merck Sharpe and Dohme were in breach of their operating licence, in breach of statutory duty, and guilty of negligence, nuisance, trespass and/or the rule in *Rylands v Fletcher*. They lost in the High Court but ultimately succeeded in the Supreme Court. While the Hanrahans found it difficult, on the basis of technical evidence, to prove that, on the balance of probabilities, the air emissions from the Merck Sharpe and Dohme facility had caused the injuries which they alleged they had suffered, ultimately the Supreme Court was convinced that in all likelihood, the ill health suffered by the Hanrahan family and their animals in relation to which medical evidence was given and accepted had been caused by air emissions from the defendants' facility even though this was not to say that those injuries could not have occurred as a result of other factors as alleged by the defendant.

(b) *Cambridge Water Company v Eastern Counties Leather plc* is an English case decided by the House of Lords in 1994. The action was based on negligence, nuisance and the rule in *Rylands v Fletcher*. In this case, over time, quantities of a solvent used by Eastern Counties Leather, a tannery company, escaped from containers, seeped into the grounds and eventually percolated into the ground waters later to be extracted by Cambridge Water Company. Tests by the Cambridge Water Company in 1976, from a bore hole which was driven at considerable expense to extract drinking water from the area downstream from the now closed tannery, disclosed that the quality of the water was suitable for human consumption.

However, with the passing of the Drinking Water Directive 80/778/EEC, the waters were re-tested and it was determined that as a result of solvent quantities in the extracted water, it could no longer be used for human consumption. Cambridge therefore had to drill another bore hole and find an alternative water supply. They sued Eastern Counties Leather for their resultant costs amounting to over STG £1,000,000. Cambridge lost initially, won in the Court of Appeal, but lost in the House of Lords which held that Eastern Counties Leather were not negligent, and were not liable in nuisance or under the rule in *Rylands v Fletcher* because at the time the solvents were spilled, nobody could reasonably have foreseen the consequential damage that was eventually caused. Concerns have since been expressed that this decision was a policy-based one and may not provide that much comfort for a potential defendant in the future.

## 12.5 Defences – criminal and civil

### 12.5.1 Technical defences

Technical defences would include, for example, non-conformity with the statute of limitations legislation.

### 12.5.2 Statutory defences

Emissions which are in conformity with a validly issued licence (issued by the EPA/local authority) will result in a defence to claims under ss 3, 10, 11 and 20 of the Local Government (Water Pollution) Acts 1977–1990 and s 28 of the Air Pollution Act 1987 and Part II of the EPA Act 1992.

It is important to note that the holding of a licence does not entitle one to pollute. Whereas discharge in accordance with the licence will avoid civil liability for water or air pollution, it will not avoid other liabilities arising out of the same incident.

Defences at common law will turn on evidential issues such as the plaintiff being unable to prove negligence, trespass, nuisance, etc.

Each case/defence turns on its own facts.

## 12.6 The future

There is a proposal for a Directive of the European Parliament and/or the Council on Environmental Liability with regard to the prevention and remedy of environmental damage.

The proposal aims to establish a framework whereby environmental damage would be prevented or remedied. The proposal leaves it open to Member States to decide when the measures should be taken by the relevant operator or by the competent authorities or by a third party on their behalf. Whenever possible, in accordance with the 'polluter pays' principle, the operator who has caused the environmental damage or who is faced with an imminent threat of such damage occurring must ultimately bear the cost associated with those measures.

There have been a number of attempts in the past to introduce this type of Directive. The aim of the Directive is to expand the ambit of strict liability for environmental offences/breaches.

The European Commission issued a statement in June 2003 welcoming the recent political agreement by the EU Environment Ministers on the Directive. The legislative process involved in passing this Directive (the 'co-decision' process) began on 4 March 2002 and the Directive is expected to be passed by May 2004, followed by a two-year implementation period for Member States.

### 12.6.1 Protection of the Environment Act 2003

The Act makes provision for the amendment of the licensing provisions of the Environmental Protection Agency Act 1992 and the Waste Management Act 1996. In particular, the Act includes provision for implementation of the

Integrated Pollution Prevention and Control Directive 96/61/EC. Under the Act, the IPC licensing regime is known as IPPC licensing.

The following changes are contained in the Act:

(a) Change the technical basis of the licensing system from best available technology not entailing excessive costs (BATNEEC) to best available techniques (BAT).
(b) Give recognition to emission limit values as the operational basis of IPPC licensing.
(c) Increase fines.
(d) Provide for the revocation or suspension of licences in specified circumstances.
(e) Require that an IPPC applicant be a 'fit and proper person'.

The Act was enacted on 14 July 2003. However, at the time of writing (March 2004) not all sections of the Act have been commenced.

CHAPTER 13

# ENVIRONMENTAL BUSINESS CONCERNS

*Donal Buckley*

## 13.1 Introduction

The environment has become a key issue for all sectors of society, especially the business community, throughout the world. Irish business and industry has identified the environment as a strategic business issue and the corresponding necessity for programmes to protect and enhance the environment. It recognises the increasing priority that has been assigned to the environment by the public, insurers, investors, customers and regulators. EU environmental policies have resulted in a radical increase in the quantity of Irish environmental legislation, which in turn has placed huge demands on the business sector. The Irish business community wishes to play a positive and constructive role in the development and implementation of environmental policies, which will bring clear benefits to Irish society. The business sector accepts that it has a responsibility, supports the concept of sustainable development, and is committed to working with all stakeholders to achieve the goals of environmental protection, economic and social development.

This chapter draws on the experience of member companies of the Irish Business and Employers Confederation (IBEC) through the Environmental Policy Committee. This committee represents a broad cross-section of Irish industry, indigenous and multi-national, upon whom environmental legislation and policy at national and EU level impacts. This chapter reflects the views of these companies as to the effect on environmental policies and legislation on their business. This chapter does not set out to deal with all environmental issues of relevance to the Environmental Policy Committee, but focuses on the key issues which are of concern to them and the broader IBEC membership.

As the representative body of Irish business and industry, IBEC has a key role in working with agriculture, local authorities, national government, the EU Commission and parliament, environmental organisations and other key stakeholders in the community. A partnership approach to the economy has served us extremely well in many spheres; a partnership approach to the environment will undoubtedly be of equal value. Changes in legislation and behaviour have resulted in much-improved public access to environmental information and an increase in public consultation in decisions with environmental consequences. This has resulted in a much more informed debate on how Ireland can achieve sustainable development.

The central message of IBEC's environmental policy is that business is clearly committed to the principles of sustainable development which implies

a balanced approach to environmental protection and economic growth. IBEC has an important role in keeping its members informed of developments in the environmental area so that they can anticipate and prepare for legislative and policy requirements. Economic growth and environmental protection are not in opposition and have equally legitimate aspirations within a context of sustainable development. Indeed these two principles are not exclusive of each other and in a properly structured environment are in fact inter-dependent. Ireland should learn from some of our European partners, who have managed to combine high levels of environmental protection with strong economic development. IBEC believes that high standards of environmental performance are much more likely to come from a competitive and prosperous economy than from an uncompetitive and declining one. Less economic growth leads to fewer jobs, but it also means fewer resources that can be spent on environmental protection.

Of late, IBEC are extremely concerned that this stated balance between environmental, social and economic considerations is not being met in Ireland. Economic development is not being given the same weighting as environmental protection with consequences for Ireland's prosperity. Competitiveness is critical to the success of Irish companies and must be given full and balanced consideration in framing environmental policies. An imbalanced approach to sustainable development will not lead to improvements in the environment, society or the economy.

## 13.2 Environmental policy in context

Irish environmental policy is set in the context of EU Treaty objectives, Environmental Action Programmes and legislation. Key aspects of EU policy on the environment are set out in the Sixth Environment Action Programme entitled *Environment 2010: Our Future, Our Choice*. This programme seeks to address those environmental problems where action and leadership are required at European level. It establishes environmental objectives for the next ten years and beyond and sets out measures and approaches required to achieve these objectives. This programme, like its five predecessors, clearly identifies industry as part of the solution to arrest the degradation of the European environment. These programmes encourage partnership approaches as a preferable mechanism of finding solutions.

Irish environmental policy is also framed in the context of how society perceives the current state of the Irish environment. Many myths have developed as to the poor state of the Irish environment and the role the business sector has had in damaging our environment. We are constantly reminded of examples of environmental neglect but almost always fail to acknowledge our relative position compared to our EU partners, or measurable improvements. In fact Ireland's environment is amongst the best in Europe and is improving. In addition, Irish industry has performed exceptionally well in meeting and exceeding its environmental responsibilities, is now one of the least threats to the environment and should receive due recognition for this success.

Irish environmental legislation has been fundamentally updated in recent years and places many new obligations on Irish industry. The manner in which the legislation has been implemented has, in the view of the business community, placed significant costs onto the business sector without the corresponding environmental benefit. Environmental costs have now become a very significant factor for businesses operating in Ireland. In a country with a modern efficient business sector and an excellent environmental track record these costs are now out of line with our competitors. This imbalance makes little sense when set in the context of Ireland's environmental performance relative to other EU Member States.

The costs which are of most concern to the business community are not those which have resulted directly from EU policy and Directives but are a consequence of national measures which we have put in place. These include:

(a) the obtaining of licences, permissions, approvals and permits;
(b) compliance costs;
(c) user charges/taxes.

IBEC wishes to participate actively in dialogue regarding both policy formation and legislative developments to ensure that sufficient weight is given to economic development and competitiveness.

These measures are within the control of the policy makers in Ireland and if a similar approach is taken to address the upcoming environmental challenges now facing Ireland we risk repeating our mistakes of imposing cost with no benefit. A pragmatic approach could mean meeting the demanding targets, protecting the environment without impairing our economic growth.

## 13.3 Waste management

Waste is one of the most challenging environmental issues in Ireland today and waste management continues to be dominated by the cheapest available option, a technically unsophisticated landfill network for the disposal of waste. Our continuing reliance on landfill as the principal waste disposal route is reaffirmed by the fact that 87% of household and commercial waste is currently landfilled.

The waste crisis has been exacerbated by a large decrease in the number of landfills in Ireland. The number of landfills is set to fall further due to the fact many are approaching their capacity and those that are not, or cannot be upgraded to meet the requirement of waste licences issued by the EPA, will have to close. As the local authorities do not have a statutory obligation to collect commercial and industrial (C&I) waste they are now restricting entry to C&I waste by using quota systems.

Our heavy reliance on landfill, which was previously coupled in many cases with uneconomic charging, has limited the development of the required integrated waste management approaches and inhibited waste recovery and recycling options. Recovery, including recycling, tends to be more successful in countries with integrated waste management options. The length of time for a decision in the planning process and the uncertainty of outcome has not

assisted the generation of waste infrastructure. Also the strength of public opposition to any waste facilities, even bring centres, has hindered recovery and recycling.

Waste management infrastructure in Ireland has been consistently underfunded and significant capital investment will now be necessary to achieve the radical improvements which are required. The imposition of a landfill levy prior to the delivery of waste infrastructure has resulted in industry paying over €30 million in charges when there is no alternative option available. In addition, this money has not, as promised, been used to the maximum effect to develop waste industry to date.

Waste facilities should be operated so as to provide environmentally effective and cost-efficient waste services to industry and consumers alike. IBEC supports equitable use-related charges for waste disposal with charges kept to a minimum. The polluter pays principle will need to be applied, as the generation of waste will impose a burden on the waste management services and on the environment. By ensuring that waste generators pay directly for the full costs of waste collection, treatment and disposal, there is a direct economic incentive for waste reduction.

Unfortunately, in Ireland, with regard to waste management we have added costs with no clear environmental benefit, and we have not applied these costs in an equitable manner. Weight based charges for waste disposal in the business sector have risen from €5 to over €150 per tonne, the most expensive in Europe, in the last ten years. Despite this rise, there has neither been a comparable reduction in the environmental impact from the disposal facilities, nor has a range of alternatives in the form of recovery or recycling facilities been developed. In addition, weight based charging for waste applies only to the business community and not to the domestic sector.

One of the major problems which must be faced is that there is no body designated under existing legislation for the provision of waste management facilities for commercial and industrial waste. Provision of waste infrastructure is fraught with difficulties and involves numerous bodies, making it extremely difficult to get action to solve the problem.

EU policy on waste calls for a de-coupling of waste generation from economic growth; significant reductions in waste generated by improved prevention initiatives, recycling, waste recovery and incineration. Reduction targets for waste disposal by 20% on 2000 levels by 2010 and 50% by 2050 are also presented. It requires actions such as increased producer responsibility for collecting, treating and recycling hazardous wastes, the development of recycling strategies, promotion of markets for recycled materials, promotion of greening of processes and products and increased consumer information.

At a national level the government policy statement on waste, *Changing Our Ways*, was published by the Department of the Environment and Local Government in September 1998. The document reaffirms the principle that waste management is firmly grounded in the waste hierarchy, with prevention and minimisation the most favoured options, and disposal as the least favoured option. The stated objective of the policy statement is to provide a national framework within which local authorities and the waste industry could plan ahead. It sets clear targets aimed at stabilisation of waste generation,

reduced dependency on landfill and increased recovery rates. These ambitious targets will require huge capital investment in the coming years. Specific targets include a diversion of 50% of household waste away from landfill, a reduction of 65% of biodegradable waste consigned to landfill and the recycling of 35% of municipal waste. A key priority is again to break the link between economic growth and waste production. Implementation of the waste hierarchy in Ireland should take into account both economic and social factors. Waste reduction and clean technology programmes should be encouraged on a national, sectoral and firm level by the use of incentives.

These new policies and legislation at both national and European level compound this need for change, which recognises the exigency to move away from landfill disposal as the primary means of waste disposal toward a more modern approach to waste management and infrastructure. For the business community it is especially critical that such a transition comes about quickly and in a cost-effective manner.

Waste management will have to change radically in Ireland with an integrated waste management approach which utilises a range of waste treatment options to deliver the ambitious recycling and recovery targets. Ireland is currently in a transition phase between the low technology solutions of the past, where local authorities provided both infrastructure and services, to a new era where new technologies and methodologies are required. With the correct structures and investment of resources, the problems can be overcome despite the significant challenges they pose. However, this transition needs to be managed carefully, with the necessity for an integrated national plan for achieving the objectives. A completely new way of planning for waste management needs to be developed, and the implementation of such plans will have to be carried through as a matter of urgency.

Private sector involvement will be critical to ensure the provision of the much-needed waste facilities. The regional waste plans, which specify the infrastructure needed, will cost in excess of €1 billion, and the current National Development Plan allocates €825 million to waste infrastructure over the life of the plan. Local government, central government and the EU will provide only €254 million of the required funding. The other €577 million that is required from the private sector is unlikely to be forthcoming unless changes are made to address the impediments to private sector involvement.

Ireland needs to utilise all the options available to it and introduce modern prevention, minimisation, recovery, reuse, recycling, thermal treatment and disposal systems. Thermal treatment of waste is in use in all EU Member States except Ireland, and in most other developed countries, including the USA, Japan and Australia. IBEC believe that, used as part of an integrated waste management system, thermal treatment, with energy recovery where possible, would be a beneficial addition to the waste management infrastructure in Ireland. Decisions on the type of treatment facility should be taken on rational scientific and economic grounds, and all suitable technologies should be explored.

Ireland's first voluntary environmental agreement, between government and industry, was set up in 1997 to meet our obligations under the Packaging Directive (94/62/EC). IBEC supports the Repak initiative as a cost-effective

method of achieving recycling targets for used packaging. Repak, which is funded by industry, has enabled Ireland to recycle over 200,000 tonnes of packaging from household, industrial and commercial sources in 2001. This equates to a recycling rate of 25%, which has exceeded our packaging recycling targets under the Directive. Future voluntary agreements to deal with electrical and electronic waste and end of life vehicles are likely. IBEC would like to see the concept of shared responsibility rather than just producer responsibility as the principle informing further policy making. Producer responsibility is a key driver to reward those who continually reduce their environmental impact but unless we can apply responsibility to all of society through shared responsibility we will not bring about the changes needed.

Facilities for recovery and disposal of hazardous waste are as important elements of the economic infrastructure as roads, telecommunications and electricity supply. It is therefore critical that access to suitable waste facilities is available. The National Hazardous Waste Management Plan published in 1999 by the EPA has identified a need for the provision of hazardous waste landfill capacity and hazardous waste incineration. This plan must be used as the template for putting in place the necessary facilities for the safe and cost-effective treatment of hazardous waste, which will allow for economic growth well into the next century. Particular consideration will need to be given to the needs of small to medium-sized enterprises (SMEs) in dealing with hazardous wastes.

In summary, it is well recognised that Ireland has a waste management problem, as we are unable to manage our own waste. This inability is manifest in our over-reliance on diminishing local authority landfill capacity and the lack of alternative waste infrastructure, which in turn has led to the export of waste out of Ireland. A poor overall recycling performance is further evidence of Ireland's inability thus far to tackle waste management effectively. This problem is having a serious impact on the competitiveness of Irish industry and the ability of Ireland to attract foreign direct investment. Foreign direct investment has been identified by the OECD as a key driver behind Ireland's economic success of the 1990s. Effective waste management has recently been identified as one of the '*highest priorities in Ireland for the next three years*'.

To address Ireland's waste problems IBEC is proposing that:

(a) Ireland needs to adopt a national approach to waste infrastructure, where the key documents such as Strategic Planning Guidelines, Regional Planning Guidelines and Regional Waste Management Plans reflect actual waste management situations and requirements. This will ensure the roll out of infrastructure in a manner which is cost-effective, while ensuring environmental protection.

(b) Ireland needs to adopt an approach which ensures a level playing field for both the public and the private sector to operate and which recognises the important role the private sector has to play in the delivery of effective waste management.

(c) Ireland needs to adopt an approach which also ensures that environmental standards and legislation regarding waste are enforced.

These changes in approach will deliver the necessary economically viable, efficient and environmentally sound waste management infrastructure and services.

## 13.4 Control of pollution

In 1992, under the Environmental Protection Act, Ireland was the first EU Member State to introduce Integrated Pollution Control Licensing, now mandatory in the EU since 1999. To date, over 600 companies who have a significant environmental footprint have obtained an integrated pollution control (IPC) license from the Environmental Protection Agency with subsequent significant reductions in environmental impact to the receiving environment. The business sector has worked with the EPA also, as can be seen from the fact that emissions from IPC licensed facilities have shown dramatic falls in all media, with discharges to sewer, for instance, averaging less than 25% of licence limits. Those companies below the thresholds for IPC licensing are regulated by the local authorities for environmental issues such as trade effluent licences, the Packaging Regulations, waste collection permits, etc. Special regard must be given to the particular problems faced by SMEs when designing policies for environmental protection and pollution control. Relevant thresholds should be put in place below which a permit or licence is not required. Permitting and licensing procedures should be kept as simple as possible and financial support should be made available.

IBEC continues to support the establishment of the EPA as a credible, independent body with responsibility for all matters pertaining to environmental protection. It is important that the Environmental Protection Agency establishes itself as an authoritative voice on environmental issues. In its ten years of existence, the EPA has made significant progress towards this goal.

It is vital that environmental policies and standards should be applied consistently and equitably across all sectors of society, regardless of whether the enforcing authority is the Environmental Protection Agency or a local authority. Environmental protection is a challenge that faces all sectors of society and is not confined to any one single group. The business community is often perceived as an easy target and while the task of involving the other diverse and often diffuse sectors should not be underestimated, it must be undertaken. The conditions attached to licences and permissions in Ireland often exceed those required for similar installations in other EU Member States. This has the effect of adding significant costs to operating in Ireland and if not addressed will become a deterrent to Foreign Direct Investment (FDI). The effect of this extra expenditure by Irish companies does not in many cases have a corresponding equivalent environmental benefit. Such measures are not in line with the principles of sustainable development and will damage economic prosperity. It is essential that full account be taken of economic costs as well as environmental benefits in imposing licensing conditions on companies.

The overlap between various bodies regarding environmental considerations is also a cause for concern. IBEC believes that planning issues are prop-

erly differentiated from environmental protection issues and that decisions on environmental protection measures should be taken on technical and scientific grounds by technically qualified bodies.

The length of time required to obtain licences, permissions, approvals and permits from the regulatory authorities is a major concern. The acceleration of the process would give a decision to all the interested parties sooner, without a removal of any democratic input.

IBEC wishes to see a review of the integrated pollution control licensing systems carried out, with a view to driving down costs of compliance and reducing the amounts of unnecessary paperwork required from companies, without compromising environmental protection in any way. It is essential that licence applications are dealt with in a timely and efficient manner, and that the EPA monitors and publishes its performance in this respect.

An equitable and transparent procedure for dealing with appeals and objections to conditions imposed in integrated pollution control licences should be developed and introduced by the EPA.

IBEC wishes the EPA to develop a transparent process for determining the economic factors relevant to Best Available Technology, in particular for existing industries. Most importantly, IBEC insists that Irish industry should not be unfairly penalised relative to industries in competitor countries, which may take advantage of the flexibility allowed for in the IPPC Directive, in the determination of BAT. Any involvement by the EPA in the operations of a company should be conducive to both good environmental performance and competitive economic performance.

Over 300 companies in Ireland to date have implemented an independently certified Environmental Management System (EMS), such as ISO 14000 and EMAS, which require them to continually reduce their environmental impact. These companies are subject to rigorous ongoing independent audits to ensure that they continually meet the demanding requirements of the certification bodies. IBEC supports the use of voluntary mechanisms such as EMS, which is an extremely useful tool for actively managing environmental performance. An EMS has proved very successful at providing a company with a coherent structure in which environmental issues can be tackled in a planned and proactive manner. Many IPC licences require companies to put in place a non-certified EMS which they report on as part of their Annual Environmental Report to the EPA. Significant derogations from the current levels of reporting, monitoring and auditing by the EPA should be given to those companies who operate to a certified environmental management standard. Monitoring fees set by the EPA for companies should be transparent and should relate to the amount and type of monitoring carried out by EPA inspectors.

## 13.5 Planning and infrastructure

If Ireland is to become a better place in which to live and work, there has to be a greater emphasis on the environmental needs of the country, not just the current requirements, but our needs into the future. Environmental infrastructure and development go hand in hand with industrial development. It is clear

that such infrastructure in Ireland has not kept pace with our economic development or with the changes and requirements brought about by environmental legislation. Waste and water infrastructure lag seriously behind what is necessary in a modern economy. If urgent action is not taken immediately, the bottlenecks in environmental development will result in a further loss of competitiveness due to the extra costs borne by the business community in compensating for a lack of development. Some industries simply will not be able to operate if they do not have access to waste facilities.

The current planning system is seen as a barrier to the delivery of the much-needed environmental infrastructure. The business community has identified the complexity of the process and the length of time taken to arrive at a decision as the two key difficulties with the current system. It is believed that both of these have a significant impact on the costs of developing infrastructure in Ireland as compared to our competitors.

It is the view of IBEC that the existing planning process must be simplified in order that it can be speeded up. Those critical infrastructure projects, which are of national strategic importance, should be prioritised. It is vital that regional planning guidelines should be consistent with national policies regarding the infrastructure needs of the state. To expedite the inevitable referral to An Bord Pleanála (ABP), planning applications for all strategic infrastructure projects should go directly to ABP and bypass the local planning authority. In addition, a specialist planning body should be established in An Bord Pleanála to assess these strategic infrastructure projects. To ensure a timely outcome mandatory timetables for infrastructural planning decisions should be established and met. These actions would go some way to delivering a workable planning system.

Development plans should have regard to a national industrial policy framework, providing sufficient land for industrial development, and having regard to the need to provide the infrastructure necessary for that development. In addition development plans should be sufficiently flexible to accommodate desirable change and to incorporate innovative procedures and technologies. Consideration should be given to the use of enterprise zones which should be designated with pre-cleared planning approval for projects of national importance.

## 13.6 Climate change

The prospect of climate change is a matter for genuine public concern. IBEC shares this concern and believes that as a key stakeholder the business community must co-operate with governments and others to seek economic and internationally agreed solutions. The issue of global warming is a global problem, which must have an agreed global solution. The combating of climate change is therefore a worldwide, and not just a national, challenge, that will require wide international co-operation. For these reasons it was recognised that only an international binding agreement could provide a lasting solution. At the 1992 Earth Summit in Rio, Ireland signed the United Nations Framework Convention on Climate Change (UNFCCC) whose objective was the stabilising

of greenhouse gases (GHG) concentrations at levels that would prevent interference with the climate system. In 1997 the adoption of the Kyoto Protocol marked a new phase in tackling GHG emissions by requiring developed countries to reduce their overall emissions by 5% below 1990 levels by 2012. This will be followed by progressive cuts until the threat of climate change has been eliminated. It has been stated that cuts of 70% in global emissions may be required to meet that goal.

On 31 May 2002, the EU ratified the Kyoto Protocol, ahead of its global counterparts like the US and Australia, both of whom have decided not to ratify. The protocol will not come into force until developed countries who make up 55% of emissions ratify. This is a figure that can only be achieved if Russia ratifies. Irrespective of this, the EU has decided that it will meet its target and therefore Ireland has an individual target. This target is a 13% increase in emissions over our 1990 levels, and does not look very challenging when compared to those of many other EU Member States. However, in light of our huge increase in emissions over 1990 levels it actually is a very onerous target. Irish emissions are generated by different sectors of society: industry 15%; transport 14%; agriculture 32%; energy 25%. Our rapid economic development in the 1990s has resulted in significant increases in GHG to the extent that Ireland is currently at 31% of 1990 levels and in the absence of significant action we could exceed the 1990 level by over 40% in 2012 as compared to our 13% target.

The challenge facing Ireland in achieving its target, compared to other Member States, is very significant. Therefore, the economic impact and effect on competitiveness will be much more severe here than elsewhere. The National Climate Change Strategy (NCCS), published by the government in November 2000, identified the GHG emissions levels from each sector, the target reductions for each sector and mechanisms that are available to meet these cuts. The measures specified for the business community included cross-sectoral market-based instruments like taxation and emissions trading and other sectoral instruments such as negotiated agreements.

Given the potentially severe impact on Irish business, it is vital that the shape of these instruments is structured in such a manner that allows Irish business the flexibility to meet an equitable share of the burden in the most cost-effective manner. Given also that climate change is a global problem, measures such as the introduction of a tax on energy at European or at individual Member State level will not achieve an overall solution. Such measures would, however, have a seriously detrimental effect on the competitiveness of European and Irish industry.

IBEC are fundamentally opposed to the introduction of a national carbon tax on the basis that it will not deliver its objective, which is a reduction in GHG emissions, but will only in effect raise revenue. Irish industry is modern and efficient and is currently well advanced in working to BAT. Clearly, a large segment of industry will not be able to change behaviour and improve efficiency, because they already operate to best practice. Companies that have benchmarked themselves against European and international standards in terms of energy efficiency are found to be at the leading edge and should be rewarded, not penalised.

An IBEC report on the impact of a carbon tax on Irish industry predicted that it would severely damage Irish business, without accruing any noticeable environmental benefit. Such a measure is diametrically opposed to the economic pillar of sustainable development and poses a serious threat to our economic prosperity. A tax could force companies to move to countries where less stringent environmental legislation applies. The net result will be a loss of employment to Ireland, with little overall environmental benefit.

A carbon tax is unnecessary: negotiated agreements and emissions trading cover the vast bulk of emissions from the business sector. These solutions offer the greatest flexibility for business, are more efficient, can deliver greater certainty in meeting environmental targets – and they contribute to real reductions in emissions. Clear alternatives exist and IBEC supports the use of long-term agreements with industry as an efficient and highly effective alternative to taxation.

## 13.7 New policy options

This is a critical time for the environmental policymakers, as Ireland faces a number of impending environmental issues which, depending on how we address them, have the potential to damage the economic gains of the last ten years. Ireland must meet its international and European environmental targets and obligations, but we should do so in a manner that will protect the remarkable economic, social and environmental progress made in the last decade. In agreeing to obligations and targets for Ireland we must ensure that they are realistic targets that will cater for ongoing economic growth. Upcoming environmental issues include:

(a) carbon/energy taxation;
(b) emissions trading;
(c) WEEE and RoHS Directives;
(d) waste disposal and recovery costs;
(e) IPPC licensing;
(f) waste water charges;
(g) environmental liability.

IBEC's overall position as to framing new policy options to manage these measures is that we should learn from our previous experience in dealing with environmental issues. It is important to realise that Ireland does have choices as to how we address these imminent environmental obligations. The responses we chose are within our control, and if we adopt similar approaches to address these upcoming challenges as we have in the past, we risk repeating our mistakes of imposing cost with no benefit. However, adopting a pragmatic approach could mean meeting the demanding targets and protecting the environment without impairing our economic growth.

What is clear is that a 'one size fits all' approach will be unsuccessful and that a comprehensive range of measures need to be considered to allow us to meet our targets without compromising the economic performance that has

underpinned the social and environmental progress of the last decade. IBEC is proposing a range of possible solutions and will work with various parties in a constructive and pragmatic manner to make sure we meet our obligations in the most cost-effective manner. IBEC does not accept that any one measure will bring about the required change. What is necessary is the development of a range of innovative measures which reflect the different circumstances that can exist in different companies and sectors. The policy makers need to work closely with industry to obtain the correct policy mix and range of options to allow the business community the flexibility to achieve environmental objectives and targets in the most suitable manner.

Each of the emerging issues should be examined in detail and individual solutions must be developed for each one, but there are some overall principles that could be used to shape our responses:

(a) The regulatory process for all licences, approvals and permissions needs to be overhauled to reduce the timeframe and complexity.

(b) A cost/benefit analysis must be undertaken on the current compliance conditions contained in regulatory approvals and those which simply add cost with little or no environmental benefit should be removed.

(c) Environmental taxes should be used only where it can shown that:
- their objective is to change behaviour and not just to raise revenue;
- clear and available alternatives are in place;
- they will be cost neutral to the business community – the revenue generated will be used to address the environmental objective;
- recognition will be given to those companies who are operating to best practice;
- they will be applied in an equitable manner across all sectors.

(d) Where user charges are applied for services, this should be done in a fair and equitable manner and the business community should not subsidise other sectors. These services should be provided at the appropriate level and at least cost to all users. The potential for private sector operation of these services should be fully explored.

(e) The concept of shared responsibility should be fostered to encourage all stakeholders in society to play a role in environmental protection. Environmental protection is an issue that must be addressed by all members of society.

(f) Implementation of environmental objectives and obligations should be undertaken using a partnership approach with full consultation with the business community and all other sectors.

(g) IBEC favours the use of voluntary agreements, negotiated agreements and other flexible measures which should be used wherever possible to achieve environmental goals. In this way, the considerable experience of the business sector can be utilised to develop affordable and cost-effective solutions. The success of Repak shows how targets can be met in a cost-effective manner.

(h) Measures which are implemented should be consistent with those in place in our main trading partners. In view of our overall positive performance in terms of environmental protection, measures should not be imposed which will place Irish companies at a significant disadvantage in terms of costs over our trading partners.

(i) Measures should only be introduced where there is a demonstrated need and then only after a full cost/benefit analysis has been carried out. Where legislation is deemed necessary, full consultation with industry to determine the most effective action will be necessary.

(j) IBEC believes that incentives such as tax reliefs and credits, accelerated depreciation and grants towards environmental best practice should be utilised as a policy instrument to encourage the changes in production and consumption behaviour which are necessary for sustainable development.

(k) Recognition must be given to companies who have achieved excellence. Where a company has measured itself against European and international standards benchmarks in terms of environmental indicators and is found to be at the leading edge then their effort should not be punished but rewarded.

## CHAPTER 14

# CONCLUSION

*John Darby*

This book has examined all applicable environmental laws in Ireland from an international, European and national perspective.

At international level, several seminal environmental agreements have been adopted by the international community which have had a direct effect on environmental policy and law. Most significant have been the United Nations Conference on the Human Environment, the Montreal Protocol on Substances that Deplete the Ozone Layer, the United Nations Conference on Environment and Development, the United Nations Framework Convention on Climate Change, the United Nations Millennium Declaration and the World Summit on Sustainable Development. In addition, the United Nations Environment Programme provides leadership and encourages partnership in caring for the global environment.

At European level, the European Environmental Agency co-ordinates the role of environmental protection throughout the European Union.

It is at national level, however, that one becomes most aware of the large amount of environmental regulation. The Environmental Protection Agency 1992 (the EPA Act) established the Environmental Protection Agency and provided it with a broad remit in relation to the protection of the Irish environment. The EPA Act also established the system of licensing known as Integrated Pollution Control.

In the area of water protection, the Local Government (Water Pollution) Act 1977 (as amended) provides for the prevention of water pollution in Ireland. In the area of air pollution, the Air Pollution Act 1987 provides for the prevention of air pollution. Finally, in the area of waste management, the Waste Management Acts 1996 and 2001 seek to provide a clean and healthy environment and to develop approaches to protect human health and the environment. It is clear, therefore, that a detailed knowledge of this heavily regulated area is required in order to advise businesses and individuals alike of their responsibilities and remedies in regard to the environment.

# INDEX