



To LegalServices@epa.ie

31<sup>th</sup> May 2019

### **Re: Draft Policy on Compliance and Enforcement**

Dear Sir/Madam,

Further to your invitation, the ***Irish Waste Management Association (IWMA)*** offers the following comments in relation to the EPA's Draft document on Compliance and Enforcement Policy.

The IWMA recognises that the EPA is a good organisation with well trained and well-educated staff and despite our sometimes blunt comments in this submission, we strongly support the work of the EPA and we recognise the good intentions of the Agency staff. Our comments go beyond the details of the draft policy document and address the wider enforcement regime for waste management in Ireland, with a view to encouraging a better overall environmental outcome.

We hope that this submission will be read by the Board of the EPA and by those that have the power to reform waste management enforcement in Ireland for the better.

#### ***IWMA Background***

The IWMA is made up of c.40 waste management companies that operate approximately 60 waste management facilities that are licensed by the EPA and approximately 30 waste management facilities that are permitted by the local authorities. Further details of our association, including a list of our members is available at [www.iwma.ie](http://www.iwma.ie).

#### ***Comments on the Draft Policy Document***

The document provides a good overview of the EPA approach to compliance and enforcement and provides the rationale behind the approach taken by the Agency to licensees. It is welcome in that context. However, we suggest that EPA policy on compliance and enforcement should not be considered in isolation. Ireland needs a national compliance and enforcement policy for waste management. It is only through a national policy that the enforcement principles can be implemented in a fair and comprehensive manner.

The IWMA is strongly opposed to the two-tier enforcement system in Ireland and we have stated our position in that regard for almost two decades now. The existence of the two-tier system means that enforcement of waste management in Ireland is:

- not risk based,
- not proportional,
- not consistent,
- not transparent, and
- the polluter does not always pay.

The Irish State is therefore failing to implement the enforcement principles that are put forward in this draft policy document. We elaborate below.

#### *Risk Based*

Unauthorised sites pose a higher risk to the environment than regulated sites. The EPA takes no interest in unauthorised sites unless there is a complaint against a local authority. We see this as a failure to achieve many of the objectives listed on page 4 of the draft policy document, such as:

- The objective to promote a culture of compliance with legislation to achieve a clean and healthy environment;
- The objective to ensure that harm caused by non-compliance is remedied;
- The objective to eliminate any financial gain or benefit from non-compliance;
- The objective to intervene to deal with serious risks to the environment and/or human health.

#### *Proportionality*

Unauthorised sites merit the greatest enforcement action, but often receive little or no action as the EPA is not normally involved in such enforcement, so the system does not deliver proportionality.

#### *Consistency*

There is no consistency in Ireland in the enforcement of licensed sites versus permitted sites versus unauthorised sites. The greatest attention is directed at the licensed sites and these are low risk because they have control measures installed in response to licence conditions. Unregulated sites have no such control measures and should attract the greatest attention from the EPA enforcement officers, but this is not the case as the system is seriously flawed.

#### *Transparency*

The EPA delivers transparency, but this is not consistent with the transparency surrounding permitted or unauthorised sites as local authority enforcement is a lot less transparent. The publishing of the priority list for enforcement is very unfair as it is restricted to licensed sites only and customers of those sites could switch to unauthorised sites that will never make it to the priority list for enforcement.

#### *Polluter Pays*

Operators of unauthorised sites have a substantial financial advantage over operators of licensed sites. The lack of EPA interest in unauthorised sites means that in many cases the polluter does not pay.

### ***Need for New National Policy on Enforcement***

As the lead authority for environmental protection in Ireland, we strongly recommend that the EPA rewrites this policy document to address all compliance and enforcement policy for the Irish State, in consultation with relevant stakeholders. Such an exercise would surely lead to a rethink on the two-tier enforcement system as it would point out the lack of consistency, proportionality, risk analysis, fairness, environmental protection, justice, etc in the current system.

The waste industry is clearly very frustrated by the current system and the EPA Policy document is just one part of the picture and the conclusions offered in the document do not apply in the wider context. The reader of the EPA draft policy document could be convinced that the enforcement system is targeted at those that financially gain from non-compliance and from environmental pollution. However, the truth is that those that gain most from non-compliance and environmental pollution are not on the EPA's radar and are not the target of EPA enforcement. That is not effective, is not fair and is not a good reflection of justice in the environmental field in Ireland. The EPA has the strongest enforcement tools, but they are not normally available to tackle the unregulated illegal operators.

### ***Need for an Appeals Process for Non-Compliances:***

IWMA members (and others in other licensed industries) are frustrated by the EPA enforcement system whereby non-compliances are unilaterally decided by EPA inspectors with no formal appeals process. Many of our members argue that they have received unfair or unjustified non-compliances and these remain on the company's record, causing reputational damage, despite the company challenging these non-compliances. It appears that the only formal challenge under the current system is a judicial review and we do not consider that to be a good use of the courts time and good use of the resources of those involved.

The EPA inspectors can include 'observations' on audit reports if the issue is not likely to lead to a significant environmental impact. A repeat observation could be a non-compliance, but a minor issue that is not repeated should be a lesser offence and an 'observation' is a fair way to treat it. For example, a company can do everything in its power to comply with its licence, yet an individual member of staff can put a paint can or an oil drum on the ground beside a bunded pallet and the company can be issued with a non-compliance, despite providing the bunded pallet and educating the workforce. In our view, this should be an 'observation', not a 'non-compliance'.

The IWMA requests that the EPA establishes a formal appeals process, whereby a more senior member of staff could decide whether a 'non-compliance' could be reduced on appeal to an 'observation'. This should not require much additional resource. The enforcement section of the EPA appears to be well resourced and the appeals system could save on legal challenges and could save on resources in the long run.

### ***Specific Comments on the Document***

Our members provided some specific comments on the document and I repeat them here for your consideration. The IWMA endorses these comments.

## **Comment 1**

### Compliance Actions & Enforcement Powers

#### *Proposal*

With regard to such powers and the attachment of licence conditions, it is imperative that only conditions that are reasonable and workable are utilised in practice.

The imposition of conditions which do not accord with such criteria will give rise to an unfair administrative and cost burden for licensees which may be regarded as contrary to the principles of proportionality, transparency and consistency which underpin the EPA's draft Compliance and Enforcement Policy.

In this regard, the Environmental Protection Agency Act 1992, as amended, imposes a positive duty on the Agency to ensure, in so far as is practicable, that a proper balance be achieved between the need to protect the environment (and the cost of such protection) and the need for infrastructural, economic and social progress and development.

#### *Rationale*

As part of a licensing system that is founded on the following guiding principles including proportionality, consistency, transparency and polluter pays, the attachment of all licence conditions must necessarily accord with these overarching principles if a licensee is to have clarity in terms of what is legally required.

It is also crucial that licensees are only expected to comply with those that are legally permissible. The European Court of Justice ruling in Brady, Case C-113/12 must be borne in mind in this regard as this decision stipulates that liability cannot be directly imposed on an individual operator for the actions of third parties.

Therefore, it is of vital importance that licensees are permitted to conduct their business operations with a degree of certainty and in line with operable and fair licence conditions which will in turn accord with the guiding principles as laid down in the Agency's Compliance and Enforcement Policy.

Similarly, the attachment of conditions that are proportionate and practicable will enable the Agency's regulatory function to be conducted in a fair, proportionate and transparent manner.

## **Comment 2**

The EPA should give notice in advance of major site audits. These audits can take a full day and are very disruptive for licensees. Staff members have to drop their daily duties to attend to the EPA Inspectors' needs. Advance notice is required to put contingency measures in place to cover the additional staffing required to manage the site and facilitate the audit simultaneously.

We understand that the EA in the UK gives one month's notice in advance of major audits of facilities. We also understand that other state bodies in Ireland such as the Revenue Commissioners and the HSA give advance warnings of major audits.

### **Comment 3**

Page 4 The Regulated community “know what to expect from the EPA” – Overzealous enforcement of minor issues and ignoring the bigger picture e.g. national capacity, Circular economy etc. Enforcement needs to be better in touch with the EPA Licensing/Guidance section re big issues.

### **Comment 4**

Page 5 “Risk based” – If a licensee is substantially in compliance with its licence it is not a significant risk to the Environment. These should be recommendations not non-compliances. There should be an appeals process for unfair non-compliances to remove them from the record e.g. off-site chicken manure smell being logged as a complaint.

### **Comment 5**

Page 5 “Consistency” – No consistency between EPA and Local Authority Enforcement particularly on Soil & Stone/Rubble. EPA need to use/enforce Section 63 of the EPA act to ensure a level playing field.

### **Comment 6**

Page 4 and 5 mention the “regulated community” and the EPA’s policy towards this community- however the document does not specifically mention the “unregulated community”. Nor does it specifically outline the EPA policy or objective in dealing with this “unregulated community”.

### **Comment 7**

Page 5. Risk – Based. The document states that the EPA’s enforcement work is risk based “or that have the potential to undermine the public’s confidence”. The EPA appear to ignore the risk based approach in the case of public complaints. Public complaints are deemed to be valid even after a site and often EPA investigation determines otherwise. There are cases where the public complain frequently and there is no justification, however the sites full complaint process and reports system to the EPA are initiated and completed each time. Which is time consuming on both the EPA and the site personnel. If the EPA could look at a system where by complaints from members of the public are also risk based and thus the level of an investigation / response can be suitably determined.

### **Comment 8**

Page 7 Mentions that the EPA issues warning letters or compliance investigations where they discover non-compliance. The EPA has moved away from issuing “observations” to issuing non-compliances. Which technically is correct, however if they apply a risk based approach there should be some distinction between conditions of a licence not being adhered to i.e ignored and those that are being adhered to, but was observed on the site audit to have been incorrect. An example would be if a company has bunds for the storage of liquids, and the site audit notes a drum not on a bund, the EPA are currently issuing a non-compliance for not having the drum on a bund. However, an observation would be that there are bunds on site, that they are used, but it was observed that one drum was not in the correct place.

When a member of the public reads a site report, they see the number of non-compliances and base their decision on this. The non-compliance is often not representative of the risk or the seriousness of the observation.

**Comment 9**

When the EPA are reporting data on complaints, they should identify those that were found to be valid. The number of complaints are recorded in a transparent manner, but there is no mention of how many of these complaints were found to be valid. Complaints that are not found to be valid, should be recorded separately against a licence and in the EPA reports.

**Comment 10**

When reporting data the EPA should identify site audits separate to other inspections. In 2017, our site appeared in the top 10 most visited sites- we had 19 off site odour inspections (1 NC found) and 1 site audit, 1 training visit with EPA and consultants and 1 data audit. However, as the EPA presented all the data in one format, it appears to a member of the public at a glance that the site is in the top ten most visited sites and that reflects badly on our company.

**Comment 11**

An appeals system for non-compliances should be introduced. However, if a combination of observations and non-compliances were used fairly, I think there would be no need for an appeals system.

**Comment 12**

Each non-compliance carries the same potential summons. We consider that to be very unfair and there should be a lot more tolerance on items that are not causing any environmental damage as opposed to ones that are. We find that inspectors are issuing non-compliances for minor issues that would be better described as observations. An appeal system is needed.

**Concluding Remarks**

We hope that the feedback contained in this submission is considered carefully by the Agency. We accept that it goes well beyond the scope of the draft document, but it addresses more fundamental issues that have been concerning our members for a long time and we hope that it will lead to reforms that will result in better environmental outcomes in Ireland. We are available to meet to discuss these issues or to clarify any matters.

Yours Sincerely,



Conor Walsh  
IWMA Secretary

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