

Waste management conference – waste law developments

Speaking about Irish and European waste law developments, Alison Fanagan, consultant with A&L Goodbody, solicitors, spoke about the EPA's enforcement policy, prosecutions, financial provision and recent judgments of the Court of Justice of the EU.

Ms Fanagan drew attention to the EPA's policy, adopted earlier this year, of publishing waste enforcement documents. The documents, which include site visit reports, routine self-monitoring reports and site closure reports, are uploaded on the EPA website 60 days after receipt.

The EPA will also publish the licensee's response, but this must be submitted to the agency within 45 days of the issue of the EPA site visit report. This, Ms Fanagan said, allows licensees to say "we had issues but this is what we have done". The documents are also available at EPA offices.

Highlighting the issues of concern to the EPA, Ms Fanagan quoted from remarks by EPA director, Dr Laura Burke, reported in the Irish Independent recently. Fifty percent of all complaints received by the EPA related to eleven waste facilities. The eleven will be named shortly. In relation to enforcement, Dr Burke said the waste sector is dominating complaints, with things like odours having a significant impact on local populations.

She said Dr Burke remarked that the EPA has brought 15 prosecutions this year and has 32 cases ongoing with regard to sites. Dr Burke has warned it is up to sites to bring themselves into compliance and if they do not, the EPA will take whatever steps are necessary, including prosecution or suspension of licences.

Reviewing prosecutions since the Waste Management Conference 2015, Ms Fanagan said the average fine was €15,000, in the five cases where fines were imposed. This excludes the fine in the Greyhound case and the €20,000 contribution by Nutricia to the court poor box.

This average compares to an average fine of €15,700 in 2015 (excluding the Jenzoph case) and an average of €7,500 in 2014, when there were nine prosecutions. She said the number of prosecutions is going up, with most cases being taken in the District Court.

Giving a warning to the management of companies to send members of the management team to court, she mentioned that recently a case was adjourned by a District Court judge until the directors came to court.

Financial provision

Speaking about financial provision, Ms Fanagan said it is the putting in place of an approved (by the EPA) financial instrument or other provision. Having explained who needs financial provision and why it is required, she went on to say it is to manage environmental liabilities from licenced activities, either arising from unforeseen incidents (environmental liability risk assessment - ELRA) or from the inevitable closure of a site and site restoration (closure remediation and aftercare management plan – CRAMP).

Options for waste companies are bonds, (from banks or insurance companies), parent company guarantees and environmental liability insurance. The cost of bonds will vary, she said, with rates from 0.5% to 1.2%. Key issues in relation to environmental liability insurance are cover for excess and business interruption loss.

Mentioning three recent judgments by the Court of Justice of the European Union (CJEU). Ms Fanagan said the Court is adopting a "purposive" approach.

In the *Total Waste Recycling SRL* case, the Court held that a failure to notify the authorities of a change to a border crossing rendered an amber list shipment illegal. In the *Nutrivet D.O.O.E.L* case, the Court found that giving incorrect or inconsistent information, even where it was not deliberate, on green list documentation rendered a shipment illegal.

In the *Edilizia Mastrodonato SRL* case, which concerned the authorisation regime for backfilling operations in respect of disused quarries, the Court held backfilling is a "recovery" operation only if the backfilling is required and the material is suitable, that is that it is non-hazardous and inert.

