

# **Protection or Pollution?**

***An evaluation of the Environmental Protection Agency***

***See No Evil***

***Hear No Evil***

***Speak No Evil***

# ***Cork Environmental Alliance***

**Cork Environmental Alliance Ltd wish to gratefully acknowledge the generous assistance of the Joseph Roundtree Charitable Trust in the funding of this report.**

## **Contents**

Acknowledgements.....	page 1
Forward.....	page 2
Introduction.....	page 3
Summary.....	page 4
Background.....	page 5
The Establishment of the EPA.....	page 14
The Funding of the EPA.....	page
The Performance of the EPA/ Key Aspects.....	page
Three Case Studies.....	page
<i>i) Aughinish Alumina Ltd</i>	
<i>ii) Procter &amp; Gamble (Manufacturing Ireland Ltd)</i>	
<i>iii) Irish Steel/Irish Ispat</i>	
Appendix 1.....	page
Appendix 2.....	page
Appendix 3.....	page
Glossary of Terms.....	page

## Forward

***....an official inquiry could not be any other thing. Its object was not the fundamental why, but the superficial how of the affair.***

**(Marlow, Lord Jim, Joseph Conrad)**

That Ireland's environment is deteriorating at an alarming rate is becoming more apparent by the day. While the Irish Government is seeking billions of Euros from the EU and the Irish taxpayer to finance remedial measures such as sewage treatment plants, waste recycling centres, new roads to relieve traffic congestion, the reality is that the Government's very own economic policies have led to a rapid degradation of the Irish environment.

This report examines the environmental consequences of an economic policy based on the establishment of multinational chemical/pharmaceutical and extraction industries without the legislative and administrative framework necessary to supervise their subsequent operations.

When the Irish Government was eventually forced to act to protect its own industrial policy from the objections of the Irish public, it did so by establishing the Environmental Protection Agency (EPA). This report will show how the EPA has become the new State administrative system designed to licence and legalise industrial pollution while at the same time effectively removing Irish citizens' rights to prevent the establishment of polluting industry.

This report demonstrates how and why the the EPA does not protect the Irish environment. More importantly this report contains much evidence that its real role is to provide a legal camouflage to protect the industrial polluters.

## Introduction

***"Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs."***

*(Agenda 21 - Brundtland Commission)*

This report analyses the effectiveness, since its inception, of the Environmental Protection Agency in protecting the Irish environment from industrial pollution.

The effects of other pollution sources such as farming, urban sewage, vehicle emissions etc are not dealt with in this report. The pollution effects of these sources are very significant and are growing at an alarming rate.

The systematic and institutionalised failure of the Irish Republic over the last three decades to protect its environmental resources from the insidious effects of industrial pollution does not augur well for the development of a comprehensive and effective policy to prevent the growth of environmental problems related directly to these other areas.

In this report every effort has been made to ensure an objective overview, from a community perspective, of the *raison d'être* of the Agency, the structures and performance of the Agency and the influences effecting the performance of the EPA in protecting the environment since its establishment in 1993.

In the compilation of this report a wide variety of NGOs, community, resident's and sectoral interest organisations, associated with issues relating to EPA functions, have been consulted. (full list of groups and issues attached as appendix 2)

This report has been prepared by CEA in a genuine spirit of '*constructive criticism*'. It is the sincere hope of CEA that these criticisms will be examined in the spirit of Agenda 21, as defined by the Brundtland Commission, and acted

upon by our legislators in order to provide a more effective and realistic approach to environmental protection than has hitherto been the case.

## 2

### Summary

- Sustainable development in the context of environmental degradation is a relatively new concept in Ireland which is rarely understood by the legislators, or by those charged with environmental protection by the State. This is evident in the wording of the EPA Act and in the priorities given to areas of environmental concern by the Agency itself.
- The Environmental Protection Agency was not established to protect the environment. Rather, the true objective of the Agency has been to nullify the environmental conflicts between communities and the incoming MNCs. The Agency has been aided by the State industrial promotional agencies, such as the IDA and Local Authorities, in their efforts to achieve this aim.
- The EPA Act does not address the problems highlighted by those who have opposed the State's policy of attracting polluting industry through the active promotion of Ireland's lax environmental regulation.
- The underlying environmental philosophy of the Agency is flawed in that it is one of '**Pollution Control**' rather than '**Pollution Prevention**'.
- The Environmental Protection Agency is seriously under funded and, as a consequence, cannot carry out the limited role as an environmental protection agency ascribed to it under the EPA Act.
- The '*Independence*', often attributed to the Environmental Protection Agency is questionable. Under the EPA Act, the Agency is obliged to "*have regard to government policies*" and consequently is clearly not independent of government.
- Certain sections of the EPA Act are likely to prove unconstitutional in that they deprive the constitutional right of citizens to seek legal redress in particular situations.

## Background

***"We are at the stage now when the powers that be are going to do all our thinking for us and at the same time, talk about our God given right to choose our own way of life."***

*("The Gargoyle", Stone Mad, Seamus Murphy)*

The formation of an environmental protection body in Ireland cannot be viewed in isolation. To understand fully the context in which the EPA was created it is necessary to examine the social and industrial development of Irish society during the past forty years. This section outlines a short history of that period, from which the Environmental Protection Agency has emerged.

The creation of the Environmental Protection Agency was not brought about by any over-riding sense of concern for environmental protection on the part of the Irish State. The Agency was politically inspired; designed specifically to eliminate the one remaining obstacle to State industrial policy, ie, the vociferous public concern regarding the negative effects that policy was having on the environment.

The relatively pristine and unpolluted nature of much of Ireland`s environment was a direct result of the country`s non-involvement in the Industrial Revolution and was not reflective of a State policy reflecting concern for the environment.

The birth of modern day industrial Ireland can be traced back to the Sean Lemass led Fianna Fail governments of 1959 - 1966. The traditional economic policies of self - sufficiency and protectionism practiced by preceding governments had created an unprecedented era of gloom, depression and stagnation in Irish economic history. When Lemass entered office in 1959, Ireland had a very low standard of living, as well as high unemployment and emigration rates.

Having adopted the economy as a priority, Lemass committed his government to what many would regard as more realistic and pragmatic economic policies. The first public sign of a new approach came with the adoption of T. K. Whitaker`s (Secretary to the Dept of Finance) First Programme for Economic Expansion, which earmarked £220.4 million of State money for productive investment. This was essentially a five-year plan and an intrinsic part of this policy was *"the encouragement of foreign investments to Ireland by giving grants and tax incentives"*. To this end the Industrial Development Authority (IDA), which was

established in 1949 and mandated with the task of planning and assisting industrial growth, played a vital and extremely successful role.

The first Programme for Economic Expansion, (1959 - '64) proved an outstanding success with its growth targets for annual GNP of 1% and 2% being surpassed, reaching an annual average of 4% during the five year period of the programme. For the same period exports rose between 40% and 50%.

A second programme, emphasising social, educational and industrial development, was introduced to cover the period 1964 - 1970, but was abandoned in 1967 having failed to reach its targets. However the earlier policy of encouraging foreign investment has continued to the present day largely in line with the grant aids and tax incentives outlined above.

During the period between the late 60`s and the early 80`s IDA officials found they were *'pushing an open door'* in their efforts to attract certain categories of foreign chemical, pharmaceutical and other, polluting industries to Ireland.<sup>1[1]</sup>

The vast majority of these multinational Corporations, which have established factories in Ireland, engage in highly polluting<sup>2[2]</sup> bulk production which has very low employment potential when contrasted with the R&D and final product stages carried out elsewhere. Raw materials are imported into Ireland and processed before exporting for finishing at other locations. Very little product research and development is undertaken in Ireland.

Wastes are disposed of to air, land and water in Ireland at low cost, relative to the more regulated disposal, pollution prevention and treatments required both in the parent company and in most other Western nations.

In the Pharmaceutical sector over one hundred and twenty subsidiaries of foreign MNCs employ 15,000 people and export US\$12 billion annually. This represents over 20% of total exports from the Republic and takes Ireland, in just twenty years, from being a negligible exporter of pharmaceuticals and fine chemicals to one of the largest in the world.

With more than one fifth of its export economy dependent on one sector of foreign MNCs (whose only motive, ultimately, is profitability and share price value) it would be more than foolhardy to suggest that the Irish legislature is not

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<sup>1[1]</sup> The establishment in 1970 of the US Environmental Protection Agency was a golden opportunity for IDA efforts to attract polluting US industries to Ireland. Many of the US based industries which were resisting, for economic reasons, compliance with the new domestic environmental legislation in the US relocated to Ireland during the 70s & 80s. More than 50% of all MNCs operating in Ireland today are subsidiaries of US corporations.

<sup>2[2]</sup> At the time of writing the Novartis plant at Ringaskiddy, Co Cork discharges 40,000 kgs of effluent to Cork Harbour for every kg of product produced.

heavily compromised in formulating regulations which, although beneficial to environmental protection, could impact on the profitability of those MNCs.<sup>3[3]</sup>

That such MNCs have exerted *influence*, either directly or indirectly, in the formulation of environmental legislation and policy in Ireland is self evident to most community activists.

### **The IDA`s Secret Deals**

The IDA has enjoyed enormous success in attracting foreign industry to Ireland. By the end of 1998 there were 1,140 foreign owned companies operating in Ireland generating 115,981 jobs. Total exports from this sector amounted to £21 billion with a further £8 billion being expended within the Irish economy.

The cost per job in 1998 to the Irish Exchequer has been estimated by the IDA as being £11,462. This has fallen from a high of £29,988 in 1988.<sup>4[4]</sup>

The official reasons for the IDA`s success in attracting such industries to Ireland are well known-

- • - a very generous tax regime and grant aid system
- • - political stability
- • - English speaking
- • - low labour costs
- • -A flexible educational system geared to the needs of industry

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<sup>3[3]</sup> The IPCMF Business Plan 1997-2002 outlines as one of its overall objectives....*"Working closely with the EPA to ensure that IPC licences issued do not erode the relative competitiveness of the sector."* The Business plan further states that.....*"The federation is committed to providing an environment which is conducive to the success and further growth of the pharmachem industry in Ireland. It tries to achieve this through lobbying and representation with government, the civil service, local authorities, and relevant state agencies such as the EPA, the HAS, the IDA, FAS, the IMB."*

An internal memo circulated to IPCMF members in May 1998 suggested that CEOs of member companies should *"adopt a TD or Councillor."*

<sup>4[4]</sup> The cost per job sustained is calculated by taking into account all IDA Ireland expenditure to all firms in the period of calculation. Only jobs created and sustained to the end of each seven year period are credited in the calculations. IDA Ireland, Annual Report 1998.

- - EU membership providing access to EU markets which, potentially, could become restricted

Less well publicised however, has been the one other major incentive the IDA has offered these dirty industries, i.e., a safe haven from meaningful environmental regulation. Throughout the 60`s and 70`s, because of increasingly stringent pollution controls in parent countries, this became a major factor in reducing production costs.<sup>5[5]</sup>

The arrangements made between the IDA and polluting industries locating in Ireland during the past 25 years have never been made publicly available. However an intriguing glimpse of the extent to which such agreements continue to compromise the Irish State`s ability to impose pollution prevention controls on these companies came to light in June 1997 during an appeal by one such industry against 40 conditions of a pollution control licence.

The Irish subsidiary of the Canadian Multinational Alcan, Aughinish Alumina Ltd, argued successfully at that Appeal Hearing that any costs incurred in reducing emissions of SO<sub>2</sub> to the limits suggested in an EPA issued IPC licence would be in breach of the following section of an agreement they had reached with the IDA in 1974...<sup>6[6]</sup>

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<sup>5[5]</sup> The prevailing attitude of MNCs to environmental protection in Ireland during this period is epitomised in a 1977 internal report of the Cork Harbour based Pfizer Corporation (now famous for its role in the bulk manufacturing of ingredients of Viagra). This report stated that the 1.3 million tonnes of industrial waste generated annually at their plant and dumped just outside Cork Harbour ....

***“.....equated in 1977 to the total BOD load of the whole of the Republic of Ireland.”***

Though that report went on to suggest that an alternative treatment technology to sea dumping was available to Pfizers, the company stated that it was cheaper to continue with sea dumping because....

***“Irish law tends to be non-specific in effluent matters reflecting the unadvanced state of the economy” (Cork Harbour Study 1989, Greenpeace)***

<sup>6[6]</sup> This was the first "Pollution Licence" issued to Aughinish Alumina Ltd. Since their establishment in Ireland in 1974 they had operated under a planning permit granted by Limerick County Council. No emission monitoring was ever carried out by Limerick County Council. **(Appendix C2, Investigations of Animal Health Problems at Askeaton, County Limerick, Interim Report, EPA, 1995)**

***"... the Government will not impose discriminatory taxes, rates and charges on the property of the Irish company, the products and materials used by it, or on its operations."<sup>7[7]</sup>***

The fact that it was 23 years before any company had to publicly rely on such an agreement to minimise the effects of State pollution controls on its operations is indicative of the lack of state commitment to environmental protection during this period.

Such state policies on environmental controls, coupled with the victimisation of dissenting voices, ensured an `easy ride` for the multinational polluters who have located in Ireland to date.<sup>8[8]</sup>

These policies have proven a resounding success in attracting environmentally suspect industry to Ireland. The direct result of this irresponsible strategy has given rise to the numerous and on-going environmental conflicts in Ireland today.

### **Environmental Protection in Ireland Pre EPA**

Environmental protection in Ireland prior to the establishment of the EPA was haphazard and inadequate. Control of industrial emissions was regulated by conditions laid down under the Local Government (Planning and Development) Act, 1963, which was implemented by 88 different planning authorities. These planning authorities - county councils, city corporations, urban district councils etc - were under resourced and lacked any level of expertise to adequately control the highly polluting MNCs locating in the country.

Officials charged with regulating emissions from polluting industries were clearly out of their depth.<sup>9[9]</sup>

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<sup>7[7]</sup> Aughinish Alumina objection to EPA Integrated Pollution Control licence issued to the company, 20<sup>th</sup> March, 1997. Efforts by CEA to secure access to the full text of this agreement were denied by the Minister for Public Enterprise.

<sup>8[8]</sup> In an internal industry report on the suitability of Ireland for locating toxic industries, the favourable social and political climate of the country was given careful consideration:

*"The prospects of employment tends to outweigh suspicion, especially in areas such as Cork. It is said that there has been victimization by the local population of people who attempted to oppose the building of a pharmaceutical plant, which would provide employment in the area. An environmentalist who blocked the construction of a plant by Schering Plough was forced to move out of the area."* **(Ireland: An Investment Opportunity for the Pharmaceuticals Industry. SCRIP, 1985)**

Throughout the 70s and 80s industrialisation raced ahead of Ireland`s ability to understand or control industrial pollution. For instance by 1983 the State run `Institute for Industrial Research and Standards` (IIRS) was admitting that a quarter of all industrial waste generated in Ireland went missing each year.<sup>10[10]</sup>

The implementation in 1977 of the Water Pollution Act and in 1987 of the Air Pollution Act, both mandated by EU Directives, merely exacerbated the situation. Although limits were at last being set on the amount of pollutants permitted to air and water, the licensing authorities undertook no enforcement of such conditions.<sup>11[11]</sup>

The failure of the State to address the polluting effects of these industries had considerable social consequences. Throughout Ireland - from Co Tipperary, where cattle were dying in large numbers alongside a pharmaceutical plant, to Cork Harbour where, in the midst of a rapidly expanding pharmaceutical/chemical industrial zone, claims of ill health and ecological effects were widespread - communities were divided.<sup>12[12]</sup>

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<sup>9[9]</sup> The Chief Environmental Officer with Cork County Council, who sanctioned the daily discharge of 600 tonnes of industrial effluent from the Penn Chemicals plant at Currabinny to Cork Harbour in 1973, admitted that as a civil engineer he... "*knew nothing about toxic waste.*"

Likewise the Head of Chemical Engineering with the IIRS, assured objectors to the Aughinish Alumina Development on the Shannon Estuary that the 25 tonnes of SO<sub>2</sub> emitted daily from the 280 ft boiler stack at the site would "*fall within the site perimeters*".

<sup>10[10]</sup> **New Scientist, April 7<sup>th</sup>, 1983.**

<sup>11[11]</sup> Following the introduction of the Freedom of Access to Information on the Environment Directive in 1993, compliance monitoring figures became publicly available for the first time. CEA published a study of effluent emissions during the six month period, Jan to June, 1993, from 12 multinational pharmaceutical plants operating in Cork Harbour. Despite 1,740 documented breaches of Water Pollution licence conditions during that period by the 12 companies reviewed no action was taken by the licensing authority. **(We're Tired of being Guinea Pigs, A Pollution Overview of the Chemical/Pharmaceutical Industry in Cork Harbour, CEA April, 1994)**

<sup>12[12]</sup> In 1988 the Supreme Court found that the pharmaceutical plant of Merck, Sharpe and Dohme at Ballydine, Co Tipperary, was liable for the deaths of almost 200 cattle on the neighbouring farm of John Hanrahan. In the absence of any action by the local authority, John Hanrahan prosecuted his own case. Interestingly, since the passing of the EPA Act, he would now, almost certainly, be precluded by law from seeking such legal redress.

A study by the Zoology Dept of UCC in 1987 established that 67% of the fish surveyed in Cork Harbour were diseased. To date no Follow up studies have been conducted. **(Cork Harbour Water Quality Study, ERU, 1989)**

In 1991 the Minister for Health announced his intention to conduct an epidemiological study in Cork Harbour but then postponed its implementation due, officially, to a lack of funds. The study has never been carried out. **(Letter to CEA, May, 1991)**

The ensuing conflicts, which were widely reported by the national and international media, made it increasingly difficult for the IDA to attract polluting multinationals. This volte face on the part of previously quiescent communities in Ireland peaked in 1988 when two MNCs targeted by the IDA decided not to locate in Ireland as a result of local opposition. Following the decision of the Swedish multinational Nordoff Genkist to cancel its plans for a factory in Cork Harbour, the American giant Merrell Dow also refused to locate in Cork Harbour. The company rejected the IDA's encouragement to locate in Cork Harbour where the chemical pharmaceutical industry had an uneasy relationship with the local community.<sup>13[13]</sup> Instead Merrell Dow sought to locate at a green field site at Killeagh in East Cork. However, a protracted campaign ensued involving street protests, planning appeals and High Court challenges until, in 1989, Merrell Dow abandoned their plans and withdrew.

As Merrell Dow withdrew the Swiss multinational Sandoz announced their intention of locating at Ringaskiddy in Cork Harbour. Despite a widespread and concerted opposition campaign, including a 13 day planning appeal hearing of objections, High Court and Supreme Court appeals, the company was granted planning permission.

However the chemical/pharmaceutical industry again suffered a public relations nightmare with the national and international media spotlight focussed on the appalling record of the dirty industries in Cork Harbour.<sup>14[14]</sup>

Public confidence in the ability and/or the willingness of the State to protect the environment and public health was at an all time low. The multinational pharmaceutical/chemical sector, for the first time in more than twenty years, began questioning the wisdom of locating in Ireland. The successes of communities and individuals in opposing dirty industries had thrown the State's industrial policy into turmoil. Amid this confusion and panic an Environmental Protection Agency was proposed.

While the EPA legislation was being drawn up, discussed and debated; Irish planning regulations, the one other area where citizens had successfully engaged the State apparatus in opposing dirty industries was addressed. The

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<sup>13[13]</sup> The Red Book, Jerry O'Callaghan, Poolbeg, 1992.

<sup>14[14]</sup> That the communities opposition was so successful is evidenced by the fact that IDA promotional literature in 1999, directed towards the international pharmaceutical/chemical sector no longer lists Cork Harbour as a location. Instead the area is referred to as Cobh, a town in Cork Harbour which doesn't host a single industry from that sector. **(IDA Annual Report, 1998)**

Government instituted `The Industrial Policy Review Group` (IPRG)<sup>15[15]</sup> in June, 1991, under the Chairmanship of Mr Jim Culliton. The terms of reference for the group were,

*"To review and make recommendations on industrial policy in Ireland and on public policy generally as it affects industrial development. The Review should address, particularly, the internationally trading indigenous sector and, where possible, identify policies and measures to be adopted which would form the basis for the development of this sector over the medium to the long term, with a view to increasing employment and wealth creation. For this purpose, industry included internationally traded services."*<sup>16[16]</sup>

This group sought the advice of a number of consultants to assist in its assessment of certain key aspects of Industrial Policy. Frank L Benson and Associates, one of the major companies involved in the Planning Industry and Ove Arup and Partners, consultant engineers to many of the Pharmachem industries locating in Ireland were recruited by the group to assess **"The Impact of Planning, Licensing and Environmental Issues on Industrial Development."**

This sub group`s brief was as follows,

- *An outline of the present procedures for the dealing with planning approval, planning appeals, by-laws and other environmental regulations for industrial development purposes, and their underlying objectives and rationale.*
- *An evaluation and assessment of the efficiency and effectiveness of the present system from both an industrial development and environmental protection point of view.*
- *The identification of any changes required on either the environmental legislation, regulations or operational side, or the industrial promotion/development side, to improve the present system and **to remove any constraints to the development of industrial projects** while maintaining necessary environmental safeguards.*
- *Recommendations for any changes considered necessary together with an outline of their organisational and other resource implications.*

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<sup>15[15]</sup> The Industrial Policy Review Group consisted of four businessmen, two bankers, one trade union representative, one lecturer in economics and a secretary. There was no representation of any of the major social justice or environmental groups.

<sup>16[16]</sup> More frequently referred to as **"The Benson Report"**.

The flurry of consultation and legislative activity during the early 1990s resulted in two major Acts of the Oireachteas, The EPA Act, 1992 and The Local Government (Planning and Development) Act 1993, both of which have had major implications for environmental protection and access to the planning /licensing system by third parties, i.e., members of the public.

The principle effect of The Local Government (Planning and Development) Act, 1993 was to separate environmental and planning law. One effect of this unique approach, which was a strong recommendation of the Benson Report to the IPRG, was to permit the construction of a project which, in theory at least, may not be allowed to operate by the EPA under the IPC licensing system. (see figure 3a)

While the planning authorities licence the physical development of a project, the EPA is charged with licensing the pollution arising from the operation of the facility.

The reality is of course that once planning permission has been obtained and a substantial investment has been made by a developer, and in the case of MNCs this could be several hundred million pounds, the EPA would be under intense political and economic pressure not to prevent operations on `environmental protection grounds`.

Another effect of this change was to enhance the practical difficulties third parties face in engaging in the appeal system. Under the new regulation two entirely distinct objections/appeals must be mounted. One through the planning system and another through the Pollution licensing system. With the limited resources available to communities and individuals the new system has resulted in a `fall off` in objections to major projects and has indeed resulted in ***removing the constraints to the development of industrial projects*** which formed part of the brief given the architects of the Benson Report in 1991.

Over a period of thirty years, 1963 to 1993, there were no less than seven Acts of the Oireachteas, enacted in 1963, 1976, 1982,1983,1990,1992 and 1993, dealing with planning matters. This ongoing legislative `fiddling` with planning legislation is indicative of the highly contentious nature of regulating development in Ireland, and is aimed at closing perceived loopholes used by environmental activists to prevent bad planning decisions.<sup>17[17]</sup>

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<sup>17[17]</sup> At the time of writing new legislation, the **Planning and Development Bill, 1999**, proposing further changes in planning procedure has been published. This legislation seeks to impose charges for the first time on third parties wishing to appeal a planning decision of a local authority. It is also proposed to create Industrial Sacrifice Zones exempt from normal planning

As stated earlier this mish mash of planning legislation is administered by 88 local planning authorities, with An Bord Pleanála as the final arbiter in any appeals against decisions of the local planning authorities.

Ten Government Departments also have specific and/or general responsibilities for environmental protection.

The Dept of the Environment, Dept of Transport, Communications and Energy, Dept of Agriculture, Food and Forestry, Dept of the Marine, Department of Enterprise and Employment<sup>18[18]</sup>

There are a further twenty-one Bodies with statutory obligations, to varying degrees, as regards environmental protection.

The EPA, Local Authorities, Regional and Central Fishery Boards, Harbour Authorities, Foibairt, Industrial Development Authority, The Irish Aviation Authority, Shannon Free Airport Development Company (SFADCO), Teagasc, The Marine Institute, Coilte Teoranta, Custom House Docks Development Authority, National Roads Authority, The National Authority for Occupational Health and Safety, The Buildings Regulations Advisory Body, The Radiological Protection Institute of Ireland, The Office of the Ombudsman, Electricity Supply Board, The National Heritage Council, The Arts Council<sup>19[19]</sup>

There is no cohesive policy to optimise the efforts of this plethora of Government Departments and statutory bodies which enjoy environmental protection responsibilities. It is regrettable that despite constant declarations of an integrated approach to environmental protection each of these State bodies perform their individual environmental protection roles in isolation without any concept of an overall national policy.

And it is within this context of confused and conflicting responsibilities that this report examines the effectiveness of the isolated functions of the EPA in protecting the environment.

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criteria. Under the new legislation access to Judicial Review of planning procedures will be further restricted.

<sup>18[18]</sup> Yvonne Scannell, Environmental and Planning Law in Ireland, The Round Hall Press, 1994, pp 55 - 81.

<sup>19[19]</sup> Ibid

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### **The Establishment of the Environmental Protection Agency**

The Environmental Protection Agency is a QUANGO<sup>20[20]</sup> and was established in July 1993 under section 19 of the Environmental Protection Agency Act, 1992.

Under the legislation the Agency has a number of functions. These include,

- · Licensing, under the Integrated Pollution Control (IPC) licensing system, large-scale activities having the potential to cause significant environmental pollution.
- · Advising the Minister for the Environment of specific situations where action by the Minister may be necessary to avert, reduce or eliminate significant environmental harm.
- · Advising Local Authorities in relation to management of sewage treatment plants, drinking water quality and other environmental issues.
- · The EPA is charged with establishing the quality of air, soil and water (including rivers, lakes, coastal, estuarine and ground waters)
- · Co-ordinating environmental research
- · Controlling and regulating the release of GMOs
- · Overseeing the environmental activities of Local Authorities
- · Advising and providing guidance on environmental problems to Local Authorities
- · The promotion of environmentally sound practices
- · Under the Waste Management Act 1996, the EPA is charged with licensing of landfill sites, hazardous waste disposal and hazardous transit holding sites.
- · Under Section 70 of the EPA Act the Agency is obliged to prepare and publish a report on the State of the Environment at intervals not exceeding five years.<sup>21[21]</sup>

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<sup>20[20]</sup> Quasi Autonomous non Governmental Organisation

- **Human Health:-** There is an unresolved dispute between the Dept of Health and the EPA as to which body is responsible, under legislation for monitoring the effects of EPA licensed emissions on human health. Though the Agency does consider species protection, it is notable that the protection of human health is not acknowledged by the EPA as part of its functions.<sup>22[22]</sup>

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<sup>21[21]</sup> The first such report was published in Feb 1996. While the report collated established information on the 'State of the Environment' and identified many of the pressure sources on the quality of the environment, it also acknowledged serious gaps in baseline information. These information gaps were caused, it is suggested by a *'lack of resources and the lack of enforcement and measurement of Environmental Quality Objectives, Environmental Standards and Emission Limit Values.'* 39, State of the Environment Report, EPA, 1996

<sup>22[22]</sup> State of the Environment Report, 1996, EPA, pp 30/33

### **The Structure of the EPA**

The EPA has a full time Executive Board consisting of the Director General and four other Directors.

All Directors were appointed by the Government following screening by a selection committee representative of the public and private sectors. The selection committee comprises of the secretary to the Government, the secretary of the Dept of the Environment, the Chairperson of An Taisce, the Managing Director of the Industrial Development Authority, the General Secretary of the Irish Congress of Trade Unions and the Chief Executive of the Council for the Status of Women.

The selection committee appoints the Director General. The committee also supplies a list of not more than three candidates for selection by the Government for each position of Director.

#### **There are four divisions in the organisation: -**

- i) Corporate Affairs
- ii) Environmental Management and Planning
- iii) Licensing and Control
- iv) Environmental Management and Planning

The EPA operates on a regional structure with headquarters in Wexford and five regional offices in Castlebar, Cork, Dublin, Kilkenny and Monaghan. There are four sub offices in Athlone, Letterkenny, Limerick and Mallow.

The staffing levels are distributed as indicated at Table 5a

## Funding

The EPA received just under £6 million from the state in 1997, a figure which represents more than 75% of the Agency's income for the year. Fees from the Integrated Pollution Control licence (IPC) holders and applicants make up the bulk of the Agency's remaining income.

It is worth noting that just £300,000 was spent on Environmental Research in 1997, down from £480,000 in 1995.

The Agency's almost total dependence on Oireachtas grants raises major questions as to the EPA's independence of government. While the Agency refers to itself as "*an independent public body*", its reliance on State funding places it very much in the position of being just another administrative arm of the Department of the Environment, its actual sponsor in government.

This unhealthy dependence on direct finance from the State can also be seized upon by those who are angry at the EPA's silence on a variety of environmental issues, as a major reason for its inaction in the face of government indifference to environmental issues.

It has often been argued by the Agency that its income from pollution licensing fees fulfills the '*Polluter Pays Principle*'. However, the very concept of an environmental protection agency concentrating most of its meagre resources administering the process of legalising pollution is a difficult one to accept. The low scale of the IPC licence fees represents the basic cost of overseeing pollution, and is what many environmentalists regard as a legal deception, and in no way represents a charge on these polluters of the real cost of the actual pollution.

The EPA appears to operate as a simple administrative body, concentrating on the paperwork associated with overseeing the pollution licensing system based on the so-called assimilative capacity of the environment. Very limited resources are allocated to enforcing compliance with its licences, prosecuting polluters or conducting independent environmental research.

An Bord Pleanála, the State Planning Appeals Board, which deals with all planning appeals against local authority decisions operates on an income of just £3.5 million, £2.8 of which comes from Oireachtas grants. When one considers that An Bord Pleanála administers all environmental planning appeals, with the exception of the environmental elements of appeals requiring an Integrated

Pollution Control licence (administered by the EPA), it is evident that the State contributes very little financially to ensure environmental protection in Ireland. (Table 5b)

Table 6a

## Oireachteas Grants 1997

Environmental Protection Agency	£5,775,753
An Bord Pleanala	£2,800,000
<b>Total</b>	<b>£8,575,753</b>

Table 6b

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**EPA Income**

<b>Year</b>	<b>1993</b>	<b>1994</b>	<b>1995</b>	<b>1996</b>	<b>1997</b>
Oireacht as Grants	£1,997,263 (89%)	£4,476,369 (85%)	£5,057,079 (77.8%)	£5,487,065 (72.86%)	£5,775,753(66%)
Advisory Services (1)	£34,387	£38,482	£39,188	£33,221	£25,278
Regional labs (2)	£205,451	£614,546	£667,062	£682,308	£803,541
IPC Fees	£-	£76,920	£710,391	£1,196,642	£1,889,788
Sundry	£1,003	£29,470	£25,423	£60,909	£96,414
Other	£-	£-	£78,133	£67,124	£175,512
<b>Total</b>	<b>£2,238,104</b>	<b>£5,235,787</b>	<b>£6,577,276</b>	<b>£7,518,269</b>	<b>£8,766,286</b>

**Notes:**

**(1) (1) Advisory Services are charges for advice to local authorities and other Government agencies**

**(2) Regional Laboratories income is derived from charges to local authorities and other Government agencies for services provided (almost exclusively laboratory analysis).**

Table 6c

**EPA Expenditure**

<b>Year</b>	<b>1993</b>	<b>1994</b>	<b>1995</b>	<b>1996</b>	<b>1997</b>
Salaries	£1,698,222	£2,691,269	£3,278,830	£4,165,100	£4,565,268
Travel	£88,837	£251,024	£292,730	£372,374	£418,407
Env. Research	£-	£-	£438,967	£244,599	£303,319
Public Relations	£-	£-	£21,318	£57,075	£67,337
<b>Totals</b>	<b>£1,698,222</b>	<b>£4,556,648</b>	<b>£5,894,389</b>	<b>£7,055,269</b>	<b>£8,206,916</b>

## Human Health & The EPA

To state that one of the purposes of the Environmental Protection Agency is to protect human health is stating the obvious. A close reading of the Act supports that view. See for instance Section 83(2) and 83(3) which set out pre-conditions to the granting of any licence.

A licence is not to be granted for instance unless any emissions from the activity will not cause "*significant environmental pollution*". The definition of environmental pollution in Section 4 of the Act is couched in terms that ultimately refer to endangering human health (among other things). The EPA does not seem to see things quite so simply however. The Agency's position, vis a vis the impacts of licensed pollution on human health, has been somewhat nebulous.

In January 1995 one of the country's Health Boards, the Southern Health Board, (SHB) was sufficiently concerned about this issue that it wrote to the EPA under Section 85(2) of the Act. The Board in question expressed concern that an application for an IPC licence by Schering Plough (Irl), Brinny, Co Cork, had neither identified nor specified the health implications, if any, of the proposed development. The Health Board noted a further concern that no provision appeared to have been made for the biological monitoring of human health of the pollution affects, or potential affects, of the processes to be undertaken.

The SHB made the very practical request that the EPA's Pollution Licences would therefore include an obligation on the licensee to monitor human health. The reply from the EPA was not reassuring. The Agency stated that it considered that biological monitoring of human health was a matter for the "*relevant Health Authority*". It is certain that it would not be '*appropriate*' for the Agency to impose conditions that were the responsibility of another authority. The Agency's reply went on to place reliance on standards and emission limit values which would be imposed and further claimed that monitoring after the licence was granted would "*establish the risk imposed to the environment and by extension public health.*"

There is no legal basis for the Agency's assertion that biological monitoring of human health is a matter for the relevant health authority. Health Boards, as they are more properly known, are established by statute and their powers are limited by statute. These powers given to Health Boards nowhere specify the type of health monitoring suggested by the EPA. Therefore, for the EPA to

attempt to avoid imposing these conditions on the basis that they are the responsibility of the Health Boards is legally spurious.

The second element of the EPA argument is similarly questionable. The EPA appears to have taken the view that it can adopt standards or emission limit values adopted in political bodies, such as the EU, and apply them to Irish conditions regardless of whether or not they are appropriate to local needs. The weakness of this approach is readily apparent when it comes to licensing the additional imposition of bio-accumulative toxins, such as dioxins, into an area whose population's current body burden of that substance has never been measured.<sup>23[23]</sup>

The legislation is sufficiently clear on the EPA's responsibilities in this area but given that the Agency does not appear to have reached the same conclusion then it may be desirable to place an amendment making the responsibility unavoidably that of the Agency. Such an amendment should further provide that the Agency equip itself with appropriate medically and toxicologically qualified personnel to assist it in properly discharging that responsibility.

This is particularly relevant in the context of the current positions adopted by both the EPA and the Department of Health.

In a statement issued in May 1998 the EPA stated that *"Serious animal and human health problems will in future be reported to the relevant State Agencies as soon as possible."*

In May 1999 the Minister for Health, in a letter to CEA, stated that....*"where the EPA are concerned over the level of a particular discharge or emission from a licensed source they would bring this to the attention of the Director of Public Health with the local Health Board with regard to the possible impact on human health in the area."*

Given that the Agency has no expertise available to it with which to identify such problems, the question arises as to what criteria the Agency would employ which would trigger the concerns identified in the Minister's statement?

Furthermore it is stretching the credulity of the public somewhat to suggest that the EPA, despite their immunity from prosecution, would on the one hand licence a source of pollution and then turn around and inform the Director of Public Health that the pollution licensed by the Agency is impacting negatively on public health.

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<sup>23[23]</sup> See Case Study Irish Ispat/Irish Steel

## The Status and Role of the EPA - Key Aspects

Essential to a proper assessment of the effectiveness of the EPA as a protector of the environment from industrial pollution, key roles and functions ascribed to the Agency with regard to its effectiveness in ensuring protection of the environment within democratic principles must be analysed.

### The Independence of the Agency

To be effective as an environmental protection body the EPA must be independent in order to carry out its functions impartially and without pressure from any quarter, be it political or economic.

Promotional material released by the EPA states under the heading, *Frequently Asked Questions*, that the EPA.... *was established as an independent body but must have regard for government policies.*<sup>24[24]</sup>

A number of other aspects of legislation, within the EPA Act and other linked legislation seriously impinges on the Agency`s ability to reach independent decisions. The more significant areas are outlined below.

### Prior Commitment

Responsibility for physical planning and control of environmental emissions are dealt with separately by the EPA, Local Authorities and An Bord Pleanala respectively. The EPA has the power to award an Integrated Pollution Control (IPC) licence to an applicant without looking at the issues of physical planning.

Clearly a considerable pre-commitment by the State exists where an applicant makes an application for an IPC licence for a facility for which he has already been granted permission to build. Where a lead agency, such as An Bord Pleanala becomes committed, through formal approval, to a project (often under construction with significant capital investment by the applicant) the EPA cannot realistically refuse an permit to operate the facility.<sup>25[25]</sup> Thus the Agency`s role

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<sup>24[24]</sup> EPA Website, <http://www.epa.ie>

<sup>25[25]</sup> IDA agreements guaranteeing tax breaks and operating conditions ad infinitum (such as that with Aughinish Alumina Ltd, Case Study ) seriously inhibit the EPA`s ability to impose pollution controls on certain industries.

is reduced to that of merely *rubber stamping* its approval of pollution from the industrial plant.

Whilst such issues as pre-existing planning permissions are not legal impediments to the EPA's deliberations on IPC applications, the statistics speak for themselves. Not one project has ever been refused an EPA pollution licence where planning permission was first sought for a facility within which an IPC licenced activity was to take place.

The issue of pre-commitment is also present in pre IPC licence application negotiations. These discussions between the applicant and the Agency do not form part of the planning file and as such are inaccessible to members of the public. It would be reasonable to argue that the appropriate time to introduce environmental considerations is during the planning permission decision making process when full access to such deliberations is possible.

### **Composition of the Section 21 Committee**

The Directors, particularly the Director General, play a significant role in the operation of the EPA.

While the Directors are appointed by the Minister for the Environment from lists supplied by the Section 21 Committee, this committee is not independent of government. Three of the six members are government or semi-State employees, i.e., the Secretary of the Department of the Environment, the Secretary to the Government and the Managing Director of the IDA.

### **The Composition of the Advisory Committee**

The Advisory Committee is obliged to meet regularly and bring to the attention of the Agency issues of environmental concern which, in the opinion of the Committee, are of significant environmental import.

The appointment of Advisory Committee members is controlled by the Minister for the Environment and is another example of the lack of independence of the Agency.

The Minister decides which organisations in *his/her opinion* are to supply lists from which between 5 and 7 members of the Advisory Committee will be appointed. The Minister appoints the remaining members of the Committee.

This entirely contravenes the principle of independence from Government control.

## **The EPA`s Interpretation of BATNEEC (Best Available Technology Not Entailing Excessive Cost)**

Where there is no objective assessment procedure in deciding what is or is not BATNEEC, interpretations will vary widely and be decided on crude, simplistic and unsubstantiated economic grounds<sup>26[26]</sup>. Likewise a case for BATNEEC may also be argued by equating `best` with `latest` or `most expensive`. That the best and most effective solution to a pollution problem may in fact result not from a radical upgrading of existing technology but from some other modification, e.g., a change in work practice has rarely been considered as part of the BATNEEC concept by the EPA.

The EPA is not equipped to determine what is `excessive cost`. It has no expertise within its own staff qualified to consider or determine economic argument. A developer will always define `excessive cost` as the potential additional financial expenditure, which he claims to be `excessive` relative to the overall profitability of the enterprise. These costs will de facto be projected, rather than actual, figures with all the uncertainty associated therewith.

In any judgement of what is deemed to be `excessive` the real economic cost of the social and physical impact on the environment should be considered, e.g., burden on the health services, degradation of air quality, water quality, soil clean up costs, loss of amenity, restricted development potential for future generations, etc. Despite significant advances in environmental economics<sup>27[27]</sup> environmental impacts are never `costed` by the EPA. The EPA with its emphasis on `acceptable` levels of pollution has ensured that traditional economic costs always outweigh environmental costs and takes no cognisance of ***the Precautionary Principle***.<sup>28[28]</sup>

## **The Appeals System**

Provisions within the EPA Act have removed one of the fundamental rights of our planning legislation; viz., the right to appeal pollution licences to an independent authority.

Under the EPA Act, 1992 the Agency has

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<sup>26[26]</sup> See Aughinish Alumina Case Study

<sup>27[27]</sup> Pearce, Campbell-Good, Unido

<sup>28[28]</sup> The principle that no activity should be permitted, the impacts of which are likely to result in environmental damage.

a) The power to grant an Integrated Pollution Control licence

and

b) The power to adjudicate on any appeal against this licence.

This appeal structure seriously offends the legal principle of *'Nemo Judex Causa'*.<sup>29[29]</sup>

The Act reasons that, as the highest authority in the State on environmental matters and as the EPA will employ the best available technical personnel to staff the Agency, there can be no *'Higher Court'* to which the Agency should submit. Therefore it, and only it, can adjudicate on appeals to its decisions.

It is desirable that the Agency should be so regarded. However to be so accepted in the public mind, the Agency must win and retain the respect and confidence of the public in all its procedures and outcomes, including those of hearing and determining licence appeals.

The farcical situation, which has existed to date, whereby the very personnel who have drafted the licence under appeal are nominated to access and evaluate objections to that licence<sup>30[30]</sup>, does little to inspire public confidence in the fairness or objectivity of the appeals system.

A practical alternative to this ridiculous situation, which was clearly identified by the CEA in the original proposals to establish the EPA, is contained in a paper entitled *Critique of the Environmental Protection Agency Bill, 1990 - CEA Spring 1991 (Appendix 3)*

### **Inspectors Overseeing Appeals**

In the event of appeal against a proposed pollution permit issued by the EPA the Agency appoints a member of its staff to assess the appeal/s and to make recommendations as to the merits of the appeal/s to the Board of the EPA.

The Inspector, selected by the Board, is frequently the same person who drafted the proposed pollution permit.<sup>31[31]</sup> Furthermore the appointment of Inspectors by the Board of Directors of the Agency appears to be arbitrary. This has resulted

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<sup>29[29]</sup> No one shall be judge of his or her own court.

<sup>30[30]</sup> The same personnel who drafted the licence under appeal chaired oral hearings of appeals against IPC licenses issued to Syntex (Irl) and Aughinish Alumina Ltd. Under the appeals system the chairmen are then required to make recommendations to the Board on the objections to the licenses which they, the chairmen, have themselves recommended prior to appeal.

<sup>31[31]</sup> See Aughinish Case Study.

in a situation whereby a staff member of the EPA with no legal, financial or medical training finds himself forced to adjudicate on matters relating to such disciplines which are clearly outside his knowledge.<sup>32[32]</sup>

### **Immunity of the Agency**

Section 15 of the EPA Act grants immunity to the Agency, or any body acting on behalf of the Agency, from legal action arising from any failure to perform, or comply with, any of the duties conferred on the Agency or its agents.

This removes the Agency's legal accountability in the event of negligence on its part as a result of which people are injured, property is damaged or loss caused. This is unlikely to be in accordance with natural or constitutional justice. The EPA is entrusted by law with the protection of the environment. However if it fails to carry out its legal duty, an injured party cannot sue the Agency. This is unprecedented in Irish law in that public authorities can be, and have been in the past, successfully sued following negligent planning decisions which resulted in loss or injury to individuals.

### **Failure to Allow Private Prosecutions**

Under the Local Government (Water Pollution) Act 1977 and the Air Pollution Act 1986 there exists a general principle whereby any citizen may take a prosecution under the Act. These private prosecutions could proceed without the permission of any other party.

It is a major flaw in the EPA Act that a provision was not made which would similarly empower private citizens to initiate private prosecutions.

The Act gives significant powers to the EPA in terms of their interpretation and prosecution of environmental law. However little was done to address the democratic deficiency, which has resulted from the concentration of such power in the hands of one *'Super Agency'*.

### **Enforcement Policies of the Agency**

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<sup>32[32]</sup> Ibid

The 1997 EPA annual review of Integrated Pollution Control licensing showed that of the pollution licence holders audited the previous year 80% were found to be breach of licence conditions. The review went on to reveal that of those found in breach of their conditions only 4% were prosecuted.<sup>33[33]</sup>

The fact that four out of every five licence holders breached their conditions is a direct result of the *softly, softly* policy adopted by the Agency, whereby it is clearly following a co-operative model in their dealings with offending parties. The modus operandi of the EPA would appear to promote the misguided logic that IPC licences issued by the Agency are aspirational rather than legal and enforceable documents. The theory behind this would seem to be that the non-conforming pollution licence holder is encouraged rather than compelled to comply with the conditions of the pollution permit.

This *compliance first* strategy adopted by the Agency emphasises working co-operatively with violators to obtain compliance, eschewing penalties in favour of persuasion. How long will this gentle persuasion be continued by the Agency?

This discretion goes far beyond the spirit of the Act.

It is questionable whether this policy is in any way effective in forcing compliance with the already loose emission standards included in IPC licences issued. When combined with the tiny numbers of enforcement personnel employed by the Agency, the overall picture is not encouraging.

The EPA Act clearly identifies the Agency as the sole body, which is entitled to initiate prosecutions and contains clear lists of penalties that are available to the EPA to prosecute offenders. The Act was designed to be a deterrent-based enforcement statute. This model of enforcement accepts that a licensed industry would be a rational actor whose interests are primarily to maximise profits. As such, decisions regarding compliance would be based on a determination of self-interest. In short, businesses will comply where the cost of non-compliance outweighs the cost of compliance. The prosecutions initiated to date, all in the District Court, (Fig 7a ) clearly promote, in economic terms, non-compliance by the pollution licence holder.

## **The Diminution of Established General Negligence Principles**

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<sup>33[33]</sup> Pg 19, IPC Annual Report, 1997

Irish law, in a similar approach to all other common law jurisdictions, such as the UK and USA, establishes a right whereby a plaintiff may seek damages for injury caused from a defendant where he is able to prove *on the balance of probabilities* that injury resulted through the negligence of the defendant. The legal principles which support the law of negligence require that first of all a *Duty of Care* should exist between the parties and that this *Duty of Care* is subsequently breached.

Under the EPA Act, where a company, issued an IPC licence by the EPA, is accused of negligently causing injury as a consequence of the company's licensed emissions, a breach of this *Duty of Care* would be practically impossible to establish.

In an imaginary scenario let's assume that an injured party presents irrefutable evidence that the licensed emissions from the company are directly and solely responsible for the injury suffered. However such evidence, while establishing the company as the cause of the injury, is not sufficient to prove a case under general negligence principles. In order to prove his case the plaintiff must show that the defendant acted unreasonably in permitting the emissions escape from his facility. Under present legislation it would be impossible for the plaintiff to prove his case.

The defendant would simply have to show the court that they had acted reasonably in that they had engaged the state's recognised apparatus for securing an IPC licence, were awarded such a licence and operated within the parameters of the IPC licence.

Since the Agency is guaranteed absolute immunity from prosecution under Section 15 of the EPA Act, the injured party is denied any legal redress through which he could seek damages.

### **Failure to Demand Performance and Cleanup Bonds**

No environmental Cleanup Bonding has been demanded by the EPA of any of its licensees. In other jurisdictions the growing incidences of contaminated lands have encouraged equivalent agencies to require Bonding which would allow for a cleanup of any industrial site which had been contaminated by industry.

In the absence of such assurances, Irish communities have no way of protecting themselves against the effects of contaminated zones.<sup>34[34]</sup>

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<sup>34[34]</sup>An inter-agency investigation into widespread contamination in the environs of Silvermines village in Co Tipperary was published in June 2000. This report ascribed a number of cattle deaths in the area to lead poisoning. The local village school playing field had to be resurfaced immediately when the belated investigation uncovered high lead levels in the soil which posed a potential risk to children.

This is especially relevant because the normal rules of Civil Liability are not applicable to a licensee of the Agency, i.e., a plaintiff who is damaged by licensed emissions will not be able to recover losses against the party who has caused the emissions.

The US Comprehensive Environmental Response Compensation and Liability Act (CERCLA) imposes retroactive and strict liability on potentially liable persons who are possibly liable for the contamination of sites. Costs incurred by such parties can be significant. The average cost of cleanup of a site on the US EPA's national profile list is approximately \$31 million (£23 Million).

This figure would exceed the entire Irish EPA's annual budget by a factor of 2.5.

While no figures are available on the actual contamination of industrial sites in Ireland, it is known that all of the chemical/pharmaceutical plants operating in Cork Harbour have, in breach of licence conditions, contaminated groundwater to a significant degree.<sup>35[35]</sup>

The use of *strict liability* in the US CERCLA Act is a useful tool as it dispenses with the need to prove any issue of intent, recklessness or negligence on the part of a polluter. If you owned or controlled the site then you pay for the cleanup. This system is also particularly useful in the US because there is a lesser incentive for the companies to move to other jurisdictions. The defendants are in essence captive. This is in stark contrast to Ireland where an offending transnational may move its base to another country at its pleasure.

The issue of cleanup costs is not something with which Irish based MNCs are comfortable. The experience in the US is that the costs of such open ended insurance policies has skyrocketed over the past three years. This overhead is not something which the MNCs are willing to assume. The situation in Askeaton, where the EPA have continued to delay the imposition of any bond upon Aughinish Alumina Ltd despite the acknowledged reality that the company claims to be in a precarious financial position which could result in a complete shut-down of its manufacturing/extraction process within a decade. Who will be responsible for the massive slag heap on Aughinish Island at the mouth of the Shannon? The state is foolhardy to accept such terms from any company, but especially from one which is capable of disappearing into the mists of liquidation so easily.<sup>36[36]</sup>

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Many local people were found to have high lead levels in their blood. The company, Mogul, which had operated a lead mine in the area ceased operations in 1982. (Dept of Agriculture, June 2000)

<sup>35[35]</sup> This contamination of groundwater in Cork Harbour is not considered significant by the EPA or Local Authorities as the groundwater in question is not potable. There has never been a prosecution of an IPC licence holder for contamination of groundwater in Cork Harbour.

<sup>36[36]</sup> See Aughinish Alumina Case Study

## **Character and Past Compliance Record of Pollution Licence Applicants**

In assessing an application for a pollution permit the EPA takes no cognisance of the character or compliance record of the applicant. Compliance with environmental regulations contained in pollution/planning permits previously issued to a current applicant is not considered relevant by the Agency.<sup>37[37]</sup>

This is in stark contrast to the Drink licensing laws whereby an applicant seeking a licence to sell intoxicating liquor must establish before a judge of the District Court that he is of good character and, where applicable, has complied previously with conditions of the regulations.

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<sup>37[37]</sup> In October 1996 appellants at the Oral Hearing of objections to a Draft IPC licence issued to Co Clare based multinational Syntex were denied the opportunity to raise the past compliance record of the applicant company by the Inspector who ruled that the prior record of the applicant was not admissible as evidence.

## **The Performance of the EPA**

In assessing the effectiveness of the EPA as a protector of the environment from industrial pollution, the independence, functions and powers ascribed to the Agency under legislation must be examined.

The three cases outlined in this section illustrate the shortcomings of the legislation and the abrogation by the EPA of many of its duties which are vital to proper and realistic protection of the Irish environment.

## I

### **Aughinish Alumina Ltd and the EPA**

***"We have had to leave our farm and our families in order to give our children a future because there is none left on this poisoned farm."<sup>38[38]</sup>***

Aughinish Alumina Ltd is based on Aughinish Island, 18 miles downstream from Limerick City on the Shannon Estuary. (fig ?) It is an alumina refinery designed to extract alumina from imported bauxite. Alumina is the material from which the metal aluminium is smelted. Cheap electricity is the key to economic aluminium production.

Construction of the plant at Aughinish Island began in June 1978, at one stage employing up to 6000 construction workers. Costing £640 million to build it was, at the time, the most expensive single industrial project in Ireland`s history.

The alumina produced at Aughinish Island is exported for smelting abroad as electricity is too expensive in Ireland to make aluminium smelting economically viable at the Aughinish site.

The plant commenced operations in 1983 producing 1 million tonnes of alumina per annum.

Environmental controls on emissions from the site were outlined in the grant of planning permission issued by Limerick County Council in 1977.

- The main limits placed on atmospheric emissions related to sulphur dioxide (SO<sub>2</sub>) and dust.
- There was no requirement for independent monitoring of emissions by the local authority or other State regulators.
- Limits were placed on the ambient concentration of SO<sub>2</sub> in any place outside the site which could be attributable to Aughinish Alumina Ltd operations.
- No pollution abatement technology was required by regulation or employed by the company.

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<sup>38[38]</sup> Letter from Suzanne Ryan to CEA, Jan 1996

- Monitoring sites for ambient levels of SO<sub>2</sub> in the Shannon Estuary are now acknowledged to have been in the wrong place as these locations were based on a computer dispersion model which failed to take account of the topography of the area.<sup>39[39]</sup> Consequently records of ambient SO<sub>2</sub> levels prior to 1995 are unreliable.

Until 1995, when the EPA directed the company to apply for an Integrated Pollution Control Licence, the only monitoring carried out was that conducted by the company. This consisted of daily SO<sub>2</sub> calculations based on the sulphur content of the heavy fuel oil used to supply the boiler and calciner plants at the site.<sup>40[40]</sup> Notwithstanding this meagre monitoring, breaches of the SO<sub>2</sub> limits were frequent, yet no action was taken by State regulators.

### **Animal Health Problems in the Askeaton Region**

In 1979 a baseline survey of animal productivity, financed by Aughinish Alumina Ltd, was undertaken in the Askeaton area by the State funded Agricultural Service An Foras Taluntais.<sup>41[41]</sup> The three year study examined 25 herds in detail and the criteria for selection of the study herds were,

- i) i) That the farms were within 5 miles of Aughinish Island and were distributed throughout the area
- ii) ii) That they represented herds typical of the area.
- iii) iii) That the farmers were willing to cooperate in a 3 year study.

The Baseline Survey was published in April 1984, and while it suggested that milk yields per cow per acre could be improved by supplementary winter feeding, the most reassuring aspect for local farmers was its conclusion that ***"Fertility and calf viability were as good as or better than the national average."***<sup>42[42]</sup>

However by 1988 things had begun to change. A number of local farmers were experiencing reduced milk yields among their herds. By 1993 several more

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<sup>39[39]</sup> In July 1995 a new dispersion model incorporating the topography of the Shannon Estuary predicted highest concentrations of SO<sub>2</sub> at completely different points to those being monitored from the start up of the Aughinish Alumina plant. (ibid)

<sup>40[40]</sup> Investigations of Animal Health Problems at Askeaton, Co Limerick, EPA, Sept 1995.

<sup>41[41]</sup> Baseline Survey in the Vicinity of Aughinish Island, Animal Productivity. P.A.M. Rogers and D.B.R. Poole, Field Investigation Dept, An Foras Taluntais.

<sup>42[42]</sup> Ibid.

farmers in the area had begun to report falling milk yields, chronic ill-thrift, infertility and spontaneous abortions in their herds.

Several preliminary studies conducted on the farmers behalf in 1993 and 1994 suggested that the newly arrived industrial pollution may have been a contributing factor to the animal health problems in the area.<sup>43[43]</sup> However, rather than investigate the veracity of such claims, the state opted instead to place almost total reliance on one other study, which had been funded by the State, which had concluded that bad farm management leading to iodine deficiencies were at the root of the problem.<sup>44[44]</sup> It is noteworthy that supplementary iodine, subsequently administered, failed to resolve the problem.

In 1994 when the CEA approached the EPA on behalf of the effected farmers and asked that a possible link between industrial emissions and the animal health problems be investigated by the Agency, Mr Iain McLean, a Director with the Agency, bluntly refused saying **"We are not going to be a fire brigade for anyone"**.<sup>45[45]</sup>

A few months later, in February 1995, the Minister for Agriculture, Forestry and Food *invited* the EPA to co-ordinate a general investigation into the problem. Coincidentally, also in February 1995, the Agency directed Aughinish Alumina Ltd to submit an application for an Integrated Pollution Control licence which would impose, for the first time, realistic limits on emissions from their facility.

The format of the proposed three year EPA led investigation was designed as follows:

- • The EPA to investigate pollutant emissions and environmental quality
- • The Veterinary Research Laboratory to investigate animal health
- • Teagasc<sup>46[46]</sup> to investigate soil and plant status
- • The Mid Western Health Board to investigate public health aspects

There was much public concern that the EPA investigation into the animal health problems at Askeaton would be biased in industry`s favour. In March `95, just as the investigation commenced, Dr Paul Toner of the EPA, who was in overall

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<sup>43[43]</sup> Veterinary Study by local vet John O`Mahony, `93. Conservation Advisory Service Study, `94.

<sup>44[44]</sup> Dowding Report, 1994.

<sup>45[45]</sup> Meeting with CEA, Sept 1994

<sup>46[46]</sup> Teagasc is the State Funded Agricultural Advisory Agency

charge of the inquiry, suggested, in response to a question on the EPA's handling of the investigation, that **"Somebody must defend industry."**<sup>47[47]</sup>

The animal health problems were most severe on three farms in the immediate vicinity of Askeaton. Two of these were small to medium sized dairy farms while the third operated in the main as a stud farm with some sheep and cattle also being run.

The main investigation was centred on the two dairy farms, one of which was purchased by the Dept of Agriculture and the other being operated for the duration of the study period at the direction of the investigation team.

The owners of the stud farm refused to cooperate with the study team because of the failure of the EPA to agree that all scientific sampling carried out on this farm be on a split test bases with the owners own scientific consultants.

Immediately upon commencement of the investigation farm practices on the two study farms were altered. Whereas, prior to the investigation, winter housing of cattle had never been a feature of dairy farming in the area, the investigation team housed cattle for long periods, thus, it was suggested, sheltering the stock from possible exposure to atmospheric pollution. Silage was sourced outside the study farms` normal supply and supplementary minerals and supplements were introduced to the diet on the farms.

The general feeling locally was that study farms were being operated more as a laboratory than as a commercial enterprise and that any farmer attempting to emulate the agricultural practices of the EPA led study team would be bankrupt within a matter of months.

It was clear to most serious observers that the modus operandi of the investigation was designed to achieve a pre-determined result, namely, a healthy livestock for the duration of the study.

The integrity of the investigation was further undermined by the publication, two days before an oral hearing of objections to a proposed pollution licence issued by the EPA to Aughinish Alumina Ltd in June 1997 of the 2<sup>nd</sup> Interim Report of the investigation team.<sup>48[48]</sup>

That report stated that.....

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<sup>47[47]</sup> RTE current affairs programme, Prime Time, March 1995

<sup>48[48]</sup> Investigations of Animal Health Problems at Askeaton, Co Limerick. 2<sup>nd</sup> Interim Report (Oct;1995 to Dec1996) EPA June, 1997.

***"It is clear that whatever adverse circumstances led to the cattle deaths and ill-health on Ryan and Somers farms in the late 1980s and early 1990s are now absent."*<sup>49[49]</sup>**

This was in stark contrast to the situation pertaining to animal health on the stud farm immediately adjacent to one of the study farms where in the period August 1995 to August 1996 eleven horses had died. Eight of these horses had been submitted to the Irish Equine Centre for detailed post mortem examination. There were two, two year old colts, two mares and four foals. Elevated levels of aluminium were detected in the tissue of all eight animals and aluminium was demonstrated in the granulomatous lesions discovered. No other causes of granulomatous lesions were detected.

The four adult animals had lesions of granulomatous enteritis.<sup>50[50]</sup> The disease had previously been found only in individual animals on individual sites.

**This was the first recorded case where a cluster of cases of granulomatous enteritis had been recorded anywhere in the world.**<sup>51[51] / 52[52]</sup>

Thus, whilst the EPA were stating definitively that the causes of the animal health problems had disappeared on the two farms under study, a world phenomena with regard to animal ill-health remained undetected by the investigation team within yards of the examination site.

It was against this background that appellants attended the opening day of oral hearings of objections to the proposed IPC licence issued by the Agency to Aughinish Alumina Ltd.

## **Oral Hearing of Objections to Aughinish IPC Licence**

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<sup>49[49]</sup> Ibid. Conclusions

<sup>50[50]</sup> Granulomatous enteritis is a chronic enteric disease of the horse that may also effect other internal organs and the skin.

<sup>51[51]</sup> Irish Equine Centre. Study carried out on behalf of Doris and Andy Shhehy, 1997.

<sup>52[52]</sup> Aluminium is the 3<sup>rd</sup> most common element on earth. It is not normally absorbed when ingested. However one theory relating to high levels of aluminium detected in post mortem examination of animals in the Askeaton region suggests that the extraordinary levels of *acid rain* causing pollutants emitted from industries in the area may dissolve aluminium in the soil and atmosphere. The dissolved aluminium would then be metabolised by ruminating animals resulting in animal health problems consistent with those experienced among local livestock.

## **II**

### **EPA V Proctor & Gamble**

This case exemplifies in many ways the approach the EPA has followed in prosecuting environmental offences. The factual background to the case is as follows.

On August 3<sup>rd</sup> 1996 Nenagh Urban District Council and Tipperary North Riding County Council began to receive complaints from consumers of the Nenagh public water supply concerning an unusual taste and odour from the tap water. The complaints described the water as having a perfume or disinfectant like odour.

On August 16<sup>th</sup> Nenagh UDC took a decision to cease pumping from the Gortlandroe well because of the contamination.

A similar incident in April 1996 had been tracked and attributed to a spill of 500kgs of shower gel from the Proctor & Gamble plant in the town. No action had been taken by the Agency in this instance.

However, following the August contamination incident, the EPA, as the licensing and regulatory for the Proctor & Gamble plant, commenced an investigation. Two reports followed one in September 1996 and the other a few months later.

The initial report pulled no punches and stated at the outset that...

*"...the contamination of the Gortlandroe well has been one of the most serious incidents of pollution of a public water supply source in years."*

Two lines later the report continues.....

*"...the well has been contaminated by effluent from the Proctor & Gamble site.....the compounds octamethylcyclotetrasiloxane originated from the Proctor & Gamble factory."*

In this report a number of actions and recommendations were promised by the EPA.

Chief among these was an undertaking by the Agency to institute legal proceedings against Proctor & Gamble Ltd in relation to unauthorised discharges to groundwater which resulted in the contamination of the public water supply as outlined above.

In the meantime the population of Nenagh bore the brunt of the hardship caused by the contamination. All the water, which had been supplied by the Gortlandroe well, was supplied by tanker to each household. The tankering of the water and the provision of an alternative water supply for the town cost in excess of £10 million.

A summons was issued to Proctor & Gamble to appear at Nenagh District Court to answer certain charges under the Local Government Water Pollution Act 1977 (as amended by the EPA Act 1992). This decision of the Agency to prosecute the case in the lowest possible court was to have major ramifications. To understand why, it is necessary to examine the choices open to the EPA under legislation.

Under the EPA Act 1992 it is within the gift of the Agency as to which court, the District, Circuit or High Court that such prosecutions are taken.

The District Court can impose a maximum fine of £1,000

The Circuit Court can impose a maximum fine of £5,000

The High Court can impose a fine of £25,000 and also has the power to order the guilty party to pay for the cost of the cleanup and associated remedies.

The District Court was created to deal with summary matters. Typically a District Court Judge is kept busy with parking offences, drunk and disorderly offences etc, with individual cases dealt with in minutes.

However the Procter & Gamble legal team pleaded not guilty and organised a very robust defence. Eventually the case, which was expected to last little more than an hour, dragged on for months.

When the Judge gave his verdict it was clear that the Court was not capable of penalising the company effectively. The Court imposed two fines of £750 each on two counts of water pollution. While the population and business community of Nenagh suffered a huge amount during the summer of 1996, Nenagh UDC, Tipperary North Riding, and the Dept of the Environment were forced to fund the provision of an alternative water supply. As stated earlier this cost in excess of £10 million, yet the cost to Procter & Gamble, who were found guilty of causing the damage, was a mere £1,500 fine.

It is worth pointing out that Procter and Gamble were charged with and convicted of a criminal offence. A criminal statute is said to have a dual purpose. Firstly a criminal statute is meant to punish offenders and secondly to act as a deterrent to other potential offenders.

The economic model of the law would suggest that an individual would comply with the law only where his compliance<sup>53[53]</sup> costs him less than the cost of non-compliance. The ship owner will only provide jackets for his passengers if the cost to him of not providing them is greater. The ship owner discovers the true costs of his inaction when the ship goes down. All lives are lost and the company gets sued.

Clearly the Irish State, through its servants in the EPA, has sent a clear financial message to multi national polluters. The £1,500 fine imposed on Procter & Gamble was an obvious indication to all potential polluters in Ireland; as long as the economics are right, pollute at will. A message, no doubt, received with pleasure by the many representatives of the Irish based multi national pharmaceutical/chemical sector who attended every minute of the Procter & Gamble court case, including some very expensive PR professionals.

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<sup>53[53]</sup> The international legal community accepts this business philosophy. In an article from the International Financial Law Review, Vol. 5, Issue 8, Aug 1986, pp 22-23 it is stated that Alcan, (parent company of Aughinish Alumina Ltd,)..... *relies on a litigation philosophy that is more like a business principle than a legal principle: if the present discounted return does not justify the litigation investment, no legal effort will be made.*"

# Irish Steel/Irish Ispat

## ***Glossary of Terms***

- • **AER** *Annual Emissions Register*
- • **AN Bord Pleanála** *Irish planning authority*
- • **Assimilative Capacity** *The ability of air, water or soil to effectively degrade or disperse chemical substances. If the rate of introduction of pollutants into the environment exceeds the rate at which the environment can assimilate the materials, an adverse effect may occur to human health or welfare, wildlife or other living components of an ecosystem.*
- • **BATNEEC** *Best Available Technology Not Entailing Excessive Cost*
- • **BioResearch Ireland** *Established by Forbairt to promote biotechnology research in Irish universities and research institutes.*
- • **BOD** *Biochemical Oxygen Demand*
- • **Dail** *Parliament*
- • **Dioxins (tetrachlorodibenzo-para-dioxin)** *An aromatic halogenated hydrocarbon that is one of the most toxic compounds known. The compound is toxic to liver and kidney function and has been shown to induce a variety of tumors in animal models. Adverse effects on the immune system of mammals have also been noted. TCDD has been involved in a number of well-publicized environmental cases, the most famous of which is contamination of the herbicide mixture known as AGENT ORANGE used as a defoliant during the Vietnam War. The US Office of Research and Development has concluded that dioxin causes cancer in humans and that current exposure levels appears to place people at or near body burdens where sensitive responses may occur.*
- • **ELV** *Emission Limit Value*
- • **EMP** *Environmental Management Programme*
- • **ENQ** *Environmental Quality Objective*
- • **ENS** *Environmental Quality Standard*
- • **EPA** *Environmental Protection Agency*
- • **FOAIE** *Freedom of Access to Information on the Environment*
- • **FOI** *Freedom of Information*
- • **Forbairt** *Agency providing state support to Irish industry across a range of activities including product development and a range of technological services.*

- • **Forfas** *Policy Advisory Board for enterprise promotion and science and technology development*
- • **Fugitive Emissions** *Any gas, liquid, solid, mist, dust or other material that escapes from a product process that is not routed to a pollution control device.*
- • **GE** *Genetic Engineering (also known as bio-technology)*
- • **GMO** *Genetically Modified Organism*
- • **Hazardous Waste** *Any solid waste listed as hazardous under the RESOURCE CONSERVATION AND RECOVERY ACT regulations, or that poses a significant threat to human health or safety because it is toxic, ignitable, corrosive, or reactive as determined by specified tests.*
- • **IDA** *Industrial Development Agency*
- • **IIRS** *Institute for Industrial Research & Standards*
- • **IPC** *Integrated Pollution Control*
- • **IPRG** *Industrial Policy Review Group*
- • **LA** *Local Authority*
- • **MNC** *Multi-National Corporation*
- • **NGO** *Non Governmental Organization*
- • **Oireachtas** *Government*
- • **PER** *Pollution Emissions Registers*
- • **Polluter Pays Principle** *The concept that the party responsible for pollution pays the cost of any expenses incurred by that pollution.*
- • **Precautionary Principle** *The principle of eliminating and preventing pollution emissions where there is reason to believe that damage or harmful effects are likely to be caused, even where there is inadequate or inconclusive scientific evidence to prove a causal link between emissions and effects.*
- • **Quango** *Quasi-autonomous non-governmental organization. A semi-public body with financial support from and senior appointments made by the government.*
- • **Significant** *Significant harm means primarily an emission, likely to cause an adverse effect, an emission likely to exceed a numerical standard or an emission likely to violate some other numerical standard.*
- • **Sustainable Development** *The effort to guide economic growth in an environmentally sound manner, with emphasis on natural resource conservation.*

- **Synergistic Effect** *An effect resulting from two or more agents acting in such a way that the total effect is greater than the predicted sum of the individual agents acting alone. For instance the two air pollutants sulphur dioxide and particulates have a greater adverse effect on human health than would be expected from the sum of their individual toxicities.*
- **Teagasc** *Government Agency for research and education in agriculture.*
- **TNCs** *Transnational Corporations.*

Table 4a

**EPA Staff Levels**

<b>Year</b>	<b>1993</b>	<b>1994</b>	<b>1995</b>	<b>1996</b>	<b>1997</b>
Wexford	15	28	51	63	73
Dublin	31	34	33	35	36
Cork	0	1	4	10	10
<b>Total</b>	<b>77</b>	<b>102</b>	<b>128</b>	<b>148</b>	<b>161</b>


mandated to nurture development therefore un-opposed planning applications are approved with undue haste as opposed to IPC applications which are much more complex and take much longer.

## 6

### **Environmental Regulation in Ireland Pre EPA**

***"The point is not that a few politicians may have been corrupt; rather it is that the political system as a whole is corrupt."***

*(Vincent Brown, Barrister & Columnist: Irish Times March 3rd, 1999)*

The Environmental Protection Agency Act of 1992 was the first piece of legislation passed by the Irish state specifically designed to protect the environment. Prior to this there had been piecemeal implementation of various EU environmental Directives with responsibilities of application and enforcement divided among a variety of public bodies. The EPA Act of 1992 was the first specific piece of home grown legislation, ostensibly aimed at environmental protection, introduced by the Irish legislature.

5 ustrial Development/US EPA establishment/Brown Paper Bags/Development Controls pre EPA/Cork Harbour/Hanrahan/Merrel Dow/Culliton-Benson Report/

## **6 The Legislative Framework**

and Overview of Duties/Section 15/Advisory Committee/Public-Community

Exclusion from Decision making process. Lack of accountability. Public Lack of trust in EPA.CCC

7 EPA - its Setting Up, its Independence/must have regard to Government Policies

8 Activities of EPA

9 Areas, within its budgetary restrictions, where the EPA has Concentrated its Resources

10 The IPC licensing system/public input limited to preparation of licence/many of the conditions of an IPC are negotiated afterwards between the agency and the IPC holder.

11 The Appeals System/Nemo iudex causa/held within a very limited field of scientific expertise/Batneec arguments not subject to independent verification/

12 Monitoring/is a licence aspirational, or is it a legally enforceable permit?/Enforcement/80% of IPC holders audited in 1997 were found to be in breach of licence requirements/4% were prosecuted - "The percentage of non-compliant sites has increased significantly over 1996 (pg 19, IPC Annual Report, 1997)

13 GMOs/Lack of Appeal System/Research conducted by permit applicants

14 Case Studies - Askeaton/Clarecastle/Irish Steel/P & G

15 Conclusion

"I know that," said the Gargoyle, "but still an` all we have a right to talk about what people are doing in other parts of the world and not be treated like hot-house plants. I did`nt mind the bogey-man when I was a child, but at this hour of me life I don` t want to be regarded as wan, just because I talk about communism. We are at the stage now when the powers that be are going to do all our thinking for us and at the same time, talk about our God given right to chose our own life. God on our right hand, the boss on our left, an` the devil at our feet - sure `tis enough to addle any man".

***"The size of the plant can be seen from the aerial photo, a far cry from the windswept fields before progress came to Aughinish."***

*(from a promotional brochure issued in 1991 by Aughinish Alumina Ltd,  
Aughinish Island, Co Limerick)*

**Figure 7a**

**Prosecutions taken by EPA against IPC  
licence holders to date**

<b>IPC Licence Holder</b>	<b>Date</b>	<b>Court</b>	<b>Fine</b>
Our Lady Of Lourdes	7/06/'96	District Court	£200
The North Western Health Board	5/07/'96	District Court	£100
Monaghan Poultry Products Ltd.	26/11/'96	District Court	£1,000#
Roche Ireland Ltd.*	13/12/'96	District Court	Probation Act
Castlemahon Foods	10/01/'97	District Court	£1050#
Castlemahon Foods	10/01/'97	District Court	£800
Liffey Meats (Cavan) Ltd.	19/06/'97	District Court	£450
IFI Marino Point**	24/09/'97	District Court	£750
Marrow Meats Ltd.	26/09/'97	District Court	£500
Lawter International B.V.*	7/11/'97	District Court	£500
Monery By-Products Ltd.	13/11/'97	District Court	£350
Liffey Meats (Cavan ) Ltd.	19/02/'98	District Court	£1,000#
Monaghan Poultry Products Ltd.	10/03/'98	District	£1,000#

		Court	
Irish refining plc.	2/04/'98	District Court	£750
Procter & Gamble (Manufacturing Ireland Ltd.)*	19/05/'98	District Court	£1,500#

**Figure 7a (continued)**

MMF Limited (Killorglin)	10/09/'98	District Court	£100
National By-Products	5/10/'98	District Court	Agency lost case
Masonite Corporation*	9/12/'98	District Court	£100
Premier Proteins Ltd.	5/05/'99	District Court	Probation Act
Castlemahon Foods	14/05/'99	District Court	£1,900#
Munekata*	28/05/'99	District Court	£3,000#
Dublin Products Ltd.	23/06/'99	District Court	£1,800

\* Indicates foreign owned company

\*\* Jointly owned by the Irish State and ICI (49% share)

# Where fines shown are in excess of £1,000, more than one charge has been prosecuted by the Agency in relation to a specific incident.

The maximum fine which can be imposed by the District Court is £1,000

**CRITIQUE  
OF THE  
ENVIRONMENT PROTECTION AGENCY BILL  
1990**

**BY  
THE CORK ENVIRONMENTAL ALLIANCE**

**SPRING 1991**

**1. 1. INTRODUCTION**

**The long awaited Environment Protection Agency Bill was finally published on December 11<sup>th</sup>. 1990. The Cork Environmental Alliance welcomes this Bill and regards it as a necessary and positive step towards environmental protection.**

**It has been evident for some considerable time that an independent agency was urgently required to reverse the growing disillusionment of many people with existing environment protection authorities. This was reflected in the increasing number of instances throughout Ireland of open conflict between individuals, communities and the State authorities in relation to the environment. Communities throughout County Cork in particular have been to the forefront of many of those conflicts involving, for example, Merrell Dow, Sandoz and Cork Harbour pollution problems.**

**Clearly there is a number of fundamental requirements necessary for the proposed Agency to become a success and to enjoy public**

**confidence. Some of these have already been identified by the Minister of State, Department of the Environment, Mary Harney. These include independence, sufficient powers to carry out its job effectively, transparency in all its decisions, and adequate funding.**

**The Cork Environmental Alliance has examined the bill in detail in relation to a number of specific criteria which we regard as essential. Overall, unless there are significant amendments made to this Bill, we believe that the Agency, as proposed, will not inspire community confidence and public trust in its ability to protect Ireland's environment in the coming years.**

**The Bill is merely a framework for ministerial action in many respects. Fifteen Sections depend on ministerial orders to bring them into effect. Twenty-one further Sections require ministerial regulations to be made. Thus the very commencement of a large portion of the substance of the Bill depends on ministerial action at some unknown future time.**

**In the following submissions we discuss the principal problems which the Cork Environmental Alliance has identified and suggest practical solutions and improvements. These should ensure that the proposed Agency is able to carry out its functions effectively.**

## **CONTENTS**

- 1. 1. INTRODUCTION**
- 2. 2. PHILOSOPHY OF THE BILL**
- 3. 3. FREEDOM OF INFORMATION AND ACCOUNTABILITY**
- 4. 4. INDEPENDENCE**
- 5. 5. BUDGET**
- 6. 6. APPEALS PROCEDURES**
- 7. 7. PROBLEMS WITH 'BATNEEC'**

## **8. 8. ENVIRONMENTAL IMPACT ASSESSMENT**

## **9. 9. POWERS OF THE PROPOSED EPA**

## **2. 2. PHILOSOPHY OF THE BILL**

**The first and most serious criticism which the Cork Environmental Alliance has of the EPA Bill is of the philosophy on which it is based. The Cork Environmental Alliance believes that the primary principle of environmental protection from which all else must follow is *Pollution Prevention* . Under this Bill the Agency is committed to pollution control rather than pollution prevention. It is a tragedy that, as Ireland establishes its own Environment Protection Agency, it should have adopted an already outmoded and increasingly discredited approach.**

**Despite several references to the importance of pollution prevention, the overwhelming emphasis of the Bill is on the regulation, licensing and control of pollution. The functions and procedures laid out for the Agency all bespeak a 'control' philosophy rather than a 'preventative' one. The Bill assumes that significant levels of pollution are inevitable in a developed economy. It sees the role of the EPA as determining levels of pollution which are to be 'acceptable' in Ireland. This is a fundamental flaw.**

**Environmental protection in our view begins at the start of the production process, regardless of whether it is pills, pigs or potable water that is being produced. An EPA needs to focus on eliminating causes of pollution, not just to concentrate on setting limits for emissions to air and water or for amounts of hazardous waste for disposal on land. If it is centrally preoccupied with these 'end-of-pipe' solutions-and this Bill ensures that it will be-it will fail to tackle the root cause of the pollution problem. The EPA will be like a doctor who treats only the symptoms and ignores the causes of the illness.**

**It is now internationally recognised (see the 1988 report of the World Commission on Environment and Development-the *Bruntland***

**Report and the Declaration on the Environment** issued by the EC Environment Ministers in Dublin in June 1990) that only a positive commitment to pollution prevention at source will ensure that economic development is sustainable in the short and long term. The EPA, as proposed in this Bill, cannot give life to such a commitment.

In order to correct this serious weakness in the philosophy of the Bill, the Cork Environmental Alliance *proposes* that Section 4(1) of the Bill be amended to contain a statement of commitment to the following principles:

(a) environmental protection by means of pollution prevention at source rather than by pollution control, in order to ensure the sustainable development of the economy in the immediate and long term;

(b) economic planning shall incorporate the concept of clean production.

If the EPA Bill does not incorporate such a commitment to pollution prevention at source, on a phased basis, the Cork Environmental Alliance considers that the Agency will be so fundamentally flawed as to be incapable of inspiring public confidence in the Agency's ability to protect the environment.

In addition the Cork Environmental Alliance *proposes* that the Bill include a clear statement of its commitment to certain other principles which Section 4(2) should be amended to include:

(c) the intrinsic value of the environment which in its eco-system provides our basic life-support system;

(d) the Precautionary Principle as espoused by the present Government in its own 1990 document *An Environment Action Programme*: 'the principle of precautionary action even where there is no definitive scientific evidence to link emissions or discharges with detrimental environmental effects' (p.2);

(e) the integration of environmental considerations in all policy areas involved in planning and decision-making for the community and the economy (see *An Environment Action Programme* (p.2));

(f) the 'Polluter Pays' principle as set out in Council Recommendation 75/436 EURATOM, ECSC, EEC 3<sup>rd</sup>. March 1975, without the qualification: 'in so far as it is feasible' which we feel should be deleted from Section 51(2) (c);

**(g) there shall be public access *AS OF RIGHT* to *ALL* information relating to environmental matters, whether the information is held by the EPA, public authorities or licencees.**

**It is noteworthy that many of the above provisions were incorporated in the EPA Bill 1989 (*the Shatter Bill*).**

**By committing the Agency to such a set of explicit principles, those who carry out its functions, which in some instances will involve subjective questions of 'balance', will do so with reference to these stated principles against which the decisions may be judged and justified.**

### **3. 3. FREEDOM OF INFORMATION AND ACCOUNTABILITY**

#### **3.1 3.1**

**The Cork Environmental Alliance welcomes the Minister's commitment to the 'transparency' of the proposed Agency. In order to ensure that this 'transparency' is implemented and to make the Agency publicly accountable, the Cork Environmental Alliance *proposes* that the Bill be modified to make all information available to the *public as of right*. For example, as proposed, the Bill does not seem to provide for public access to the inspector's report of an Oral Hearing on a licence (see Section 83).**

**Criteria for confidentiality must be published by the EPA or its agents. In each and every case where the EPA agrees to classify information as confidential, it must automatically refer the grounds for its decision to a consultative committee as may be set up under Section 40. This committee will review the EPA's decision and either ratify it or not. A note of all requests for confidentiality, together with the committee's decisions shall be published in the Annual Report.**

**All documents relating to the activities of the Agency should be available at the offices of the Regional Environmental Units.**

#### **3.2 3.2 Immunity of the Agency**

**On the issue of public accountability the Cork Environmental Alliance notes with concern that Section 15-Immunity of the Agency-grants immunity to the Agency from legal action arising from any failure to perform, or comply with, any of the duties conferred on the Agency.**

**This removes the Agency's legal accountability in the event of negligence on its part as a result of which people are injured, property is damaged or loss caused. This is unlikely to be in accordance with natural or Constitutional justice. The EPA is being entrusted by law with the protection of the environment yet it appears that, if it fails to carry out its legal duty, an injured party cannot sue the Agency. This is unprecedented in Irish law in that public authorities can be and have been sued following negligent planning decisions causing personal injury.**

**The Cork Environmental Alliance *proposes* that Section 15 be deleted.**

### **3.3 3.3 Public Access to the EPA**

**There appears to be little or no provision for the general public or community groups to request the EPA directly to initiate action in a particular area.**

**The Cork Environmental Alliance *proposes* that there should also be available a mechanism whereby the public can themselves ask the EPA to review an existing licence. This provision could be incorporated into Section 85 of the Bill.**

**The Cork Environmental Alliance *proposes* that the public should be allowed to request the Agency to investigate an incident of environmental concern under Section 101 and to receive a copy of the Agency's report on this investigation.**

## **4.INDEPENDENCE**

**4.1 The Cork Environmental Alliance believes that the Environment Protection Agency**

**has to be, independent in order to:**

- (a) (a) Carry out its functions impartially and without pressure whether political or other;**
- (b) (b) obtain the confidence of the community in general.**

Despite claims by the Department of the Environment that the proposed Agency reservations in several areas as set out below.

#### 4.2 Composition of the Section 21 Committee

4.2.1 It is evident from the bill that the directors, in particular the Director general, will play a significant role in the operation of the proposed Agency.

4.2.2 4.2.2 The cork Environmental alliance contends that the existing composition of the 'Section 21 Committee', which will supply the lists from which the Minister will appoint the Directors fails to strike an appropriate balance between interested parties. The Committee is insufficiently representative of these parties. Its choices cannot be independent of Government if three of the six members are government or semi-state employees *i.e.*, the Secretary to the Department of the Environment, the Secretary to the Government and the Managing Director of the IDA.

The Cork Environmental Alliance *proposes* that the 'Section 21 Committee' be expanded to include one representative from at least the following groups: agricultural interests, Bord Failte, Coras Trachtala, fishing interests the Confederation of Irish Industry, the Conference of Major Religious Superiors, Consumers Association of Ireland, the Federation of Irish Chemical Industries and at least two nominees of environmental organisations.

#### 4.2.3 4.2.3 The Re-appointment of the Director General

The Cork Environmental Alliance *proposes* that the Minister must consult the Section 21 Committee if s/he wishes to re-appoint the Director General.

#### 4.3 4.3 Advisory Committee

The Cork Environmental Alliance notes with concern that the minister will decide which organisations in *his/her opinion* are to supply the lists from which between 5 and 7 members of the Advisory Committee will be appointed. The Minister will appoint the remainder of the committee. This entirely contravenes the principle of independence from Government control, which is a stated aim of the Department of the Environment.

The Cork Environmental Alliance *proposes* that in this regard the formula of government Commissions of Inquiry be followed: *i.e.*, that a notice be published in the news papers inviting the public to nominate organisations within the designated categories to the Advisory Committee.

The Cork Environmental Alliance *proposes* that the Minister appoint seven nominees to the Advisory Committee from the designated categories.

#### 4.4 4.4 Financial Matters

4.4.1 Many of the remaining sections of part II of the Bill are valuable in ensuring the independence of the Agency. However, the Cork Environmental Alliance strongly recommends that directors on appointment, and also the members of the Advisory Committee, be required to register publicly a full list of their commercial interests (if any).

4.4.2 4.4.2 The Cork Environmental Alliance agrees with the position where by the Agency is allowed to charge fees for its services. However, the Agency must not be allowed to become dependent on income from 'customers' in order to carry out its functions. Were this to occur it would compromise its regulatory and enforcement function should the strict demarcation between customer and regulated enterprise become blurred. Clear guidelines in relation to both internal and external operations to the Agency should be laid down in relation to financial matters to ensure its independence.

4.4.3 We are please to note that the Agency is required to publish, in its Annual report, details of all gifts accepted by it during the period of the report (Section 47(3)).

However, the Cork Environmental Alliance proposes that any conditions attached by the donor to the acceptance of EPA should be detailed in the Annual Report. We would, of course, presume that the EPA would not accept gifts with inappropriate conditions attach, but this proposal is felt desirable to promote transparency.

## 5.BUDGET

It is self evident that without an adequate