

## Sanctions and Enforcement of Environmental Law: Current Sanctions and New Remedies

### Athsmaoineamh ar Cúiteamh, Smachtbhanna agus Leigheasanna Malartacha

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with research from Luke Filan and Neil Freeman.  
Colm Scott Byrne BL advised on early drafts of this paper.

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Enforcing environmental laws is a challenge to most states. It can be costly to fund Environmental Protection agencies, and to ensure that they have sufficient staff and resources to regulate polluters and entities which breach environmental standards. Therefore, enforcement of the environmental laws is often inadequate. This is not only a matter of funding – although resources are limited – but also result of structural barriers to enforcement, diverse enforcers and a lack of clarity as to which body has responsibility to act to achieve a resolution.

Empowering citizens to act and enforce environmental laws would exponentially increase the power for enforcing. Increasing the citizen's involvement in enforcing environmental law would go to improving and protecting the environment and biodiversity, thereby achieving the environmental goals that the Irish people have set out for themselves and for their children.

There are currently strong sanctions in Irish law for environmental offences. Sanctions exist in:

- Wildlife Act 1976
- Waste Management Act 1996
- Forestry Act 2014
- Forestry Regulations 2017
- European Communities (Birds and Natural Habitats) Regulations 2011
- Planning and Development Act 2000
- Dumping At Sea Act 1996
- Sea Pollution Act 1991

These sanctions which currently should broadly remain in place on adoption of the model law.

The concern, however, is the degree to which they are enforced and who has standing to take the case. In addition, it is now recognised that successful sanctions go beyond simply criminal penalties for offences, and should include administrative penalties, and a wider range of orders, mediated solutions and agreement to take courses of action in the future

This paper provides detail on the sanctions which exist, with context on their enforcement. It makes suggestions for improvement. The suggestions and conclusions links in with the draft Environmental Code which is part of the Symposium, as many of the conclusions reached have been enshrined in the Model Environmental Code.

We now turn to a review of the central sectors of environmental legislation in force at present.

## I. Waste Management

The Waste Management Act 1996 (“the 1996 Act”) prohibits the collection, transport, disposal or recovery of waste in the course of business without either a waste collection permit or waste license.<sup>1</sup> Holders of Waste are also under a general duty not to conduct such activities in a manner likely to cause environmental pollution.<sup>2</sup>

The Act makes it a criminal offence to fail to comply with any provision under the Act constitutes an offence. The penalties for an offence under the 1996 Act are set out in s. 10:

- Summary conviction – Where convicted a person may be liable for a Class A fine, no more than 12 months’ imprisonment or both.
- Conviction on Indictment – Person may be liable for a fine not exceeding €15,000,000, no more than 10 years’ imprisonment or both.

A person guilty of an offence under ss. 16(5), 32(6) (where the offence consists of a contravention of regulations under subs. (4) of that section), 33(8), 34(1)(c), (in so far as the offence consists of contravention of a condition attached), under section 34(7)(d), to a waste collection permit, 34(10A), 34A(13), 38 (7) or under 40(13) shall be liable on summary conviction to a class A fine or to imprisonment for a term not exceeding 12 months, or to both such fine and such imprisonment.

If the contravention in respect of which a person is convicted of an offence under this Act is continued after the conviction, the person shall be guilty of a further offence on every day on which the contravention continues and for each such offence the person shall be liable, on summary conviction, to a fine not exceeding € 1,000 or on conviction on indictment, to a fine not exceeding € 130,000. The Act also provides for the payment of fixed payment notices for certain offences.<sup>3</sup>

Summary proceedings may be brought by the Local Authority, the Environmental Protection Agency (“the EPA”) or any person specified in regulations passed by the Minister, including the minister themselves. The DPP will prosecute for proceedings brought on indictment. The EPA provide updates on prosecutions and penalties that it is involved in.<sup>4</sup>

The Court must have regard for the risk or extent of environmental pollution when making its decision (s. 10(4)).

### Civil Cases

Any person may bring a claim before the court that waste is being held, recovered or disposed of in a manner causing or likely to cause pollution or in contravention of ss. 34 or 39 of the Act (i.e., without a license or in breach of a license).<sup>5</sup> Cases can be heard by the Circuit, District and High Courts. Claims before the District Court must not exceed €15,000, €75,000 in cases before the Circuit Court and may be heard by the High Court in any case.<sup>6</sup> Where the court is

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<sup>1</sup> Waste Management Act 1996, ss. 34 and 39.

<sup>2</sup> Waste Management Act 1996, s. 32.

<sup>3</sup> Fixed payment notice for certain offences relating to producer responsibility, s. 10A, fixed payment notice for certain offences relating to waste collection permit, s. 10B and fixed payment notice for certain offences relating to single use plastic, s. 10C.

<sup>4</sup> <https://www.epa.ie/our-services/compliance--enforcement/whats-happening/prosecutions-and-penalties/>

<sup>5</sup> Waste Management Act 1996, s. 57.

<sup>6</sup> Waste Management Act 1996, s. 58.

satisfied that pollution has occurred, is occurring or is likely to occur or that there has been a contravention of ss. 34 or 39, it may issue an order,

- Requiring the holder to carry out specified measures to prevent, limit or prevent a recurrence of pollution.
- Requiring the holder to cease or refrain from any specified act or omission
- Making such other provision as it considers appropriate, such as the payment of costs.

The court may also order the holder to:

- Discontinue the holding, recovery or disposal of waste.
- To mitigate or remedy any effects of that activity in a specified manner.

To succeed in a claim, the applicant must first demonstrate that there is waste, as defined in the Act and with reference to the EU Waste Catalogue, that said waste is being held, recovered, or disposed of and that the activity is likely to cause environmental pollution.<sup>7</sup>

Pollution is defined as holding, recovery, transport or disposal of waste in a manner endangering human health or risking environmental harm. Once a risk of pollution is established that risk will itself constitute “pollution.”<sup>8</sup>

Any order made is required to be proportionate to the good likely to be achieved in securing compliance. The court must choose the least burdensome option that is still equally effective at achieving the legislative objective.<sup>9</sup> It is a good defence in relation to both a prosecution and civil claim to show that the act complained of was carried out in accordance with a waste or Integrated Pollution Prevention & Control (“IPPC”) licence.<sup>10</sup>

#### Corporate liability

Where a criminal offence is committed by a corporation with the consent of or is attributable to any director, manager, secretary or other similar officer of the body corporate, or a person who was purporting to act in any such capacity, that individual will also be guilty of an offence and punished accordingly.<sup>11</sup>

Civil liability of individual directors under s. 57 and 58 is less clear. Initially the courts deemed it necessary to suspend the law of limited liability to ensure the full application of the polluter pays principle and the achievement of objective of strong environmental protection.<sup>12</sup>

More recently however the High Court ruled that such a fundamental principle cannot be suspended without express statutory authorisation, such as that found in relation to offences under the act.<sup>13</sup> The High Court has since held directors directly involved in the management of a polluting waste activity independently liable for any environmental damage. Such persons can be deemed managers of an activity and thus “waste holders” for the purposes of the act. However, the amendment of the definition of “holder” to now only include producers or

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<sup>7</sup> *Cork County Council v. O’Regan* [2005] IEHC 208, at paras. 19–25.

<sup>8</sup> *Wicklow County Council v. Fenton (No. 2)* [2002] 4 I.R. 44.

<sup>9</sup> *Laois County Council v. Scully* [2006] IEHC 2, at para. 11.

<sup>10</sup> Waste Management Act 1996, s. 32(6)(b).

<sup>11</sup> Waste Management Act 1996, s. 9.

<sup>12</sup> *Wicklow County Council v. Fenton (No. 2)* [2002] 4 I.R. 44.

<sup>13</sup> *Environmental Protection Agency v. Neiphin* [2011] IEHC 67, at paras 39-42.

possessors may require a more personal connection to impose liability.<sup>14</sup> Either way, those directors not directly involved in but who profit from polluting activities are placed beyond the reach of the law. This leaves the community with the cost of pollution, violating the polluter pays principle.

#### Local Authorities

In general, local authorities are responsible for the supervision and enforcement of the Act within their functional area. They may issue notices requiring specific action to prevent or limit pollution or take such action themselves. Such powers are also granted to the EPA. Local authorities are also responsible for the granting of waste collection permits while the EPA is responsible for the granting of Waste Licenses.

#### EU Waste Framework Directive

Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (“the EU Waste Directive”) defines waste producer and holder, which are repeated in the Irish Legislation. It also sets out a clear waste hierarchy for waste management with prevention and re-use at the top and disposal at the bottom.

Something not contained in the 1996 Act is the definition of “end of waste criteria.” EU law requires that the material, having been treated, meet certain criteria,

- Substance used for specific purposes
- Demand exists for the substance, or it responds to some market
- Fulfils the technical requirements for some specific purpose and complies with relevant legislation
- Substance’s use will not have an overall harmful effect on health/environment.

It is the responsibility of the person who uses the substance for the first time, before it is put on the market, or the person who places the substance on the market, to ensure the criteria are met.

Waste Management must be carried out in accordance with the polluter pays principle. This means all costs including infrastructure must be borne by the original producer or waste holder.<sup>15</sup> All management must also be carried out without endangering public health or the environment, causing any nuisance or adversely affecting the countryside or places of special interest.<sup>16</sup>

Specific recycling targets are set out with the aim being to transition to a circular economy. Member States are required to ensure that 50% of all municipal waste is being recycled by 2020, with goal being to hit 65% by 2035.

The directive also sets out an optional Extended Producer Responsibility (“EPR”).<sup>17</sup> This allows Member States to take steps to ensure anyone professionally involved in waste management is held responsible for their actions. Examples of measures include those designed to encourage designing products so as to reduce the amount of waste generated by each unit. EPR measures must ensure that producers cover the cost of:

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<sup>14</sup> *South Dublin County Council v. Ken Fennell (Liquidator)* [2011] IEHC 350.

<sup>15</sup> The EU Waste Directive, Article 14.

<sup>16</sup> The EU Waste Directive, Article 15.

<sup>17</sup> The EU Waste Directive, Article 8.

- Separate collection, transport and treatment and other costs necessary to meet management targets or other targets and objectives
- Providing adequate information to waste holders
- Data gathering and reporting<sup>18</sup>

## II. Habitat, Wildlife and Hedge Cutting & Vegetation

The protection of wildlife in Ireland is governed by the Wildlife Act 1976. This Act creates a number of offences. It is an offence under the Wildlife Act to:

- Contravene any provision of the Act by act or omission
- To attempt, aid, abet, counsel or procure the commission of any contravention
- To provide false information knowingly or recklessly, when requested by Gardaí/Authorised persons and when seeking a license or renewal
- To contravene any condition of a license
- To allow the use of a vehicle to aid in the commission of an offence.<sup>19</sup>

Offences can be prosecuted summarily by the Minister, a member of the Gardaí or any other person who prosecutes with the consent of the minister or has been nominated for that purpose. Proceedings must be brought within 1 year of the offence.<sup>20</sup> The prosecution are not required to negate the existence of a hunting license or prove that the offence was consequent upon some lawful act.<sup>21</sup>

Penalties/Enforcement:

There are 5 main categories of penalty/offence,<sup>22</sup>

- General, non-specified offences which will be subject to a Class A fine on summary conviction
- Offences relating to hunting with firearms without a license, use of specified weapons on certain animals, the use of traps on protected animals without a license and the use of lamps/dazzling devices without a license
  - Summary conviction carries a potential penalty of a class A fine, up to 6 months' imprisonment or both.
  - Conviction on indictment carries a potential penalty of up to €100,000 fine, up to 2 years' imprisonment or both

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<sup>18</sup> The EU Waste Directive, Article 8a.

<sup>19</sup> Wildlife Act 1976, s. 69

<sup>20</sup> Wildlife Act 1976, s. 70

<sup>21</sup> Wildlife Act 1976, s. 71

<sup>22</sup> Wildlife Act 1976, s. 74



- “Part II Offences”<sup>23</sup>, the carrying on of a wildlife dealing business without or in contravention of a license and certain other requirements, hunting fauna on the territorial sea without the Minister’s permission
  - Such offences must relate to 4<sup>th</sup> Schedule Fauna, CITES Species or other species specified by the Minister
  - Summary Conviction carries a potential penalty of a class A fine, up to 6 months’ imprisonment or both.
  - Conviction on indictment carries a potential penalty of up to €100,000 fine, up to 2 years’ imprisonment or both.
- Carrying out of works damaging a natural heritage area without the consent of the minister, failure to comply with a restoration order in relation to such damaging works and acting as a commercial shoot operator without a license, breaching said license or making false statements to procure such a license.
  - Summary Conviction carries the penalty of a class A fine
  - Conviction on indictment carries a penalty of €100,000
- Anyone who assaults an authorised person
  - Summary Conviction – Class A Fine, 6 months’ imprisonment or both
  - Indictment – Fine (unspecified), no more than 5 years’ imprisonment or both.

Powers of Gardai/Authorised persons:

Where there are reasonable grounds for believing a person has committed an offence the Garda/Authorised person may,

- Stop and search the person
- Require them to give their name and address or any other information necessary to carry out their function
- Require the suspected person to desist from the activity
- Arrest without warrant or cause the arrest of a person who
  - Continues or recommences the offence
  - Fails to provide their name, address or any information or any other relevant information
  - Gives false/misleading information, including a false name or address.

Such persons may also seek a search warrant from the District Court. Where granted any thing or document relevant to the prosecution of an offence may be seized. Authorised persons must be accompanied by a Garda.<sup>24</sup>

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<sup>23</sup> Specified below

<sup>24</sup> Wildlife Act 1976, s. 73



Gardaí and authorised persons are also empowered to issue fixed payment notices in relation to fixed payment offences. Fines must not be more than €500 and must be paid within 21 days. Where the penalty is paid a prosecution in respect of the alleged offence will not be instituted.<sup>25</sup>

#### Powers of the courts

As stated above they may issue search warrants where satisfied that there are reasonable grounds for suspecting that an offence is being committed. The courts may also revoke a firearm certificate where the holder is convicted of a “Part II Offence” and disqualify them from holding such a license for as long as the court deems appropriate. This is additional to any other punishment handed down for the offence.<sup>26</sup> The court may at its discretion, and on application of the minister or person instituting criminal proceedings order the forfeiture of:

- Any fauna, flora, fossil or any part or derivative of such a specimen
- Any firearm, trap, snare, net, etc.
- Any mechanically propelled vehicle
- Seized by the Gardai or Authorised person under reasonable suspicion of having been used in the commission of an offence.

The court may order forfeiture once satisfied an offence has been committed but this does not require that anyone be convicted of an offence.

Forfeiture orders may be made by:

- The District Court where the value of the item does not exceed €15,000
- The Circuit Court where the value does not exceed €75,000
- The High Court in any case.

Forfeiture applications are to be brought in a summary manner.

#### Part II Offences

Part II of the Act deals with the protection of wild birds, flora and fauna and their habitats. The Act prohibits any damage to Wild Birds, other than those listed in the Third Schedule, and animals referred to in s. 23. It shall be an offence to:

- Hunt a protected species other than in accordance with a license and the time period specified in that permission<sup>27</sup>
- To injure outside of hunting<sup>28</sup>
- To remove eggs or nests without permission<sup>29</sup>
- To wilfully destroy or disturb nests, breeding or resting places<sup>30</sup>

There are exceptions:

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<sup>25</sup> Wildlife Act 1976, s. 74A.

<sup>26</sup> Wildlife Act 1976, s. 75.

<sup>27</sup> Wildlife Act 1976, s. 22(4)(a)(i) and 23(5)(a-b).

<sup>28</sup> Wildlife Act 1976, s. 22(4)(b) and 23(5)(c).

<sup>29</sup> Wildlife Act 1976, s. 22(4)(c).

<sup>30</sup> Wildlife Act 1976, s. 22(4)(d-e) and 23(5)(d).

- Unintentional damage done while engaged in agriculture
- Unintentional damage done during road construction, archaeology or other work as may be prescribed.
- Capture of an injured specimen for the purposes of tending to it or humane killing
- Taking and killing of hares at regulated coursing matches or hunting hares with packs of beagles with permission
- Disturbing a bird while engaged in ornithology

However, it is not for the prosecution to prove that such exceptions do not apply but for the defendant to demonstrate that they were engaged in an exempted activity.<sup>31</sup> Prosecution proceedings may be brought before any District Court.<sup>32</sup>

In relation to flora the Minister may declare species protected throughout the state or a particular area of the state, where he considers that a species should be protected making it an offence to

- Cut, pick or otherwise damage any specimen or part of such a specimen or any species listed in the Habitats Directive Annex IV(B)
- Purchase, sell, transport, keep for sale, offer for sale or be in possession of
- Wilfully alter, damage or interfere with the habitat of that species.

Licenses may be granted by the Minister for hunting, educational or other specified purposes.

#### Hedge Cutting

Under the Wildlife Act 1976 it is an offence to cut, grub, burn or otherwise destroy any vegetation on uncultivated land between 1 March and 31 August.<sup>33</sup> Exceptions are listed under section 40 and include:

- Destruction in the ordinary course of agriculture
- Cutting of isolated bushes in the ordinary course of agriculture
- Clearance in the course of Public Health and Safety Works carried out by the minister or another regulated body
- Clearance in the course of road or other construction works.

On summary conviction, a potential penalty may be imposed of a class A fine, no more than 6 months' imprisonment or both. In the case of conviction on indictment, there is a potential €100,000 fine, no more than 2 years' imprisonment or both.<sup>34</sup>

#### European Communities (Birds and Natural Habitats) Regulations 2011

The European Communities (Birds and Natural Habitats) Regulations 2011 creates a number of offences which protect birds and their natural habitats. They are set out under Regulation 67 with offences are split into 2 categories. Only the second category may lead to an indictment. The potential penalties are similar to those provided for under the Wildlife Act. On summary conviction, there is a potential penalty of a class A fine, up to 6 months' imprisonment, or both.

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<sup>31</sup> Wildlife Act 1976, s. 22(7) and 23(8).

<sup>32</sup> Wildlife Act 1976, s. 22(8) and s. 28(9).

<sup>33</sup> Wildlife Act 1976, s. 40

<sup>34</sup> Wildlife Act 1976, s. 74(3)

In the case of conviction on indictment, there is a potential penalty of €100,000 fine, 3 years' imprisonment or both. The indictable offences under the Regulations include:

- Failure to comply with a ministerial direction not to carry out a damaging activity
- Failure to comply with a direction to carry out restorative work on a damaged site
- Carrying out an activity without ministerial consent or in breach of its conditions
- Removal or placing in a vehicle for removal, any resources obtained via an unlawful activity
- Offences relating to protected species
- Introduction/dispersal of species not normally resident in an area save in accordance with a license
- Breaching a license<sup>35</sup>

Anyone who incites, directs, procures, permits or assists in the carrying out of an offence is themselves guilty of an offence.<sup>36</sup> Similarly, where a corporation commits an offence with the consent of/which is attributable to any director, manager etc. that individual may be held liable and prosecuted and punished accordingly.<sup>37</sup>

Summary offences under the Regulations may be prosecuted by a number of different bodies. These are:

- The Minister or other Minister of Government
- Minister's officer or other person nominated for the purpose
- Member of an Garda Síochána
- Any public authority. The Regulations lists 27 potential authorities.<sup>38</sup>

The Minister is given a number of powers under the Regulations. The Minister can order either both the cessation of activities likely to cause damage to a European Site and to order that any site damaged by some activity be restored.<sup>39</sup> As stated, failure to comply in both cases constitutes an indictable offence. The Minister also has the power to seek injunctions where they believe an activity, alone or in combination with others, may damage a European Site. Requirements can range from cessation of an activity to elimination or reduction of any adverse effects. Injunctions may be sought from the Circuit or High Court who may make interim orders as they deem necessary to uphold the directives/coherence of Natura 2000.<sup>40</sup>

In relation to injunctions the courts have gone as far to say that the minister is obliged to seek injunctive relief where:

- The site concerned has been designated as an SCI/SPA/SAC

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<sup>35</sup> European Communities (Birds and Natural Habitats) Regulations 2011, reg. 67(2).

<sup>36</sup> European Communities (Birds and Natural Habitats) Regulations 2011, reg. 65.

<sup>37</sup> European Communities (Birds and Natural Habitats) Regulations 2011, reg. 66.

<sup>38</sup> European Communities (Birds and Natural Habitats) Regulations 2011, reg. 69.

<sup>39</sup> European Communities (Birds and Natural Habitats) Regulations 2011, regs. 28, 29 & 36.

<sup>40</sup> European Communities (Birds and Natural Habitats) Regulations 2011, reg. 38.

- And the activity has the potential to adversely affect the sight.<sup>41</sup>

These powers can be delegated to any public authority or other person to ensure the Directives are effectively implemented.

#### Potential Issues

The first potential issue, particularly with the wildlife protection measures and hedge cutting provisions, is the exception for any damage caused in the ordinary course of agriculture. These exceptions appear to grant farmers a “get out of jail free card” without placing any obligation on them to avoid damage to the greatest extent possible.

The second issue that has been highlighted in Dáil Debates and the media is the lack of prosecutions under the Wildlife Act in recent years. Between 1977 and 1987 there were 75 prosecutions per year.<sup>42</sup> That has since dropped with only 164 prosecutions being brought in the last 8 years.<sup>43</sup> This is despite wildlife crime being one of the largest criminal activities in the world and instances of deliberate interference, particularly poisoning of birds of prey and capture of badgers, being on the rise.<sup>44</sup> In one incident 23 buzzards were found poisoned in West Cork despite the bird being protected under the Wildlife Act. Prosecutions are difficult to take due to lack of evidence.

The need for an overhaul of sanctions for environmental crime has been seen in Scotland, which has recently completed an in-depth study on sentencing for environmental wildlife crime. As a result a specialist Wildlife and Environmental Crime Unit was established by the *Animals and Wildlife (Penalties, Protection and Powers) (Scotland) Act* in July 2020. The Scottish Parliament explained the need for the new legislation as follows;

*“Why the Bill was created*

*In recent years there have been some extreme animal cruelty cases which have caused public upset. The public support the courts having more options to make the punishment fit the crime.*

*Fixed penalty notices can deal with minor animal welfare offences. These are quicker and less costly to administer than going to court. This could also be a deterrent against committing these crimes.*

*Sometimes animal inspectors/constables need to remove an animal to protect their welfare. They will not need court permission to remove an animal. This avoids delays which could affect the welfare of these animals.*

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<sup>41</sup> *Minister for Arts, Heritage, the Gaeltacht and the Islands v. Kennedy, Kennedy and Kennedy* [2002] 2 ILRM 94;

<sup>42</sup> Dáil Debate – 6 October 2020 [https://www.oireachtas.ie/en/debates/question/2020-10-06/77/#pq-answers-77\\_378](https://www.oireachtas.ie/en/debates/question/2020-10-06/77/#pq-answers-77_378)

<sup>43</sup> Ray Ryan, “Wildlife crime unit being examined as record number of protected birds of prey killed last year,” *Irish Examiner* 19<sup>th</sup> Oct 2020, <https://www.irishexaminer.com/farming/arid-40066109.html>

<sup>44</sup> Mark Hilliard, “Gardai to train park rangers in effort to tackle wildlife crime,” *Irish Times* Jan 19<sup>th</sup> 2021, <https://www.irishtimes.com/news/environment/garda%C3%AD-to-train-park-rangers-in-effort-to-tackle-wildlife-crime-1.4461554>

*Anyone who injures a service animal will be accountable for their actions. This follows a campaign called Finn's Law.*"<sup>45</sup>

Scottish Natural Heritage has also developed impact statement guidance for staff and there has been systematic training for SNH officers in giving expert evidence. The Scottish Sentencing Council has begun work on an Environmental and Wildlife Crime Sentencing Guidelines.

Section 19(9) of the Wildlife Act allows for potentially damaging works to be carried out on Natural Heritage sites where ministerial consent has been sought but not replied to within 6 months. It seems strange not to require express consent in all cases to ensure the potential impact of every project is subject to some form of scrutiny.

Connected to that, section 74(4) offences carry no potential prison sentence. This is despite the fact that such offences could cause significant damage to habitats and animal populations, potentially more so than more direct offences such as hunting without a license, or direct damage to a plant species, which can lead to imprisonment. It is notable that similar offences relating to European Sites are indictable offences under the Regulations, but Natural Heritage sites are not so protected under the Act.

Finally, there is the issue of the ability of concerned groups to challenge licenses whose conditions appear contrary to the aims of the Directives. In *Hosey v. Minister for the Environment, Heritage and Local*, where the granting of the Minister of a licence to hunt wild birds was challenged by way of judicial review by the applicants, an unincorporated association, the Minister argued that the association did not have locus standii. The Court ruled that any applicant not directly affected must show,

- It is unlikely that a responsible challenger would emerge if standing was denied
- The allegations establish a clear breach of an important duty or a significant default by a public body.

The Court was of the view that the challenge to the granting of the licence should to be brought by a more directly interested individual owning property rights/sporting rights etc. stating that there was 'every likelihood' that such a challenger would come forward if it apprehended that the Minister was acting ultra vires. The court did however also point to doubts surrounding the *bona fide* nature of the action which undoubtedly influenced the refusal to grant standing.<sup>46</sup> This case demonstrates the barrier caused by restrictive locus standii rules.

### III. Forestry and Tree Preservation

#### Statistics

It is estimated that forests once covered 80% of Ireland's land surface. Forest coverage in 2017 stood at 11%.<sup>47</sup>

- This is however a marked improvement from 1973, when coverage stood at 5.9%
- The statistic applies to both state- and privately-owned forests

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<sup>45</sup> <https://beta.parliament.scot/bills/animals-and--wildlife-penalties-protections-and-powers-Scotland-bill>, accessed 26<sup>th</sup> October 2020

<sup>46</sup> *Hosey v. Minister for the Environment, Heritage and Local Government* [2010] IEHC 61.

<sup>47</sup> Department of Agriculture Food and the Marine, Forest Statistics Ireland 2020, July 2020, p. 6

- State – 81,958 ha to 378,663 ha between 1973 and 2017
- Private – 242,056 ha to 391,357 ha

The majority of forests (50.8%) are owned by the state. Private grant aided forests make up 34.8% with the remainder being privately owned but not grant aided.<sup>48</sup> Non-forest hedgerows, scrub and woodlands coverage has differing estimates.<sup>49</sup>

- Teagasc’s 2011 estimate placed coverage at 6.4%
- The third National Forest Inventory in 2017 estimated 4.9%

Agri-Environmental Schemes have had a definite impact since their introduction in 1994.<sup>50</sup>

- 6,605 km of new hedgerows
- 3,785,398 newly planted trees

It is worth mentioning however that Sitka Spruce, makes up 51.1% of the total forest area,<sup>51</sup> and made up 77% of the grant aided afforestation in 2019.<sup>52</sup>

Ireland is however, still far below the both the EU, 33.5%, and global, 30.6%, rates of forest coverage. Ireland has the 2<sup>nd</sup> lowest rate of coverage in the EU, higher only than Malta, and closely followed by the Netherlands. We do however have one of the highest forest expansion rates in the EU, though given our extremely low rate of coverage that may not mean much.<sup>53</sup>

#### Forestry Act 2014

The Forestry Act 2014 governs forestry in Ireland. The Act makes it an offence to fell/remove trees without a license issued by the minister or in contravention of the conditions set out in such a license. Those found guilty of an offence are liable for:

- Summary Conviction – Fine not exceeding €200 per tree, up to a max of €5,000, no more than 6 months’ imprisonment or both
- Indictment – Fine not exceeding €1,000,000, no more than 5 years’ imprisonment or both.<sup>54</sup>

Licenses are self-contained documents. In determining their remit, only the terms and conditions of the license are relevant. They do not need to be read in conjunction with any application or harvesting plan. The conditions of a license, such as the permitted area, are also strict and apply to the interpretation of any other conditions set out by the minister.<sup>55</sup>

#### Ministerial Powers/Orders

The Act gives the Minister for Agriculture, Food and the Marine (“the Minister”) a number of powers. The Minister may issue a preservation order prohibiting the felling/removal of any tree or trees. Any person who contravenes such an order is liable on summary conviction to a Class

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<sup>48</sup> *ibid* p. 9

<sup>49</sup> *Ibid* p. 11

<sup>50</sup> *ibid* p. 12

<sup>51</sup> *ibid* 10

<sup>52</sup> *ibid* 20

<sup>53</sup> *ibid* 80-83

<sup>54</sup> Forestry Act 2014, s. 7

<sup>55</sup> *Minister for Agriculture, Food and the Marine v. Kehoe* [2017] IEDC 29, at paras. 38-40.



A fine, up to 6 months' imprisonment or both.<sup>56</sup> Such orders can apply to any tree, including exempted trees which include:

- Any tree
  - In an urban area
  - Within 30 m of a building, excluding buildings built after the tree was planted
  - Any tree required to be moved in the opinion of the minister
  - Purely decorative trees, in the opinion of the minister
  - Removed by a public authority in the performance of a statutory function
  - Considered by the planning authority to be dangerous due to age, condition or location, etc.<sup>57</sup>

Where trees have been:

- Felled without a license
- Felled under a license which was contravened either at the time or subsequently
- Seriously damaged, in the opinion of the minister

The Minister may issue a **Replanting Order** to the landowner requiring replanting of the damaged trees or fulfilment of any conditions attached to a license. Failure to comply is an offence leaving the landowner liable to a fine for every 30 days that the failure continues.<sup>58</sup>

- Summary – Class D Fine (€1,000 at the time of writing)
- Indictment – Fine not exceeding €5000

Continued failure to comply following a conviction can lead to a daily fine:

- Summary – Class E fine (€500 at the time of writing)
- Indictment – Fine not exceeding €2500

Once a replanting order has been issued the minister may register that order as a burden on the land, or as a deed in the case of unregistered land.<sup>59</sup> The Minister may also order the removal of any vegetation, presenting a risk of fire, or vermin where they are satisfied that the trees are at significant risk of being damaged. The landowner may be served with a notice of the danger and directed that it be removed or destroyed.<sup>60</sup> Vermin need only be destroyed as far as is reasonably possible.<sup>61</sup>

Vermin is defined as including:

- Squirrels, other than red squirrels
- Wild or feral animals not protected by the Wildlife Act.

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<sup>56</sup> Forestry Act 2014, s. 20

<sup>57</sup> Forestry Act 2014, s. 19.

<sup>58</sup> Forestry Act 2014, s. 26.

<sup>59</sup> Forestry Act 2014, s. 21.

<sup>60</sup> Forestry Act 2014, ss. 14 and 15.

<sup>61</sup> Forestry Act 2014, s. 15.



- Must take the list of protected species under the Wildlife Act and Habitats Regulations into account.<sup>62</sup>

Other licenses are also required for:

- Afforestation
- Forest road works
- Aerial fertilisation<sup>63</sup>

These licenses are granted by the Minister who may vary/add any conditions as they see fit as well as having the power to suspend or revoke any license.<sup>64</sup> Engaging in or permitting any of these activities without a license is also an offence, though the sanctions are not as tough.

- Summary conviction – Class A fine, up to 6 months’ imprisonment or both
- Conviction on indictment – Fine not exceeding €500,000, up to 5 years’ imprisonment or both

#### Authorised Officers

The Minister may appoint those they think appropriate to be Authorised Officers. Gardai are also considered authorised officers for the purposes of the Act.<sup>65</sup> Officers are granted a broad range of powers to enable them to combat illegal deforestation and other harmful activities. They are entitled to enter the premises for the purposes of inspection and can conduct inquiries relating to,

- Any tree or thing related to trees
- Any timber or timber products
- Any activity at that property
- Any records relating to the above.

They may also seize property and seek access to records, computers or any information reasonably required for the purposes of the investigation. A warrant from the District Court or the consent of the landowner are required in order to enter the premises.<sup>66</sup>

#### Other offences and penalties

The Act also creates a number of other miscellaneous offences. These include:

- Providing false information/misleading statements when applying for a license
- Failure to comply with a notice/direction
- Contravention of regulations passed under the act
- Obstruction of an authorised person
- Forgery of a license

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<sup>62</sup> Forestry Act 2014, s. 15(5).

<sup>63</sup> Forestry Act 2014, s. 6.

<sup>64</sup> Forestry Act 2014, s. 7.

<sup>65</sup> Forestry Act 2014, s. 23.

<sup>66</sup> Forestry Act 2014, s. 24.

Where convicted a person can be liable for:

- Summary – Class A fine, max of 6 months’ imprisonment or both.
- Indictment – €25,000 fine, 2 years’ imprisonment or both<sup>67</sup>

More serious punishments exist for those found guilty of

- Causing/permitting any act calculated to cause irreparable damage, death or decay to a tree without the permission of the minister
- Intentionally/recklessly setting fire to a tree

A person convicted may be liable for:

- On summary conviction – €200 fine per tree not exceeding a max of €5000, up to 6 months’ imprisonment or both
- On conviction on indictment – €1,000,000 fine, up to 5 years’ imprisonment or both.<sup>68</sup>

Where a person is convicted of any of the above offences the court may also order the forfeiture of any equipment used in the offence and any timber or trees resulting from it. Summary prosecutions may be brought by the Minister.<sup>69</sup> Where a corporation commits an offence with the consent of/attributable to a director, manager or other officer that individual can be punished as if they had committed the offence themselves.<sup>70</sup>

#### Forestry Regulations 2017

The purpose of these Regulations is to provide detailed rules for the control of forestry activities in the areas of felling, afforestation, forest road works and aerial fertilisation of forests as provided for in the Forestry Act 2014. The Regulations also give further effect to the European Directives relating to Environmental Impact Assessment. The Regulations creates two new penal provisions.<sup>71</sup> The carrying out of aerial fertilisation is prohibited between 1 September and 31 March, though the minister may grant a license to do so in exceptional circumstances. The regulations also prohibit:

- The carrying out of aerial fertilisation, (unless the landowner consents in writing)
  - 100 meters from a water source intended for human consumption
  - 50 meters of an aquatic zone
  - 60 meters of a dwelling house
  - 30 meters of non-forested land
- Prohibited in all cases within
  - 60 meters of a European site, (can be authorised with the written permission of the Minister for arts, heritage, regional, rural and Gaeltacht affairs)
  - 15 meters of a road

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<sup>67</sup> Forestry Act 2014, s. 27.

<sup>68</sup> Forestry Act 2014, s. 27(13).

<sup>69</sup> Forestry Act 2014, s. 28.

<sup>70</sup> Forestry Act 2014, s. 29

<sup>71</sup> Forestry Regulations 2017, S.I. No. 191 of 2017, reg. 22.

- 20 meters of a monument recorded under the National Monuments act<sup>72</sup>

Those carrying out licensed felling must put up notices of the activity. This Notice must,

- Be legible and durable
- Be maintained for as long as work continues or as long as specified by the minister
- Contain the license number and where further information on the license can be obtained
- Be removed and replaced if it becomes illegible.

The Minister may also require that changes be made or more notices be put up where they consider notice to be inadequate.<sup>73</sup>

Another noteworthy addition is the requirement placed on the Minister to carry out Environmental Impact Assessments (“EIAs”) wherever an afforestation or forest road works project is likely to have a significant effect on the environment by virtue of their nature, size or location.<sup>74</sup> EIAs must be carried out before a license is issued.

The decision on licensing can also then be challenged in the High Court by anyone who:

- Has sufficient interest in the matter -sufficient interest is not limited to interest in land or a financial interest.
- Is a consultation body
- Is a body or organisation, other than a govt body, whose aims and objectives related to the promotion of environmental protection, that has pursued those objectives in the last 12 months.<sup>75</sup>

Appropriate Assessments are also required where there is a risk that an activity could significantly affect the integrity of an SAC or SPA, as set out in the Habitats and Birds Directives. The license cannot be issued unless it is demonstrated that the activity will not have such an affect.

#### Tree Protection Orders

The Planning and Development Act 2000 also has a significant role in the protection of trees. The Planning Authority is given the power to, where it deems it expedient in the interest of some amenity or the environment, make provision for the protection of a tree/group of trees/woodland. Such an order may prohibit the cutting, topping or wilful destruction of the tree(s). The landowner may also be required to enter into an agreement with the authority to ensure proper management with the authority’s assistance. Again, orders can include replanting.<sup>76</sup> It is an offence to violate such a protection order and any person found guilty of such an offence shall be liable to:

- Summary Conviction – Fine not exceeding €5000, no more than 6 months’ imprisonment or both.

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<sup>72</sup> Forestry Regulations 2017, S.I. No. 191 of 2017, reg. 8.

<sup>73</sup> Forestry Regulations 2017, S.I. No. 191 of 2017, reg. 4.

<sup>74</sup> Forestry Regulations 2017, S.I. No. 191 of 2017, reg. 13.

<sup>75</sup> Forestry Regulations 2017, S.I. No. 191 of 2017, reg. 17.

<sup>76</sup> Planning and Development Act 2000, s. 205.

- Indictment – Fine not exceeding £10,000,000, up to 2 years’ imprisonment or both.<sup>77</sup>

Summary proceedings may be brought by any planning authority whether or not the offence took place within its functional area. Proceedings must either be brought within 6 months of the date of the offence or within 6 months of the date on which the prosecutor believed they had sufficient evidence to justify bringing proceedings.<sup>78</sup>

Local authorities are required to set out conservation objectives relating to amenities in their local development plans. This includes, according to guidelines issued in 1986, the mapping and listing of trees of interest. Landowners should be informed and Tree Preservation Orders (“TPO”) made in appropriate cases, based on the trees’ amenity importance and the risk of damage.<sup>79</sup> Where a TPO is issued prior to a felling license under the 2014 Act, the felling cannot take place without the local authority’s consent. Likewise, where planning permission is issued, a felling license is still required.<sup>80</sup>

#### IV. Planning And Unauthorised Development

The Planning and Development Act 2000 governs planning law in Ireland. Section 160 of the Planning and Development Act 2000 gives the court jurisdiction to order a person “to do or not to do, or to cease to do” anything they feel is necessary to prevent an unauthorised development taking place.<sup>81</sup> The provision is found in Part VIII of the Act and is part of a group of enforcement measures enacted to ensure that the “environmental and ecological” rights of the public are preserved, and the “integrity” of the planning system is maintained.<sup>82</sup>

Upon receiving an application under s. 160, the Court is given a wide discretion to do what is required to ensure that the unlawful development is prevented, and the land is restored to the state it was in prior.<sup>83</sup> In certain instances, this includes demolishing the unauthorised structure where there has been gross infraction of planning laws<sup>84</sup> or where the rights of a neighbouring party are dramatically impacted<sup>85</sup>, for example.

##### Planning Injunctions - What are the sanctions?

A person who is subject to planning injunction will be required to do whatever is necessary to (a) ensure the unauthorised development is not carried out or continued and (b) that the land is restored to its condition prior to the commencement of any unauthorised development. Subject to new amendments, the Court can order whatever is necessary to ensure that the development is carried out in conformity with the permission pertaining to that development or conditions to which the permission is subject. Per s. 160(2), this can include an order for the carrying out of any works, including the restoration, reconstruction, removal, demolition or alteration of any structure or other feature. The nature of the Court’s order will depend on a range of discretionary factors.

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<sup>77</sup> Planning and Development Act 2000, s. 156.

<sup>78</sup> Planning and Development Act 2000, s. 157

<sup>79</sup> Department of Agriculture, Food and the Marine, “Felling and Reforestation Policy,” p. 42

<sup>80</sup> *Ibid.*

<sup>81</sup> Planning and Development Act 2000, s. 160(1).

<sup>82</sup> *Meath County Council v. Murray* [2017] IESC 25, at para. 75.

<sup>83</sup> P & D Act 2000 (n1), s.160(1)

<sup>84</sup> *Meath County Council v. Murray* [2010] IEHC 254, at para. 44.

<sup>85</sup> *Morris v. Garvey* [1983] I.R. 319, at p. 313

Who can enforce?

Per s. 160(1) of the Act, anyone can seek an injunction against an unauthorised development regardless of their interest in the land.<sup>86</sup> There is no standing requirement. However, that being said, the Court are naturally aware of the potential for vexatious litigants and as such, they retain a discretion that may take into account the circumstances in which the application is made.<sup>87</sup> Moreover, the Court will attach more weight to the conduct of the local planning authority as they are seen as the “watchdogs” of planning law. Thus, their attitude toward the development may be given more weight in certain instances.

Required proofs

In applications for an injunction under s. 160, it is the applicant that must show that the “use of the land by the Respondent is unauthorised”<sup>88</sup> given the potential impact on the property rights of the respondent. An application for an injunction under s. 160 must first satisfy the “formal requirements”,<sup>89</sup> namely that the application is within the appropriate timeframe for bringing such an application and the development is unauthorised.

An unauthorised development is one which involves the “carrying out of any unauthorised works (including the construction, erection or making of any unauthorised structure) or the making of any unauthorised use.”<sup>90</sup> An “unauthorised use” means, ‘in relation to land, use commenced on or after 1 October 1964, being a use which is a material change in use of any structure or other land and being development other than’ exempted development or a use that is subject to planning permission.<sup>91</sup> As Simons notes, establishing an unauthorised use is more difficult than establishing an unauthorised development. The person bringing the application must be able to demonstrate a contrast between how the land had been used, and how it is being used currently. In some cases, this may be obvious like an increase in noise. However, in other situations the change may be to the character of the development. However, this change may nonetheless be material. It is on the applicant to demonstrate this change.

As for the timeframe, an application cannot be made after 7 years from the date that the development commenced where no planning permission had been granted, or in the case of developments that are the subject of a permission, up to 7 years after the expiration of the relevant planning permission.<sup>92</sup> In respect of unauthorised quarry and peat extraction developments, the *Environment (Miscellaneous Provisions) Act 2011* amended s. 160 so that no time limit applies where the applicant is seeking only to halt this unauthorised developments.

While in general, the burden of proving that the development is unauthorised falls on the plaintiff, exceptions do arise. For example, where the respondent seeks to rely on section 4 of the PDA (exempted development provision) or the exempted development provisions in the 2001 Regulations in order to defend the existence of their unauthorised development the onus of proof falls upon the defendant to show that the development is exempt.<sup>93</sup> Similarly, per Hogan J in *Wicklow County Council v. Fortune (No 1)* [2012] IEHC 406, it falls upon the

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<sup>86</sup> PDA 2000, s. 160(1)

<sup>87</sup> Simons, “Planning Injunctions: Section 160” (2004), 2 Irish Judicial Studies Journal 199, at p. 203.

<sup>88</sup> *Pierson and Others v. Keegan Quarries Ltd* [2010] IEHC 404 at 25

<sup>89</sup> *Meath County Council v. Murray* [2018] 1 I.R. 189 at [85]

<sup>90</sup> PDA 2000, s. 2(1).

<sup>91</sup> PDA 2000, s. 2(1).

<sup>92</sup> PDA 2000, s. 160(6)(a)

<sup>93</sup> *South Dublin County Council v. Fallowvale Ltd* [2005] IEHC 408, at para. 70

respondent to establish that the development is outside of the time limits for bringing an injunction under section 160.<sup>94</sup>

Once the applicant discharges the onus of proof, it will then fall to the court's discretion what order should be made.<sup>95</sup> This is a statutory discretion, not an equitable one. The court must exercise their discretion in a manner that is consistent with the State's view of unauthorised development as one that is a criminal offence in Irish law. In *Meath County Council v. Murray* [2018] 1 I.R. 189, McKechnie J. listed the factors that fell to be considered when the Court was exercising their discretion:

- (i) the nature of the breach: ranging from minor, technical, and inconsequential up to material, significant and gross;
- (ii) the conduct of the infringer: his attitude to planning control and his engagement or lack thereof with that process:
  - acting in good faith, whilst important, will not necessarily excuse him from a s. 160 order;
  - acting mala fides may presumptively subject him to such an order;
- (iii) the reason for the infringement: this may range from general mistake, through to indifference, and up to culpable disregard;
- (iv) the attitude of the planning authority: whilst important, this factor will not necessarily be decisive;
- (v) the public interest in upholding the integrity of the planning and development system;
- (vi) the public interest, such as:
  - employment for those beyond the individual transgressors; or
  - the importance of the underlying structure/activity, for example, infrastructural facilities or services;
- (vii) the conduct and, if appropriate, personal circumstances of the applicant;
- (viii) the issue of delay, even within the statutory period, and of acquiescence;
- (ix) the personal circumstances of the respondent; and
- (x) the consequences of any such order, including the hardship and financial impact on the respondent and third parties.<sup>96</sup>

Where the development in question is subject to environmental considerations, the Court will be careful as to how they exercise their discretion. In *Krikke v. Barranafaddock Sustainability Electricity Limited* [2019] IEHC 825, Simons J., addressing the discretionary factors outlined in *Murray*, noted that the fact that the impugned windmills were subject to the EIA Directive was a relevant consideration. Article 10a of the EIA Directive states:

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<sup>94</sup> *Wicklow County Council v. Fortune (No 1)* [2012] IEHC 406.

<sup>95</sup> *Meath County Council v. Murray* [2018] 1 I.R. 189 at para. [85]

<sup>96</sup> *Meath County Council v. Murray* [2017] IESC 25, [2018] 1 I.R. 189, at para 90.



*“Member States shall lay down rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive. The penalties thus provided for shall be effective, proportionate and dissuasive.”*

As noted by Simons J in his judgement, any “changes or extension” to a project that had been subject to an environmental impact assessment must be screened again in order to determine whether another EIA must be carried out in respect of those proposed changes. Failure on the part of the developer to carry out such a screening will be given weight by the Court when exercising their discretion.

Who imposes the sanction?

Per s. 160(5), the Circuit Court has jurisdiction to hear an application where the market value of the land does not exceed €3,000,000. Anything over that shall be transferred to the High Court. “Market value” is defined in s 160(5)(e) of PDA 2000 as “*in relation to land, the price that would have been obtained in respect of the encumbered fee simple were the lands to have been sold on the open market, in the year immediately preceding the bringing of the proceedings concerned, in such manner and subject to such conditions as might reasonably be calculated to have resulted in the vendor obtaining the best price for the land.*”

Enforcement notices

The local authorities have the ability to issue enforcement notices requiring such steps as may be necessary in order to restore the land to the condition it was in prior to the unauthorised development taking place. (s. 154(5)(B))

Penalties

If an individual who is served with an enforcement notice fails to comply with the conditions they will suffer a penalty. Under s. 156(1)(a), they may be subject to a fine up to £10,000,000, or a period of imprisonment up to 2 years, if they are convicted on indictment. The penalty for a summary conviction is a fine not exceeding €5000 or a period of imprisonment up to 6 months. If a person is convicted of an offence and they proceed to continue with the offence they will be subject to a further offence for every day that they fail to comply. Thus, if they are convicted on indictment, they will be subject to a fine of £10,000 or a prison term not exceeding 2 years. On summary conviction, the fine will be €1500 for each day.<sup>97</sup>

Who can enforce?

It is the local authorities who have the power to issue enforcement notices. However, members of the public can make representations to their local authority informing them of unauthorised development. The local authority has the power to require whatever steps are necessary, within a certain timeframe, in order to restore the land to its condition prior to the unauthorised development taking place. If, at the expiration of the specified time, the enforcement notice has not been complied with, the local authority has the ability to enter onto the land and perform the necessary works. In cases of urgency, the Local Authority may issue an enforcement notice without the prerequisite warning letter and investigation.

What are the proofs?

When an unauthorised development comes to the attention of the Local Authority, they must issue a Warning Letter<sup>98</sup> to the owner or occupier. The warning letter must specify what the unauthorised development is, that they may be subject to an enforcement notice, and outline the penalties that they may face if the unauthorised development continues. Upon issuing the warning letter, the Local Authority must begin investigating the alleged unauthorised

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<sup>97</sup> PDA 2000, s. 156(2)(a)

<sup>98</sup> S. 152



development. Where it is established that unauthorised development has been taking place, they can proceed with an enforcement notice, or make a s. 160 injunction.

Who actually imposes the sanction?

The Local Authority issues the enforcement notice, and ensures it is complied with. Where the enforcement notice is not complied with, the Courts are responsible for issuing the penalties.

## V. Air Quality

The main legislation governing this area of law in Ireland is the Air Pollution Act 1987. Its provisions govern a range of different areas from licences for industrial plants to household pollution. Under s. 4 of the Act, “air pollution” is defined as “a condition of the atmosphere in which a pollutant is present in such a quantity as to be liable to: (i) be injurious to public health, or; (ii) have deleterious effect on flora or fauna or damage property; (iii) impair or interfere with amenities or with the environment”. Under s. 5 of the Act, “best practicable means” is defined as the provision and proper maintenance, use, operation and supervision of facilities which are the BPM of preventing or limiting an emission. Under the APA, it is an offence to contravene any provision or regulation of the Act.

### Sanctions

Section 24 of the Act places a general obligation on the occupier of premises (not a dwelling home) to use the best practicable means to limit emissions from the premises.<sup>99</sup> ‘Best Practicable means’ is defined as using as the ‘best practicable means’ to prevent or limit an emission through the provision and proper maintenance, use, operation and supervision of facilities which, having regard to all the circumstances, are most suitable for such prevention or limitation.<sup>100</sup> It is a further offence under s. 24(2) of the Air Pollution Act 1987 for the occupier of a premises (and premises in this context includes a private dwelling) to cause or permit an emission from such premises in such quantity or in such a manner as to be a nuisance.

A person who is found guilty of an offence under this Act shall be liable

- (a) On summary conviction: to a Class A fine (=€5000) and a Class E fine (=€500) or to a term of imprisonment not exceeding 6 months.
- (b) On conviction on indictment: To a fine up to €500,000 with an additional fine of €5000 for each day in which the offence continues or to a term of imprisonment up to 2 years.

Where the relevant authority believes that a person has committed an offence and is liable for summary prosecution, they may serve a fixed payment notice. This allows the person who has committed the offence to make a payment that will result in them avoiding summary prosecution.<sup>101</sup>

Fixed Payment Notice: Instead of instituting summary prosecution, the local authority can issue a ‘fixed payment notice’ which allows the accused to pay a fine in lieu of summary prosecution. The fixed payment notices are used in situations where accused has breached the Air Pollution Act, 1987 (Marketing, Sale and Distribution of Fuels) Regulations 1998 to 2011, relating to the sale, marketing and distribution of certain fuels. The penalties range from €500 to €1000.

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<sup>99</sup> Air Pollution Act 1987, s. 24(1)

<sup>100</sup> Air Pollution Act 1987, s. 5

<sup>101</sup> Air Pollution Act 1987, s.12A as inserted by the Environment (Miscellaneous Provisions) Act 2011

### Who can enforce?

The local authority is responsible for enforcing the provisions of the APA. Under s. 26, the Local Authority can issue a notice on the occupier of a premises ordering them to prevent emissions coming from their premises. Under subs. 2 of s. 26, there are a range of considerations which the Local Authority must consider before issuing such a notice.

- (a) any air quality management plan in relation to the area in which the premises are situate,
- (b) any special control area order in operation in relation to the area in which the premises are situate,
- (c) any relevant emission limit value,
- (d) any relevant air quality standard,
- (e) the availability of the means necessary for compliance with the notice, and
- (f) the expense which would be incurred in complying with the notice.

Where the person upon whom the notice is served fails to comply with the notice, the Local Authority can take such steps as they believe are ‘reasonable and necessary’ to ensure that the notice is complied with. Under s. 28, the local authority can apply to the High Court for an order compelling the occupier of the premises to eliminate or reduce the risk of air pollution.

### Required proofs

It will not be an offence under s. 24 if the emissions are released in accordance with a licence under the APA; if it is in accordance with an Emission limit value under the Act; or, if it is in accordance with a Special Control Area Order.

### Civil liability

Under s. 28B of the Act, where an emission causes injury, loss or damage to a person or to the property of a person, the person may, without prejudice to any other cause of action that he may have in respect of the injury, loss or damage, recover damages in any court of competent jurisdiction in respect of such injury, loss or damage from the occupier of a premises or from the act or omission of any person.

The Air Pollution Act 1987 (Marketing, Sale, Distribution and Burning of Specified Fuels) Regulations 2012 restricts the marketing, sale and distribution of specified “smoky fuels” within specified areas. More generally, solid fuels cannot be sold in a bag unless the bag is sealed and there is a record that the bag does not contain a specified fuel. Occupiers of any private dwelling are now also banned from burning specified fuels.<sup>102</sup>

Distributors of bituminous coal for residential use must register with the EPA each year.

The regulations are enforced by the local authority who can appoint an “authorised person”. Under the 2012 Regulations, this “authorised person” has the ability to inspect any premises/vehicle which they believe is being used in connection with the sale of solid fuel.

It is an offence to contravene any provision of these regulations. Authorised persons have the ability to issue ‘fixed payment notices’ with fines ranging from €200 to €1000 for breaches of the regulations.<sup>103</sup>

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<sup>102</sup> S. 5

<sup>103</sup> s. 11 of the Environment (Miscellaneous Provisions) Act 2011

## VI. Industrial Sites

### IPPC Licenses

The Environmental Protection Agency Act 1992 prohibits the carrying on of activities to which the act applies without a license issued by the EPA.<sup>104</sup> This is known as an Integrated Pollution Prevention & Control (IPPC) licence - a single integrated licence which covers all emissions from the facility and its environmental management. All related operations that the licence holder carries in connection with the activity are controlled by this licence. An Activity is defined as any operation/process/ development specified in the First Schedule to the Act and carried out in an installation.<sup>105</sup> This prohibition does not apply to “established activities” which were being carried on before the 29<sup>th</sup> of October 1999, unless a specific order is made by the Minister.<sup>106</sup>

### Criminal penalties and prosecution:

Anyone who breaches of a provision of, or regulation passed under the act is guilty of an offence and liable for:<sup>107</sup>

- Summary Conviction – A fine of up to €3000, no more than 12 months’ imprisonment or both.
- On Indictment – A fine of up to €15,000,000, 10 years’ imprisonment or both.
- Should the offence continue after conviction
  - Summary Conviction – Fine of up to €1000 per day
  - On Indictment – Fine of up to €130,000 per day<sup>108</sup>

Summary prosecutions can be brought by the EPA, or any other person specified by the minister including the minister themselves. The Court must take into account the risk or extent of environmental damage arising from the offence.<sup>109</sup>

### Civil proceedings

Any person may bring a claim before the court alleging that a relevant activity is being carried out in contravention of the requirements of the Act.<sup>110</sup> The Circuit Court has jurisdiction where it is satisfied that it is appropriate for the Circuit Court to hear a given claim otherwise, the case must be passed on to the High Court. In determining appropriateness, the court must consider,

- The nature and extent of the alleged pollution
- The estimated cost of compliance.

Upon a successful claim the court may require that the person responsible refrain from or cease any specified act or omission or make such other orders as it deems appropriate. Failure to comply with such orders constitutes an offence under the act. To succeed in a claim under the Act the applicant must show that an IPPC license was required, and that the activity occurred

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<sup>104</sup> Environmental Protection Agency Act 1992 s. 82

<sup>105</sup> Environmental Protection Agency Act 1992 s. 3

<sup>106</sup> Environmental Protection Agency Act 1992, s. 82(4)

<sup>107</sup> Environmental Protection Agency Act 1992. s. 8

<sup>108</sup> Environmental Protection Agency Act 1992. s 9

<sup>109</sup> Environmental Protection Agency Act 1992. s 11

<sup>110</sup> Environmental Protection Agency Act 1992. s.99H

without or in contravention of that license. In *Environmental Protection Agency v. Deegan* the High Court held that in doing so two factors must be demonstrated.

- Whether the business operation is a specified activity under the First Schedule.
- Whether the Area Involved meets the threshold requirement set out in the First Schedule.<sup>111</sup>

Thus, the applicant must show that there is an “activity” as defined above, being carried on in an “installation”. The courts have determined that the interpretation of such terms must give effect to the clear legislative intent to provide meaningful environmental protection.

- “Installation” includes any technical unit or plant where the activity or any directly associated activity with a technical connection is carried out on the site of the primary activity.
- “Plant” refers to any land or part of any land used for the purpose of or incidental to the activity.

The inclusion of “plant” has been found to greatly broaden the meaning of “installation” and thus what can be included in determining whether a threshold requirement is met.<sup>112</sup> Terms such as “technical connection” must also be given a broad definition to ensure the intended level of environmental protection is achieved.<sup>113</sup>

In *Environmental Protection Agency v. Harte Peat Extraction*, the High Court provided a detailed account of how the court may approach such a case. While it was overturned by the Court of Appeal with the consent of the parties, the language used is very similar to that of *Deegan*. The court ruled that:

- Sites can and should be aggregated with the court finding that differentiation between contiguous and non-contiguous sites would produce an absurdity.
- Installation must be given the widest possible meaning and include any land incidental to the activity
  - Ancillary activities with a technical connection must also be included.
  - Where they are carried out in the course of business.
- Technical connection must be interpreted broadly, focusing more on a practical rather than physical nexus.
- The identity of the business owner(s) is highly relevant.
  - Ostensibly separate businesses run on different sites that are in truth common businesses with a common business or owner,
  - Must be aggregated when determining if a threshold requirement is met.<sup>114</sup>

#### Granting of licenses

IPPC Licences are granted by the Environmental Protection Agency under part IV of the Act. The EPA may only do so where 11 criteria have been satisfied. Aside from those criteria the

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<sup>111</sup> *Environmental Protection Agency v. Deegan* [2019] IEHC 755 at para 69.

<sup>112</sup> *Environmental Protection Agency v. Deegan* [2019] IEHC 755 at para 67.

<sup>113</sup> *Environmental Protection Agency v. Deegan* [2019] IEHC 755 at para 68

<sup>114</sup> *Environmental Protection Agency v. Harte Peat Extraction* [2014] IEHC 308

EPA is also entitled to attach any further conditions to the license as they deem appropriate.<sup>115</sup> Licenses may be suspended where the licensee can no longer be considered a “fit person” or someone technically and financially capable of fulfilling the license’s conditions.<sup>116</sup> Extra requirements are added to those sites which give rise to a risk of pollution of aquifers. The licensee must be capable of complying with the added requirements of the Groundwater Directive and the license must be reviewed at least every 4 years.<sup>117</sup>

The Agency is also required to set out an Environmental Inspection Plan which shall examine the relevant environmental effects of every relevant installation. The frequency of inspections will depend on the environmental risk.

- High risk installations must be subject to inspection at least every year.
- Low risk installations must be inspected at least every 3 years
- Where a significant lack of compliance is discovered a follow-up inspection must occur within 6 months.

The environmental risk must be based on,

- The potential or actual impact on health and the environment based on the type of emissions, the sensitivity of the local environment and risk of accidents.
- The record of compliance.
- Participation in the EU Eco-Management audit scheme.

The Agency is also required to conduct irregular inspections of serious complaints, accidents or contraventions.<sup>118</sup>

## VII Marine Life

### Habitats:

The marine habitats protected by the Habitats Directive (as implemented by European Communities (Birds and Natural Habitats) Regulations 2011) include:

- Estuaries
- Large shallow inlets and bays
- Mudflats and sandflats not covered by sea water at high tide
- Reefs
- Sandbanks that are slightly covered by seawater at all times
- Submerged or partly submerged sea caves.<sup>119</sup>

Under the 2011 Regulations, any person who without lawful authority:

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<sup>115</sup> Environmental Protection Agency Act 1992 s. 83(5)

<sup>116</sup> Environmental Protection Agency Act 1992 s. 97 and 84(4)

<sup>117</sup> Environmental Protection Agency Act 1992, s. 99I

<sup>118</sup> Environmental Protection Agency Act 1992, s. 99J.

<sup>119</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora OJ L 206/7, Annex I

(a) carries out any plan or activity that may have a significant effect on, adversely affect the integrity of, a European Site, or

(b) enters or occupies any European Site, or brings onto or places or uses or releases in any European Site any animal or object where such action or the use or presence on the European Site of such an animal or object is likely to have a significant effect on, or adversely affect the integrity of, a European Site,

shall be guilty of an offence. The penalty for summary conviction is a Class A fine and/or a prison term up to six months. The penalty for a conviction on indictment is a fine not exceeding €500,000 and/or a prison sentence up to three years.<sup>120</sup>

#### Wildlife

Under the Wildlife Act, dolphin species, porpoise species, seal species and whale species<sup>121</sup> are ‘protected wild animals.’<sup>122</sup> It is an offence to hunt (without a permission or licence), injure them otherwise than hunting<sup>123</sup> or to wilfully interfere with or destroy the breeding place of any protected wild animal.<sup>124</sup> However, it is not an offence to ‘unintentionally to injure or kill a protected wild animal’ while engaged in fishing<sup>125</sup> or aquaculture<sup>126</sup>.

The penalty for an offence is a Class A fine. When prosecuting under this section, it is not necessary to illustrate how the offence occurred otherwise than while the defendant was engaged in fishing or aquaculture.<sup>127</sup> The Wildlife Act only has regulatory force as far out as the foreshore i.e., 12 nautical miles from Ireland’s shore. Proceedings under the Act may take place in any District Court.<sup>128</sup>

#### Annex IV Wildlife – Dolphins and Whales

Annex IV of the Habitats Directive requires that certain species are given ‘strict protection’.<sup>129</sup> Included in this are cetaceans i.e., whales and dolphins, which occur in Irish marine environments. Under the European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. No. 477), a person who does any of the following in relation to these creatures is guilty of an offence.<sup>130</sup>

- (a) deliberately captures or kills any specimen of these species in the wild,
- (b) deliberately disturbs these species particularly during the period of breeding, rearing, hibernation and migration,
- (c) deliberately takes or destroys eggs of those species from the wild,
- (d) damages or destroys a breeding site or resting place of such an animal, or

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<sup>120</sup> S.I. No. 477/2011 - European Communities (Birds and Natural Habitats) Regulations 2011, Reg. 67(2)

<sup>121</sup> Wildlife Act 1976, Fifth Schedule.

<sup>122</sup> Wildlife Act 1976, s. 23(5)(a)

<sup>123</sup> Wildlife Act 1976, s. 23(5)(c)

<sup>124</sup> Wildlife Act 1976, s. 23(5)(d)

<sup>125</sup> Wildlife Act 1976, s. 23(7)(a)

<sup>126</sup> Wildlife Act 1976, s. 23(7)(a) (as substituted (31.07.2001) by Wildlife (Amendment) Act 2000 (38/2000), s. 31(c)(i), S.I. No. 371 of 2001)

<sup>127</sup> Wildlife Act 1976, s. 23(9)

<sup>128</sup> Wildlife Act 1976, s. 23(10)

<sup>129</sup> Ibid, Annex IV

<sup>130</sup> *European Communities (Birds and Natural Habitats) Regulations 2011*, reg. 51(2)



(e) keeps, transports, sells, exchanges, offers for sale or offers for exchange any specimen of these species taken in the wild, other than those taken legally as referred to in Article 12(2) of the Habitats Directive.

The only exception to this rule is where the minister grants a derogation licence. This will only be granted where an overriding interest is concerned and there will be harm to the cetaceans.<sup>131</sup> The penalties for a summary conviction is a Class A fine and/or up to 6 months' imprisonment. The penalties for a conviction on indictment is a fine not exceeding €500,000 and/or imprisonment for a term not exceeding three years.<sup>132</sup> When the Court is deciding what sentence to impose, the regulations state that particular regard should be had for 'the risk or extent of injury to the environment arising from the act or omission constituting the offence, and to the polluter pays principle.'<sup>133</sup>

#### Pollution in The Marine Environment

The Dumping At Sea Act 1996 makes it an offence to dump any substances or materials in the maritime area. Where dumping occurs, it is the master of the vessel and the owner that is liable.<sup>134</sup> Similarly, it is an offence to burn any substance or material in the maritime area.<sup>135</sup> The penalty for a summary conviction is a fine not exceeding €3000 and/or imprisonment for a period of up to 12 months.<sup>136</sup> A person convicted on indictment is liable to a fine 'of such amount as the court considers appropriate' or to a term of imprisonment not exceeding five years.<sup>137</sup> It is a defence to demonstrate that the dumping took place due to a mistake or default of another person or to an accident or some other factor outside the person's control.<sup>138</sup>

Per s. 5 of the Act, the EPA can grant permits 'authorising the dumping of a specified vessel, aircraft or offshore installation, or a specified quantity of a specified substance or material in a specified place within a specified period of time or the loading onto the vessel or aircraft, of a specified quantity of a specified substance or material at a specified place within a specified period of time, which is intended to be dumped from the vessel or aircraft concerned.'<sup>139</sup>

#### Enforcement

'Authorised officers' have extensive powers to enter onto premises, open containers and carry out examinations/inspections/analyses that they believe to be necessary to enforce the provisions of the Act.<sup>140</sup> 'Authorised persons' have the ability to detain vessels and aircraft where they believe them to be guilty of illegal dumping.<sup>141</sup>

'Authorised officers' include a range of persons including:

- A member of the EPA;<sup>142</sup>
- A member of Inland Fisheries Ireland;<sup>143</sup>

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<sup>131</sup> Ibid, reg. 54

<sup>132</sup> Ibid, reg.67(2)

<sup>133</sup> Ibid, reg.67(3)

<sup>134</sup> Dumping at Sea Act 1996 s. 2

<sup>135</sup> *ibid*, s. 3

<sup>136</sup> Ibid, s.10(4)

<sup>137</sup> Ibid, s.10(1)

<sup>138</sup> Ibid, s. 2(2)

<sup>139</sup> Ibid, s. 5(1)

<sup>140</sup> Ibid, s. 6(2)

<sup>141</sup> Ibid, s. 6(5)

<sup>142</sup> Ibid, s. 6(1)(a)

<sup>143</sup> Ibid, s. 6(1)(b)



- A member of An Garda Siochana;<sup>144</sup>
- A member of the Permanent Defence Forces<sup>145</sup>

Summary Proceedings for offences can be brought and prosecuted by the EPA.<sup>146</sup>

#### Imposition of sanctions

Under the Act, District Court judges have the jurisdiction to try summarily an offence if they believe the offence to be sufficiently minor and both the prosecution and defendant consent.<sup>147</sup>

#### Sea Pollution Act 1991

The Sea Pollution Act 1991 allowed Ireland to ratify the MARPOL Convention - The International Convention for the Prevention of Marine Pollution from Ships. The Sea Pollution Act 1991 gives the Minister the ability to make regulations:

- (a) prohibiting or regulating the discharge anywhere at sea from a ship registered in the State or the discharge in the State from any ship of any oil, oily mixture, noxious liquid substance, harmful substance, sewage, garbage, substances subject to control by Annex VI to the MARPOL Convention, anti-fouling systems or ships' ballast water and sediments ;
- (b) governing prescribed operations on board ship relating to any such substance carried on the ship.<sup>148</sup>

The owner and the master of the ship will be held liable where there is a contravention of one of these regulations.<sup>149</sup> Where there has been a discharge of a polluting substance specified in Annex I or Annex II to the Marpol Convention, the person responsible will be held liable even if they are not the master/owner of the ship.<sup>150</sup> Where a person is convicted on indictment for such an offence, the fine shall not exceed €500,000 and or imprisonment of up to 3 years.

These regulations will not apply where the discharge or pollution was for the purpose of

- (i) securing the safety of a ship, or
- (ii) saving life at sea

or where the discharge was due to damage to the ship, or to its equipment provided that all reasonable steps have been taken after the damage to minimise the discharge.<sup>151</sup>

Wherever there is an incident, whether on board or outside a ship, resulting in discharge of hazardous and noxious substances or a pollutant the Master of the ship shall report the matter to the Minister or, where the incident or discharge occurs in or is observed from a harbour, to the Harbour master. Failure to do so is an offence.

The Minister can prescribe regulations requiring the owner or master of a ship to comply with requirements so as to prevent, control or reduce the discharge into the sea of pollutants. Any person being the owner or master of a ship who contravenes any regulation under this section shall be guilty of an offence. The Minister can appoint an inspector to ensure that the provisions

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<sup>144</sup> Ibid, s. 6(1)(e)

<sup>145</sup> Ibid, s. 6(1)(f)

<sup>146</sup> Ibid, s. 7 (as substituted by s. 36 of the Foreshore and Dumping at Sea (Amendment) Act 2009)

<sup>147</sup> Ibid, s.10(2)

<sup>148</sup> Sea Pollution Act 1991, s.10(1)

<sup>149</sup> Sea Pollution Act 1991, s.10(2)

<sup>150</sup> Sea Pollution Act 1991, s.10(2A)

<sup>151</sup> Sea Pollution Act 1991, s.11

of the Act are being upheld i.e. that ships are complying with conditions and requirements regarding equipment standards etc. Inspectors have the power to go on board any ship while the ship is in the State. They may also inspect any documents on board the ship.

An inspector has the power to direct the master of the ship to do everything necessary to ensure that the ship or its equipment corresponds with the particulars of a certificate under s. 17 or an equivalent certificate issued by another party to the MARPOL Convention or is so defective that the ship is not fit to put to sea without presenting a serious threat of damage to the marine environment.<sup>152</sup> The inspector can take all steps necessary to ensure that a ship in relation to which he has given directions under this section does not go out to sea or leave harbour for the purpose of proceeding to the nearest repair yard.

Inspectors have the power, where they have reasonable cause to believe that a ship has caused or may cause pollution and the ship is in the State, he may stop and detain the ship, or take it to such a place in the State as he considers appropriate.<sup>153</sup>

A person who commits an offence under this Act is liable:

- (a) on summary conviction to a fine not exceeding £1500 or to imprisonment for any term not exceeding twelve months, or, at the discretion of the Court, to both such fine and such imprisonment or
- (b) on conviction on indictment, to a fine not exceeding £10,000,000 and/or imprisonment for any term not exceeding 5 years.

Oil Pollution of the Sea (Civil Liability and Compensation) Acts 1988 to 2003

The Oil Pollution of the Sea (Civil Liability and Compensation) Acts 1988 to 2003 gives effect to international conventions concerning civil liability and compensation for oil spills in our seas.<sup>154</sup> Per s. 7, the owner of the ship will be liable where a ship carrying oil in bulk causes pollution within our seas.<sup>155</sup> The agent of the owner of a ship will not be held liable for pollution caused by the ship. Per s. 8, the owner of the ship can avoid liability if they show that the discharge of oil was a result of:

- (a) An act of war or a 'natural phenomenon of an exceptional, inevitable and irresistible character.
- (b) Was wholly due to anything done, or left undone, by any other person other than servant or agent of such owner) with intent to do damage.
- (c) Was due wholly to the negligence or wrongful act of any government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.

Per s. 10, the owner of the ship may limit his liability in situations where the discharge of oil which occurred without his 'actual fault or privity'.

'(c) where the owner concerned limits his liability in accordance with this Act, his liability for any one discharge shall not exceed fourteen million units of account, or one hundred and thirty-three units of account per ton for each ton of the ship's tonnage, whichever is the lesser.'

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<sup>152</sup> Sea Pollution Act 1991, s. 22

<sup>153</sup> Sea Pollution Act 1991, s. 24

<sup>154</sup> < <https://www.gov.ie/en/publication/864256-marine-environment-legislation/>>

<sup>155</sup> Oil Pollution of the Sea (Civil Liability and Compensation) Act 1988, s. 7

Per s. 12, the Court decides the amount payable on a finding of liability for the owner. On top of this, the Court must also determine the additional payments that may need to be made to other people making a claim against the owner. Section 13 gives inspectors the power to stop and detain any ship in the State where they believe the owner of that ship to be liable for pollution damage. If they leave without having detained the paid the liability owed, they are guilty of an offence.

#### The International Oil Pollution Compensation Fund

Section 19 states that prescribed persons must file returns detailing what volume of crude oil and fuel oil carried in each ship owned by them and received at terminals within the state.<sup>156</sup> On top of filing these returns to the Minister, they must pay a prescribed amount into the International Oil Pollution Compensation Fund established under the Fund Convention.<sup>157</sup> Failure to do so is an offence. The Fund is liable for pollution damage in the State for a ship carrying oil in bulk as cargo. The fund is liable in any case where section 7 (owner of the ship liable) or where a person has been unable to obtain ‘full satisfaction of the amount of compensation due to him under s.7.’<sup>158</sup> The fund will not be liable for pollution damage where the discharge ‘resulted from an act of war, hostilities, civil war or insurrection or was caused by oil which has escaped or been discharged from a warship’ The Act provides for the appointment of inspectors. Inspectors have the ability to stop, detain or board any ships they deem necessary for the purposes of enforcing provisions of the Act.<sup>159</sup> It is an offence to wilfully disobey the directions of an inspector.<sup>160</sup>

#### Conclusions

Ireland’s marine environment is regulated various acts and regulations. The legislative instruments appear largely to be introduced in order to implement international conventions which Ireland is party to. Ireland’s marine environment regulations can be separated into those that protect marine wildlife and habitats and those that enforce against marine pollution.

In terms of protecting against pollution, there is legislation that protects against pollution emanating from ships and illegal dumping from ships and aircraft vessels. However, while these enforcement measures are necessary it is unlikely that they make a large contribution to the quality of Ireland’s marine environment. Rather, they seem to be measures implemented on a precautionary basis. The real threat to the quality of our marine environment, at least in coastal areas, is high nitrogen levels due to agricultural activities. The EPA’s *Water Quality in 2020: An Indicators Report* found that 21% of Ireland’s estuarine and coastal waters had nitrogen levels that were too high.<sup>161</sup>

The more important legislative provisions pertaining to our marine environment are the Wildlife Acts and the 2011 Habits Regulations. These seek to provide protection for our marine wildlife and habitats. There is a real need to ensure that our marine ecosystems are protected from degradation. As noted by the Marine Protected Area Advisory Group, a thriving marine ecosystem brings “many benefits to society through “ecosystem services”, such as providing

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<sup>156</sup> Sea Pollution Act 1991, s.19(1)

<sup>157</sup> Sea Pollution Act 1991, s.19(2)

<sup>158</sup> Sea Pollution Act 1991, s. 20(2)

<sup>159</sup> Ibid, s. 32

<sup>160</sup> ibid

<sup>161</sup> < <https://www.epa.ie/news-releases/news-releases-2021/urgent-action-needed-to-curb-nitrogen-pollution-in-irelands-waters-says-epa.php>>

food and raw materials, and maintaining climate and water quality and the rich environments we rely on for recreation, tourism, and cultural well-being.”<sup>162</sup>

The current enforcement measures we have in place for protecting our marine ecosystem are not adequate. The Wildlife Act, for example, protects our marine mammals such as dolphins and whales from being killed, yet no liability arises where these mammals are killed in the process of fishing. While this is designed to protect the economic activity of fishing, it is unlikely that these species would be killed or harmed via any other activity. On a wider note, the combination of the Wildlife Acts and the Habitat Directives still leave a lot of marine habitats and species unprotected. The Wildlife Acts only cover Ireland’s foreshore i.e. 12 nautical miles from Ireland’s coast.<sup>163</sup> Outside of this, marine habitats and species are protected if they are identified as a habitat or species for which an SAC must be created under the Habitats Directive. The issue that arises here is that where the habitat does not qualify as an Annex I habitat under the Directive, there is currently no legislation in Ireland to protect these habitats, even though they may be in decline.<sup>164</sup>

Marine Protected Areas (MPAs) are marine areas that are protected and managed over the long term, with a primary objective of conserving habitats and/or species.<sup>165</sup> The Irish Government are currently seeking to expand our network of MPAs, to greater protect marine biodiversity and ecosystems. Currently Ireland’s MPAs account for just 2.13% of Ireland’s maritime area was MPA network.<sup>166</sup> By 2030, the Irish Government wish to increase that to 30%.<sup>167</sup> In order to do so, it is likely that new legislation will need to be introduced as there is currently no legal definition for MPA in Ireland, so to create an MPA, it must be done through the Habitats Directive. Giving MPAs a statutory underpinning would enhance the protection we could afford to marine habitats and species as we would not be reliant on the designation requirements of the Habitats Directive. Offences and penalties could be established for harming marine biodiversity, similar to provisions of the 2011 Regulations.

## VIII Water

The law governing water standards in Ireland is set out in the Local Government (Water Pollution) Act 1977–2007. Definitions in section 1 provide:

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

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<sup>162</sup> Marine Protected Area Advisory Group, *Expanding Ireland’s Marine Protected Area Network* (A report by the Marine Protected Area Advisory Group for the Department of Housing, Local Government and Heritage, October 2020)

<sup>163</sup> Foreshore Act 1933, s.1A (as inserted (29.06.2005) by Maritime Safety Act 2005 (11/2005), s. 60(b), commenced on enactment)

<sup>164</sup> Marine Protected Area Advisory Group, *Expanding Ireland’s Marine Protected Area Network* (A report by the Marine Protected Area Advisory Group for the Department of Housing, Local Government and Heritage, October 2020)

<sup>165</sup> *ibid*

<sup>166</sup> *ibid*

<sup>167</sup> *ibid*

- “Water” means
  - any (or any part of any) river, stream, lake, canal, reservoir, aquifer, pond, watercourse or other inland waters, whether natural or artificial,
  - any tidal waters, and
  - where the context permits, any beach, river bank and salt marsh or other area which is contiguous to anything mentioned in paragraph (a) or (b), and the channel or bed of anything mentioned in paragraph (a) which is for the time being dry.
  - There is a general prohibition on ‘causing or permitting’ polluting matter to enter water – Section 3 of the Act:

A person found guilty of ‘causing or permitting’ polluting matter to enter waters will be liable on summary conviction to a Class A fine or up to 3 months’ imprisonment (or both). A person found guilty on indictment could be liable to a fine of up to €15,000,000 or imprisonment for a term not exceeding 5 years (or both). In this context, ‘permitting’ can mean either allowing the pollution to occur or failing to ‘take reasonable steps to prevent it.’

It is not necessary to establish any intention on the part of the polluter when prosecuting this offence. This is based on the Supreme Court’s decision in *Shannon Regional Fishing Board v. Cavan County Council* [1996] 3 I.R. 267, Blayney J approved of the idea that in cases such as these it was “unnecessary and undesirable” to introduce the concept of *mens rea*. Thus, where the facts establish that the defendant was indeed responsible for the polluting material entering the water, this will be enough to establish liability. Whether they intended to or not is irrelevant.

The defendant can avoid liability, however, where they can show that “they took all reasonable care to prevent the entry to waters to which the charge relates by providing, maintaining, using, operating and supervising facilities, or by employing practices or methods of operation, that were suitable for the purpose of such prevention”.

Thus, an offence under s. 3 is a halfway house between a conventional *mens rea* offence and a strict liability offence. The defendant can avoid liability only if they can show that they took all reasonable steps to prevent the pollution from occurring.

Per s.3(4), a prosecution for an offence under this section may be taken by a local authority, a board of conservators, the Minister for Fisheries or any other person.

Prohibition on the discharge of effluent without the benefit of a licence – Section 4:

Per section 4, it is an offence to discharge trade effluent or sewage effluent into any waters ‘except under and in accordance with a licence’. ‘Trade effluent’ is effluent discharged from premises used for carrying on any trade or industry.

Licences can be granted by the local authority if the discharge is to waters within their functional area or if the premises where the discharge originates is in their functional area. When granting a licence, the Local Authority can apply conditions to that licence. These conditions cover a wide range of things including the nature and composition of the waste, the time when it can be discharged etc.

A person who contravenes s. 4 of the Act i.e. discharges trade or sewage effluent without a licence or outside the conditions attached to the licence commits an offence. The penalties are a Class A fine and/or up to 3 months in prison on summary conviction and a €15m fine and/or imprisonment for a term not exceeding 5 years.



Per s. 4(9), a prosecution for an offence under this section may be taken by a local authority, a board of conservators, the Minister for Agriculture, Food and the Marine, or any other person.

#### Application to Court for an order remedying water pollution – Section 10

Per s. 10 of the Act, “any person” regardless of their interest in the waters concerned, can apply to the appropriate court where they believe that another person is “causing or permitting” polluting matter to enter waters or is discharging trade effluent or sewage effluent to waters without the benefit of a licence for a court order. The court order may direct the other person to do one or more of the following:

- Terminate the pollution within a specified time;
- Mitigate or remedy any effects of the pollution;
- Pay the applicant or such other person as may be specified to pay the costs incurred by the applicant or the specified person in ‘investigating, mitigating or remedying the effects’ of the pollution.

The application is made summarily. It is an offence not to comply with such directions from the Court with the sanctions being a Class A fine and/or imprisonment for a period up to 3 months. The “Appropriate Court” depends on the estimated cost of complying with the Court Order. Thus,

- Where the estimated cost is any sum up to €15,000 the application is heard before the district court;
- Where the estimated cost is any sum up to €75,000 the application is heard before the Circuit Court;
- And the High Court has the ability to hear any application.

#### Local Authority notices

Per s. 10(5), a local authority has the power to serve a notice upon a person they believe to be causing or permitting polluting matter to enter waters or to be causing or permitting trade and/or sewage effluent to be discharged to waters without a licence. A notice directs the person responsible to halt the discharge. Where the party fails to comply with the notice, the Local Authority can proceed to stop the pollution themselves and recover the costs from the polluter.

#### Local Authority power to take pre-emptive action – Section 12

Per s. 12 of the Act, if the L.A believes that a premises in its functional area is keeping substances that could pollute waters, it can issue a notice specifying certain measures that need to be followed to prevent the matter from entering waters. It can even order that certain activities taking place on the premises be halted for a period of time or that the facilities for holding such substances be relocated. Where the person upon whom such a notice is served fails to comply, they are liable on summary conviction to a Class A fine and/or imprisonment for a term not exceeding 3 months.

#### Duty to notify the LA of any incidents of accidental pollution – Section 14

In situations where there has been an accidental discharge, spillage or deposit of any polluting matter which is likely to enter waters, the responsible party must notify the L.A ‘as soon as practicable.’ Failure to do so is an offence.

#### Licensing of discharges to sewers – Section 16

It is an offence for anyone other than a sanitary authority to ‘cause or permit’ the discharge any trade effluent to a sewer without the benefit of a licence granted by the sanitary authority who

control those sewers. Like s. 4, the sanitary authority may attach any conditions to the licence which are binding on the licensee. The penalties for an offence under this section are:

- (a) On summary conviction, a Class A fine and/or imprisonment for a term up to 3 months.
- (b) On conviction on indictment, to a fine not exceeding €15,000,000 and/or imprisonment for a term not exceeding 5 years.

#### Agricultural Pollution of Water

European Union (Good Agricultural Practice for Protection of Waters) Regulations 2017 (S.I. No. 605).

The Nitrates Directive (91/676/EEC) is an EU Directive which seeks to protect water sources from pollution by agriculture and to encourage good farming practices. The implementing legislation in Ireland is the European Union (Good Agricultural Practice for Protection of Waters) Regulations 2017. The regulations prescribe a range of measures which must be followed in order to protect water sources from agricultural pollution. These include the capacity of storage facilities on the farm; the distances from water upon which different types of fertilisers can be applied; periods when fertilisers can be applied.

It is an offence to contravene any of the measures set out in the regulations designed to protect waters from agricultural pollution. A person found guilty of an offence is liable on summary conviction to a Class A fine and/or imprisonment for a term up to 3 months. A person found guilty shall be liable on conviction on indictment to a up to €500,000 and/or a prison sentence up to 1 year in length. Under the Regulations, the Local Authority are responsible for monitoring waters in its functional area in order to determine the extent of pollution from agricultural sources. It must also carry out inspections of farm holdings.

#### Conclusions

According to the EPA, the “most prevalent human activities that impact on water quality are agriculture, hydromorphology, forestry and urban wastewater discharges”. In terms of enforcement, there are measures that allow each of these human activities to be curtailed to an extent. The 1977 Water Pollution Act gives a general power to enforce unlicensed water pollution. There is also a particular section of the Act dedicated to preventing unlicensed discharge of trade and sewage effluent, which anyone can enforce. Similarly, agriculture is controlled by the Nitrates Regulations, under which there are relatively extensive powers to try and ensure that the agricultural run-off does not affect our waters. Despite this, the latest EPA data shows that wastewater discharge and agricultural pollution still have a major effect on our waters.

Regarding wastewater treatment, it appears that Ireland’s problem is not an enforcement issue but an infrastructure/funding issue. In 2020, treatment at 12 of Ireland’s 174 large urban areas failed to meet EU standards under the Urban Waste Water Treatment Directive. The problem is that 54% of the wastewater collected in Ireland is treated in these 12 areas. In particular, the Ringsend treatment plant, one of the areas that failed to meet these standards, treats wastewater for over 2 million people. It appears from the EPA’s ‘Urban Waste Water Treatment in 2019’ report, it appears that everyone is aware of this situation, including Irish Water, and it is an issue of not having facilities capable of treating the country’s waste water.

Similarly, when it comes to agricultural pollution, it appears that the enforcement measures are extensive, yet the EPA report on water quality in Ireland notes that over 20% of our estuarine and coastal water have too much nitrogen in them. The highest concentration of nitrogen is in the south and southeast, of which 85% is attributable to agriculture. While not addressing it



directly, the report states that ‘there needs to be full implementation of existing regulations by the Local Authorities ...’ which suggests that the extensive enforcement powers set out in the Nitrate regulations are not being used to their fullest extent.

## IX. Proposals for Reform

In this section we summarise the findings and make some proposals for reform. Some of the proposals have been drafted into the Model Code presented to this Symposium.

First, as we said at the outset of this paper, while the sanctions for criminal offences that exist are strong the problem is the lack of prosecutions. The example we give in the paper is that under the Wildlife Act there were only 164 prosecutions being brought in the 8 years to 2020.<sup>168</sup> This is despite wildlife crime being one of the largest criminal activities in the world and instances of deliberate interference, particularly poisoning of birds of prey and capture of badgers, being on the rise.<sup>169</sup>

We have highlighted how Scotland has sought to add fixed penalty notices to the sanctions toolkit, on the basis that they are quicker and less costly to administer than going to court. and could also be a deterrent against committing these crimes. Some of these approaches should be considered in Ireland.

Second, as can be seen from the review above, there is an overfocus in Ireland on the criminal law as a sanction for breaches of environmental law. The criminal law a number of limitations as follows; the burden of proof is high, some offences have to prove mens rea, stakeholder research shows that the public are reluctant to see neighbours subjected to criminal law; prosecutions are costly and time consuming for underfunded gardai and local authorities to bring. The stakeholder paper presented to this symposium discusses the views of the public on their attitude to criminal enforcement..

For this reason, other sanctions should be added to the enforcement of environmental law. The following sanctions used in other countries can be considered: administrative fines,<sup>170</sup> environmental compensation and bio-diversity offsetting,<sup>171</sup> risk management orders, the writ of continuing mandamus,<sup>172</sup> restorative justice and mandatory environmental education. For example, offenders in New Zealand have been ordered to make reparations to the community

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<sup>168</sup> Ray Ryan, “Wildlife crime unit being examined as record number of protected birds of prey killed last year,” *Irish Examiner* 19<sup>th</sup> Oct 2020, <https://www.irishexaminer.com/farming/arid-40066109.html>

<sup>169</sup> Mark Hilliard, “Gardai to train park rangers in effort to tackle wildlife crime,” *Irish Times* Jan 19<sup>th</sup> 2021, <https://www.irishtimes.com/news/environment/garda%C3%AD-to-train-park-rangers-in-effort-to-tackle-wildlife-crime-1.4461554>

<sup>170</sup> These have been adopted in UK law.

<sup>171</sup> *JF Investments Ltd v Queenstown Lakes District Council* (unrep) (NZenvC) The mitigation/offset proposals included pest control measures at specified locations, annual funding for the life of the consent into specified bird conservation and breeding programs, covenanting and fencing of the Punga wetland, riparian fencing of specified areas, the translocation of native bats, funding for beach accessways and cultural mitigation, including training local iwi in water quality monitoring; *Royal Forest and Bird Protection Society v Gisborne District Council* W26/2009 (unrep) (NZenvC) cited in Warnock, C *Environmental Courts and Tribunals* (Hart Publishing: 2020) at p 33.

<sup>172</sup> *Metropolitan Manila Development Authority v Concerned Residents of Manila Bay* GR Nos 171947-48 (SC 18 Dec 2008) (Philippines) cited in Warnock, C *Environmental Courts and Tribunals* (Hart Publishing: 2020) at p 33.

by planting trees, funding environmental projects and making public apologies at local meetings.<sup>173</sup> Similar approaches have been taken in Australia.<sup>174</sup>

The third potential issue is the exception in the criminal law for any damage caused in the ordinary course of agriculture. These exceptions appear to grant farmers a “get out of jail free card” without placing any obligation on them to avoid damage to the greatest extent possible.

Fourth, in enforcement, the burden of proof is an issue. Where there is inequality of knowledge between those in breach of, for example, an IPPC licence, and those seeking to enforce restrictions on discharge to river courses, sanctions can be difficult to impose. In other areas of law where there is inequality of knowledge, such as the differing positions of employer and employees in employment equality, the EU has adopted a shifting burden of proof. The employee is required to prove a prima facie case, and the employer then adduces the evidence to defend. The New South Wales Land and Environment Court has recognised that the application of the precautionary principle may require a shifting burden of proof.<sup>175</sup>

We hope that this paper generates a rethinking of environmental sanction.

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<sup>173</sup> See *Auckland City Council v Shaw* [2006] DCR 425 (NZ), cited in Warnock, C *Environmental Courts and Tribunals* (Hart Publishing: 2020) at p 33.

<sup>174</sup> *Chief Executive of the Office of Environment and Heritage v Rinaldo (Nino Lani)* [2012] NSWLEC 115, cited in Warnock, C *Environmental Courts and Tribunals* (Hart Publishing: 2020) at p 33.

<sup>175</sup> *Gray v Minister for Planning and Others* [2006] NSWLEC 720. In an case on the adequacy of an environmental impact assessment of a new mine for coal, Pain J noted that the precautionary principle may result in a shifting burden of proof “*The applicant also raised the precautionary principle as one of the ESD principles not taken into account by the Director-General. As stated in Telstra v Hornsby at [150], the function of the precautionary principle is to require the decision-maker to assume that there is, or will be, a serious or irreversible threat of environmental damage and to take this into account, notwithstanding that there is a degree of scientific uncertainty about whether the threat really exists or its extent. As identified in Telstra v Hornsby at [150], if the two conditions precedent or thresholds are satisfied so that there is a threat of serious or irreversible environmental damage and there is the requisite degree of scientific uncertainty the principle will apply so that the shift in an evidentiary burden will occur meaning that the proponent for the development has to demonstrate that the threat does not exist or is negligible.*”