

European Network of Prosecutors for the Environment

Réseau des Procureurs Européens pour l'environnement



ENPE newsletter - Issue 4

June 2017

Message from ENPE President Anne Brosnan

“Recent developments across Europe show what a fast paced, changing world we live in. Now more than ever we need to be agile and able to respond to new challenges and opportunities.



I am delighted to welcome our four new ENPE members and look forward to working with colleagues from prosecuting bodies right across Europe. Pollution and criminal activity recognise no international boundaries, so the ENPE network is strengthened by having contacts and colleagues in ever more Member States of the EU. It is through co-operation and collaboration that we can best work together to fight serious and organised environmental crime.

We have had a very busy few months with lots to report. I'd like to draw your attention to the fascinating case reports, below, from Ireland, England and the Netherlands, full details of which we will post on our Environmental Crimes Database. Please let us now about your environmental prosecution work so that we can share with other prosecutors.

In the early months of 2017, Board members of ENPE have attended two workshops organised by the EU Commission, DG Environment, who have launched their Compliance Assurance Initiative. We have seen the publication of the ENPE-LIFE project Cap & Gap report setting out baseline information about prosecution activity in relation to environmental crime. This has some powerful recommendations as to how we may work to improve the position. I attended a meeting of BRIG, a part of the European Network of Heads of Environment Protection Agencies and told them about our work at the sharp end of enforcement, see below, and I joined up with Deborah Harris of the US Department of Justice's Environmental and Natural Resources Department in May at the Interpol Pollution Crime Working Group meeting in Rome, in a session entitled “Ensuring a viable case. What do Prosecutors need?”

I look forward to seeing you all at our annual Networks Conference at Magdalen College in September 2017 in Oxford. We have an exciting programme to update and involve you with the activities of our working groups and also to hear from some international speakers about environmental enforcement, in a remarkably lovely venue. Don't forget to register to receive further information and check out our new look website.”

Anne Brosnan President of ENPE

ENPE network welcomes new members

In January and April 2017, the Board members of ENPE approved four new organisations to join the network representing Albania, Greece and the Former Yugoslav Republic of Macedonia. The organisations all have central roles in the prosecution of environmental crimes in their respective countries and comprise:



- The General Prosecutor's Office of the Republic of Albania;
- The Supreme court of Greece;
- The Association of Public Prosecutors of the Former Yugoslav Republic of Macedonia;
- The State Environmental Inspectorate of the Former Yugoslav Republic of Macedonia.



[all flag images courtesy of flaglane.com]

We welcome all our new members and are pleased to report a growing membership as our network expands. In addition to our new members as detailed above, our list of ENPE membership organisations, including members and observers is currently, MEMBERS: Environment Agency (England, UK); Ministère de la Justice (France); Environmental Protection Agency (Republic of Ireland); Riksenheten för Miljö- och arbetsmiljömål (Sweden); Openbaar Ministerie, Functioneel Parket (Netherlands); Vrchni statni zastupitelstvi v Praze (Czech Republic); Ökokrim (Norway); Rigsadvokaten (Denmark); Fiscalía General del Estado Medio Ambiente y Urbanismo (Spain); Drvazno Dovsetnisvo Republike Hrvatske (Croatia); Finnish Prosecution Service (Finland); Specialised Multi-field Prosecution Office (Latvia); The Association of Public Prosecutors (Former Yugoslav Republic of Macedonia) SUPPORTING MEMBERS: Public Prosecutor's Office, Antwerp, Belgium; OBSERVERS: International Association of Prosecutors (IAP); Sofia Regional Prosecutors office (Bulgaria); Dublin City Council (Republic of Ireland); Eurojust (Netherlands); The State Environmental Inspectorate (SEI) (Former Yugoslav Republic of Macedonia).

For more information about joining ENPE please contact shaun.robinson@environment-agency.gov.uk

European Union news

DG Environment Workshops: Compliance Assurance Workshop 31 January 2017; Workshop on Waste & Wildlife crime, 20 March 2017, Brussels, Belgium

Anne Brosnan, Lorna Dempsey and Rob de Rijck attended the DG Environment's Compliance Assurance Workshop on 31 January in Brussels. All three presented on ENPE activities, with focus on the LIFE-ENPE project progress, including outputs so far, including the Working Groups that will focus on tackling Waste and Wildlife crime.

Anne, together with Carole Billiet and Jan Van den Berghe of EUFJE also attended the second DG Environment workshop on tackling waste and wildlife crime on 20 March also in Brussels. Carole gave a presentation on the activities of the LIFE-ENPE Working Group on prosecution best practice and administrative sanctions, which she chairs and spoke about our other WGs all of which are now convened and have held their introductory meetings.

Both Commission workshops were organised in the framework of the work on an Action Plan on Environmental Compliance Assurance envisaged in the Commission Work Programme for 2017. The relevant Commission roadmap is available here:

http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_env_066_environmental_compliance_assurance_en.pdf

For more details, including the workshop programme, and the two case studies on Waste and Wildlife crimes which were examined and discussed on the day, please contact shaun.robinson@environment-agency.gov.uk

LIFE-ENPE Capitalisation and Gap-filling report published

The LIFE-ENPE project is a five-year EU Life programme-funded project that seeks to establish the ENPE network and instil consistency in the prosecution and sentencing of Environmental crime across Europe. Its aim is:

“to improve compliance with EU environmental law by addressing uneven and incomplete implementation across Member States through improvements to the efficiency and effectiveness of prosecutors.....in combating environmental crime”.

The project includes a key action to provide a ‘baseline’ Capitalisation & Gap-filling report to analyse existing information on environmental crime and prosecution activity across Europe. Drawing on information gathered via prosecution and sentencing statistics, correspondence with prosecutors and legal/literature reviews of the 28 European Union Member States, the report presents a baseline analysis of “what we know about environmental crime and, crucially, how it is *actually* being tackled by prosecutors and judges across Europe”. We refer to this as our Cap & Gap report and it includes some excellent references and some powerful recommendations.

This report is available as a pdf from the ENPE website: <https://www.environmentalprosecutors.eu/eu-life-project>

ENPE NETWORKING

ENPE representation at the EJTN Annual meeting

Our colleague, Jan Van den Berghe of EUFJE attended the European Judicial Training Network (EJTN) Steering Group Meeting in Brussels on 27 March 2017, providing a verbal update on the networking activities ENPE is involved with, as well as those of EUFJE. Our work with DG Environment in addressing waste and wildlife crimes was noted, as was the successful Utrecht conference in May 2016. EJTN have recently published a report on their Specialised Exchange Programme in 2016. This programme allows for judges and prosecutors to spend time in the jurisdiction of another Member State to further their knowledge of the institutions and law/training of another country, to further the experience of belonging to a common judicial culture and mutual trust, to expand language skills and to increase participants’ knowledge of EU instruments, case law and co-operation.

ENPE has been asked to identify available places for specialised exchanges so that these can be secured prior to the launch of the call for applications for the 2017-18 session. There will then be a call for those interested in an exchange to identify their area of interest, the Member State to which they would like to apply, via the EJTN.

For more information on this exchange programme, including a copy of the 2016 and for information relating to exchanges for 2017-18, please contact Shaun Robinson in the first instance shaun.robinson@environment-agency.gov.uk

LIFE-ENPE sits on the LIFE SMART WASTE External Steering Group

Shaun Robinson, LIFE-ENPE Project Manager, met with the LIFE SMART WASTE team and other invited external stakeholders including representatives from Police Scotland; Her Majesty's Customs & Revenue Service, Natural Resources Wales, the Irish Environmental Protection Agency and the Scottish Crown Office and Procurator Fiscal Service, to attend their first External Steering Group (ESG) meeting and workshop.

The event was held at the Radisson Blu hotel, in central Glasgow, Scotland on 1 March 2017



Members of the LIFE-SMART WASTE ESG are pictured at their first meeting, in Glasgow on 1 March 2017

This well-attended and lively day included discussions on innovative ways to enable early intervention in tackling illegal waste activities. Lorraine Ferguson, LIFE-SMART WASTE Junior Project Manager thanked all attendees, adding that it was “a really helpful meeting for our team to receive input to help to shape three of our Projects products: The Policy maker and Legislator Engagement Action Plan, Financial Investigation Toolkit and The Interventions Manual.”

For more information please contact shaun.robinson@environment-agency.gov.uk or george.hope@sepa.pnn.gov.uk

EPA Heads Better Regulation Interest Group (BRIG) 5 April 2017

Anne Brosnan attended the BRIG meeting in Rome on 5 April, and gave a presentation on ENPE and the ENPE-LIFE project. BRIG is co-chaired by Laura Burke, CEO of EPA Ireland and Terry A'Hearn, CEO of SEPA. Among the key themes for the meeting were improved collaboration between environmental networks such as ENPE and IMPEL under the Commission's **Environmental Compliance Assurance Initiative** and discussions on the recent country specific **Environmental Implementation Review** programme. The programme included a presentation from IMPEL about their activities across 52 participating countries and information about the **European Environmental Evaluators Network (EEEN) 2017 Forum**. The theme of the 2017 forum is on evaluating innovation in environmental protection and sustainability. The deadline for registering an interest in presenting or participating at the forum is **31 July**. More information is available at: www.eea.europa.eu/eeen2017.

Case Reports

Thames Water Utilities Ltd fined £20 million in the largest freshwater pollution case ever taken by the Environment Agency of England (UK)



Source:GOV.UK website

In March 2017, Thames Water Utilities Ltd (TWUL) was ordered to pay in excess of £20 million in fines and costs for a series of significant pollution incidents on the River Thames. These offences were caused by the firm's negligence and led to the death of fish and wildlife and considerable distress to the public. This level of fine for environmental offending is unprecedented in England and ranks amongst some of the biggest penalties ever imposed across Europe.

The prosecution saw six separate cases - which caused widespread pollution at a number of sites from 2012 to 2014 - brought together in one hearing at Aylesbury Crown Court. The court heard how TWUL's repeated illegal discharges of sewage into the River Thames and its tributaries, resulted in major environmental damage including visible sewage along 14 kilometres of the river, and the death of birds, fish and invertebrates.

The multiple incidents from the company's wastewater sites in Oxfordshire, Buckinghamshire and Berkshire caused significant distress and disruption to riverside residents, farmers, local businesses, anglers, and recreational river users. Sailing regattas and other events on the River Thames were also disrupted.

Investigations carried out by Environment Agency officers revealed a catalogue of failures by TWUL management, involving repeated discharges of untreated or poorly treated raw sewage into rivers, disregarding risks identified by their own staff and failing to react adequately to thousands of high priority alarms meant to alert them to the problems.

The Court heard how for weeks, untreated sewage amounting to millions of litres per day, was diverted to the rivers and away from the treatment process, although the incoming sewage flow was well within the designed capacity of the treatment works. In many instances less than half of the incoming sewage was sent for treatment.

It was pointed out to the Court that local residents impacted by the pollution were also customers of TWUL and were paying the company to have their sewage treated to the required standards, designed to protect the environment.

His Honour Judge Sheridan, who heard the case condemned the “disgraceful conduct” of Thames Water Utilities Limited, which he said was “entirely foreseeable and preventable.” It was “a very dark period in the history of Thames Water” who demonstrated “scant regard for the law, with dreadful results for people who live in the area.”

He congratulated the Environment Agency for their “painstaking and thorough investigation”, and added that he hoped the courts would never see the like of such a case again. When commenting on the level of the fines, His Honour Judge Sheridan noted that this was a record breaking fine for record breaking offending. He required that the fines be met by TWUL, and not be passed onto customers; it was the company, not the customers, he said, who broke the law.

The offences caused officers to work around the clock for lengthy periods, responding to reports of pollution, attending to clean up and river recovery and in undertaking very detailed and complex investigations. The investigation included intelligence gathering, monitoring, river sampling, interviews and analysis by the Environment Agency and was largely handled by the Agency’s in house prosecution team. Source: GOV.UK website, UK

Lawyers : Marie De Viell, Angus Innes, Howard McCann and Rooma Horeesorun, Environment Agency, England

Glorious simplicity - Sanctioning

Most of us are familiar with the contents of Directive 2008/99/EC on the protection of the environment by through criminal law (Eco-crime Directive). The Eco-Crime Directive requires EU Member States to take the necessary measures to ensure that serious environmental offences, which it lists, are punishable by penalties that are “*effective, proportionate and dissuasive*” (Articles 5 and 7). Regarding offenders who are natural persons, criminal penalties meeting these criteria must be provided. It is less widely known that this sanctioning obligation is a specification of the general enforcement obligation that the European Court of Justice (ECJ) derived from the principle of loyal cooperation laid down in Article 4(3) TEU. According to the ECJ, EU Member States have an enforcement obligation with regard to all EU-embedded law and the enforcement must be non-discriminatory (compared to the enforcement of pure national law violations of a similar nature and importance), effective, proportionate and dissuasive.

On 24 January 2017 the Dutch court of Zeeland – West-Brabant, a first instance court, issued a judgement in a criminal case (ECLI:NL:RBZWB:2017:288) that holds a little gem: an explicit check of the inflicted penalty to the enforcement criteria developed by the ECJ and imposed by the Eco-Crime Directive. The offences under consideration included violations of Article 2(35) of Regulation (EC) No 1013/2006 on shipments of waste, which are serious offences as regards the Eco-Crime Directive. While sentencing the offender, a natural person, to twelve months of prison sentence (nine effective, three conditional), the court considered “*that the imposition of this penalty meets the obligation of Member States that violations of EU law have to be followed by an effective, proportionate and dissuasive sanction, which is comparable to the sanctions for equally serious violations of similar national rules*” (p. 38/46, own translation). This penalty motivation is a *primeur* for the Netherlands.

The thrilling thing about this explicit check, incorporated in the motivation of the sentence, is that it could offer the beginning of a solution to the sanctioning inconsistencies that are observed throughout the EU with regard to environmental crime. Sanctioning inconsistencies notoriously exist from Member State to Member State but are also present within one same Member State. They involve the sanctioning practices in the administrative as well as criminal sanctioning tracks. Regarding the criminal sanctioning track they even exist within the resort of one same court of appeal, up to the level of the different chambers of one same criminal court. The inconsistencies not only impede on the EU level playing field of corporations but also feed the perception of a lack of equity and justice with civil society and corporations alike.

If each criminal judge and administrative sanctioning authority could, whenever sanctioning environmental offences, consider the non-discriminatory, effective, proportionate and dissuasive character of the sanctions to be imposed, a sanctioning practice could emerge where inconsistencies are softened. It would definitely be Good Practice to start considering the EU sanctioning requirements in each criminal judgment and administrative sanctioning decision when motivating the sanctions. For prosecutors it would be good practice to motivate the sanctioning requests using those same EU-criteria.

Carole Billiet

Chair of Working Group IV Sanctioning and Prosecution Best Practice

ENPE-LIFE project

Report on operation and evidential possibilities arising from the use of new odour monitoring technology.

In 2016 the Environmental Protection Agency (the 'EPA') in Ireland decided to pilot the use of new odour monitoring technology, which may be used to investigate odour nuisance complaints.

The target site chosen was a mixed use industrial estate called Clonminam, on the outskirts of Portlaoise town. Portlaoise is a midsized town of approximately 22,000 inhabitants in the Irish midlands. There is a residential housing estate to the north of the industrial estate. There have been a number of odour complaints from local residents over the years in relation to a company called ENVA, which deals with processing waste oil and contaminated soil. As part of that processing, the substances must be heated up to very high temperatures, resulting in high levels of hydrocarbon emissions. The ENVA site was the subject of an Irish television programme called Prime Time, which specialises in investigative journalism. The company was also subject to a prosecution (for breaching conditions of their EPA Licence) in December 2016. They were convicted and fined €8,000.

How does the EPA currently investigate air pollution?

Until recently, the existing methods used by the EPA to monitor odour emissions were:

- EPA Inspector Odour Surveys
- Odour Logs completed by civilian witnesses
- Statements of complaint by civilian witnesses

While EPA Inspectors are highly trained in carrying out surveys, the difficulty from a prosecution perspective with all of these methodologies is that they are inherently subjective.

Inspectors conduct odour surveys to assess intensity and offensiveness of odours. The EPA then uses the FIDOL acronym: Frequency, Intensity, Duration, Offensiveness, Location to assess whether those odours are nuisance odours. Two of those markers are more subjective than others; intensity and offensiveness. The Inspectors carry out inspections up wind of the site, downwind of the site and then on the site itself. When there is more than one inspector, they do not discuss their observations while carrying out the inspection and they each complete an independent field report. There is a marking scheme of 0,1,2 indicating no odour, intermittent and persistent. Odour monitoring technology is currently being trialled to indicate likely odour from licensed sites. If effective, the EPA may consider using it to corroborate the evidence of civilian witnesses. Lorna Dempsey and I met the Air Enforcement team with a view to establishing whether it would be an appropriate tool to introduce in criminal prosecutions.

What is the odour monitoring technology and how does it work?

The technology that is being trialled is a small monitor which contains four sensors that can detect various groups of hydrocarbons.



Installing the monitoring an existing lamppost

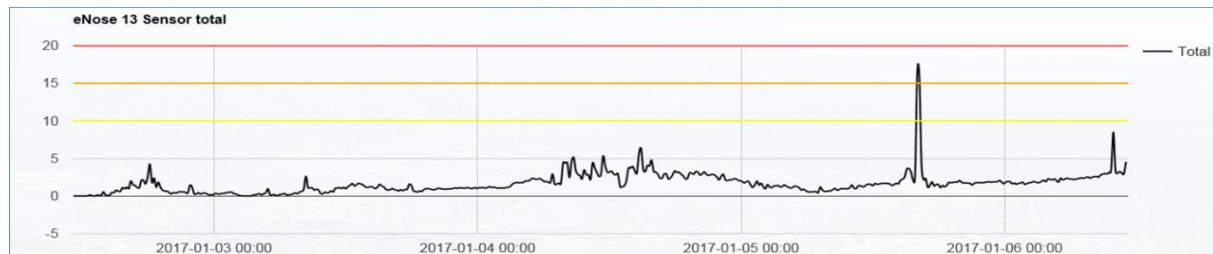
The device can indicate a presence of four groups of chemicals:

The odour monitoring technology can indicate a presence of the following chemicals:

- Aromatics (including benzene)
- Aliphatics
- Methane
- Ammonia

This odour monitoring technology is most useful in monitoring air pollution in industrial processes which release hydrocarbons. It is of secondary use in the investigation of landfill / waste dumps, as currently configured it would not be capable of detecting hydrogen sulphide. However, it could detect methane, which is commonly found in landfill sites. It is possible to install other sensors to detect hydrogen sulphide, but that model is not currently being trialled.

The sensors do not give results in terms of any measurable units; rather they operate on a numerical scale indicating a presence of hydrocarbons in the air. This may limit their potential usefulness in a prosecution scenario.



In The Netherlands, they are an important investigative tool in determination of odour sources. They are used as preventative tools where email alerts are sent to the industry and regulator in cases where there could be a breach of individual emission limits. As far as I am aware, they have not, however, been used in prosecutions in the Netherlands. The units themselves are not serviced but rather replaced every 5 years. They can be calibrated and electronically controlled remotely. The software used in the device is proprietary software. It may be possible to access the raw data can be accessed and the calculations, performed by that software, could then be carried out by the inspector.

Potential use in criminal prosecutions

While there is no doubt that the odour monitoring technology is an impressive investigative tool in environmental enforcement, there remain issues which may give rise to potential challenge from defence lawyers.

Apart from the potential technical issues which may arise, there are also wider issues of how air pollution is investigated that feed into any possible use of technology in this area. Dealing with wind directions and their effect on air pollution is a basic issue which potentially affects the results of any investigation. This technology has the potential to account for wind direction in that it allows the user to see 'Pollution Roses' of the data on screen. It allows the user to compare the wind direction with the various odours recorded in order to establish the potential source is of the odours. However, one of the EPA inspectors suggested that you would need a network of monitors to reliably determine the source.

The potential of these machines is impressive in terms of their ability to provide early detection of odour issues and support investigative and remediation efforts. However, the jury's out on their current use in criminal prosecutions.

Aisling Kelly B.L. Ireland

Forthcoming conferences

European Forum of Judges for the Environment – 2017 conference details & 2016 conference presentations now available

EUFJE will be holding its annual conference at Merton college, Oxford on the 22 and 23 of September 2017. The conference venue is located very near to the venue of the Tri-networks conference (see below) and will follow on from this conference to enable delegates to attend both if they so wish. Please contact EUFJE at (insert email contact) for more details including registration.



The Fellows quad, Merton College is pictured (source: Merton College Oxford website).

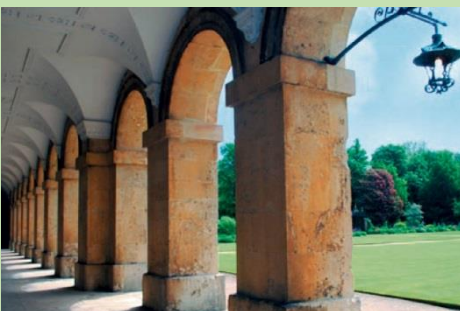
Presentations from the 2016 annual EUFJE conference are also now available via the EUFJE website. Please see:

<http://www.eufje.org/index.php/en/conferences/bucharest-2016> for access to the presentations.

ENPE annual conference 2017 update

EU Environmental Crimes Enforcement Tri-networks conference 2017 – Magdalen College, Oxford, England

We will be holding our ENPE annual general meeting on the 20-21 September 2017 at Magdalen College Oxford as part of the EU Enforcement Networks conference. At the conference, in conjunction with our colleagues



at IMPEL and EnviCrimeNet we will focus on the chain of compliance in enforcement against environmental crime in Europe, with particular



focus on waste and wildlife crime. The programme will include update you on current initiatives at all levels and will include presentations from NGOs and case studies on recent successful cases in Italy, Sweden and the Netherlands. A delegation from China and a keynote speaker from Australia

will be attending and we hope to attract guests from across the EU. Our agenda for the conference is developing and more details can be found at our [event website](#).

Contacts

We very much value your input. If you have any items, whether prosecution case updates, lessons learnt, legal developments or anything else likely to be of interest to environmental prosecutors, and which you would like us to disseminate on your behalf, please let us know. For details of how to register for our conference or who to contact to access the environmental crimes database.

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