Closing Submission

September 30th 2010

on

The Revised EIS for the Corrib Onshore Gas pipeline Application from Shell E & P Ireland Ltd

to

An Bord Pleanála's Oral Hearing

I. Introduction

Inspector and colleagues of The Board, Officers of An Bord Pleanála, Counsel, ladies and gentlemen - An Taisce, The National Trust for Ireland, and a prescribed body for the purposes of this application and hearing; would like to start our closing submission to this oral hearing conducted by An Bord Pleanála, by acknowledging our appreciation of the Inspector's accomodation of our submission today and his consideration thereof. Once again we wish to express our appreciation of the assistance and courtesy extended by the officers of the Board in the context of this oral hearing.

An Taisce would also like to again particularly acknowledge the public, who have participated not only in this hearing, but in the context of many aspects of the Corrib Gasline Project over many years, and on both sides of the debate. For it is only through such participation and debate and associated examination of issues that solutions can be found and correct outcomes can be arrived at.

Again, for the record and without any desire to appear partisan or biased, it must be acknowledged that those who have challenged the applications associated with the Corrib Gas Line Project have provided a great service to the various competent authorities in making decisions about these proposals, and consequently to the state as a whole; by highlighting issues in the numerous associtated applications which have been consequently refused, or modified or conditioned in many instances. The knowledge, wisdom and indeed expertise, both old and newly acquired of a motivated community never ceases to amaze. It is a critical input to the public consultation which is a fundamental legal requirement in the conduct of an Environmental Impact Assessment,EIA under the Directive 85/337/EEC[1] as ammended.(hereafter referred to as the EIA Directive).

The time and effort expended by so many, over so many long and hard days and nights with great personal impact, expense, and inconvenience is a service to the state which is too often overlooked and indeed is all too often inappropriately criticised and resented. An Taisce salutes them.

In this context we wish to state our absolute objection to the fact that appellants to this hearing have been required to prepare their closing statements and be in a position to submit them within 14 hours of questioning concluding late on Tuesday evening Sep 28th, after some 6 intensive weeks of hearing. This is totally contrary to any concept of fair proceedings or justice. This requirement has been exascerbated by the extraordinary decision of this hearing to require appellants to make submissions before questioning of the Applicant and Prescribed Bodies was concluded; together with the restriction on Applicant's in making 'Submission Points' in response to answers to their questions of the Applicant. Making for an extraordinarily onourous requirement to attend all sessions of the hearing – the duration of which is always difficult to assess. For those with jobs, family obligations, animals or livestock to manage, or health concerns this has been particularly unfair and problematic. These factors have all served to create an unfair advantage to a more highly resourced Applicant team, totally dedicated and reimbursed for their attendance. The structure of this hearing in particular created at the very least the appearance of inequity in the conduct of proceedings, and in for the preparation of final submissions which are important consolidation point of key argumentation, and an important point of psychological-discharge for the community and its concerns. Additionally we submit the request for appelants to submit their questions in writing in advance to the Inspector has been a matter of serious concern, and concerns have been raised that this trust has been subject to abuse. This is a strong term, and An Taisce does not wish to personalise this matter. The advance submission of questions is simply a practice which we submit is prone to misinterpretation, and increases the potential for relevance to be misconstrued. It has clearly resulted in frustration and confusion occasssioned to appealants has suffered to compromise them in making their case.

[1] COUNCIL Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (85/337/EEC)

We wish to formally note our support for argumentation presented in the various submissions made by Peter Sweetman & Monica Muller, Cornelius King, Martin Harrington, Máire Harrington, Polatomish National School (including Fr Nallan, Tom Mc Andrew and Jim Mc Andrew, collectively and seperately), Anthony Brogan, Imelda and Ed Moran and Rossport Solidarity Camp – with the express caveat of excluding from our endorsement any personal comments re. the Applicant's team, supporters of the application, or on the Board expressed therein. These above stand out – many other important issues were raised, and supported by many others – and we wish no inference to be construed to any ommission on endorsements

2. Overview:

It is our intention in this closing statement to provide a highlevel executive summary of **<u>some</u>** of the main points of our earlier submission, **but it should in no way be considered to be a substitute** for that more substantive submission, and then to address matters arising subsequent to that, and to re-focus on certain areas for the Board's consideration.

That earlier submission of Sep 17th 2010 to the reconvened oral hearing – laid out in detail the following – (a precis of which is also provided in italics – we refer ultimately to the original submission)

1. **Introduction**

   Acknowledgement address to the Board and the Hearing. Appreciation of the public who have participated in such an important process and the consequential contribution their scrutiny and focus have provided to the state.

2. **Making a legal decision under the EIA directive**

   This outlined the requirements of The EIA Directive Art 8 requiring the Board to include consultation in its decision – and detailed the problems arising from inadequate advertisement and notification of late information submitted by the applicant and facilitated by the Board, given Art 6 (3c) – An Taisce concluded the Board cannot grant permission as it has proceeded.

3. **Preface to further remarks given the Irvine Judgement**

   S*ubmission given An Taisce's concerns about the conduct of the hearing as observed.*

4. **Legality of the application – certain specifics**

   - ***Out of time (4a)***

     (Significant information required to comply with the Boards request of Nov 2nd has been submitted late to the application, even in light of the extension of time granted the applicant)

   - ***Application is invalid (4b)***

     (The application doesn't include retention permission for development at Glengad which is included in the advertisement for this application – and which was not exempt and which required planning permission)

   - ***The development cannot be permitted as the development proposal the subject of this application relies on development which requires EIA and post-construction consent (4c)***

     (Development at Glengad which was constructed by the applicant and is not inconformance with the EIA conducted for the Section 40. No EIA has therefore been conducted for same – and yet the applicant constructed this in a Natura 2000 site. As this application relies on and includes this development at Glengad – the Board is precluded from granting consent for a post-construction EIA as per its recent and most welcome decision on the Nurney Demesne

appealed by An Taisce; and the clarification provided on this matter by the ECJ judgement on case c-2155/06 which the Board referenced and quoted from in its decision.)

- ***Further complexities associated with the constructed development from the High Water Mark, HWM to the landfall at Glengad and the matter of Section 40 Consents (4d)***

  (The pipeline as constructed, and as now proposed are not in conformance with the Section 40 consent granted – there is no provision in law to withdraw or ammend a Section 40 consent, and the Applicant's contention that they can simply apply for a new one – is a matter which is as yet legally unresolved – any permission in advance of this resolution would be premature. However, given the section 40 requires EIA and the development at Glengad is included in the New section 40 consent cannot be granted EIA consent post-construction – a new section 40 cannot be granted – notwithstanding the legal compexities arising from the old Section 40 consent)

- ***The application relies on information – the legal basis of which is of concern – given issues with Ministerial licence issued (4e)***

  (Note: While the language we use hear has been moderated – in line with the objection raised by Mr Keane, Counsel for the applicant – the substantive issue, and implication thereof for the consequential deficiencies of this application remains, and indeed have been subject to further challenge. The Minister granted a foreshore licence advertised as site investigation to facilitate data collection for the revised EIS, but detailed in the application as detailed design work, however the Minister granted no exemption as he extraordinaritly deemed none was required, despite the activity being conducted in a Natura 2000 site and thus requiring EIA and Appropriate Assessment – or at the very least screening thereof)

5. Record of the applicant pertinent to the Corrib Gas pipeline experience

(This section highlights to the Board the concern that the applicant themselves presents a risk to the Natura 2000 sites in which this development, the subject of the application before the board will be constructed and indeed operated. Given the precautionary principle this alone we submit invokes the consideration of Article 6(4) of the Habitats directive. The matter of risk is exascerbated by Mayo County Councils lack of enforcement credibility – as the appropriate authority)

- ***Development without consent or licence (5i)***

  (Addresses the various implications of the ongoing work of the drilling rigs in the bay – after Mr Keane Counsel for the Applicant indicated formally to the Inspector that it was not proposed to furnish the Board with further information. The implication is this ongoing acticity is Development activity, for the development the subject of this application, being conducted in a Natura site – without EIA and without Consent and without appropriate Foreshore Licence, having been provided. It is descibed in the application as 'detailed design', while advertised as site investigation.####

- ***Development not in accordance with consents granted/Non-compliance with conditions of permission. (5ii)***

  (References the development at Glengad in the Natura 2000 site which was constructed by the applicant and is not in conformance with the EIA or consent granted. Additional areas have been subequently highlighted in relation to non-conformance with conditions of consent - particularly in relation to the terminal development consent including lack of compliance with condition 37 for a financial bond of €20 million in respect of decommissiong of the terminal, and condition 7 in relation to trucks and haul routes, which was varied without proper application to vary, we refer to Mr Sweetman and Ms Muller's various submissions and questioning for further elaboration on this matter)

- ***The use by the applicant of applications for retention (5iii)***

  (The applicant has acknowledged same. An Taisce contends that the approach of developing and then seeking consent for retention – is a signal insult to the planning process. Continued exploitation of such an approach is of concern to An Taisce and a matter for the Board to consider.

- ***Dolphins (5iv)***

  (The recent dolphin incident in the bay was also referenced – as many had raised this as a concern but the relevance was queried. We submit it as a matter for the Board and others to consider in terms of the implications and any consequences thereof for the applicant and perhaps for the application – and we now add this is all the more significant particularly considering it has now been shown the investigation works in the bay are part of this project, and the matter of derogation not addressed.##)

These matters have been substantially augmented in the context of questioning sessions subsequent to our original submission – as indicated in our earlier submission as was only to be expected, given the extensive knowledge of this community of this applicant an its applications.

- ***Section 35 – application to refuse (5v)***

  The matter of a Section 35 application for permission to refuse the development was submitted as an option open to the Board for consideration – not that it isn't spoiled for choice in that regard!

6. **Compromise of the EIA subsequent to the Board's Direction of Nov 2nd 2009**

(Here we submitted that the Board had applied an inappropriate constraint on the consideration of alternatives – thereby compromising the conduct of the EIA as legally required under the directive)

7. **Implications of the Birds and Habitats Directive**
   - *The approach taken in the remainder of the submission was to:*
     - *Part A step through the legal requirements and argumentation, establishing key legal submission points such as how uncertainties and risk constitute negative effects – and how the provisions of Article 6(4) of the habitats directive are invoked in such instances and how the stricter provisions of the Birds directive apply in this case – and how as a consequence both the Board and The Commission must refuse the application as presented and justified as it is on economic grounds -*
     - *Having established the legal premise – then in Part B further examples of issues to support the legal argument were presented,*
     - *Part C – provided a conclusion.*

These Parts are outlined further now – for the convenience of the Board

Part A Establish the Legal Argument

- *(i) The outstanding response from the ECJ on the interpretation of the phrase/concept 'site integrity' requested by Ireland's Supreme Court of Justice*
- *(ii) The absence of site-specific conservation objectives for the Broadhaven Bay and Glenamoy Bog Complex cSACs and the Blacksod & Broadhaven SPA/pSPA.*
- *(iii) Invoking the requirements of the Article 6(4) of the Habitats Directive*
- *(iv) Implications of Article 7 of the Habitats Directive and Article 4(4) of the Birds Directive*
- *(In addition to highlighting that the project does not have necessary justification to permit the*

negative risks and impacts its development and operation presents to the pSPA. This section also addressed the European case law protecting areas of the Broadhaven Bay current SPA designation proposed for ommission and the new areas to be included – in brief – all are protected until the new designation process is fully complete)

Part B – (Support grounds for refusal with further argumentation and example.)

- B1. The Lack of an Emergency Plan, Status of Safety Permit & All-Ireland (Energy) Market Considerations

  Concluding the EIS to be dismally deficient in addressing the direct and direct effect of the application as required legally, and indeed to be premature in the case of the requirements of the safety permit and requirements and standards of An All Ireland Energy Market

- B2 Intervention Pit.

  Highlighted the fact – this is the fall-back position in the event of a tunnel obstacle, and that the stipulations proposed in relation to its deployment rely on illegal post-consent conditions as clarified in the Lough Rynn judgement and which we also submit is contrary to the Circular from the department on same. ###

- B3 'ALARP' or "ALA Shell E & P Ireland Ltd RP" ?

  Highlighted the lack of tranparency with the applicants view of what is a reasonable level of risk management, and lack of effective compliance with the requirement of the Boards letter of Nov 2nd , and the fact it is clear there is a difference in what the Board views as a reasonable level of effort and complexity and cost and risk for this development and the applicants given the applicant previously rejected the option of tunnelling under the Bay – but the Board have requested it be further qualified in this revised EIS. The Board has been provided with no transparent basis or numerical or empirical basis on which to review that risk has in fact been managed to a point which is as low as reasonably practical – because the factors and the values taken into account have not only been not presented to the Board – but have not been assigned according to the applicants expert when questioned. We add as have many in this hearing - it appears it is an instinctive approach – Shell E & P Ireland's instinct, the basis for which the Board must therefore consider. We conclude the EIS submitted is insufficient in this regard.

- B4 Deficiencies in Senarios Modeled

  Despite the pipeline passes through wide areas with no building present but where people may occur, there is no modeling provided on the extent of exposure required to or which would occassion a fatal dose of irradiated heat, absence of detail on modeling assumptions with regard to age of individual etc were also highlighted. We conclude the EIS submitted is insufficient in this regard, and major environmental uncertainties and risk arise as a consequence.

- B5 Waste

  An Taisce concluded the EIS was deficient in specifying how the tunnell arisings would be addressed – which are a direct consequence of this application, and the environmental impacts of their disposal was inadequately treated. We are indebted to Mr Sweetman for his vindification of our remarks and amplfying our concerns in the context of his questioning on traffic and other matters. We conclude the EIS submitted is insufficient in this regard, and major environmental uncertainties and risk arise as a consequence.

- B6 Proposed Trench, Stone-Road, certain outstanding elements of the EIS and project splitting
  This section highlighted concerns with the sustainability of the pipeline as proposed, elements required to facilitate its functioning as pressure drops of from the field which have not been specified in this EIS, and other very significant considerations in relation to the clear issue of over-specification or under-specification of the works for this development (particularly in relation to the trench, which varies some 3 metres in width) which have not been appropriately justified in the information before the Board. We conclude the EIS submitted is insufficient in this regard, and major environmental uncertainties and risk arise as a consequence.
- *B7* Further concerns raised petaining to the trenching technique and the onshore portion of the tunnel south of Sruwaddacon Bay.
  The lack of long term evidence for the approach being undertaken to restore the 190m of bog identified as 'N17' in figure 12.2c of the Revised EIS, and the controvesially narrow assessment of what constitutes active bog in Ms Neff evidence (Ecological expert on behalf of the applicant) and the resulting uncertainty regarding a priority blanket bog habitat, under Annex 1 of the Habitats directive.

- B8 Birds
  Outlined Irelands obligations under European Directives, international treaties and conventions on migratory species and the large body of scientific concern regarding the impact of unnatural levels of light on birds and indeed wider ecosystem effects on zoo-plankton whose movements respond to light and which may consequently result in algal bloom, compromising the water quality and the habitat of the Natura sites and adjacent habitats. The clear uncertainty & risk presented as a consequence and the implications of the precautionary principle for refusal of this application were highlighted.

- B9 Otters

In brief the otter survey was inadequate, as otters and their habitat are protected under Annex II and IV and specifcally under Art 12 of the Habitats Directive, Derogations under Art 16 are required, need to be provided in advance of any consent for the development from the Board; but cannot infact legally be granted in Ireland at this time given the species is not at "favourable status" within the territory – as is required under Art 16 in order for a derogation to be allowed.
The following list of areas were addressed in relation to the evidence presented by the applicant's EIS and statement:

- ** Inability to support assessment requirements of the Habitats Directive*
- ** Inadeaqacy of searches and monitoring*
- ** Limitations to survey times*
- ** Adequacy of Surveying and Monitoring Techniques employed*
- ** An Taisce's contention on the acknowledged uncertainty and the precautionary principle – a derogation licence is required*
- ** Derogation should have been sought in advance of the application*
- ** Illegal Conditionas and Post-Consent Surveys (Lough Rynn & Broadhaven Bay Case ECJ c183/05)*
- ** Illegality of derogation licences for otters in Ireland – concluding they are required for this application to proceed – but cannot be granted given the lack of favourable status for the otter in Ireland.*

8. Part C. Conclusion

The conclusion briefly referenced the following points :

- *Insufficiency of information*
- *Technical Issues with the application*
- *Complex outstanding and unresolved legal matter with Section 40 consents*
- *Complexities arising from need for clarity for the Board on the meaning of 'site integrity'*
- *Complexities arising from lack of site specific conservation objectives – required in order for the Board to conduct its legal obligations in compliance with the legal requirements of Article 6 of the Habitats Directive.*
- *The Extent of uncertainty and risk pertaining to the application*
- *The legal restriction on the Board to use compliance conditions and post-consent surveys to complete an inadequate EIS and to develop mitigation.*

An Taisce then concluded on the matter of:

- *Strategic Justification and Energy Security & Energy Matters*

  This provided reminder of the detail presented to the Board about the lack of strategic justification and indeed the flaws in the argument that the Corrib field contributes to Ireland's energy security.

  We add to this now that we are indebted to Ms Máire Harrington for her detailed expose in her closing submission of the fractional contribution of the Corrib field to Ireland's requirements – which augments our argument - – with a treatment of fractions – which only an ex-school teacher and principal could employ! But which An Taisce submits, should be a matter of the strictest concern to both the Board and the State and its agencies in considering the applications asscociated with this and indeed other fields and energy proposals and other applicants – if the concerns of Mr Branigan who put his life on the line to provide energy security for the state in the past are to be truly addressed and indeed respected.

Having reviewed our original submission points and in the context of matters arising subsequent to it – our submission to the Board remains that the Board is *precluded* from granting permission to this development legally, and has insufficent evidence on which to base a finding that the development would be consistent with the proper planning and sustainable development of the area. Indeed it remains to be seen how the Board could 'reasonably' grant permission, and its consequential credibility. In this context An Taisce – a prescribed body for the purposes of this application - specifically request the Board to address each of the points for refusal in our opening submission of Sep 17th and in our closing statement in its report – and its basis for rejecting our arguments should it decide to grant permission for this development – as a courtesy to the Board so we can understand the basis for its deliberation, and so that the matter of deliberations is transparent.

Having addressed our opening submission, we now wish to move on. As it is not practical to summarise all arguments effectively in a closing statement - in An Taisce's closing statement we also wish to highlight some of the key points and findings from the hearing which have arisen subsequent to it. In this context we take our original oral submission of Sep 17th to the reconvened oral hearing, which the Board has a written copy of, and our other written submissions on this application as read.

In brief it is An Taisce's concluding contention that the decision on this application *must at least a*ddress the following 12 considerations; and on the basis of each of these 12 categories/consideration – we provide argumentation which warrants refusal of the application given these considerations. *(Note: Each of these are offered without predjudice to other argumentation submitted, and will be expanded on later below)*

1. The strategic basis on which this application has been advanced is flawed, particularly with reference to the purported contribution of the field to Ireland's energy security and energy infrastructure. Such objection is not limited to the considerations arising consequent on the ownership and contractual arrangements of the Corrib field and the manner in which the gas market operates. This has significant implications for the decision making context which must be applied to the application by The Board – particularly, but not limited to considerations of interest and justification raised in the European Habitats[2] and Birds[3] Directives, and as will be laterly argued – serve to orchestrate a refusal of permission.

2. Given the requirements of the Habitats and Birds Directive – the only legal decision for this application is refusal – we submit. Specifically we argue as follows:

   a) The considerations of Article 6(4) of the Habitats Directive pertain to the cSAC and SPA Natura 2000 sites associated with this application. An Taisce submits in the context of the plausable and credible reasons for this development - that the only operative condition is that for a reference to The European Commission who can effectively grant permission for the development in the context of an argument of Overiding Public Interest, but only where no alternatives exist, given sequentiality requirements. Given neither of these conditions pertain to this application - therefore the Commission must refuse the application also;

   b) The Further & more restrictive implications of the Birds Directive for the decision:
   Further implications for the considerations relevant to the decision arise given the status of the Blacksod & Broadhaven Natura 2000 site as a <u>proposed</u> SPA. Given its status as a pSPA the provisions of the Birds Directive therefore ***overide*** those of the Habitats Directive. We submit therefore that The Board and the Commission therefore **<u>cannot</u>** grant consent legally for the application under the Birds Directive given:

   - Given the development is predicated on an acknowledged economic justification and is documented as such in the revised EIS for the application – and such a justification is not superior to the general interest of the Birds Directive. #
   - Given what An Taisce maintains are adverse impacts from the development to the proposed Special Protection Area, Natura 2000 site - Blacksod & Broadhaven pSPA, or impacts which are at best *'uncertain impacts'* - this therefore invokes the

[2] COUNCIL Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora - hereafter referred to as the Habitats Directive

[3] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (this is the codified version of Directive 79/409/EEC as amended) – hereafter referred to as the Birds Directive;

precautionary principle, and given the greater level of protection afforded the pSPA under the Birds Directive and in this instance given the provisions of article 4 – exposing the site to uncertain impacts and risks – **a grant of permission cannot be argued to be consistent** with avoiding deterioration and disturbance of the birds as per Art 4(4), and in maintaining the objectives of the Directive as per Art 4 (1) and 4 (2).

- *Note: We would remind the Board we expand on these points later below, and even greater detail is afforded to them in our primary submission of Sep 17th on the revised application.*

3. Additionally An Taisce contends that the Applicant appears to wish to both *'have their cake and eat it'* when it comes to the presentation and Environmental Impact Assessment of this scheme.

   On the one hand Shell E & P Ireland Ltd and the Board argue that the impacts of this particular application for the onshore pipeline should be viewed in isolation from other applications and developments associated with the Corrib Gas Pipeline Project – and that it is not a case of 'project splitting'. Given such a stance - any argument for the 'sustainability' of the onshore pipeline development simply evaporates as it stands alone as an expensive tube! The matters which An Taisce has sought to raise as far back as 2004 on the Corrib Gas Line applications with Board relating to Environmental Management and the need for Integrated decision making continue to pertain and obscure the real effects and appropriate planning, co-ordination and operational management of the various elements of this Corrib Gas Pipeline Project.

   So then in response or on the other hand, when the Applicant or the Board wishes to argue 'sustainability' and 'strategic context' – the onshore pipeline, the subject of this current application, the standalone pipe suddenly transforms into a critical part of an ongoing initiative or scheme – other elements of which remain not only unspecified and unassesesed and in some cases undisclosed – but which will somehow magically, **but in an unspecified manner -** provide for the ongoing operation of the terminal after the corrib field has been exhausted etc, Also changes which Mr Costello (for the applicant) indicated would be required to allow for the terminal to cope with the reduction in pressure are also unspecified stragely! The cake is once again subject to a salami-slicer in such instances, and the full extent and impact of same are patently unclear and unassesed – which is contrary to the requirements of EU law.

   An Taisce submits with respect, that the Board, and other agencies such as the EPA and indeed the State appear to also be complicit in this double standard with regard to the Environmental Impact Assessment thus far, and that such is contrary to European Law, and fundamentaly at odds with the objectives of the EIA Directive which requires that prior to the consent for a project - which is defined in Article 1 of the EIA directive to include '***schemes***' ; the impact of same should be assesed before executed in whole or in part.

   The splitting of this project and subsequent modifications applied – have completely compromised the ability to determine the environmental impact assessment of this proposal from the outset and determine whether it should or should not go ahead, and the implications of post-construction EIA, given the extent of construction undertaken and outstanding and the varying status of same - **have potentially the widest implications for the Corrib Gas Pipeline initiative – as currently proposed.**

4. The application itself does not adequately address the requirements of the EIA Directive which governs the application. Additionally the processes undertaken by The Board to assess it thus far – are not incompliance with the requirements of the EIA Directive. An Taisce submits that the current application **does not provide the Board with adequate information** on which it could consider that this development was consistent with the proper planning and sustainable development of the area, and does **not** provide a basis for such an assessment. In addition to the points above on areas of specific deficiency highlighted.

5. The Board - to use its own words in the decision in the recent Nurney Demesne case appealed by An Taisce is *' precluded from considering a grant of planning permission .."* as per the judgement of the European Court of Justice -c 2155/06. This is given this application, similarly to the Nurney Demesne case, depends on development at Glengad which has been constructed without EIA and which required EIA.

6. Any decision to grant permission would be premature pending resolution of outstanding legislative considerations not limited to the complexities arising from the legal issues arising vis-a-vis the Section 40 consent matter.

7. The insistence by the Applicant on a landfall for the pipeline at Glengad and the associated constraints to the consideration of alternatives by both the Board and the Applicant.

8. The extraordinary implications of the evidence/statements made by Ms Neff ecological expert presented by the Applicant pertaining to the competence of the National Parks and Wildlife Service, together with the conflict of interests pertaining to NPWS staff whose hearsay evidence was provided to support the Applicant's contention of the non-existence of Machair at Glengad. This hearsay evidence is in stark contrast to the documented maps secured by An Taisce from the NPWS and produced at the hearing indicating the presence of the priority habitat Machair at Glengad, the site of development the subject of this application.

   Consequential and additional concerns pertain to the assessment of 190 m of bog identified within the EIS in Figure 12.2c of the Revised EIS document as 'N17'. In the context of the bad status of blanket bog and particularly priority habitat active blanket bog – the opportunity to designate consequent on a status which has emerged in the context of an application for development – is not without precedent (Ballyseedy Woods) - Clearly this is not a matter for the hearing to progress but it may be a matter for the NPWS to address and we wished to record same.

At the very outside a matter of considerable uncertainty with regard to the ecological impacts of this development pertains, particularly in relation to priority habitats and consequently we submit Article 6(4) of the Habitats Directive is invoked.

9. The direct,indirect and cumulative effects of allowing the onshore pipeline on other components of the Corrib Gas Pipeline Scheme require fuller consideration under the EIA Directive than has been provided for in the process so far.

10. Not only consequent on the signing of Ireland's signing (accession to and acceptance of) the Lisbon Treaty – the application should have been treated as a SEVESO site/application

11. The Applicant themselves constitute an unacceptable risk to the Natura 2000 sites associated with the development application – even while only considering the development experience associated with the Corrib Gas Pipeline scheme and their non-compliance behaviour, together with the inefffectiveness of Mayo County Council to enforce conditions or process changes to conditions appropriately.

12. The application itself is frought with basic procedural and administrative faults which mean the application itself is not incompliance with the law, and numerous outstanding and unresolved matters pertain. It should be refused in line with numerous other decisions by Local Authorities and The Board on other applications – so that all treated and seen to be treated equally before the law.

On the basis of all of the some dozen categories for refusal detailed above – upon which we will shortly expand – An Taisce submits :

- The application is technically deficient, and not in compliance with basic planning legislative requirements, and those of the EIA Directive

- The Board has insufficient evidence before it on which to determine this application is consistent with the proper planning and sustainable development of the area

- Notwithstanding the insufficiency of evidence, The Board is specifically *precluded* from granting permission legally to this application – given certain specific considerations of both the EIA and Birds Directives, and case law from the European Court of Justice clarifying same - not limited to
    - Restrictions to a grant of consent for post construction EIA and also
    - The exclusion of economic justification in permitting a negative impact to a pSPA

- The Board must therefore refuse the application.

We work through the above categories for refusal in reverse order with reference to the more detailed argumentation in our earlier submission of Sep 17th ,and the record of questioning of the Applicant, and appealants submission points thereon.

12. The application itself is frought with basic procedural and administrative faults which mean the application itself is not incompliance with the law, and numerous outstanding and unresolved matters pertain. It should be refused in line with numerous other decisions by Local Authorities and The Board on other applications – so that all treated and seen to be treated equally before the law.

A) No evidence of consent from land owners to develop on lands not in the Applicant's ownership – as required by the Planning & Development Act 2000 as ammended and regulations thereof.

- The Applicant has not provided evidence to the hearing and to the Board as part of their application, that they have permission from the owner of lands subject to their development proposal – to either present the application and execute the development as is required by the Planning and Development Act 2000 as ammended and regulations thereof. In effect – the lands which will be developed if this application is granted permission are not all in the ownership of the Applicant. For example the seabed is a matter of state ownership and other lands are owned by Coillte and so by the State, and other ownership matters may infact pertain. We submit the foreshore licence applied for by the Applicant – is not the appropriate consent in this context – and indeed the foreshore licence for the development has not infact been granted. (case Murphy v Mayo County Council)

B) Private Developers cannot subject state-owned lands to CPO
    - The matter of CPO for lands owned by Coillte necessary to this development proposal has not been properly addressed or resolved and the compulsory purchase of state owned land by a private developer is indeed precluded by law

C) The application is simply out of time
    - On Nov 2nd 2009 the Board issued a letter inviting the submission of a revised EIS etc to support proposed alterations to the route applied for by the Applicant in 2009, by Feb 5th 2010.
    - The Applicant requested and was granted further time to comply with this request.
    - On May 31st 2010 the Applicant submitted a response to the Board – and this was advertised on June 29th 2010.
    - Subsequently the Applicant submitted further information. The Board deemed this to be significant by virtue of the fact they required it to be re-advertised and it was on Aug 10th 2010.
    - Subsequent to this in the course of the reconvened Oral Hearing which commenced on Aug 24th – the Applicant has submitted yet further extensive additional information including detailed technical borehole data. In addition to submissions we have made regarding the lack of notification and consultation afforded to same – we submit this information has to be considered significant – and must be considered 'late' in the context of the submission of the revised application.
    - We submit the application should simply therefore be ruled out of time, the application deemed to be lapsed, and permission cannot be granted for same, unless the Applicant wishes to withdraw the additional information – in which case

the inadequacy of the information provided on which to base an assessment comes into sharp focus. The application is therefore either late or inadequate we submit.

- The fact that the drilling rig continued after the applicant had indicated they did not propose to provide further information to the hearing – and indeed is described in the application – as 'detailed design' – we submit creates a major issue – as this is effectively development work undertaken for this application for which no EIA has been conducted and is without consent – the implications of this for post-construction EIA are extraordinarily significant for this application.

D) The application does not include an application for retention

- The advertisement for the application indicates it includes the development from chainage 83+400 to the High Water Mark at Glengad.
- The application does not include request for retention permission for development already constructed which is part of this development application.
- It is our contention that the development of the pipeline – which was subject to a section 40 consent in 2002 – was not infact exempted development, and infact required planning permission which was not secured.
- The Applicant has <u>not</u> produced sufficient evidence thus far to the hearing that planning permission has been secured or is not required for the landfall development at Glengad . Given the declarations requested in that case – <u>the judgement of Justice Charleton An Taisce argued have infact no bearing on the specific matter of the status and matter of permission for the development from the HWM to the landfall at Glengad</u>. Subsequently when Mr Keane's (Counsel for the Applicant) questioned An Taisce following our earlier submission - he provided a further affi-davit and declaration from Mr JO'Donnell with regard to development at Glengad. But as An Taisce responded then – it is not clear what arguments and considerations were presented to Mr Justice Charleton on the legality or otherwise of the development and on what evidence he based his decision with regard to its exempted or non-exempted status. In brief An Taisce submits the Applicant has not satisfactorily rebutted the considerations raised by others and An Taisce in its submission with regard to a number of considerations which we have detailed in our earlier submission would have de-exempted the pipeline from the requirement for planning permission – therefore we submit our contention stands – the development of the pipeline at Glengad required planning permission, and now given it has been constructed – requires retention permission, and none has been sought. We also submit that Mr Keane Counsel for the Applicant is precluded from introducing new evidence on this matter at this point – given the Hearing has entered 'closing statements'.

- The application relies on borehole log data information. Serious issues have been raised in relation to the validity or otherwise of the foreshore licence against which this information was secured – and which are consequently a matter of concern.

  - In brief, the Applicant submitted borehole log data consequent on a foreshore licence granted by the Minister.
  - An Taisce is as indicated to Mr Keane is happy to moderate our earlier remarks on this matter. However our contention that the Minister's decision to consider the drilling of boreholes in a Natura 2000 site simply did not require EIA or consideration under Article 6 of the Habitats Directive is not just extraordinary but is fundamentally flawed in law.

- Consequently the implications for information submitted to the Board consequent on the grant of such a licence are at the very least in question.
- We would ask the Board to note our earlier submission includes responses to an 'Access to Information on the Environment Request' served on the Department (DOEHLG) in relation to this matter. It indicates the Minister somewhat extraordinarily did not consider an exemption was required because the Minister viewed no assessment was required. This despite such considerations as the work to be undertaken was in a Natura 2000 site.

11. 11. The Applicant themselves constitute an unacceptable risk to the Natura 2000 sites associated with the development application – even while only considering the development experience associated with the Corrib Gas Pipeline scheme and their non-compliance behaviour, together with the inefffectiveness of Mayo County Council to enforce conditions or process changes to conditions appropriately.

An Taisce contends the Board must consider the risk presented to the Natura 2000 sites associated with this development, given the particular requirements of the precautionary principle, also the risks presented to the community and indeed the environment at large based on the Applicant and the specific non-compliance behaviour evidenced by the Applicant in relation to the Corrib Gas Pipeline scheme not limited to:

- Development without consent or licence
- Development not in accordance with consents granted.
- Development not in accordance with conditions granted
- The use by the Applicant of appliciations for retention.

These are summarised briefly below:

- *Development without consent or licence*

  We contend the ongoing execution of borehole investigations, which continues beyond the pretext of provision of information to support this EIS for which a foreshore licence was applied for back in Jan 2010 and granted in July 2010 – now constitutes development activity. This is notwithstanding our earlier remarks regarding the questionable legality or basis for the foreshore licence for the site investigation boreholes in the first instance, and the issues arising from the late submission of this information and the lack of consultation afforded to same which we summarise later.

  In brief the Applicant indicated that it was not proposed to submit further information to the hearing – yet the drilling rigs continued their activity in Sruwaddacon Bay – for some days even after An Taisce raised this as a concern at the hearing.

  We submit the activity of the drilling rigs cannot be therefore considered to be anything other than 'development activity' for which no permission has yet been granted or refused by the Board, and for which no foreshore licence for the development of the tunnel has been granted or refused.

  The Applicant – must acknowledge that either they require further site investigation data to submit to the Board – or some uncertainty pertained to that which they have presented to the hearing and on which they have withheld mention of, or they have proceedded with development activity without consent.

- *Development not in accordance with consents granted.*
  - Notwithstanding earlier comments regarding planning permission and points to be addressed re the EIA requirements for the development constructed at Glengad – we also wish to make the following point.
  - The Applicant previously sought a Section 40 consent under the Gas Act, and was granted same in 2002. While that application for consent provided for development at a certain point in Glengad, and provided an EIS to support the EIA of development at that point. The Applicant then subsequently constructed

development at another point entirely in Glengad and without securing any associated consents or EIA in advance thereof.
    - We wish to note it formally, albeit the Board is aware, that this illegal development was actually executed in a Natura 2000 network for which the State has an obligation to protect.
    - While the extent of accomodation and legal amendment engaged upon by the State to accomodate the Corrib gas pipeline initiative is perhaps unprecedented - the very deliberate actions of the Applicant, Shell Exploration and Production Ireland Ltd in our view have in fact compromised this State, the Republic of Ireland in terms of its undertakings and legal obligation to protect the Natura 2000 network within the State's terrritory within the European community, and its international obligations under the Ramsar Convention and Conventions on Migratory Species.

- *Development not in accordance with conditions granted.*
    - The permission granted for the terminal in 2004 by the Board included a pre-construction condition that the Applicant would provide a bond for €20 million against the decommissioning of the terminal. It is also critical to note that Mayo County Council failed to enforce this condition within the statutory timeframe – however fortunately an independent enforcement action still exists against the Applicant on this matter – which given it is a financial condition for a significant amount is of particular import. The Applicant has not complied with this condition despite court action on this matter.

- Effectiveness of Mayo County Council
    - Further to the above concerns regarding the ineffectiveness or otherwise of Mayo County Council in enforcing compliance with the financial condition above – the Council also failed to properly address the matter of revising conditions issued associated with haul route for the disposal of peat associated with the terminal construction and the trucks to be used. Not only did the Council not apply to revise the conditions, but its actions and those of the Applicant could be seen to have served to undermine and compromise the impact assessment which had been undertaken, and arguably served to increase the environmental impact of the disposal works, given all the number of road surfaces which had to be relaid which is generally contended to have been consequent on the requirements of the different and larger trucks used. We conceed this is a matter of some contention.

- The use by the Applicant of appliciations for retention.
    - In brief the Applicant has been forced to make applications for retention for development and variations without prior consent ****

Finally extensive discussion was conducted in the hearing in realation to an incident with the Applicant and dolphins (a protected species under the Habitats Directive), in Sruwaddacon Bay. An Taisce understands from comments made by Appealants to the NPWS at the hearing - that a formal complaint was being prepared and there was a clear intention indicated to submit same on this incident. Clearly, as stated is not for An Taisce to adjudicate on this matter – however we simply wish to remind the Board of this *potential* further area for consideration re. the Applicant, and to have on record the matter of the complaint. (we understand the complaint has been submitted)

The matter of particular concern for the Board is that development will be conducted in Natura 2000 sites – and the precautionary principle requires the Board to consider uncertainty and risks which cannot be

eliminated. In this context An Taisce submits the Board must consider what uncertainties and potential risks are presented to the Natura 2000 sites given the experience of the Applicant to date, and the poor record of Mayo County Council in managing the Applicant, and enforcing compliance – even within Natura 2000 sites. We submit this uncertainty and risk is sufficient to invoke Art 6(4) of the Habitat's Directive – an argument which we expand on shortly.

In conclusion we once again remind the Board that the matter of a Section 35 application to the courts for refusal of an application on the basis of previous non-compliance of an Applicant is an option open to the Board. Clearly as we have already articulated – this is a matter for the Board to consider. An Taisce, as stated, welcomes a strong signal to Developers that compliance with planning conditions and the law is not a "pick 'n mix" or optional activity.

10. 10 Not only consequent on the signing of Ireland's signing (accession to and acceptance of) the Lisbon Treaty – the application should have been treated as a SEVESO site/application

Quite simply the requirement for the application to be treated as a SEVESO major accident hazzard application is a matter the Board must consider – not only given the effect of the signing of the Lisbon Treaty. The acknowledgement by one of the applicants own consultants that the development would be considered a SEVESO site in the UK – is a matter and an implication for the closest consideration by the Board.

9. T9 The direct,indirect and cumulative effects of allowing the onshore pipeline on other components of the Corrib Gas Pipeline Scheme require fuller consideration under the EIA Directive than has been provided for in the process so far.

The EIA Directive also requires the consideration of the direct, indirect and cummulative effects of an application and An Taisce has highlighted to the hearing – (particularly in the context of the Applicant's questioning of An Taisce subsequent to our submission) – that the operationalisation of the terminal is in effect a direct effect, or at the very outside, an indirect effect of a consent for this onshore pipeline component. Therefore we submit <u>all</u> considerations and requirements associated with the introduction of gas and associated processing requirements and the environments and working conditions created are therefore a matter of consideration for this application. We submit these have not been afforded proper consideration at this hearing given the restrictions operated on the matters open for consideration at this hearing as can be evidenced within the recorded transcript and the Board's written instructions to the Inspector of Aug 16th 2010, ref 16.GA0004 and displayed at the hearing and read into the record.

8. The extraordinary implications of the evidence/statements made by Ms Neff ecological expert presented by the Applicant pertaining to the competence of the National Parks and Wildlife Service, together with the conflict of interests pertaining to NPWS staff whose hearsay evidence was provided to support the Applicant's contention of the non-existence of Machair at Glengad. This hearsay evidence is in stark contrast to the documented maps secured by An Taisce from the NPWS and produced at the hearing indicating the presence of the priority habitat Machair at Glengad, the site of development the subject of this application.

Consequential and additional concerns pertain to the assessment of 190 m of bog identified within the EIS in Figure 12.2c of the Revised EIS document as 'N17'. In the context of the bad status of blanket bog and particularly priority habitat active blanket bog – the opportunity to designate consequent on a status which has emerged in the context of an application for

development – is not without precedent (Ballyseedy Woods) - Clearly this is not a matter for the hearing to progress but it may be a matter for the NPWS to address and we wished to record same.

Clearly a significant element of uncertainty with regard to the impacts of this development, particularly in relation to priority habitat now pertains and consequently we submit Article 6(4) of the Habitats Directive is invoked.

We refer to the recorded record of the hearing on these matters out of consideration for the gravity of the matter at hand and the implications thereof, and the implications this has for the Board's deliberations. We summarise the matters as we have understood them.

- An Taisce secured copies of 1996 maps and asscociated notes from the NPWS files on the Natura 2000 Glenamoy Bog Complex files. These indicated the existence of the priority habitat Machair on the site at Glengad (Priority Habitats are highlighted in the Annex 1 habitats listed in the Habitats Directive). Mr Sweetman questioned the Applicant's ecological expert Ms Neff on same.
- Ms Neff indicated that in her opinion the ecologists who had conducted the associated surveys were not vegetation ecologists. Her testimony we understood ineffect was to undermine the validity of the determination evidenced on the maps produced - which indicated that Machair existed in Glengad.
- Ms Neff further substantiated her view that no Machair existed in Glengad based on comments made to her by Dr Gaynor of the NPWS.
- Prior to this, the NPWS personnel who attended the hearing also provided hearsay evidence indicating Dr. Gaynor's view that no Machair existed in Glengad – based on her own survey of the site.
- However on Sep 28th by Mr Sweetman was finally allowed make a submission regarding the fact that Dr Gaynor of the NPWS who has been quoted in hearsay is perhaps conflicted. In brief ~~given~~ she was engaged previously by Ms Neff company in the conduct of surveys for the Applicant. So the basis of the Applicant's evidence that there is no Machair in Glengad is not only hearsay – but is also now hearsay of someone who is the subject of a conflict of interest – or at the very least a perception of same. All of this being on such a matter of grave import as to the existence or non-existence or even more worringly the potential disappearance of the priority habitat - Machair at Glengad – the situation of the offshore/onshore pipeline, and a site subject to this development application.

- The wider considerations of Ms Neffs remarks pertaining to the competency or otherwise of personnel engaged by the NPWS to make a determination on habitats, and whose findings have been recorded documented in the file for the Natura 2000 site, and the implications for those in the NPWS assigning and overseeing such activity, and the wider implications for other sites these parties may have been involved in - are clearly beyond the scope of the Board. However, the credibility of the NPWS service has been called into question we submit by the Applicant's witness. In this context the absence of any formal request or requirement for correction to the NPWS files by the Applicant and/or their witness - should be a matter for the close consideration of the Board.

- In brief we submit the Applicant has not provided satisfactory evidence to rebut the documented file evidence produced indicating Machair on the Natura 2000 site at Glengad. Whether the Machair was there and is now not there, raises a further matter which should be highlighted formally to the NPWS given it is a priority habitat.

- Regardless of same given the Applicant argues there is no Machair – they clearly have not assessed the impact on same of their development. Therefore at best the Board must consider 'uncertainty' clearly pertains as to the impact of the application on a priority habitat on the site – with the consequential implications for Article 6(3) and and 6(4) which we will expand on shortly.

A further issue on impacts to priority habitat arises in relation to the 190m of bog south of Sruwaddacon bay which will be the subject of a trench development to accomodated the proposed pipeline and which is identified on figure 12.2c in the revised EIS as 'N17'. An Taisce and others have also contended that the basis on which Ms Neffs has determined that this piece of bog is not 'active' and therefore not a priority is overly restrictive. We refer to our earlier submission in this regard. An Taisce once again refers the Board to the definition within the commissions guidance documentation on what constitutes 'active' bog, and therefore priority habitat blanket bog; and also the detail on this matter contained in the backing documents for the Conservation Reports produced by the NPWS as part of the reporting obligations required under the Habitats Directive.

We submit this is a matter for the closest consideration of the Board given status of “Bad (U2)” for 'Overall Status' and 'Future Prospects' for Blanket Bog in Ireland reported to the commission by the NPWS, and as detailed in the backing documents referred to in our earlier submission and raised in questioning of the applicant.

Clearly these are not matters for An Taisce to make a determination on – however we submit to The Board our concerns given the above on the matter of the *'uncertainty of impacts on priority habitats'* – and the requirements of the precautionary principle and the consequential implications for Articles 6(3) and 6(4) of the Habitats Directive.

7. TThe insistence by the Applicant on a landfall for the pipeline at Glengad and the associated constraints to the consideration of alternatives by both the Board and the Applicant.

The current application pertains to the transport of the offshore gas to the refinery. Many of the ongoing leagacy planning issues arise, and community concerns revolve around Shell's insistence on the pipeline making a landfall at Glengad. Indeed the whole process has been damaged by this insistence. This has resulted in an unjustifiable restriction in the alternatives considered for connecting the gas field to the terminal. Given the matters An Taisce raised re. the planning history of the site, and the direct, indirect, and cumulative impacts of the routes to the terminal from Glengad - the Corrib Gas Pipeline initiative could be considered to constitute the single most salutary lesson on why not to engage in project-splitting and splicing. The entirety of the proposed infrastructure from well head, pipeline, terminal and onward connection to Galway should have been planned and assessed as one application, and properly co-ordinated together with all the consequential plans, permits and licences needed to ensure management of environmental impacts, safe operation, and emergency response - to the hazard this proposal presents.

The Board has been complicit in this constraint – particularly with reference to the latest version of the application which follows directly on their request to submit a revised route from Glengad under Sruwaddacon Bay and onward to the terminal – thereby limiting the considertation of alternatives for the landfall. The matter of under-sea tiebacks or whatever technologies are to be employed to further supply the terminal - are addressed further in the section detailing inadequacies of the EIS, and sections addressing project splitting.

6. A Any decision to grant permission would be premature pending resolution of outstanding legislative considerations not limited to the complexities arising from the legal issues arising vis-a-vis the Section 40 consent matter.

- In Summary, in 2002 a Section 40 consent was granted for a Corrib Gas Pipeline, and this was accompanied by an EIA.
- However the pipeline which has been constructed is not in conformance with that consent.
- Furthermore the pipeline which is now proposed is also not in conformance with that consent.
- The pipeline proposal per the original section 40 consent appears to be no longer considered an option by the Consenting Authorities, a view substantiated by the Advantica report commissioned by the Minister. It is important to note the Applicant is on record as having willingly departed from the section 40 consent to pursue other options for the pipeline.
- Mr Keane, Counsel for the Applicant, clarified for the hearing that a section 40 consent cannot be ammended – and that the Applicant was therefore applying for a new section 40 consent to compliment the revised pipeline proposal proposed, and the components already constructed.
- However we submit legally – a Section 40 consent cannot be withdrawn. So the matter of non-conformity with the existing Section 40 consent cannot simply be addressed by a new application, as the Applicant appears to contend. While the Applicant has provided their view on this matter – we submit that it remains a fact that there is a legal anomaly here to be resolved and clarified, and any permission in advance of same would consequently be premature.
- The matter is further compounded by the fact that even were the matter of the existing Section 40 to be resolved – that given the new proposed pipeline contains a portion of development which has been constructed without EIA, namely the pipeline from the High Water Mark to the landfall at Glengad – it would appear that consent cannot be granted for a new Section 40 to cover the new pipeline proposal – as such requires EIA, and EIAs cannot be conducted for development after the fact. This is a point we outline further in the next section in relation to the further dimension of legacy problems for this application presented consequent on the Applicant having developed at the Natura 2000 site in Glengad without appropriate process and consents.

5. T The Board - to use its own words in the decision in the recent Nurney Demesne case appealed by An Taisce is *' precluded from considering a grant of planning permission .."* as per the judgement of the European Court of Justice -c 2155/06. This is given this application, similarly to the Nurney Demesne case, depends on development at Glengad which has been constructed without EIA and which required EIA.

- The actual constructed pipeline from the HWM to a landfall at Glengad – is not in accordance with the information submitted in the 2001 EIS for which 2002 Section 40 consent was granted.
- No EIS was submitted to address what the Applicant subsequently constructed, which was a breach through the cliff at the Natura 2000 site. Therefore quite simply as a matter of logic no EIA was conducted for this development.
- The current application before the Board – includes this already constructed development form the HWM to the Landfall at Glengad. The advertised notice for the revised EIS states clearly:

  " The section of pipeline from chainage 83+400 to the High Water Mark at Glengad has been included within the development application "

- Permission cannot now be granted for this development even if applied for - as such development required EIA at the time and an EIA cannot be conducted after the fact of the development. Or in

other words an EIA cannot be conducted restrospectively for development which has already occured.

- In this regard we reference the decision of the European Court of Justice, ECJ *Case C-215/06, Commission v Ireland, delivered on the 3rd day of July, 2008.*
- Further to this point and on the matter of consistency in the treatment of application of the rule of law – An Taisce notes and welcomes the Board's recent decision to refuse permission to a quarry **which depends on and includes** retention of development which required EIA but where the construction had occured prior to EIA – namely the Nurney Demesne, County Kildare, Board Reference: PL 09.235759. An Taisce notes the Board's reference of the same European Court of Justice ruling which we reference in relation to the Shell E & P Ireland Ltd case in its reasons for refusal of the Nurney case. We quote the reason provided by the Board in its Decision on this case:

> 2. Having regard to:-
>
> > *"the judgement of the European Court of Justice in Case C-215/06, Commission v Ireland, delivered on the 3rd day of July, 2008, in which it was held that the retention permission system, as it applies in Irish law to projects that are required to be subject to Environmental Impact Assessment under the EIA Directives, does not comply with the Directives,*
> >
> > *it is considered that as the proposed development for which permission is sought is of a class that requires Environmental Impact Assessment in accordance with the requirements of EU Directives 85/337/EEC (as amended)* ***and that it includes a significant element of retention permission, the Board is, therefore, precluded from considering a grant of planning permission in this case.****"*
> >
> > *(note emphasis added)*

- An Taisce is confident that the Board will be consistent in its judgement of such serious matters - namely where the European Court has ruled against us and clarified the requirements of the EIA Directive so explicitly. Therefore this application we submit must be refused, *as a decision to grant permission* - is *precluded* under European law - as the Board has already acknowledged.

- The matter of final warnings for non-compliance with EU requirements and the potential implications of multi-million Euro fines from the Commission are not a matter which the State nor any Agency or emmanation of the State would wish to have to consider explaining at such a time of economic hardship in the country.

4. T The application itself does not adequately address the requirements of the EIA Directive which governs the application. Additionally the processes undertaken by The Board to assess it thus far – are not incompliance with the requirements of the EIA Directive. An Taisce submits that the current application **does not provide the Board with adequate information** on which it could consider that this development was consistent with the proper planning and sustainable development of the area, and does **not** provide a basis for such an assessment. In addition to the points above on areas of specific deficiency highlighted.

In an effort to be brief – we will endeavour to just list some of the more significant deficiencies of the EIS as presented – relying on the more substantive arguments on same in our submission and matters raised in questioning to further elaborate same.

Inadequacy of ecological surveys undertaken:

Otters:

- Given the year-round breeding habits of otters - the restriction of the surveys in 2010 to just two months, and potentially the least favourable months for breeding, – serve to compromise the survey activity conducted inappropriatly - particular in relation to survey requirements for natal (breeding) holts and couches for otters.
- Insufficient detail was provided to indicate the range of months covered in prior surveys conducted before this revised application – and such evidence or information cannot be considered at this late stage in the process if provided.
- There was an unacceptable and acknowledged restriction in the EIS to the extent of area surveyed. Given the extensive degree of remove otters will occassion to secure natal holts or couches away from the potential territorial threats associated with watercourses. Also given the potential for wheeled and tracked vehicles and construction & development activity which might therefore unexpectedly encounter otters following the grant of consent; and the NRA guidelines which detail recommendations for restrictions in the distances from otters and their resting places for the operation of machinery – such deficiencies are of serious concern.
- Additionally there was insufficient evidence of the type and frequency of remote monitoring undertaken to qualify or confirm usage of what appear to be a number of uncertain couches or holts in the proximity of the development. The unacceptable limitation to a two month survey further exascerbates this matter.
- These matters were further exascerbated by the unavailability of the ecologist responsible for the otter survey to address specific queries on same; and the acknowledged lack of specific expertise on otters by Ms Neff, who indicated she would answer questions given the otter experts absence. This standard it should be noted was in stark contrast to Mr Keane's requirement for the presence of those referenced or who contributed to Appealant's submissions.
- The requirements of the Lough Rynn ECJ judgement c- 183-05, which clearly indicate that surveys post the granting of consent to clear-up outstanding survey requirements are not legal – were outlined in detail in our submission.
- We therefore contend there is insufficient information and inadequate survey data available to support the Board's decision on the enviromental impacts of the development on this species who itself is protected under Annex II and IV of the Habitats Directive along with its habitat, breeding and resting places.
- We would remind the Board of the welcome precident in the Donaghcumper Oral Hearing where the Board included in its reasons for refusal the inadequacies of surveys conducted for otters. (Ref PL09.233937)
- Given the uncertainty which therefore pertains to the otters and given the extensive usage of the sites in question – the matter of a Derogation Licence as provided for under Art 16 of the Directive must therefore be considered. The Applicant we submit has not conducted sufficient survey to determine the need for same, and it must be applied for and granted in advance of any consent for development – as clearly outlined in the Advocate General's opinion and as confirmed by the European Court in c-183/05, and as detailed in NPWS circular 02/07.
- In the context of such uncertainty the Board must consider that such a derogation might reasonably be required and must be granted in advance of consent. In this context the Board must therefore consider that given the consistently declining numbers of otters in the territory of the state as evidenced in NPWS surveys on same – the species cannot be considered to be at 'favourable status' . Therefore the State and the Minister we submit is *precluded* from granting a derogation licence under Article 16 of the Directive which would allow for the disturbance etc of the species from the development site. Therefore we submit the application must be refused. These arguments are detailed in full in our earlier submission.

Birds

It appears to us that a full breeding bird survey was not conducted for the development site. Ms Sam Brwon in particular of Rossport Solidarity Camp highlighted certain specific issues in relation to the inadequacy of the surveys conducted in relation to Plovers and snipe, in terms of area and timeframes, and the areas utilised by these birds. The Provision of Art 4(2) for protection of sites for over-wintering birds are of particular significance and the Irelands obligations under AEWA and the convention of migratory species. Again we would contend that such inadequacies have to be resolved prior to any consent being granted for the application – further to the principles established in the Lough Rynn judgement c-183/05, and mitgation cannot be developed as a condition.

The impact of the light from the development – equivalent to a full moon as already detailed – presents at best at significant risk to the birds and a deterioration of their habitat, and a risk to the wider eco-system services offered by the site.

Machair Habitat Assessment and Blanket Bog Assessment

Comments and concerns raised with regard to the uncertainty pertaining to the impacts of the development on priority habitats have been raised already in a seperate Section No. 8 of our closing submission earlier above – the implications for the adequacy or otherwise of the EIS to support the Board's requirement to conduct an Environmental Impact Assessment should also be considered here. In addition to arguments raised about the implications for the Boards conduct of the Appropriate Assessment and other further considerations given the uncertainty for Article 6(3) and 6(4) of the Habitats Directive.

Noise

Several issues were identified in questioning relating to the noise surveys which contribute to an unsatisfactory consideration of this information element, required in the EIS and which is critical to the Boards requirement to conduct and environmental assessment of the impact of the development on human beings, fauna and the receiving environment as a whole, and indeed to conduct Appropriate Assessment under the Habitats Directive

Various anomalies in noise readings taken for example at Ms Muller's house remain unexplained. Original explanations of annomalous noise levels consequent on wind readings – evaporated when local wind readings were requested by appealants and sourced.

Assessment of the mitigation provided by sound barriers at the compounds do not adequately account for the relative elevation of dwellings relative to the compound, and the potential passage of sound waves – particularly across water.

Given the negative impact of sustained exposure to noise acknowledged by the World Health Organisation and indeed the lack of credibility of the noise impact assessment and mitigation undertaken – we submit the EIA is deficient in this regard.

Intervention Pit.

In considering the Intervention Pit we wish to make a number of specific points.

The first is quite simply that while the Applicant has stated they believe there is a very low risk of having to employ this technology - the irrefutable reality is - an intervention pit is the fall back position if the progress of tunneling is compromised. As we understand it the scenario envisaged is that an intervention pit would be required if a boulder/rock which cannot be cut through or moved aside consequent on the nature of materials it is embedded in (as it will simply rotate). Given the nature of the underlying geology such a scenario cannot be ruled out 100% categorically – therefore a residual risk remains. An Taisce also has

concerns about the potential for major machinery failure or indeed a catastrophic tunnel collapse during construction – and how an intervention pit might be considered in those circumstances.

An Taisce simply wish to highlight that there is an element of uncertainty and risk associated with the tunnelling under Sruwaddacon Bay – not limited to the potential to have to resort to an intervention pit. We note the representative from the Dept of Marine – Dr Kiever (name to be confirmed/clarified) indicated unquivocally in response to questions that trenching was not an option in the Bay. - given the negative impacts to species such as salmonids for which the site is designated, siltation etc. Also we referenced in our submission the concerns raised on same in the Advantica report [4]

and indeed we also quoted from SEPIls previsious application – which rejected this route.

The reality is there is no detail or plan or limitation to the intervention pit proposals within the EIS.

The manner in which it will be undertaken is proposed to be subject to agreement with the NPWS, and we refer to the DOEHLG's own submissions in this regard. We submit that the proposed conditions from the NPWS are infact illegal post-consent conditions – and run contrary to the requirements of the Lough Rynn ECJ ruling C183/05 with regard to post-consent considerations. The implications of the Lough Rynn judgement are outlined in detail in our submission of September 17th. However in brief it is not legal to defer survey requirements after consent or to specify conditions which are intended to complete and inadequate EIS or to develop mitigation. Such would also run contrary to the memo DOEHLG NPWS 01/07 circulated by the DOEHLG – indicating it is not legal to complete an inadequate EIS by conditions, and with specific consideration for developments having a potential impact on Natura 2000 sites. An extract from the circular is quoted below:

> ***NPWS 01/07***
>
> ***"Restriction on use of compliance conditions***
>
> *Accordingly, under no circumstances should planning authorities use compliance conditions to:*
> *Complete an inadequate EIS,*
> *Ensure the adequacy of information supplied by a developer in an application for development having a potential impact on a site of international importance for nature conservation, i.e., SAC or SPA, or*
> *In either of the above cases to request the development of appropriate mitigation measures."*

In this context, given the deficit on information available on the intervention pit option – limitations proposed thereto, in terms of number, intervals, seasonal /tidal conditions etc, triggering factors and associated thresholds for initiating an intervention, together with avoidance or escalation controls , mitigations for trenching,transportation implications, access and egress to the Bay, waste management, oversight proposals etc etc - we submit the EIS is incomplete, and cannot be completed by condition. Further more the condition of 'uncertainty' as to the impacts of the development therefore arises and the associated precautionary principle are invoked in considering the requirements of Article 6 of the Habitats Directive and Article 4 of the Birds Directive.

Ommitted elements and premature consideration.

Among the more significant ommissions – is the absence of an Emergency Response Plan. One of the Applicant's consultants acknowledged the development would constitute a SEVESO applicatio in the UK. In

[4] Advantica final report 17 Jan 2006 "INDEPENDENT SAFETY REVIEW OF THE ONSHORE SECTION OF THE PROPOSED CORRIB GAS PIPELINE" - extract regarding the tunnelling option.

this context, not to mention a basic common sense view on the practicalities and risks of running a gas pipeline running through a bog – through roads, by schools and homes all surrounded by bog – it is a perfectly reasonable requirement that the proposal should be accompanied by a specified and actionable Emergency Response Plan, ERP.

Fr Nallan, an appealant to the hearing, kindly provided to the hearing a most valuable contribution to his group's submission from retired army commandant regarding the lack of an ERP and the requirements for same – this included comprehensive considerations for medi-vac procedures, task force mobilisation, evacuation, fire-service infrastructure specification etc etc.

Under the EIA Directive the Board is obligated to consider the direct and indirect impacts of the development – and such requirements as an ERP for a development of this nature are arguably direct consequences of the proposal – or at the very outside indirect consequences. The questions must therefore also be asked – particularly in the current climate – where will the funding for such emergency support procedures and infrastructure come? The Government is closing hospital facilities due to lack of funding and consolidation initiatives, and cutting back on public services. It must be not only asked, but also answered, is this consistent or conducive with the requirements of this development and the provision of the requisite level of emergency response in the event of a catastrophic event.

In the context of our earlier argumentation on the Article 6 – we contend the lack of a documented and actionable ERP – appropriate to the scale of incident which could occur also presents a significant risk to the Natura 2000 sites through which the pipeline runs, and indeed to species protected under the Habitat's Directive annex II and IV which are protected within their natural range and whose habitat this pipeline runs through. Under the precautionary principle – this presents a very real risk and we submit is sufficient alone to invoke the provisions of Article 6(4) of the Habitat's Directive – without predjudice to our other argumentation on Article 6 . Having no plan in place to provide capacity to stop the spread of wildfires across the bogs of the cSAC's in the event of an explosion – is most certainly creating and not managing a risk.

Furthermore – the state can hardly be considered to be taking

> *"appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds"*

in the absence of an Emergency Response Plan – as is required by the above extract from Article 4(4) of the Birds Directive.

An Taisce submit it is unacceptable that provisions and delivery plans for an actionable and operatable Emergency Response Plan,ERP are not before the Board as part of the EIS. We submit the application should be refused on the above grounds, and request the Board to address this matter specifically in its report.

In this regard we also raise the matter of the Commission for Energy Regulation, CER safety permit. As we understand it the CER has a role to play in the commissioning of the pipeline and a safety certificate is required. However such provisions have not yet been established by the CER. Shell E & P Ireland Ltd is unfortunate to be a 'first child' in our new energy economy – however we can not afford to let it run before we can walk at the expense not only of our citizens and our environment, but our international reputation. We therefore submit until the nature of the safety permit and the potential consequences it might have on the design and operational specifications of the pipeline can be ascertained – this application is premature, and permission should be refused.

We offer the same comment in relation to the prematurity of the application in relation to a further matter raised in Inspector Nolan's own questions on the matter of standards for an All-Ireland energy market. As we understand it these are in early stages of development. Given the purported importance of the Corrib Gas Pipeline infrastructure for Ireland's energy infrastructure and energy security – it surely makes sense to ensure this is compatable with the standards we wish to adopt. This is too important a matter to put the cart before the horse. We have seen where such an approach has got us to thus far. On this basis we contend it would be premature to grant permission.

Restriction on Alternatives Considered.

We have also documented in our earlier submission concerns regarding the inappropriate constraint to the consideration of alternatives consequent on the Applicant's insistence on the landfall at Glengad – and indeed the constraint contained within the Board's invitation to re-submit a revised EIS based on a starting point from Glengad and then under Sruwaddacon Bay and onward to the terminal.

The absence of consideration for other alternative landfalls and indeed for the consideration of undersea tie-backs is a deficiency in the conduct of the EIA as required by the Directive, and indeed as required by the when considering article 6(4) of the Habitat's Directive – as will be elaborated on later.

Waste Management & Traffic:

Mr Keane challenged An Taisce's contention that the matter of the impact and disposal of the tunnel arisings was not addressed in the application. We contend our concerns were vindicated in the context of Mr Sweetman's questioning which concluded that there were deficiencies in the traffic management plans and considerations in dealing with the tunnel waste – and that while the Board specifically requested that a waste planning be addressed in their letter of Nov 2nd 2009 – the Applicant has failed dismally to address this matter transparently and completely.

Impact & Risk Management:

These are key considerations of the EIA Directive, and indeed have attracted very welcome focus from the Board. An Taisce remains resolute that there is an unacceptable lack of transparency in the Applicant's determination of what is 'ALARP' – (As Low As Reasonably Practical) in their risk management approach to this application.

In summary the Applicant when questioned indicated no numerical values were assigned to factors such as effort, cost, time, technical complexity in considering the relative value and tradeoff of these factors versus a potential risk** envisaged. In brief what is or is not a grossly disproportionate response to the beneficial consequences of managing the risk is not documented. The Board has therefore been afforded no transparency on what the Applicant considers a reasonable effort in managing a risk. In the context of the Applicant having rejected the route of the tunnel under Sruwaddacon bay – but which in the context of the desire to maximise the extent of remove of the pipeline from homes – the Board felt was a worthwhile option to assess further – it is clear the Board and Shell E & P ireland Ltd have a different view on what is appropriate effort to minimise risk. In this context given the Boards specific requirements in its letter to address ALARP we submit the Applicant has not provided sufficient transparecy on same and that the various coloured charts presented are basically inadequate in presenting any real view of how risk is being managed effectively and appropriately – in the absence of data on the underlying judgement calls made by the Applicant or their consultants. In the context of the risks to the community and the surrounding Natura 2000 sites – this is an unacceptable deficiency in the impact and risk data submitted to support the Environmental Impact Appraisal.

Inadequacy of consultation conducted as presrcibed by the EIA Directive

We have outlined this argument in detail both orally at the hearing and in our submission of the 17th of September 2010 – a written copy of which is with the Board.

In brief - an extensive volume of, and significant data has been submitted by the Applicant in the course of this oral hearing both directly to the hearing and indirectly via the DCENR.

Such information has not been subject to advertisement and *formal* notification to the public and Prescribed Bodies as required under the Directive, with an allowance for time for submission of formal remarks thereon.

In brief art 6 3(c) of the EIA Directive makes specific reference to information relevant for the decision and which comes to light after the publication and advertisement of the EIS as detailed in Article 5 of the Directive* - which is the case here. The Directive's requirement for consultation to be facilitated on same is clearly detailed. Furthermore, Article 8 details the requirements for a legal decision under the Directive as follows:

> *Article 8*
> *The results of consultations and the information gathered pursuant to Articles 5, 6 and 7 must be taken into consideration in the development consent procedure.*

It is our contention that the EIA Directive's requirements for consultation on this new, significant information have not been provided for by the Applicant and more particularly by the Board. Also given the very technical nature of the information – consideration should have been made to ensure sufficient time was provided for to allow for the need to engage experts to review it on behalf of Applicant's and indeed to allow for such an engagement and response.

We submit the Board cannot make a legal decision to grant the application in this context, given the inadequacy of the consultation and the fact the deliberations of the oral hearing have been compromised as a consequence. It is worth noting the Board required the re-advertisement in August 10th 2010 of the additional or informational submitted prior to the hearing subsequent to the presentation of the revised EIS to the Board as advertised in July. This argument is submitted without predjudice to our submissions regarding the lateness and admissablility of this further information.

In conclusion on this section - An Taisce submits that the current application **does not provide the Board with adequate information** on which it could consider that this development was consistent with the proper planning and sustainable development of the area, and does **not** provide a basis for such an assessment. In addition to the points above on areas of specific deficiency highlighted.

We also summarise that without predjudice to our submission that the EIS is dependent on data

- which has been submitted late and
- which may be subject to considerations with regard to its admisability given concerns raised about the basis of the Ministers granting of the foreshore licence for site investigation works,

- and the EIS is therefore potentially significantly deficient to support the environmental appraisal of the revised application as required of the Board.

We also note that this 'late' information submitted at the hearing has not been subject to consultation as required by the Directive and such consultation is a fundamental requirement for a legal decision under Article 8 of the EIA Directive.

We also submit that there is consequential uncertainty and doubt with regard to the impacts of the development which are sufficient condition to constitute a 'negative assessment' thereby invoking article

6(4) in the context of the Broadhaven Bay cSAC and the Glenamoy cSAC, and as we understand it and have argued given the requirements of Art 4(4) of the Birds Directive for the Broadhaven pSPA –We reiterate this as a further area of example and further substantiation on that line of argument that the development cannot be granted permission.

3. Additionally An Taisce contends that the Applicant appears to wish to both *'have their cake and eat it'* when it comes to the presentation and Environmental Impact Assessment of this scheme.

On the one hand Shell E & P Ireland Ltd and the Board argue that the impacts of this particular application for the onshore pipeline should be viewed in isolation from other applications and developments associated with the Corrib Gas Pipeline Project – and that it is not a case of 'project splitting'. Given such a stance - any argument for the 'sustainability' of the onshore pipeline development simply evaporates as it stands alone as an expensive tube! The matters which An Taisce has sought to raise as far back as 2004 on the Corrib Gas Line applications with Board relating to Environmental Management and the need for Integrated decision making continue to pertain and obscure the real effects and appropriate planning, co-ordination and operational management of the various elements of this Corrib Gas Pipeline Project.

So then in response or on the other hand, when the Applicant or the Board wishes to argue 'sustainability' and 'strategic context' – the onshore pipeline, the subject of this current application, the standalone pipe suddenly transforms into a critical part of an ongoing initiative or scheme – other elements of which remain not only unspecified and unassesesed and in some cases undisclosed – but which will somehow magically, **but in an unspecified manner -** provide for the ongoing operation of the terminal after the corrib field has been exhausted etc, Also changes which Mr Costello (for the applicant) indicated would be required to allow for the terminal to cope with the reduction in pressure are also unspecified stragely! The cake is once again subject to a salami-slicer in such instances, and the full extent and impact of same are patently unclear and unassesed – which is contrary to the requirements of EU law.

An Taisce submits with respect, that the Board, and other agencies such as the EPA and indeed the State appear to also be complicit in this double standard with regard to the Environmental Impact Assessment thus far, and that such is contrary to European Law, and fundamentaly at odds with the objectives of the EIA Directive which requires that prior to the consent for a project - which is defined in Article 1 of the EIA directive to include '***schemes***' ; the impact of same should be assesed before executed in whole or in part.

The splitting of this project and subsequent modifications applied – have completely compromised the ability to determine the environmental impact assessment of this proposal from the outset and determine whether it should or should not go ahead, and the implications of post-construction EIA, given the extent of construction undertaken and outstanding and the varying status of same - **have potentially the widest implications for the Corrib Gas Pipeline initiative – as currently proposed.**

In summary conclusion and further justification to the above -we submit the following
The Directive aims to prevent pollution and other damage to the environment. According to the sixth recital of the preamble and Article 2, the Directive's fundamental objective is that, before consent is given, projects likely to have significant effects on the environment should be subjected to an assessment. It is important to note that Article 2 of the Directive defines a project as follows:

> *Article 1*
> 1. This Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.
> 2. For the purposes of this Directive:

'project' means:
— the execution of construction works or of other installations or **schemes**,
— other interventions in the natural surroundings and landscape
including those involving the extraction of mineral resources;

An Taisce contends as have many others at this hearing – that

- The terminal on its own without a supply of gas and a distribution network – has no function or purpose in line with the development consent sought.

- The field connection and offshore pipe – has no function or purpose, in line with the development consent sought - in isolation of further pipeline connection, processing facilities at the terminal and onward distribution network.

- The onshore pipeline is merely a tube and not consistent with the development consent sought in isolation of the offshore supply and the terminal processing facility and distribution network.

The whole – comprises a scheme – and as such is a project as defined in the EIA directive.
The whole should have been subject to an Environmental Impact Assessment for the whole scheme – which would have facilitated appropriate moderation of and management of the cumulative, direct and indirect environmental impacts of the scheme, and alternatives to it. This cannot be conducted after the fact of incremental development of the scheme, and it is arguable that post-consent EIA argumentation arises for the entirety of the remainder of the Corrib Gas Pipeline project.

More generally, the objective of the Directive is that no project likely to have significant effects on the environment should be exempt from assessment – and the concern is that the assessment of such impacts has been severely compromised by the incremental and piecemeal manner in which this overall project has been advanced and consented to and developed.~

In this regard the articulation of the European Court of Justice in the Derrybrien judgement has particular resonance:

> EU: Case C-215/06
> Celex No. 606J0215
>
> Court of Justice
>
> Judgment of the Court (Second Chamber) of 3 July 2008. Commission of the European Communities v Ireland. Failure of a Member State to fulfil obligations - No assessment of the environmental effects of projects within the scope of Directive 85/337/EEC - Regularisation after the event. Case C-215/06.
>
> *On those grounds, the Court (Second Chamber) hereby:*
> *1. Declares that, by failing to adopt all measures necessary to ensure that:*
> *- projects which are within the scope of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment either before or after amendment by Council Directive 97/11/EC of 3 March 1997 are,* ***before they are executed in whole or in part, first, considered with regard to the need for an environmental impact assessment and, secondly, where those projects are likely to have significant effects on the environment by virtue of their nature, size or location, that they are made subject to an assessment with regard to their effects in accordance with Articles 5 to 10 of Directive 85/337****, and - the development consents given for, and the execution of, wind farm developments and associated works at Derrybrien, County*

Galway, were preceded by an assessment with regard to their environmental effects, in accordance with Articles 5 to 10 of Directive 85/337 either before or after amendment by Directive 97/11,
Ireland has failed to fulfil its obligations under Articles 2, 4 and 5 to 10 of that directive;
2. Orders Ireland to pay the costs.

2. Given the requirements of the Habitats and Birds Directive – the only legal decision for this application is refusal – we submit. Specifically we argue as follows

a) The considerations of Article 6(4) of the Habitats Directive pertain to the cSAC and SPA Natura 2000 sites associated with this application. An Taisce submits in the context of the plausable and credible reasons for this development - that the only operative condition is that for a reference to The European Commission who can effectively grant permission for the development in the context of an argument of Overiding Public Interest, but only where no alternatives exist, given sequentiality requirements. Given neither of these conditions pertain to this application - therefore the Commission must refuse the application also;

b) The Further & more restrictive implications of the Birds Directive for the decision:
Further implications for the considerations relevant to the decision arise given the status of the Blacksod & Broadhaven Natura 2000 site as a proposed SPA. Given its status as a pSPA the provisions of the Birds Directive therefore ***overide*** those of the Habitats Directive. We submit therefore that The Board and the Commission therefore cannot grant consent legally for the application under the Birds Directive given:

- Given the development is predicated on an acknowledged economic justification and is documented as such in the revised EIS for the application – and such a justification is not superior to the general interest of the Birds Directive. ***
- Given what An Taisce maintains are adverse impacts from the development to the proposed Special Protection Area, Natura 2000 site - Blacksod & Broadhaven pSPA, or impacts which are at best *'uncertain impacts'* - this therefore invokes the precautionary principle, and given the greater level of protection afforded the pSPA under the Birds Directive and in this instance given the provisions of article 4 – exposing the site to uncertain impacts and risks cannot be argued to be consistent with avoiding deterioration and disturbance of the birds Art 4(4), and in maintaining the objectives of the directive as per Art 4 (1) and 4 (2).
    - *Note: We would remind the Board we expand on these points later below, and even greater detail is afforded to them in our primary submission of Sep 17th on the revised application.*

In relation to this section in particular we refer the Board to our very detailed argumentation on these matters in our earlier submission to the reconvened hearing – which we made on Sep 17th,
which includes and is supported by quotations from the Directives, supporting ECJ judgements and Guideline documentation from the Commission

In summary our contention is basically – given the development occurs in and is adjacent to a number of Natura 2000 sites that in considering the implications of Article 6 (3) of the Habitats Directive as is required– two fundamental and over-riding considerations arise at this time which given their status trigger an unavoidable condition of uncertainty vis-a-vis the impacts of the proposed development. This consequently invokes the provisions of Article 6(4).

These two considerations are in relation to:

- a) the issue associated with the non-existence of site-specific conservation objectives.
- b) the interpretation of the phrase —'adversely affect the integrity of the site concerned' under Article 6(3).

These are expanded on below:

a) the issue associated with the non-existence of site-specific conservation objectives.
Given the non-existence of conservation objectives for the natura 2000 sites in which the application is situated and which it is also adjacent to – it is impossible to comply with the requriement to conduct an appropraite assessment of the applications implication in view of them. In brief it is not reasonable to expect the Board to conduct an Appropriate Assessment against something which it has no visibility or understanding of ie site specific conservation objectives – given they have not been documented, finalised and agreed. Only draft and 'Generic Conservation Objectives' exist and these are not sufficient. The following statement is quoted from the NPWS website – the associated web reference also provided:

> *"**Generic conservation objectives** have been compiled for SACs and SPAs. These are based on the sites' qualifying features. In time, specific conservation objectives will be written for the features of interest within each site."*
>
> *http://www.npws.ie/en/PublicationsLiterature/ConservationManagementPlans/*

b) the interpretation of the phrase —'adversely affect the integrity of the site concerned' under Article 6(3).

Additionally given the Supreme Court of Ireland and the State have both acknowledged they need clarification from the European Court of Justice,ECJ on the matter of the meaning and implication of the term 'site integrity'. It is therefore not reasonable or practical to expect the Board to make a determination on whether an application does or does not impact 'site integrity' as required by article 6(3) in this context.

For the convenience of The Board Art 6(3) is quoted below:

> *Article 6*
>
> *"3.Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon,either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the **site's conservation objectives**. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will **not adversely affect the integrity of the site** concerned and, if appropriate, after having obtained the opinion of the general public. (emphasis added)*

We submit as before that Ms Neff's (the applicants ecological experts) contention that:

> *"No significant impacts are likely to arise on the Natura 2000 sites - the Glenamoy Bog Complex cSAC, the Blacksod Bay/Broadhaven pSPA or the Broadhaven Bay cSAC – and, in my scientific opinion, there is no question of adverse affects on the integrity of any of the sites as a result of the proposed development."*

An Taisce submits Ms Neff's scientific opinion - is at best interesting, but does not constitute a sufficient basis on which the Board can make a decision on the legal definition of the phrase and concept in question within the Directive.

Therefore we submit as an over-riding consideration that pending the clarification from the ECJ on the matter of the definition of site integrity and the resolution of site specific conservation objectives – the only reasonable and defensible conclusion the Board can arrive at with regard to the impacts given this uncertainty is that they are 'adverse' or at best uncertain. Given the implications of the precautionary principle, the clarification of the Waadenzee Judgement, ***a risk is considered to exist if it cannot be excluded**, on the basis of objective information, that the plan or project will have a significant effect on the site concerned. Also* iven the explicit guidance of the commission on this matter which we reference in detail in our earlier submission – 'uncertainty' with regard to the impact of the development is sufficient to trigger consideration of Article 6(4).

Before we move to article 6(4) we wish to highlight a key point with regard to obligations under the Directive as detailed in the States submission to the supreme court on the matter of the interpretation of the contentious phrase *'' adversely affect the integrity of the site concerned"#*

> *"31 ... Art 6(2) imposes a general obligation on a Member State to take appropriate steps, inter alia, to avoid, in designated sites, the ―deterioration‖ of natural habitats. The question as to how this general obligation interacts with the regulation of individual development projects under Arts 6(3) and (4) has been considered in a number of judgments of the ECJ. It is clear from this caselaw that Art 6(3) is not intended as a derogation from the general obligation to avoid deterioration, rather Art 6(3) complements this general obligation and both sub-articles seek to ensure the same level of protection: for recent examples see Case C–241/08* ***Commission v. France**, [30], and Case C–418/04* ***Commission v. Ireland**, [263].*

Notwithstanding the useful reminder of the wider obligation and objective of the directive as outlined above, we continue our consideration of the implications of Article 6(4). We submit that given the article states that if the site '*hosts'* a priority habitat – the provisions of the second paragraph of the article pertain – which means that very specific restrictions apply to the matter of consent. For the convenience of the Board – we quote Article 6(4) below:

> 4. *If, in spite of a negative assessment of the implications for the site* ***and in the absence of alternative solutions**, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.*
>
> *Where the site concerned* ***hosts*** *a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.*

Given the application is most certainly not credibly predicated on human health public safety or environmental grounds – the Board would have to refer this to the Commission arguing *'other imperative reasons of overriding public interest'* – which we contend have not and indeed cannot be substantiated for this application – the justification provided in the revised EIS is economic consideration. See Section 3 *'Need for the Project'* in the Non-technical Summary.

We also submit that given the Guidelines & ECJs are specific with regard to the sequentiallity of considerations to be addressed. Therefore the requirement of the first paragraph of article 6(4) which indicates the requirement that there must be an absence of alternatives. It is our fundamental contention that the consideration of alternatives to this development has been inappropriately constrained by the

consideration of the landfall at Glengad and the insistence on it by the Applicant. Additionally we contend the Board has erred fundamentally in the context of its request of Nov 2nd 2009 – and its instruction to the Inspector by constraining the route to be considered from the landfall at Glengad.

In relation to the fundamental issue of the constraint in the Board's invitation to submit a revised EIS for a pipeline route under Sruwaddacon Bay – we submit this has compromised the requirement of the EIA Directive to consider alternatives and also the Habitat's Directive requirement to exhaust alternatives and to examine these alternatives without regard to economic consideration.

(That is notwithstanding and without predjudice to the wider argumentation raised by Rossport Solidarity Camp which we support on the argument that – if the requirement of this project was truly the strategic requirement of security of supply for Ireland – and Irelands energy requirements as opposed to Shell E & P Ireland Ltd's commercial interests then - consideration of alternatives should and would have extended to consideration of alternative fuel sources to the gas situated within the Corrib field, particularly given the climatic impact not only of the development – but the consumption of the gas supplied by the field. However – clearly such strategic context we submit is not the case.)

We also submit that given the status of Natura 2000 sites in Ireland at present and the information available thereon – specifying compensatory measures which would ensure the overall coherence of Natura 2000 was protected would not be possible.

In summary therefore we submit that in considering the impacts on the SPAs and cSACs the Board is bound by the considerations of Art 6(4) of the Habitats Directive.

Article 6 of the Habitats Directive imposes legal restrictions on the circumstances in which a Member State can authorise development projects which adversely affect the integrity of Sites of Community Importance and Special Areas of Conservation. In brief, under Article 6(4) such development projects may only be authorised where (a) there are no alternative solutions; (b) the project must be carried out for imperative reasons of overriding public interest; and (c) the Member State takes all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected.

The legal restrictions under Article 6 are even more stringent where—as is the fact with the present case—the site concerned '***hosts'*** a *priority* natural habitat type. In such circumstances, the imperative reasons of overriding public interest are confined to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.

In response to all of the above, An Taisce submits that in referring the decision to the Commission as is the logical conclusion from such considerations as argued above –arguments on human health and public safety are not plausible; and the Commission will not be provided with either a credible argument of overriding public interest or indeed credible evidence that there is an absence of alternatives to this proposal, nor would it be possible to specify compensatory measures in the current context to ensure the coherence of Natura 2000 was protected. Therefore we submit respectfully the Commission must also refuse this application.

Further to the above, and with respect, we feel it is appropriate to quote from the States submission to the Supreme Court in relation to the matter of the meaning of site integrity arising from the Galway Outer Ring road application in the Corrib cSAC[5],

5

PETER SWEETMAN AND IRELAND, THE ATTORNEY GENERAL AND THE MINISTER FOR THE ENVIRONMENT,

"3. Ireland is the entity ultimately responsible for the transposition and implementation of EU Directives, such as the Habitats Directive, under Article 288 of the TFEU. Any failure on the part of an emanation of the State, such as An Bord Pleanála, to properly interpret and apply European law may result in infringement proceedings against the State itself under Article 258 TFEU, with the possibility thereafter of monetary fines under Article 260 TFEU."

b) The Further and More restrictive Implications of the Birds Directive for the decision:

Further to the above given the development also occurs within a proposed SPA, pSPA – the provisions of Article 7 of the Habitats Directive pertain. Which means in brief until the matter of the designation of the site is concluded – the provisions of Art 4(4) of the Birds Directive pertain and over-ride those of the Habitat's Directive. This means in effect the protection afforded the site is much greater as in brief Art 4(4) requires :

> ***Article 4***
> 4. *In respect of the protection areas referred to in paragraphs 1 and 2, Member States shall take appropriate steps* ***to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article****. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.*

The objectives of the article are detailed in 4(1) and 4(2) as follows:

> *Article 4*
> *1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.*
>
> *In this connection, account shall be taken of:*
>
> *(a) species in danger of extinction;*
>
> *(b) species vulnerable to specific changes in their habitat;*
>
> *(c) species considered rare because of small populations or restricted local distribution;*
>
> *(d) other species requiring particular attention for reasons of the specific nature of their habitat.*
>
> *Trends and variations in population levels shall be taken into account as a background for evaluations.*
>
> *Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species in the geographical sea and land area where this Directive applies.*
>
> *2. Member States shall take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where this Directive applies, as regards their*

breeding, moulting and wintering areas and staging posts along their migration routes. To this end, Member States shall pay particular attention to the protection of wetlands and particularly to wetlands of international importance.

Additionally a body of case law from the ECJ also outlines also that economic justification is not an acceptable basis on which to compromise the objectives of Articles 4(1) and 4(2)..**

This is outlined in some detail in our submission of Sep 17th to the hearing – in addition to case law on how proposed changes to the boundaries of spa's are protected - therefore the somewhat 'convenient' re-alignment of the pSPA boundary to remove certain areas subject to development impacts at the leenamore river etc are clearly according to the ECJ – still fully protected and to be treated as such – until such a time as the process is complete.

In summary – we submit that given the provision of the Birds Directive and even solely on the basis of the light impacts from the development – and the body of information and concern there is with regard to the negative impact of light on birds directly and indirectly through wider eco-system effects on the movements of zoo-plankton, water-quality, food sources etc there is at worst a situation of scientific uncertainty with regard to the impact of the light which will be at an unatural and sustained level of a full-moon. Therefore we contend the condition of an adverse impact is sustained and the state could not be considered to be complying with the requirement of the Directive's art 4(4) *" **to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article**."* on the annex 1 species in the site and the overwintering water birds – which are addressed in the objectives of the said article as referenced. We submit a general interest superior to that of the Birds Directive and which is not an economic interest is not credibly sustained for this development as is required and clarified by ~ and therefore we submit respectfully the Board must refuse this application.

1. TThe strategic basis on which this application has been advanced is flawed, particularly with reference to the purported contribution of the field to Ireland's energy security and energy infrastructure. Such objection is not limited to the considerations arising consequent on the ownership and contractual arrangements of the Corrib field and the manner in which the gas market operates. This has significant implications for the decision making context which must be applied to the application by The Board – particularly, but not limited to considerations of interest and justification raised in the European Habitats[6] and Birds[7] Directives, and as will be laterly argued – serve to orchestrate a refusal of permission.

In conclusion – we finish with the purported starting point for this Corrib Gas Pipeline Project. An Taisce continues to firmly reject any argument for a strategic context for this application.

In brief the applicant has **not** provided credible evidence that this pipeline will contribute to the security of Ireland's energy requirement – or addressed concerns regarding the fact the gas field and the operation thereof and cannot be considered to be base supply and given it is subject to contractual arrangements with other parties the basis of which is subject to commercial privacy and not available to the Board.

Given the lack of specification of a wider gas network, including sub-sea tiebacks etc or whatever mechanism is to be employed to further feed the terminal – the infrastructure as proposed also cannot be considered to be of strategic importance – as it is constrained by the corrib field and the commercial constraints of same. The applicant has not been able to credibly demonstrate how this application can be considered sustainable – let alone strategic – even in questioning.

The argument that Corrib constitutes 60% of Irelands demand – has been advanced. It remains to be seen if it will ever constitute anything approaching that of Ireland's supply. That is notwithstanding Mr Costelllo's trivial rebuttal that demand could vary and consequentially the proportion of demand potentially serviced by Corrib will vary. The more fundamental matter is given the pressures of the market and the commercial interest of the applicant – on what basis is Irelands strategic interest – matched by that of Shell E & P Ireland Ltd? This question some 10 years down the road from this intitiative was launched – has still not been answered satisfactorily. We refer again now to the detailed argument on the potential significance or rather 'insignificance' of the field – as outlined in fractional precision by Ms Máire Harrington in her closing submission – and to her argumentation that the highest bidder will secure the gas – given no undertaking to the contrary by the applicant to this state.

While An Taisce clearly has issue with the loss of our heritage and interest in resources off the coast of Ireland – that is the situation that currently pertains. What we do now object to most strongly is the abuse of an argument purporting a common strategic interest – and the leverage of powerful Strategic Infrastructure legislation to accomodate an application which is primarily of commercial import to the Applicant only – and which is clearly not of strategic importance to the State.

[6] COUNCIL Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora - hereafter referred to as the Habitats Directive

[7] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (this is the codified version of Directive 79/409/EEC as amended) – hereafter referred to as the Birds Directive;

On this basis and the submissions of those who have objected to the purported strategic significance of this application and the Corrib Gas Pipelin – An Taisce contends the application fails dismally to either demonstrate or meet the requirement to enable a grant of permission consequent on Article 6(4) of the Habitats directive on the basis achieve overriding public interest, and indeed given the applicants written acknowledgement that this project is justified on economic terms. It also fails to provide the requirement of the Birds directive to support a general interest greater than that afforded to the Birds Directive – and which specifically excludes economic considerations – and so must be refused.

An Taisce therefore concludes by asking the Board respectfully to refuse this application, and reminds it equally respectfully that it is in fact precluded in law from granting it permission.

An Bord Pleanála as stated before stands uniquely independent – over this application – and the consequences of same. The squandered national heritage of offshore rights is not within the Board's gift to restore – but it is within the Board's gift to ensure our natural environmental heritage into which this application proposes to develop and operate and so to create a risk and we contend an irrevocable impact – in the State's most prized and protected context of European Designation. These designations under the Habitats directive recognise the contribution of our habitat and species to a wider European context – we appeal to the Board to ensure this not compromised - especially in this year International Biodiversity Year 2010 – in which we have jointly committed to halt biodiversity loss and decline.

Given the overwhelming weight of argument and evidence supporting a refusal to do otherwise would compromise the credibility of the Board – and would have to be justified in some extraordinary terms and detail. We again reiterate our request that the Board address each of our reasons for refusal in its report and the basis for rejecting same should it choose to allow this application.

This is probably an appropriate point to add an aside and further comment in relation to closing remarks. The Inspector has restricted appellants from making submission points in response to answers to questions made – and has directed them to hold these over and include them in their closing, and the Inspector clarified this following An Taisce's submission. We preface the following remark that no personal inference is intended on Mr Keane – Counsel for the applicant by the following – we merely wish to put on record the following in relation to procedural matters. The matter of the introduction of new information with reference to the Applicant's closing remarks, which will be delivered following all the other parties – and on which rebuttal normally is not permitted – is a matter which we appeal to the Inspector and the Board – to address most carefully – not just in light of the courtesy owed to the proceedings of the Board, but also in the light of Ireland having amended its constitution by passing the Lisbon Treaty, now the full rights under the European Convention of Human Rights and the European Court of Human Rights is available to Irish citizens. It states that fair procedures must be followed in decision making procedures.

It is significant that our final point – now turns once again to health and safety concerns – which has been the root of the communities concerns and indeed in fairness which the Board through its direction, and indeed the questioning of its own experts have provided welcome focus and insight on. Mr Kane and indeed others directly and indirectly made submissions and responses to the hearing in relation to positive views of Shells safety record. In this context the Board *may* wish to consider – that only this month in the District Court in Belmullet a summons has been signed by Judge Andersen requiring Mercury Engineering to attend the Court to answer to matters pertaining to Health and Safety Concerns. This court action is on the basis of a civil action taken by Mr Colin Granahan. Mr Granahan withdrew his staff as we understand from site in 2008 on the basis of Health and Safety Concerns – and has pursued this action. Mercury Engineering being a significant sub-contractor to Shell, and indeed who also sub-contract – this is a matter of concern to all, the Applicant and indeed the Board. We say this without any predjudice or pre-judgement of a matter which is clearly before the Court – but which it may be useful to both the applicant and the Board to have

some context of and consideration of its findings as appropriate.

Finally – we thank the Inspector and all present at the hearing for their consideration of An Taisce's closing remarks.