Final Submission of The Swans & The Snails Limited.

We adopt the Submissions and closing Statement of An Taisce.

Any decision of the Board to grant permission for this proposed development would be both Illegal and fatally flawed for the following reasons:

THE DIRECTIONS OF AN BORD PLEANALA.

The direction of the Board of November of 2009, based on the information before the Board at that time, suggesting the route up Sruwaddacon Bay, was a decision so unreasonable that no reasonable person could have come to it. The Decision of An Bord Pleanala to invite and suggest the proffering of an amended Application for an alternative route for in excess of 55% of the length of pipeline, through an SPA and SAC, was a Decision which could not have reasonably been reached on the basis of the provisions of the Planning & Development (Strategic Infrastructure) Act 2006. The proper course of action for the Board would have been to reject the Application before it at that time.

Moreover, the Direction of the Board as to what could be considered by the Inspector at this Oral Hearing was fatally flawed as it did not have regard to the fact that this was an Environmental Impact Assessment project, routing through an SAC and a SPA. The obsession of the Inspector with the provisions of the Planning Act, without giving due consideration to the principles attaching to consideration of Projects coming within the remit of the EIA, Habitats and Birds Directives of the EU exhibits a tunnel vision worthy of any pipeline.

In addition to the foregoing, Bord Pleanala wrote to Monica Muller's Solicitors, Casey & Company, on 3rd June 2010 advising that the proposed Compulsory Acquisition Order over her lands and those of other affected persons, in respect of which there had been a full Oral Hearing, had been withdrawn. From an examination of the Bord Pleanala public file at the rear of this Hearing Room, it seems that the Board invited Shell to withdraw its' (then) Applications for CAO and CPO Orders, on 31st May 2010, a course of action which was followed by Shell on 1st June 2010.

From a reading of the provisions of the Gas Act 1976, as amended, it clear that this was NOT a course of Action which was open to the Board to follow in the manner in which it did so: Having heard the Application for a CAO over the lands of M/s Muller, the Board was entitled to acede to the request made by Shell to withdraw its' Applications for CAO and CPO Orders (which request was made at the urging of an Bord Pleanala) but having done so, was obliged to then proceed to make an Order Determining the Application(s), either by means of an Order confirming such Application(s), with or without modifications or, alternatively, annulling the Application(s). It is crystal clear that the Gas Act 1976 (as amended) does not allow for any entitlement on the part of the Decision maker to allow Shell to revise its' Application(s) for CAO/CPO, as was done in this instance. The procedure adopted was, at its'

mildest, questionable. In fact, it was illegal and beyond the powers of the Board and *ultra vires*. The Board completely mixed up and confused itself in terms of its' obligations and powers pursuant to the provisions of the Gas Act and the provisions of the Planning Act 2000, as amended.

HABITATS & BIRDS DIRECTIVES

1. The development comprises of the destruction of a designated Priority Habitat (The Machair). The Waddenzee judgement of the European Courts of Justice stipulates that:

   "*The competent national authorities, taking account of the appropriate assessment of the implications of the plan or project on the site concerned in the light of the site's conservation objectives, are to authorise that plan or project only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects.* "

2. The development also comprises the destruction of a Priority Habitat (the 190 m of Active Blanket Bog). Again, quoting from the Waddenzee Judgement of the ECJ:

   "*The competent national authorities, taking account of the appropriate assessment of the implications of the plan or project on the site concerned in the light of the site's conservation objectives, are to authorise that plan or project only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects.*

3. The development comprises of works which will, even on Shell's own admission, materially affect the bird species for which the SPA is designated.

4. The development will affect the absolute destruction of a Habitat for which The Glenamoy bog Complex is designated (Salt Marsh).

5. The Board and the Inspector, in considering this Application, are obliged to adopt procedures and standards deriving from the EIA, Habitats and Birds Directives of the EU which may be somewhat novel to them insofar as the standards which they are mandated to uphold, adopt and implement are entirely different to the standards which have been historically followed by Planning Authorities within the State. We wish to impress upon the Board and Inspector that they really do need to read, consider and understand documents such as the Habitats Manual of the EU, the Manual relating to consideration of Projects affected by the provisions of Article 6 of the Habitats Directive (both published by the European Commission and available on the EU Website) prior to their embarking upon the Decision making process. We do not make this suggestion lightly.

PLANNING & DEVELOPMENT ACTS.

This Application is invalid for (amongst others) the following reasons:

1. The developer has failed to supply the written consent of the landowner of the Foreshore (The State) and the State lands managed by Coillte Teoranta for the making of this Planning Application. (see Planning Regulations 2001 – Article 22.2.g)

   "where the applicant is not the legal owner of the land or structure concerned, the written consent of the owner to make the application"

2. The developer has failed to make an application for Retention of those parts of this Development which have already been carried out, without the benefit of planning permission.

   - The road into and onto the lands and SAC at Glengad;
   - The Stone Road which was constructed without permission immediately adjacent to the Refinery;
   - The entrance into the Compound at SC4 where the road with exceeds 4m;
   - The pipeline which has already been laid between the median High Water mark and the Land Valve Installation;
   - The current entrance to the site at Glengad which is materially different to that for which the Board granted Retention Permission;

3. We repeat what we have already submitted to the Board in relation to the operation of Article 9 (1) of the Planning Regulations 2001 which restricts and de-exempts (otherwise) exempted Development under the Second Schedule to the Planning Regulations, in this instance, Class 25 (c).

   For example, "Development" to which Article 6 relates shall not be exempted development for the purposes of the Act (a) if the carrying out of such development would — (ii) consist of or comprise the formation, laying out or material widening of a means of access to a public road the surfaced carriageway of which exceeds 4 metres in width;

Arising out of all of the foregoing it is clear that all works carried out since 2002 on the Pipeline Project are unauthorised and no Application for Retention Permission has been applied for, making this Planning Application invalid.

4. The information supplied on Noise does not stand up to scrutiny. The selection of Noise sensitive receptors is fundamentally flawed. The seashore is not a noise sensitive receptor. The Inspectors refusal to consider evidence on the existing borehole drilling in the bay as examples of noise created was a fatal mistake on his part.

5. The works carried out at the Refinery are unauthorised as the following Conditions of the original Planning Permission for the Refinery were not complied with.

> 7 (a) Haulage of all excavated peat from the Terminal site to the Deposition site shall be restricted to the designated Haul Route, and the return of all unladen haulage vehicles shall be along the designated return route. No haulage of peat shall commence until such time as the proposed improvements of the Haul Route and the return route are completed.
>
> 7(c) The proposed statutory one-way system at the southern end of the Haul Route, involving the L1204 and L12044, shall be in place prior to the commencement of haulage of peat.
>
> 34, Prior to commencement of development, a Project Monitoring Committee (PMC) shall be established.....
>
> In addition, two representatives of the local community, selected in accordance with procedures to be agreed with the planning authority, shall be invited to serve on this committee. This did not happen prior to commencement of development as confirmed today by Mayo County Council.
>
> 37. Prior to commencement of development, the developer shall lodge with Mayo County Council a cash deposit, a bond of an insurance company, or other security to secure the satisfactory reinstatement of the site, upon the cessation of activity at the terminal, coupled with an agreement empowering Mayo County Council to apply such security or part thereof to the satisfactory reinstatement of the site. The form and amount of the security shall be as agreed between Mayo County Council and the developer or, in default of agreement, shall be determined by An Bord Pleanála.

Pursuant to the provisions of Section 35 of the Planning Act 2000, as amended, the Planning Authority may make Application to the Courts for Refusal of the Development Application on the basis of continuous non-compliance with the provisions of the Planning Acts and of Permissions and Consents issued pursuant to that Act. Given the cavalier attitude exhibited by the Applicant towards the provisions of the Planning Acts in respect of this Project, we submit that it is a course of action which is mandatory for the Board to adopt.

ENVIRONMENTAL IMPACT ASSESSMENT.

Circular PD 2/07 imposes the following duties upon Planning Authorities and An Bord Pleanala:

Where the site is of "**priority**" importance (as indicated in the Annex I of the Habitats Directive with an asterix), permission should only be granted on the basis of reasons of human health and 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.

> It is clear from the above that the planning authority must have adequate information on the potential effects of the proposed development before it, including any proposed mitigation measures, when taking its decision.
>
> 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.
>
> The use of "Waste Plans", "Traffic Management Plans" and "Environmental Management Plans", such as were to be submitted and agreed with Mayo County Council under the provisions of the Grant of Planning Permission for the Refinery are examples of the type of Mitigation measures which are not to be countenanced in any Grant of Permission for this Pipeline Development.

Circular PD 6/08 – a document which has (apparently) been sent to the European Commission as showing that Ireland has given effect to the Judgements of the European Courts of Justice in **Case C-215/06.**

In its judgment of 3 July 2008, the European Court of Justice ruled that the Retention Permission system as it applies in Irish law with regard to projects that require or may require an Environmental Impact Assessment (EIA) under the EIA Directives does not comply with the Directives and needs to be amended.

Ireland is obliged under the Treaty of the European Union to comply with the Judgment or else face the consequence that the Commission issue Article 228 proceedings and seek the imposition of penalties/fines. Ireland is therefore obliged to respond to the judgment by introducing legislation that will amend the existing planning legislation insofar as it permits retention permissions on projects requiring

EIAs.

The case law of the European Court of Justice makes it clear that administrative bodies such as planning authorities and An Bord Pleanála, being emanations of the State, are bound to comply with Community law and if necessary to **disapply** national law.

The Judgement states:

A literal analysis of that kind of Article 2(1) is moreover consonant with the objective pursued by that directive, set out in particular in recital 5 of the preamble to Directive 97/11, according to which projects for which an assessment is required should be subject to a requirement for development consent [and] the assessment should be carried out before such consent is granted.

FORESHORE LICENSE FOR BOREHOLES

The Foreshore Licence granted to Shell by the Minister for Environment for boreholes in Sruwaddacon Bay is unlawful for the following reasons;

1. It is a definite example of project splitting.
2. It is a development within a SAC and SPA which was given consent without an Appropriate Assessment.
3. It is a development where Environmental Impact Assessment is required and no assessment under the Directive was performed.
4. The Decision of the Minister did not consider the Application pursuant to the provisions of the Foreshore Act, as inserted into and implemented by the Environmental Impact Assessment Regulations 1999

THE SEVESO DIRECTIVE

This Development is a project which falls within the remit of COUNCIL DIRECTIVE 96/82/EC as amended on the control of major-accident hazards involving dangerous substances**.** It is clear that both the HSA and the Board have made fatally flawed decisions concerning the operation of and applicability of the Directive to this entire Project and, in particular, to this Pipeline, in respect of both its' Offshore and Onshore/Upstream segments.

The Irish implementing Regulations of 2006 which seek to implement the (updated and amended) Seveso Directive of 2003 are in fact illegal insofar as they seek to place Gas Pipelines, both offshore and onshore, upstream and downstream, outside of the remit of the operation of the Directive in Ireland.

This Pipeline project and the Landfall Installation associated with the pressurising/de-pressurising/cooling of gas fall within the remit of the Seveso Directive and Permission CANNOT be granted without consideration being given to "Seveso Directive" issues.

Any decision made by the Board other than to refuse this Application will be unlawful, pursuant to the provisions of Irish Planning Legislation, The Habitats Directive, The Birds Directive, The Environmental Impact Assessment Directive and The Seveso Directive.

Monica Muller, Peter Sweetman, Greg Casey, & Brian Harrington