I am advised that M/s Justice Mary Irvine, on the hearing of a case for Judicial Review brought –v- An Bord Pleanála, ruled, at the behest of and on the making of Submissions to that affect by An Bord Pleanála that if one does not raise an Issue at an Oral Hearing, an Applicant for Judicial Review cannot raise that Issue in the Judicial Review proceedings and cannot rely on or plead a point or issue not so raised at the Oral Hearing.

Firstly we wish to fully adopt the submission of Martin Harrington as it is relevant to this submission.

The Environmental Impact Assessment Directive Article 3 states;

The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:
— human beings, fauna and flora;
— soil, water, air, climate and the landscape;
— material assets and the cultural heritage;
— the interaction between the factors mentioned in the first, second and third indents.

4. A description (1) of the likely significant effects of the proposed project on the environment resulting from:
— the existence of the project,
— the use of natural resources,
— the emission of pollutants, the creation of nuisances and the elimination of waste,
and the description by the developer of the forecasting methods used to assess the effects on the environment.

(1) This description should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the project.

Mr. Inspector you have already stated that the offshore pipe, the Refinery and the dump at Shramore, that they are not part of this hearing. If the Board does not assess these developments, you will fail to apply the law governing EIA as you are required to look at not just the direct effects, but also any indirect, secondary, cumulative, positive and negative effects of the "project" …………… not just PART of the Project.

6. A non-technical summary of the information provided under the above headings.

NTS

The NTS submitted with the FI does not comply with this requirement.

There was no NTS with the addendum.

The planning history of the development

The film plunges us into violent clashes between protestors and police. As tensions mount, the community divides over how to confront Shell. The conflict widens to draw in Catholic priests and even the Irish political leader, Taoiseach Bertie Ahern.

In the past year, "Big Energy" has fought hard against documentarians. Industry advocates mounted a public relations attack on *Gasland*, and Chevron applied legal pressure on the filmmaker of *Crude*. *The Pipe* reminds us again how a multinational corporation can deploy vast resources to battle dissenters.

It is now over 10 years since Barry Duke informed Monica that a pipeline would be going 40m from her house and if she did not agree to this pipe it did not matter as the existing laws would be changed by the government.

Next we had a pipe 74 m form her front door, Advantica found that that was not safe.

Next we have the pipe through Rossport Commonage The board have not yet decided on that application.

Now we have a pipe in the Bay how far away is not clear. They are currently drilling boreholes near her home. How you can apply for a tunnel when you don't know what you are tunnelling through is difficult to understand.

In the hearing to the Metro North the expert from Sweden on tunnelling asked certain questions which the Board considered relevant to the development of a tunnel using a TBM. The Board has refused me the transcript when requested under EU Directive 2003/4/EC in my opinion not legally, that's a matter with the Commission.

The inspectors and the Bord must decide that Shell have provided the answers that the Swedish expert requested from the RPA.

I am not at this time able to make a full submission on the tunnel as the date required has not been made available to either the board or us.

Article 5 (3) of the Environmental Impact Assessment Directive states;

> *— the data required to identify and assess the main effects which the project is likely to have on the environment,*

The 2001 Application Mayo County Council found the putting 600.000 tonnes of wet peat on top of a hill and hoping that it would stay there was proper planning and sustainable development of the area. Certain observers to this hearing claim that we should not have appealed this decision as we could rely on Mayo County Council. We don't agree.

Kevin Moore made a recommendation to the Board (who totally failed to carry out an Environmental Impact Assessment as require by Article 3), funny but if the Board has the courage to make the right decision at that time the gas would be flowing and most of it would have been wasted by the "Celtic Tiger"

Then we got the 2003 application for the terminal, the Board relied on its invalid finding the site of the terminal was suitable, Shell claimed once again that it was optimum.

The Board imposed conditions on no 37 has not been complied with, this is admitted in the foreshore licence application.

As this was a monetary condition the permission for the terminal in no longer valid as this condition was prior to commencement of development.

The 2002 consent under Section 40 of the Gas Act 1976 as amended granted by Minister Fahey to Shell E & P Ireland, subject to Environmental Impact Assessment, is a consent in principle which contained conditions precedent. The European Courts of Justice has found that a valid Environmental Impact Assessment consent cannot contain conditions precedent.

As it is our submission that no Environmental Impact Assessment as required by Article 3 of the EU Directive 85/337/EEC as amended by 97/11EC and 2003/35/EC has ever been carried out on the offshore pipeline and in particular on the construction compound and breech of the cliff at Glengad and as there is no facility in the Environmental Impact Assessment Directive for the carrying out of a post-construction assessment the Minister has no grounds on which he can legally grant a consent to the current application for a section 40 consent.

Shell installed and constructed a section of the consented gas pipeline, from the proposed LVI to the wellhead under the 2002 Section 40 consent which includes the requirement to comply with all plans, drawings, specifications and conditions attached. This has not been done.

The installed pipeline was not constructed within the terms and restrictions of the Rules and Procedures Manuel for Offshore Petroleum Production Operations.

The installed pipeline was not constructed as per the foreshore licence, as the Landfall is proscribed in the Foreshore Licence, as 81469E 336301 N. The Map titled FORESHORE LICENCE OVERALL ROUTE dated 30.1.02, Number 05 2102 02 P 0 199 02 states that these "Coordinated given are to define the foreshore routing."

The 2002 consent under Section 40 of the Gas Act 1976 as amended granted by Minister Fahey to Shell E & P Ireland, subject to Environmental Impact Statement is a consent in principle which contained conditions precedent. There was no Environmental Impact Assessment under Article 3 was preformed. The European Courts of Justice has found that a valid Environmental Impact Assessment consent cannot contain conditions precedent.

It is also our submission that the future submission, for agreement, of an Environment Management Plan is not valid under the judgement in Case 215/06 which 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'.*
>
> *(see paras 50-53)*
>
> *50. Further, development consent, under Article 1(2) of Directive 85/337 as amended, is the decision of the competent authority or authorities which entitles the developer to proceed with the project.*
>
> *51. Given that this wording regarding the acquisition of entitlement is entirely unambiguous, Article 2(1) of that directive must necessarily be understood as meaning that, unless the applicant has applied for and obtained the required development consent and has first carried out the environmental impact assessment when it is required, he cannot commence the works relating to the project in question, if the requirements of the directive are not to be disregarded.*
>
> *52. That analysis is valid for all projects within the scope of Directive 85/337 as amended, whether they fall under Annex I and must therefore systematically be subject to an assessment pursuant to Articles 2(1) and 4(1), or whether they fall under Annex II and, as such, and in accordance with Article 4(2), are subject to an impact assessment only if, in the light of thresholds or criteria set by the Member State and/or on*

the basis of a case-by-case examination, they are likely to have significant effects on the environment.

53. A literal analysis of that kind of Article 2(1) is moreover consonant with the objective pursued by Directive 85/337 as amended, 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'.

As it is our submission that no Environmental Impact Assessment as required by Article 3 of the EU Directive 85/337/EEC as amended by 97/11EC and 2003/35/EC has ever been carried out on the offshore pipeline and in particular on the construction compound and breech of the cliff at Glengad and as there is no facility in the Environmental Impact Assessment Directive for the carrying out of a post-construction assessment the Minister has no grounds on which he can legally grant a consent to the current application for a section 40 consent.

Shell installed and constructed a section of the consented gas pipeline, from the proposed LVI to the wellhead under the 2002 Section 40 consent which includes the requirement to comply with all plans, drawings, specifications and conditions attached. This has not been done.

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Supreme Court has stated the following case to the European Courts of Justice concerning the interpretation of the Habitats Directive.

SECOND SCHEDULE

TEXT OF QUESTIONS DRAFTED BY

IRELAND, THE ATTORNEY GENERAL AND THE MINISTER FOR THE ENVIRONMENT, HERITAGE AND LOCAL GOVERNMENT

AND

AGREED BY PETER SWEETMAN

In light of these arguments, the Court has decided to refer to the Court of Justice of the European Communities pursuant to Article 267(3) of the Treaty on the Functioning of the European Union the following questions:

1. Does the permanent loss of an area of Annex I priority habitat type constitute "deterioration" within the meaning of Article 6(2) of Directive 92/43[1]? If the answer to this question is "yes", can a plan or project involving such a permanent loss be authorised other than pursuant to the provisions of Article 6(4) of the Habitats Directive?

2. Are there any circumstances in which the permanent loss of an area of Annex I habitat type can be considered not to adversely affect the integrity of the site concerned? In particular, does Article 6(3) of Directive 92/43 admit of a *de minimis* exception, whereby the permanent loss of an area of Annex I priority habitat type can be authorised by reference to the continued existence of the habitat type elsewhere within the site. If the answer to these questions is "yes", does a finding that the permanent loss has a "significant effect" preclude the application of any de minimis exception?

3. Must the permanent loss of a habitat type for which a site has been designated be considered as having negative implications for the conservation objectives of the site? If so, can a plan or project involving such a loss be authorised other than pursuant to the provisions of Article 6(4) of Directive 92/43?

[1] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) as amended

In addition to the above it is our submission that no Assessment which would have complied with Article 3 of European Directive 85/337/EEC as amended by Directives 97/11/EC and 2003/35/EC/EEC. We attach extract from the Official Journal of the European Union issue C 82/19.

An IPPC licence was granted without Environmental Impact Assessment.

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[1] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) as amended

A new IPPC licence has got a PD for a different IPPC licence which has been appealed by Shell, it imposed condition but was not subjected to Environmental Impact Assessment.

I will now read the OJ reference to Case C-50-09

Action brought on 4 February 2009 — Commission of the European Communities v Ireland
(Case C-50/09)
(2009/C 82/35)
Language of the case: English
Parties
Applicant: Commission of the European Communities (represented by: P. Oliver, C. Clyne, J.-B. Laignelot, Agents)
Defendant: Ireland
The applicant claims that the Court should:
— declare that by failing to transpose Article 3 of Council Directive 85/337/EEC (1) on the assessment of the effects of certain public and private projects on the environment as amended;
— declare that by failing to ensure that, where Irish planning autorities and the Environmental Protection Agency both have decision-making powers on a project, there will be complete fulfilment of the requirements of Articles 2, 3 and 4 of that Directive;
— declare that by excluding demolition works from the scope of its legislation transposing that Directive,
Ireland has failed to fulfil its obligations under that Directive.
— order Ireland to pay the costs.

Pleas in law and main arguments

Failure to transpose article 3 of the directive

The Commission submits that Section 173 of the Planning and Development Regulations 2000, which requires planning authorities to have regard to the environmental impact statement (EIS) and information coming from consultees, relates to the duty under art. 8 of the directive to take into consideration information gathered pursuant to arts. 5, 6 and 7 of the directive. In the Commission's view Section 173 does not correspond to the wider duty under art. 3 of the directive to ensure that an environmental impact assessment (EIA) identifies, describes and assesses all the matters referred to in that provision.
As for Articles 94, 108 and 111 and Schedule 6 of the Planning and Development Regulations 2001, the Commission makes

the following observations. Art. 94 read with Schedule 6.2(b) sets out the information that an EIS must contain. This is a reference to the information that the developer must provide pursuant to art. 5 of the directive; it is therefore to be distinguished from the EIA which is the overall assessment process.
Arts. 108 and 111 require planning authorities to consider the adequacy of an EIS. The Commission considers that these provisions relate to Art. 5 of the directive but are not a substitute for a transposition of art. 3 of the directive. The information to be provided by a developer is only one part of an EIA and provisions concerning such information are not a substitute for the obligation set out in art. 3.

Failure to require proper coordination between authorities
Although the Commission has no objection in principle to multi-stage decision-making or to decision-making responsibility for the same project being divided between different decision-makers, it does have concerns relating to the precise manner in which duties on different decision-makers are framed. In the Commission's view Irish legislation contains no obligation on decision-makers to coordinate with each other effectively and is, therefore, contrary to articles 2, 3 and 4 of the directive.

Environmental Impact Assessment by Developer.

Ms.Neff for the developer claimed to have preformed an Environmental Impact Assessment of their section of the development.

S.I. No. 94/1997 — European Communities (Natural Habitats) Regulations, 1997
27. (1) A local authority when duly considering an application for planning permission, or the Board when duly considering an appeal on a application for planning permission, in respect of a proposed development that is not directly connected with, or necessary to the management of, a European site but likely to have a significant effect thereon either individually or in combination with other developments, shall ensure that an appropriate assessment of the implications for the site in view of the site's conservation objectives is undertaken.
(2) An environmental impact assessment in respect of a proposed development prepared in accordance with a requirement of or under the Local Government (Planning and Development) Regulations, 1994 (S.I. No. 86 of *1994* *), shall be an appropriate assessment for the*

purposes of paragraph (1).

PL 9 - Environmental
Impact Assessment
The process begins with the preparation of an
Environmental Impact Statement (EIS) by the developer.
Active public involvement in the assessment of the EIS is
encouraged. The assessment procedure is carried out by
the planning authority as part of the processing of the
relevant planning application and by An Bord Pleanála in the
event of an appeal. The EIA procedure is designed to
ensure that measures to improve a proposal can be taken at
the earliest opportunity.

THE HABITATS DIRECTIVE

190m of this development is

7130 Blanket bogs (* if active bog)

PAL.CLASS.: 52.1 and 52.2
1) Extensive bog communities or landscapes on flat or sloping ground with poor surface drainage, in oceanic climates with heavy rainfall, characteristic of western and northern Britain and Ireland. In
spite of some lateral water flow, blanket bogs are mostly ombrotrophic. They often cover extensive areas with local topographic features supporting distinct communities [*Erico-Sphagnetalia magellanici*: *Pleurozio purpureae-Ericetum tetralicis, Vaccinio-Ericetum tetralicis* p.;
Scheuchzerietalia palustris p., *Utricularietalia intermedio-minoris* p., *Caricetalia fuscae* p.]. Sphagna play an important role in all of them but the cyperaceous component is greater than in raised bogs.
The term "active" must be taken to mean still supporting a significant area of vegetation that is normally peat forming.

It is clear from this that Ms Neff is mistaken in her approach the as the species she chose to look for were not present did not make it a Priority Habitat. She is wrong.

The term "active" must be taken to mean still supporting a significant area of vegetation that is normally peat forming. This bog land is active by this description.

Shell claim that they will fully reinstate the habitat.

We were informed in the High Court that the land outside the Refinery would be reinstated. It is no a great rust field with no reinstatement of the habitat.

They have relied on the Bord gas pipe restoration, Catriona Douglas the Bog expert in the NPWS was not satisfied that these lands had been successfully restored. Go and have a look.

Take the Crossmolina road you should see the marker post, but you won't as they are hidden by the rushes.

Machair

The site designation notes and the map attached to those notes clearly shows that some of the lands at the Eastern side of the SAC at Glengad is Machair.

Environmental Impact Assessment by Developer.

Ms.Neff for the developer claimed to have preformed an Environmental Impact Assessment of their section of the development.

S.I. No. 94/1997 — European Communities (Natural Habitats) Regulations, 1997
27. (1) A local authority when duly considering an application for planning permission, or the Board when duly considering an appeal on a application for planning permission, in respect of a proposed development that is not directly connected with, or necessary to the management of, a European site but likely to have a significant effect thereon either individually or in combination with other developments, shall ensure that an appropriate assessment of the implications for the site in view of the site's conservation objectives is undertaken.
(2) An environmental impact assessment in respect of a proposed development prepared in accordance with a requirement of or under the Local Government (Planning and Development) Regulations, 1994 (S.I. No. 86 of *1994), shall be an appropriate assessment for the purposes of paragraph (1).*

PL 9 - Environmental Impact Assessment
The process begins with the preparation of an Environmental Impact Statement (EIS) by the developer. Active public involvement in the assessment of the EIS is encouraged. The assessment procedure is carried out by the planning authority as part of the processing of the relevant planning application and by An Bord Pleanála in the event of an appeal. The EIA procedure is designed to ensure that measures to improve a proposal can be taken at the earliest opportunity.

The Stone Road.

The Stone Road which was constructed without any reference in the EIS is UD and is without consent under the Environmental Impact Assessment Directive.

The Planning Application is invalid as it does not contain the retention of the pipe at Glengad, the road in the SAC at Glengad for which no planning has ever been applied for. It is our submission that under Article 9 of the Planning and Development Regulations 2001 as amended the pipe was not exempt development.

This developer decided to commence drainage of the Refinery site prior to the grant of a permission by An Bord Pleanála, we complained this unauthorised development to Mayo County Council, who responded that as this was agricultural development it was exempt, Mayo County Council stated that they will continue to enforce the planning conditions as they have done in the past. We do not believe that any enforcement by Mayo County Council can be expected.

As no planning permission exists for the pipe the ancillary works to that pipe cannot be exempted development.

The Board with a recent decision enclosed the document entitled Judicial Review.

Article 10a of the Directive states;

Member States shall ensure that, in accordance with the relevant
national legal system, members of the public concerned:
have access to a review procedure before a court of law or another
independent and impartial body established by law to challenge the
substantive or procedural legality of decisions, acts or omissions
subject to the public participation provisions of this Directive.

10a of the Directive also states:
Any such procedure shall be fair, equitable, timely and not prohibitively
expensive.

And finally we would like to remind the Board that Ireland amended it’s constitution to take account of the Lisbon Treaty. That treaty included ratifying the Convention of Human Rights.

Jenny Neff in her first affidavit to the Court in Philbin case stated that the lands at Glengad were not in the SAC we produced evidence of Mr. Ron Bergin that proved her wrong, which she subsequently admitted.

There is a major difference of opinion once again between us and Jenny Neff on three points

1. The site of the pull in at Glengad is designated as Machair.
2. As it is not legal to designate Improved Grassland as SAC the Sac at Glengad could not have been Improved Grassland, prior to its destruction by Shell.
3. As her definition of the 'Priority Habitat Blanket Bog' was not according to the Habitats Manual, which was adopted by a Decision of the EC.

   Therefore the requirements of European Courts of Justice judgement C-02-127 which states at;

4. *The first sentence of Article 6(3) of Directive 92/43 on the conservation of natural habitats and of wild fauna and flora must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the protected site is to be subject to an appropriate assessment of its implications for the site in view of the site"s conservation objectives if it cannot be excluded, on the basis of objective information and, in particular, in the light of the characteristics and environmental conditions of that site, that it will have a significant effect on that site, either individually or in combination with other plans or projects. Such an assessment of the implications implies that, prior to the approval of the plan or project, all the aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site"s conservation objectives must be identified in the light of the best scientific knowledge in the field.*

   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.

The Board must ascertain that no reasonable scientific doubt remains as to the absence of such effects. The Board must do the relevant research to establish this fact within all reasonable doubt. We in this community have had too much put on us by the agencies of the State, without any sense of 'such procedure shall be fair, equitable, timely and not prohibitively expensive'