

Grainne Power

From: Licensing Staff
Subject: Submission No 755 Ian Lumley An Taisce
Attachments: RE Dumping at Sea Permit Application Re SOO24-01 by Dublin Port Company 1.docx

From: Ian Lumley
Sent: 31 August 2015 16:30
To: Licensing Staff
Subject: TO EPA Dumping at Sea Permit Application Re: SOO24-01 by Dublin Port Company

From: Ian Lumley An Taisce
Date: 31 August 2015
Subject: RE: Dumping at Sea Permit Application Re: SOO24-01 by Dublin Port Company

Submission attached

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An Taisce - The National Trust for Ireland | www.antaisce.org
The Tailors' Hall, Back Lane, Dublin 8, Ireland
Company Reg. No. 12469 | Charity Ref. No. CHY4741 | Charity Regulator No. 20006358
An Taisce is a membership-based charity
Join at www.antaisce.org/membership

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31st August 2015

RE: Dumping at Sea Permit Application Re: SOO24-01 by Dublin Port Company

Dear Sir/Madam,

An Taisce wishes to make submission on the above.

1 SIGNIFICANCE OF DUBLIN BAY AND POTENTIAL IMPACT OF PROJECT

Dublin Bay is as a UNESCO Biosphere Reserve, and contains a range of designations under the Habitats and Birds Directive, In addition to the SAC and SPA designations in and around the Bay are also offshore designation under Annex I habitat namely sub sea 'reefs' and Annex II species 'harbour porpoise *Phocoena phocoena*'.

Apart from accommodating commercial shipping the Bay is a significant recreational amenity for swimming, sailing, canoeing, wildlife observation, diving and other activities.

The Dumping at Sea proposal is part of a single berthage and channel deepening and dumping at sea development project by Dublin Port Company, the land based part of which has been granted consent by An Bord Pleanala in June 2015 Ref 29N PA0034

This constitutes the offshore part of the project to dump 10 million tonnes of silt in the Bay over a five year period from capital dredging from Dublin Port raises significant impact concerns on the ecology of the bay in general and of the areas and species protected under the Habitats and Birds Directive in particular. We consider that there is a particular issue in relation to the protected reefs and harbour porpoise.

In addition to this there is the potential level of heavy metals in the Dublin Port operational area which have lodged in the sediment proposed for dredging, and the cumulative issue of the one million tonnes of dredging proposed by the Dun Laoghaire Harbour Company, in the Cruise Terminal lodged in June 2015.

2 PRELIMINARY LEGAL ISSUES

2.1 JURISDICTIONAL AND FUNCTIONAL COMPETENCE OF EPA TO DETERMINE REQUIREMENT OF ARTICLE 6 OF THE HABITATS DIRECTIVE TO ASSESS IMPACT ON INTEGRITY OF QUALIFYING EUROPEAN SITE.

This application requires Appropriate Assessment screening and has been determined to require both an Environmental Impact Statement and Natural Impact Statement.

We are obliged to raise and request as a preliminary matter that the EPA jurisdictional and functional competence to perform and Appropriate Assessment under the Habitats Directive be addressed. Because of the likely significant effect on a qualifying European Site the determination of this application requires Appropriate Assessment by the consent body in this case the EPA .

The application requires consideration under Article 6 of the Habitats Directive to determine if there is a significant impact on a priority habitat or species affecting the integrity the site

We refer the EPA to the judgment in *Finlay Geoghegan J. in Kelly -v- An Bord Pleanála* 2013/802 JR

It states in para ; 26.

“ There is a dispute between the parties as to the precise obligations imposed on the Board in relation to the stage 1 screening by s.1777U but its resolution is not strictly necessary in these proceedings. There is agreement on the nature and purpose of the screening process which is well explained by Advocate General Sharpston in Case C- 258/11 Sweetman at paras 47-49: “

47. It follows that the possibility of there being a significant effect on the site will generate the need for an appropriate assessment for the purposes of Article 6(3). The requirement at this stage that the plan or project be likely to have a significant effect is thus a trigger for the obligation to carry out an appropriate assessment. There is no need to establish such an effect; it is, as Ireland observes, merely necessary to determine that there may be such an effect.

48. The requirement that the effect in question be ‘significant’ exists in order to lay down a de minimis threshold. Plans or projects that have no appreciable effect on the site are thereby excluded. If all plans or projects capable of having any effect whatsoever on the site were to be caught by Article 6(3), activities on or near the site would risk being impossible by reason of legislative overkill.

49 The threshold at the first stage of Article 6(3) is thus a very low one. It operates merely as a trigger, in order to determine whether an appropriate assessment must be undertaken on the implications of the plan or project for the conservation objectives of the site [. . .]”

We submit the information in the NIS is insufficient to enable a conclusion to be drawn that the proposed project will not adversely affect the integrity of the site concerned, including. Annex I habitat 'reefs' and Annex II species 'harbour porpoise *Phocoena phocoena*'

Accordingly determination of this application should not proceed until the jurisdictional and functional competence of the EPA to carry out an Appropriate Assessment is resolved. Furthermore if Appropriate Assessment were to determine that a significant adverse impact affecting the integrity of

the conservation value of a European Site or an Annex I species, this would require the IROPI provisions of the Habitats Directive to be invoked, and alternatives demonstrated before IROPI could be used having regard to the provision of Articles 6(3) and 6(4) of the Habitats Directive.

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.'

Article 6(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'

2.2 ISSUE RELATION TO EUROPEAN COURT JUDGMENT CASE C50-09

The first part of the judgment in this case found against Ireland in the procedure involved when consent and licensing for different project are split between different consent bodies.

This is an application for an element of a larger project namely the Dublin Port Company dredging and port and shipping capacity increase granted by An Bord Pleanála in July 2015.

The ecological impact of Dumping at Sea was not addressed in the An Bord Pleanála consent which was limited in consideration of the berthage and dredged channel application site area.

An Taisce raised the issue of dredging and dumping at sea to the Board, in submission and at the Oral Hearing . However the 10 million tonnes of displaced silt for dumping was not properly assessed by the Board in its consent . The Board whether legally justified or not on the basis of its Statutory remit considered that it was constrained in the consideration of dumping methodology and location impact in assessment of the project. Its attachment of conditions were to the application site area within Dublin port, and did not include the dredging disposal methodology or location.

This means that the overall Dublin Port development, dredging and dumping project has not been subject to the integrated assessment require under the EIA Directive .

The An Bord Pleanála development consent is simply an approval for part of a project requiring integrated assessment.

In the "REASONS AND CONSIDERATIONS" on which the decision was made by the Board it is stated that

" In coming to its decision, the Board had regard, inter alia, to: (a) the European Union Ports 2030 Gateways for the Trans European Transport Network, 2014, (b) the National Ports Policy 2013, as issued by the Department of Transport, Tourism and Sport, which identifies the Port of Dublin as a Tier 1 Port of National Significance, and which supports the continued commercial development of the Port, and the identification of the Port of Dublin as a Core Port within the Trans European Network-Transport (TEN-T), (c) the nature of the proposed expansion and consolidation of long

established port operations at this location and the site's strategic location proximate to national road and rail infrastructure, (d) the National Development Plan 2007-2013, (e) the National Spatial Strategy 2002-2020, (f) the Dublin City Development Plan 2011-2017, (g) the Local Action Plan City of Dublin – Cruise Traffic and Urban Regeneration of City-Port Heritage as a Key for Sustainable Economic, Social and Urban Development, 2011, (h) the Dublin Port Master Plan 2012-2040, (i) the planning history of the site, (j) the submissions and observations made in respect of the application, including at the oral hearing, and in response to the further information submitted, (k) the requirement on the applicant to secure a Waste Licence and Dumping at Sea Permit from the Environmental Protection Agency (EPA), and (l) the reports and recommendation of the Inspector, including the addendum report dated the 5th day of June, 2015, and the supporting specialist report entitled 'Review of Coastal Processes Related Issues' prepared to advise the Board."

Under the heading "Environmental Impact Assessment" it was stated that "The Board completed an environmental impact assessment of the proposed development, taking into account: • the nature, scale, extent and location of the proposed development, • the environmental impact statement submitted with the application, • the further information received from the applicant on the 18th day of August, 2014, • the applicant's oral hearing submissions, • the further information received from the applicant on the 2nd day of April, 2015, • the submissions from the planning authority and from the observers in the course of the application, including submissions made to the oral hearing, and in response to the further information submitted, • the Inspector's report dated the 18th day of December, 2014 including the supporting report entitled 'Review of Coastal Processes Related Issues', and • the addendum report dated the 5th day of June, 2015, prepared following a request for further information which addressed, inter alia, the removal of the North Wall - Poolbeg 220kv cable and cumulative impacts of the proposed development. The Board considered that the environmental impact statement, supported by the documentation and various further submissions by the applicant mentioned above, identifies and describes adequately the direct and indirect effects of the proposed development on the environment. The Board completed an environmental impact assessment in relation to the proposed development and concluded that, by itself and in combination with other development in the vicinity, the proposed development would not be likely to have significant effects on the environment. In doing so, the Board adopted the reports of the Inspector."

Under the heading "Appropriate Assessment" the Board stated that "The Board completed an appropriate assessment of the case, taking into account the initial Inspector's report (dated the 18th day of December, 2014) and the supporting specialist report entitled 'Review of Coastal Processes Related Issues', and also the Inspector's addendum report (dated the 5th day of June, 2015), the latter having been completed following a request for further information which addressed, inter alia, the removal of the North Wall - Poolbeg 220kv cable and cumulative impacts of the proposed development. Screening stage: The Board agreed with the screening assessment carried out in the Inspector's reports which concluded that there are six European sites for which there is a likelihood of significant effects: • Rockabill to Dalkey Island candidate Special Area of Conservation (site code: 003000) • Lambay Island candidate Special Area of Conservation (site code: 000204) • North Dublin Bay candidate Special Area of Conservation (site code: 000206)."

Accordingly the Board did not perform an Environmental Impact Assessment or Appropriate Assessment on the overall Dublin Port Company development or specifically dredged silt disposal by dumping at sea project The Bord consent left the assessment of the dredged silt disposal methodology and location to a future *Dumping at Sea* consent application to the EPA.

This means that an integrated EIA and AA for the overall Dublin Port Company berthage development, dredging and silt disposal project has not been carried out. The legal implications of this must now be addressed by the EPA

The implication of this split jurisdiction means that the ruling against Ireland relative a case C50-09 needs to be addressed.

2.3 FAILURE OF EIS AND NIS TO PROVIDE REQUIRED UP TO DATE INFORMATION.

It is a matter of fact that the particulars in the EIS and NIS are out of date to assess CUMULATIVE impact. The consideration of cumulative impact with other projects is a legal requirement.

In this case the dredging and Dumping as Sea required by the current Dun Laoghaire Harbour Company Proposal, is not considered in the Dublin Port Company EIS and NIS.

This is despite the fact that the preparation of the An Bord Plenala consent for this project had been indicated for some time , with the actual consent being lodged in June 2015. This project proposed dumping of up to a million tonnes of dredged material, which needs to be considered cumulatively with the Dublin Port proposal

We submit the information in the EIS and NIS is insufficient to enable a conclusion to be drawn that the proposed project will not adversely affect the integrity of the site concerned, including. Annex I habitat 'reefs' and Annex II species 'harbour porpoise Phocoena phocoena.

3. ADEQUACY OF APPLICANTS ENVIRONMENTAL STATEMENT AND NATURA IMPACT STATEMENT

3.1 . FAILURE TO CONSIDER APPROPRIATENESS OF DUMPING AT SEA IN PRINCIPLE

While the dumping of dredged silt around Dublin Bay has been practiced since the 19th. C, the ecological impacts of such dumping now needs to be properly reevaluated and alternatives assessed

Is dumping 10 million tonnes of silt within the Bay is the most appropriate way to dispose of or reuse the material dredged? Is the argument in the EIS on the suitability of the dumping location justified? Has the issue of heavy metal contamination of silt within the port are been adequately addressed?

3. 2 FAILURE TO CONSIDER ALTERNATIVE DUMPING LOCATION

The Environmental Impact Statement fails to consider alternative locations for dumping at sea. This is a fundamental breach of the requirements of the EIA Directive and Irish law transposing the Directive; it is not possible to legally grant consent in these circumstances. The application fails to supply the information required in the application form as to how the site was selected. The application fails to explain the site selection process. This is a requirement on the application form but nowhere in the document is the site selection process explained. (A site selection process is a process whereby a number of possible sites are considered and the best site is picked on the basis of criteria. There is no indication that any other site was considered for this proposed dumping.)

3.3 INADEQUACY OF ASSESSMENT OF IMPACT ON BIODIVERSITY

The potential impacts on biodiversity including those which are identified in the EIS and Natura 2000 Impact Assessment needs to properly assessed and alternatives considered in order to determine if impacts could be completely avoided or reduced if a different land based treatment or different part of the Irish Sea was used for dumping .

We note concerns in other submissions made to date to the EPA on effects that the impact of the proposal on Annex I Habitats has not been properly assessed. The EIS and NIS do not adequately assess the impacts on the Natura 2000 Annex I habitat 'reefs'. Reef habitats have been identified in the Rockabill to Dalkey Island SAC both to the south and to the north of the dump site, as close as 4km

away in the case of the reefs on the south side of Howth. Reef habitats are susceptible to the impact of silt dumping and indeed the NPWS conservation objectives supporting document just referenced identifies a correlation between silt impacts and low numbers of species and individuals.

The studies done for the EIS demonstrate that silty water will flow in the direction of each of these at various times depending on the state of the tide. However, the only estimate of loading of silt supplied with the EIS is an estimate of the total silt load after 6 months. What is needed is an estimate of current levels of silt during various conditions over the year and the likely changes to both average and peak silt deposition at these sensitive receptors. If this analysis has been done.

4 ARHAUS AND EIA DIRECTIVE CONSULTATION OBLIGATIONS

The proposal needs to demonstrate compliance with International Conventions and the Environmental Impact Assessment Directive¹ on Public and stakeholder consultation

Serious concerns have been raised on the project by residents groups around Dublin bay, groups concerned with ecology, water users including diving and dinghy, canoeing clubs, which we have noted in submission already made to the EPA,. Some of these submissions were also sent a communications sent to An Taisce. A pervading issue raised in these submissions is inadequate public consultation in advance of the proposal.

The failure to facilitate public consultation in accordance with Art 6(4)² of the Aarhus Convention on the preliminary decisions made in relation to the current tabled proposal not limited to, but including the requirement for the project in the first instance (and moving to select study corridors without a more fundamental analysis; see below) constitutes a failure to “provide for early public participation, when all options are open and effective public participation can take place”⁴ as required by the Aarhus Convention.

Furthermore, a realistic consideration of alternatives, as required by the Environmental Impact Assessment Directive of the European Union, is undoubtedly compromised by the failure to provide a considered strategic context and assessment necessary for this initiative, and input from stakeholder and other concerned parties.

We request that the legal issues raised in this submission be addressed in a preliminary Public Hearing before any consideration is given to the substantive issues raised by the project.

Failure to properly address the multiple legal issues arising from this application, exposes the prospect of legal actions in the Irish courts and complaint seeking European Commission action to the European Court for breach of terms judgment in case C50-09 on lack of integrated EIA consent , as well as complaint on the Appropriate Assessment issue.

¹ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, codified version of 85/337/EC as amended.

² Article 6 (4). “Each Party shall provide for early public participation, when all options are open and effective public participation can take place”; UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters done at Aarhus, Denmark, on 25 June 1998.

Yours sincerely,

Ian Lumley

Heritage Officer
CC DG Environment Brussels

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