



Submission

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Applicant:	SSE Generation Ireland Limited
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See below for Submission details.

Attachments are displayed on the following page(s).

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Marian Doyle
Environmental Licensing Programme
Office of Environmental Sustainability
Environmental Protection Agency

Industrial Emissions Licence Review of Great Island Power Station (Reg No. P0606-04)

Dear Madam,

We are writing to you about the industrial emissions licence review application submitted by SSE Generation Ireland Limited (Great Island) for the Great Island Power Station, Campile, New Ross, Wexford, Y34KC62 (Registration No. P0606-04).

ClientEarth is an environmental law charity, whose purpose is to protect the environment and human health by working to ensure that environmental law is properly implemented and enforced. In Ireland, we have been collaborating with Coastwatch Europe to improve the application of EU conservation laws in the Irish marine environment.

In this regard, it has been brought to our attention that there is the potential for adverse environmental impacts caused by the operation of Great Island Power Station. In particular, we understand that the power station has been discharging biocide (sodium hypochlorite) into the estuary from an unauthorised emission point (SW8).¹ We note that the operator of this power station, SSE Generation Ireland Limited, has applied to amend its existing industrial emissions licence² in order to authorise the chlorine discharge from this emission point.

According to Coastwatch, which is highly respected for its expertise in marine ecology, numerous protected marine habitats and species are at risk from the power station's operations, particularly due to large-scale water abstraction as part of its cooling system and the use of large quantities of sodium hypochlorite (chlorine bleach), some of which is currently being discharged without authorisation from emission point SW8.

We welcome the EPA's determination of 28 January 2021 that Great Island Power Station should be subject to an Environmental Impact Assessment before an amended licence is granted.³ However, we share Coastwatch's concerns about the ongoing environmental damage caused by the continuing operation of the power station while the EIA is being carried out and the licence application being considered.

In the interim period, we would urge the EPA to engage with SSE to ensure that mitigation measures are implemented as a matter of urgency. Of particular concern is the impact of the operations on the Twaité shad (protected under the EU Habitats Directive) and other fish species that migrate upstream past the power station to spawning sites in late spring and early summer each year. The EPA should ensure that robust precautionary measures are put in place during

¹ As confirmed in the EPA's Technical Amendment Refusal – Inspector's Report (4 June 2020).

² http://www.epa.ie/licences/lic_eDMS/090151b280779da0.pdf

³ http://www.epa.ie/licences/lic_eDMS/090151b28079cafc.pdf

this migratory period, including the installation of adequate fish deterrents or stopping water abstraction from the estuary.

We are also writing to notify the EPA of our concerns that Great Island Power Station is not operating in compliance with EU environmental law, notably the EU Habitats Directive.

EU Habitats Directive

Great Island Power Station is located in the Waterford Estuary close to several Natura 2000 sites.⁴ The station itself is situated on the banks of the River Barrow and River Nore Special Area of Conservation (Site Code: IE0002162), which has been described by the National Parks and Wildlife Service as a site “of considerable conservation significance for the occurrence of good examples of habitats and of populations of plant and animal species that are listed on Annexes I and II of the E.U. Habitats Directive.”⁵ The “qualifying interests” for this SAC include the Twaite shad, Atlantic salmon, and the river and sea lamprey, which are all at high risk from the power station.

The EU Habitats Directive establishes legal duties regarding the conservation of Natura 2000 sites. For the reasons provided below, there are serious doubts as to whether the Great Island Power Station is being operated in full compliance with those legal duties.

Obligation to carry out an “appropriate assessment”

Under Article 6(3) of the Habitats Directive, any “plan” or “project” (such as a power station) that is “likely to have a significant effect” on a Natura 2000 must be subject to an “appropriate assessment of its implications for the site in view of the site’s conservation objectives”. Subject to the limited exceptions set out in Article 6(4) of the Directive, the relevant public authorities can only authorise a plan or project after having ascertained that it will not adversely affect the integrity of the site concerned.

There does not appear to be any publicly available evidence to indicate that the Great Island Power Station has ever been subject to an appropriate assessment. In particular, no such assessment was carried out during the authorisation process for granting the initial Integrated Pollution Prevention and Control (IPPC) Licence in 2011 for the construction and operation of the Combined Cycle Gas Turbine (CCGT) that replaced the oil-fired station at the site.

An “Appropriate Assessment Screening Report” was carried out during this licence application process.⁶ However, this report concluded that an appropriate assessment was not required, on the purported basis that significant adverse effects on the integrity of the nearby Natura 2000 sites were unlikely to occur from the construction or operational phases of the development.

It is clear from the text of the Habitats Directive, the guidance of the European Commission and the case law of the Court of Justice of the EU (CJEU) that this represented a poor application of the requirements of Article 6(3) on several levels.

⁴ Including the River Barrow and River Nore SAC; Tramore Dunes and Backstrand SAC; Hook Head SAC; Bannow Bay SAC; Bannow Bay SPA; and Tramore Back Strand SPA.

⁵ NPWS, *Site Synopsis for River Barrow and River Nore SAC*

⁶ http://www.epa.ie/licences/lic_eDMS/090151b28035fc1d.pdf

First, when determining whether to undertake an appropriate assessment, one must consider whether there is any likely significant effect on the site. In practice, this is a very low threshold: it is met whenever there is “a **probability or a risk** that the plan or project in question will have a significant effect on the site concerned.”⁷ Furthermore, in light of the precautionary principle, if there is any doubt as to the absence of significant effects such an assessment must be carried out.⁸ On this point, we would specifically draw the EPA’s attention to the judgment in *Commission v Germany*,⁹ concerning a very similar factual background to the present circumstances. The CJEU ruled that a coal-fired power plant’s cooling mechanism was likely to have a significant effect on Annex II fish species protected in nearby Natura 2000 areas concerned.

Accordingly, by excluding the possibility of carrying out an appropriate assessment on the basis of a consideration of adverse effects on site integrity, the Habitats Directive was misapplied.

Second, the screening report relied heavily on “mitigation measures” to conclude that the project was unlikely to have a significant effect on the sites concerned, and thereby conclude that no appropriate assessment was needed. In 2018, in *People Over Wind and Sweetman v Coillte Teoranta*, the CJEU clarified that public authorities are not entitled to rely on such mitigation measures to justify not carrying out an appropriate assessment.¹⁰ Rather, as the Court explained, the fact that mitigation measures are considered in the first place presupposes that the project is likely to significantly affect the site, and consequently, an appropriate assessment should be carried out. By excluding the possibility of carrying out an appropriate assessment on the basis of a consideration of mitigation measures, the Habitats Directive was misapplied.

Third, the screening report concluded that an appropriate assessment was not required because “no cumulative or in-combination impacts on the integrity of the sites are predicted from the other projects identified.” The “screening appraisal” section of the report shows that this finding is principally based on the fact that “there are no **proposed** projects or plans that together with the proposed Great Island Power Plant could impinge on any of the Natura 2000 sites.” However, as the European Commission has made clear since 2000 in its guidance to Member States, the requirement to consider cumulative or on-combination impacts is not limited to merely “proposed” projects or plans, but also includes “plans or projects which are **completed, approved but uncompleted, or proposed**.”¹¹

To provide just one example, at the time of this IPPC licence application there was already a wastewater treatment plant in operation across the estuary, which is likely to also be discharging chemicals into the River Barrow and River Nore SAC; yet the cumulative impacts of these projects were never appropriately assessed.

Whilst we acknowledge that some of this clarification post dates the original authorisation of the Great Island Power Station, it is clear that the plant was unlawfully authorised to operate without the carrying out of a prior appropriate assessment as required by Article 6(3) of the Habitats

⁷ *People Over Wind and Sweetman v Coillte Teoranta* (C-323/17), EU:C:2018:244, para 34.

⁸ *Waddenzee* (C-127/02), EU:C:2004:482, para 44.

⁹ *Commission v Germany* (C-142/16), EU:C:2017:301.

¹⁰ *People Over Wind and Sweetman v Coillte Teoranta* (C-323/17), EU:C:2018:244, paras 23 – 40.

¹¹ European Commission, “*Managing Natura 2000 sites The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC*” C(2018) 7621 final, p.44. See also the previous edition of this guidance, at section 4.4.3.

Directive and that no ex post appropriate assessment has been carried out following these clarifications in law.

Because of the failure to carry out an appropriate assessment to date, the risk that the power station will cause any disturbance or deterioration to the Natura 2000 site remains a probability or risk. This failure also compounds the breach of Article 6(2) of the Habitats Directive described below.

Natura Impact Statement

We note that a “Natura Impact Statement” dated January 2020 was submitted as part of this latest licence review.¹² To be clear, while this document does purport describe some of the impacts of Great Island Power Station on the Natura 2000 network, it does not meet the appropriate assessment requirements under the Habitats Directive. For example, it only deals with certain aspects of the operation of the power station that are connected with licence revision (i.e. the discharge of cooling waters into the estuary), whereas the legal duty requires that “all the aspects” of the project that are likely to have an effect must be identified and assessed.¹³ The Natura Impact Statement also only provides a cursory overview of cumulative impacts, which mainly focusses on proposed plans and projects and appears to ignore many existing projects likely to give rise to a cumulative impact.

In addition, Regulation 42(9) of the European Communities (Birds and Natural Habitats) Regulations 2011(S.I. No. 477/2011) confirms that the Natura Impact Statement only forms part of the appropriate assessment obligation. The Regulation stipulates that where a public authority is required to conduct an appropriate assessment, the authority must additionally “compile any other evidence including, but not limited to, scientific evidence that is required for the purposes of the Appropriate Assessment”.

Obligation to prevent site deterioration

Article 6(2) of the Directive requires public authorities to “take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.” An activity, which would include the operations of a power station, complies with Article 6(2) only if it is “**guaranteed** that it will not cause any disturbance likely significantly to affect the objectives of that directive.”¹⁴ The very existence of “a probability **or risk**” that an activity on a protected site might cause significant disturbances is capable of constituting an infringement of that provision.¹⁵

In C-304/05 *Commission v Italy*, the Court held that “[w]here, ...authorisation for a plan or project has been granted without complying with Article 6(3) of Directive 92/43, a breach of Article 6(2) in relation to a special area of conservation may be found where deterioration of a habitat or disturbance of the species for which the area in question was designated has been established”.¹⁶

¹² http://www.epa.ie/licences/lic_eDMS/090151b280779db1.pdf

¹³ *Waddenzee*, C-127/02, EU:C:2004:482, para 54.

¹⁴ *Commission v Spain*, C-404/09, EU:C:2011:768, para 126.

¹⁵ *Grüne Liga Sachsen and Others*, C-399/14, EU:C:2016:10, para 42.

¹⁶ *Commission v Italy*, C-304/05,EU:C:2007:532, para 94.

As noted above, no appropriate assessment has ever been carried out for this project as required Under Article 6(3) of the Directive. In addition, given the environmental impacts described by Coastwatch, there are serious doubts as to whether it has been guaranteed that the Great Island Power Station is not causing such disturbances or deterioration.

This non-compliance with the Habitats Directive must not be repeated or compounded in the consideration of the industrial emissions licence. The EPA should require that Great Island Power Station be immediately subject to an appropriate assessment of its implications for all of the potentially affected Natura 2000 sites as part of the Environmental Impact Assessment for the industrial emissions licence review.

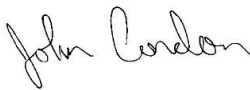
Failure to carry out such an assessment would in our view, represent a new and additional breach of the requirements of the Directive. The European Court has already confirmed that the renewal of a licence, such as arises in this instance, can constitute a distinct project requiring a new appropriate assessment.¹⁷ This is particularly so in circumstances where new works are proposed to be carried out under the licence; as noted above, SSE is now applying for an authorisation in relation to chlorine discharge from the SW8 emission point.

Conclusion

For the reasons set out above, the EPA should immediately engage with SSE as part of this industrial emissions licence review in order to ensure that an appropriate assessment is carried out in accordance with Article 6(3) of the Habitats Directive. The EPA should also require the immediate implementation of appropriate mitigation measures in order to limit the impact on protected species and habitats while the appropriate assessment and environmental impact assessment are being carried out.

We trust this letter is of assistance to the EPA in ensuring that the Great Island Power Station is operating within the parameters of EU environmental obligations. If you require further information from us, please contact John Condon, whose details are provided below.

Yours faithfully,



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¹⁷ *Waddenzee*, C-127/02, EU:C:2004:482, paras 25 – 29.