IN THE MATTER OF WASTE LICENCE APPLICATION

AND IN THE MATTER OF AN ORAL HEARING BY THE ENVIRONMENTAL PROTECTION AGENCY

OUTLINE CLOSING SUBMISSION ON BEHALF OF GREENSTAR LIMITED

1. General

1. The applicant herein, Fingal County Council ("the Council") submitted its application for a waste licence in July 2005. The waste licence application was accompanied by an Environmental Impact Statement (EIS) dated April 2006. This followed the submission of the EIS to An Bord Pleanála in May 2005 for its approval pursuant to section 175 of the Planning and Development Act 2000. No decision has yet been issued by an Bord Pleanála.

2. It is also important to note that the Council has also made a compulsory purchase order (CPO) in relation to 8 homes which will be demolished should this development proceed, and a decision on whether to confirm that CPO is also awaited from an Bord Pleanála.

3. The site the subject matter of this application was selected on foot of the Dublin Landfill Siting Study which commenced in 2000 and which by 2005 had reduced the potential sites to six suitable sites. In the end, somewhat ironically as it has now emerged, Site B was chosen as the preferred site mainly on the basis of archaeological significance of other site.

4. Subsequent to the site selection, and as part of the "baseline assessment conducted as part of the EIS" an area variously described by the Council in its application as 'an unauthorised landfill', 'contaminated land' and 'site of previous disposal of waste' was discovered by the Council's consultants. It is important to draw the unusual distinction between the

Council and its consultants in circumstances where the evidence at this hearing has established that the Council were aware of the existence of the illegal dump long before this site was selected as the preferred site.

5. The discovery by the consultants of the illegal dump was not the only surprise for the Council which emerged during their investigations. Archaeological finds were of such significance that the proposed landfill footprint had to be revised and buffer zones created. And, of course, the significance of the water resource beneath the application site and within its catchment grew and grew.

6. Although the illegal dump was discovered as part of the investigations carried out for the preparation of the EIS, there is simply no mention of it in the non-technical summary to that EIS. In the very extensive main body of the document itself, somewhat bizarrely the dump is dealt with in just six lines under the heading "Construction and Demolition Waste." This brief section referred to a risk assessment which did not form part of the EIS, and it has been confirmed during the course of this hearing, did not form part of the information before an Bord Pleanála. It is clear therefore that an Bord Pleanála can have carried out no assessment of the environmental impacts of the illegal dump within the context of this project.

7. It is also clear that the information in relation to the water resources which will be impacted by this development has greatly expanded since the time of the oral hearing before an Bord Pleanála, and that information is not before them. Thus any assessment by an Bord Pleanála of the environmental impacts on the geology and hydrogeology of the area as a result of this project must necessarily be incomplete.

2. Functions of the Environmental Protection Agency ("the Agency")

8. The various functions of the Agency were summarised by the Supreme Court in *Martin v An Bord Pleanála and Ors* [2007] IESC 23:

"The Environmental Protection Agency was established with a view to making further and better provision for the protection of the environment and the control of pollution as it is put in the long title to the Environmental Protection Agency Act 1992. This was the Act which established the Agency. The functions of the Agency, as specified in s. 52 of that Act, include the licensing regulation or control of activities for the purpose of environmental protection. The Waste Management Act 1996 confers on the EPA, inter alia, the function of deciding whether to grant a waste licence.

It is also the Agency which is charged with the monitoring of the quality of the environment. Further or additional functions in connection with the protection of the environment and in particular the control of pollution may be attributed to the Agency by way of statutory regulations. It also has a role in preparing guidelines for the Minister for the Environment on the information to be contained in Environmental Impact Statements in respect of certain specified developments (i.e. developments to which s. 72(1) of the Act of 1992 apply)."

9. One of the functions of the Agency which is not discussed in that passage is its enforcement role to which I will return at the end of this submission.

10. The Agency as an emanation of the State is also clearly bound by the Environmental Impact Assessment Directives (85/337/EEC and 97/11/EC), and a specific requirement is set out in section 40(2)(b)(ii)(I) of the Waste Management Act 1996 that in deciding whether to grant a waste licence, the Agency must have regard to any environmental impact statement submitted in accordance with the Act. The implementing regulations, the Waste Management (Licensing) Regulations 2004 (Article 14) empower the Agency to require the submission of further information where it is deemed that the information contained in the EIS does not comply with the Planning and Development Regulations, a procedure which the Agency has adopted on several occasions in the course of this application. It is clear therefore that the Agency must satisfy itself that the EIS satisfies the requirements of both Irish and EU legislation, *i.e.* it must conduct and complete an Environmental Impact Assessment (EIA).

11. Were there any doubt about whether an EIA were necessary, it is clear from the decision of the European Court of Justice in *Wells v Secretary of*

State for Transport [2004] CMLR 1, that where an environmental impact assessment has not been carried out, then where the opportunity to conduct such an assessment arises, that opportunity must be taken:

> *"52. Accordingly, where national law provides that the consent procedure is to be carried out in several stages, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which the project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure."*

12. Although this case does not involve a principal and subsidiary consent procedure, (rather, as is clear from *Martin*, both the decision of the Agency and an Bord Pleanála comprise the 'development consent') it does involve a situation where certain of the effects of the development could not – or at least will not – be assessed by an Bord Pleanála, and therefore must be assessed by the Agency.

13. It is the details of such an assessment which are required to be contained in the EIS. Article 94 and Schedule 6 of the Planning and Development Regulations 2001 set out the minimum requirements of an EIS and in *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603, Lord Hoffman described what constituted an EIS for the purpose of the Directive:

> *"My Lords, I do not accept that this paper chase can be treated as the equivalent of an environmental statement. In the first place, I do not think it complies with the terms of the Directive. The point about the environmental statement contemplated by the Directive is that it constitutes a single and accessible compilation, produced by the applicant at the very start of the application process, of the relevant environmental information and the summary in non-technical language. It is true that article 6.3 gives member states a discretion as to the places where the information can be consulted, the way in which the public may be informed and the manner in which the public is to be consulted. But I do not think it allows member states to treat a disparate collection of documents produced by parties other than the developer and*

traceable only by a person with a good deal of energy and persistence as satisfying the requirement to make available to the public the Annex III information which should have been provided by the developer."

14. While such a statement must be prepared at the start of the *application* (rather than assessment) process, it is clear that the manner in which the presence of the unauthorised landfill was dealt with (or not dealt with) in the EIS falls far short of the requirements of the Regulations and of the type of Statement described by Lord Hoffman. The failure to even mention the illegal dump in the non-technical summary, and the failure to include *any* assessment of its impacts in the EIS itself render the EIS inadequate. Notwithstanding the apparent contention to the contrary of the Council, this inadequacy has not been remedied in the context of this waste licence application. Clearly, if the EIS and EIA are inadequate, it would be unlawful for the Agency to licence this project.

3. The Proposed Decision

15. In addition to carrying out an EIA and determining the adequacy or otherwise of the EIS, the role of the Agency in this application is to determine whether this development should be licensed. In carrying out that assessment the Waste Management Regulations provide for a singular procedure. An opportunity is given to third parties to make submissions on the application for the waste licence, and arising out of that 'first phase' of the decision-making process, the Board of the Agency issues a proposed decision. An opportunity is then given to object to the proposed decision, and a final decision is then made on whether to grant a licence, in this case, subsequent to an oral hearing. Two issues arise.

16. The first relates to the status of the proposed decision at law. The Council has proceeded in this hearing with the proposed decision as their starting point, and the information that it has adduced at this hearing has been severely restricted as a result thereof. It is submitted that this approach was

misconceived, and as a result, the Agency has been deprived of an opportunity to obtain the further information it required to properly assess this application, and has therefore been deprived of an opportunity to lawfully do otherwise than refuse this application.

17. In the absence of an objection to a proposed decision, the Agency is obliged to grant a licence in the terms of that proposed decision. However, once an objection is validly made, and not withdrawn, the Agency is at large as to how to deal with the application. As indicated by the Inspector at the start of this hearing, the Agency may grant the licence subject to such conditions as it sees fit, or may refuse the licence. The proposed decision has no legal status.

18. The second issue follows from the first and is caused by the requirement for the Agency to, in effect, review its own earlier 'decision'. The Board of the Agency has already formed a view in relation this application, which view finds its expression in the proposed decision. While it is submitted that this view was formed in error, some of the Agency's Inspector's own making, and some arising from the manner in which the Council presented the information in support of its application, there is clearly the potential for the Agency in making its final determination to offend against the principle of *nemo iudex in causa sua.* In those circumstances, it is submitted that utmost care must be taken by the Agency in reviewing all the information submitted throughout the application process in order to avoid slipping into illegality, and that the safest manner for the Agency to proceed would be to have a differently constituted Board make a final determination on this application.

19. It is Greenstar's contention, as set out through our questioning and the evidence presented, that the proposed decision was arrived at on the basis of flawed information, and errors by the Inspector in the manner in which he assessed the application. In particular, we submit that the assessment of the impacts of the illegal landfill was fatally undermined by the Council's own failure to assess its impacts, and more particularly to assess the

potential impact of excavation of the unlawfully deposited material. Furthermore, we submit that the assessment of the impact on hydrogeology was contaminated by the manner in which the Council presented its evidence – with errors, obfuscations, and indifference the apparent *modus operandi*.

20. We also submit that the Inspector and the Board of the Agency have themselves erred in failing to have regard to the principle of sustainability, the precautionary principle, and in seeking to address the remediation of the illegal landfill by way of condition notwithstanding that there had been no assessment thereof. We also submit that the Agency erred in law in making a decision in circumstances where information it had determined was necessary to ensure compliance with the Waste Management Regulations had not been supplied.

4. Assessment of the Environmental Impacts of Remediating the Illegal Dump

21. The EIS contains no assessment of the impact of the unauthorised landfill. Although the EIS refers to the existence of a risk assessment having been carried out as part of the waste licence application, for reasons which have not been explained, this risk assessment was not included as part of the EIS, or with the remainder of the documentation submitted to an Bord Pleanála. Thus it is apparent that there can have been no EIA of the illegal landfill, and that this aspect of the project falls to be assessed in the first instance by the Agency.

22. It appears to be contended by the Council that the proposed licence contains emission limits in relation to possible environmental impacts and therefore the illegal landfill has been addressed, as it were, by the backdoor. Such an argument is simply unsustainable and runs counter to the requirements of the Directive and implementing Regulations which operate on the basis of *prior* assessment. Were such an argument to be endorsed by the granting of a licence in this instance, it would be wholly

undermine the waste licensing regime in this country. It would permit the licensing of any facility anywhere for any practice simply on the basis that an applicant would be in breach of licence were they to exceed certain limits. Such a situation would provide no comfort to the community, or to other operators in the industry.

23. In assessing the unauthorised landfill, the Agency will of course have before it information which was not presented to an Bord Pleanála, *i.e.* the risk assessment. Greenstar has presented clear evidence regarding the inadequacy of this risk assessment, but the three most significant omissions bear repetition – we don't know where the waste came from, we don't know how much of it there is, and we don't know what it is.

24. The Inspector and the Agency have clearly rejected the recommendation of the risk assessment in the recommended and the proposed decision respectively, and have proposed that the illegal landfill be dealt with by way of excavation and landfill. The Council had itself resiled from their initial proposal in its response to our objection in which it stated that the Agency's requirement to excavate was correct, although they seemed less sure of their position in the course of this hearing.

25. If the recommendation of the risk assessment is no longer being advocated, it might be queried what is the significance of its inadequacy. As is clear from the evidence submitted yesterday, the remediation of an illegal landfill is a very significant development. For the Inspector or the Board of the Agency to have even suggested that remediation could be dealt with by way of a single condition in a licence is so at odds with precedent and policy that it must have been at least in part influenced by the manner in which the illegal landfill was presented and its significance dismissed or disguised.

26. The inadequacies of the risk assessment are also significant because those inadequacies led the Council into error. Because the risk was not properly assessed, a wholly inappropriate recommendation was reached – to leave

the waste –undisturbed – and no assessment at all was carried out of what might be involved in excavating, screening, sorting, processing and transporting the waste or of remediating and reinstating the waste site.

5. Condition 6.35 of the Proposed Decision

27. The proposal to deal with the remediation by way of a single condition, and in particular, the proposal to leave over for subsequent agreement the manner in which that remediation will be effected would, in our submission, be unlawful.

28. In the first instance, it is submitted that the Council has simply not provided any, or any adequate information upon which the Agency could determine the extent of works involved in excavating the site. Thus, the Agency is not in a position based on the information provided to make any kind of informed decision in relation to the illegal waste site.

29. Secondly, there is no express power given to the Agency to leave such matters over for subsequent agreement with a licensee. This contrasts starkly with the general provision in the Planning and Development Act 2000, section 34(5) which specifically empowers a planning authority to impose conditions leaving 'points of detail' over for subsequent agreement with the applicant.

30. Thirdly, even in no such express power were required, it is submitted that conditions to regulate a development of the scale such as the remediation of what is potentially one of Ireland's largest illegal dumps is not and never could be a 'point of detail' to be left over for subsequent agreement. (See *Boland v An Bord Pleanála* [1996] 3 IR 435). A development which would itself require an EIA were it to proceed as a stand-alone project is clearly not a point of detail in relation to which the public could have no grounds for objecting to the measures proposed.

31. The Council appear to be arguing that what might be characterised as the opposite of 'project-splitting' applies. Project-splitting involves breaking up a project which would require an EIA into component parts which do not, of themselves, require an EIA, thereby circumventing the requirements of the Directives. The Council appear to be suggesting in this case that the *inclusion* of a project which requires an EIA, the remediation of the illegal landfill, within a larger project which has been the subject of an EIA somehow relieves the developer of the obligation to carry out an EIA of the remediation project, that the greater somehow inevitably includes the lesser.

32. Nothing could be further from the case. Although the possible emissions from the illegal landfill fall into the same categories as all other possible emissions which might lead to environmental pollution, there has been no, or no adequate, assessment in this case of the risks associated with remediating the illegal landfill. Therefore there has been no assessment at all in accordance with the Directives and implementing regulations of a significant part of the overall development. This omission cannot be addressed retrospectively by imposition of a condition requiring a post-consent assessment.

5. Compliance with Government Policy and Precedent

33. The policy and precedent in relation to the treatment of illegally deposited waste have been dealt with in some detail in our presentations, and therefore will not be rehearsed here save to highlight a number of points.

34. Since the Ministerial section 60 Direction 04/05 issued in May 2005, the manner in which illegal waste sites have been addressed in this jurisdiction has been changing. Contrast the requirements of the Agency in relation to two separate sites in Wicklow, Blessington and Whitestown in which any further importation of waste was expressly prohibited with the earlier licensing of an unauthorised landfill at Dillonsdown which allowed for the further importation of waste notwithstanding the previous illegal activity.

35. The Agency has thus taken steps to ensure that the question of illegal dumping in this country is seriously addressed and to bring the Irish regulatory system in to alignment with the requirements of European law.

36. This application must be seen in that context, and in our submission, the Agency must not sacrifice the ground made in those earlier decisions by making a decision in this case which would allow the Council to be the inexplicable exception to the rule, clearly a retrograde step in terms of sustainable development and a direct breach of the Section 60 Direction.

37. The operation in Blessington was a large and expensive operation. The landowner was made responsible for the remediation of the illegal activity which took place on lands within its control. Contrast that with the situation here. There has been no enforcement despite the acknowledgement of unauthorised activity. On the contrary, the lands appear to have been purchased by the Council, and the initial proposal was to simply leave the waste there, cap it and monitor it. This is illegal activity with no cost. Far from supporting government policy, the Council appear to be seeking to actively undermine it.

38. The evidence in our view is clear. This is potentially one of the largest illegal dumps in the country. Neither the original landowner, nor the Council, not when it was the regulator, nor as the current landowner have shown any inclination to address this issue. Rather, the illegal dump is proposed to form part of the site of one of the largest commercial landfills in the country. This makes a mockery of government policy and the approach of the Agency thereto.

39. In our submission, failure to carry through on the apparent commitment of the Agency to take this issue seriously by allowing commercial activity at this site would be an invitation to further abuse, and would be a serious blow to the legitimate waste industry in this country.

40. As noted above, this application must be seen in the context not just of government policy and recent Agency precedent, but also in the context of the Agency's role as regulator of the local authorities. The Agency, as with the Council wears a number of hats, and it cannot consider the application to licence this facility without also considering its role in directing local authorities in the manner in which they in turn regulate the industry.

6. Application of the Landfill Matrix

41. The significance of the groundwater resources beneath this site cannot be doubted. The Council appear to have accepted that there is a water resource here which may be of the same order as that at the Bog of the Ring but have sought to undermine the significance thereof. Given the efforts that the Council went to establish that the landfill was not within the Zone of Contribution of the Bog of the Ring, this is somewhat curious. It may perhaps be that their focus was so limited to the Bog of the Ring that they never appreciated the extent of the resource immediately available under the landfill site. It may be that as the process progressed they did not want to know the full story about this separate water resource.

42. In any event, it is apparent, and has been acknowledged by the Council, that they have not carried out the investigations at the site necessary to determine the extent of the water resource potentially affected by the development. The Council has shown a striking lack of interest in determining the extent of the resource available to them. This may be understandable from the point of view of an applicant for a landfill development, but it is not understandable from a sanitary authority with the responsibility for providing potable water within its functional area. Nor is it understandable why the Agency would have endorsed such a lack of interest and endorsed a conscious decision to sterilise the resource irrespective of its extent.

43. Rather than establish that this is an appropriate site for a landfill by showing that there is no water resource which merits protection beneath

the site, the Council have taken comfort in the DoEHLG/GSI/EPA Groundwater Protection Matrices, and in particular the Landfill Matrix. According to that matrix, as long as the Council can maintain 10 metres of low permeability clay beneath the landfill footprint, the site merits an R1 rating, *i.e.* it is generally acceptable to landfill.

44. It is submitted that the manner in which the Council has placed such blind reliance on this document constitutes a misunderstanding of its purpose and intent. The matrix, as confirmed in evidence by the GSI, is merely a planning tool, and as such is merely a guide in the determination of where a landfill might suitably be located. An R1 rating does not mean that a site is appropriate for a landfill irrespective of all other considerations.

45. The purpose of the groundwater protections schemes is to protect groundwater sources and resources. The distinction between the two, as confirmed by the GSI, is simply a question of whether exploitation of a source has commenced. The distinction is thus an extremely blunt tool, and it is the role of a prudent applicant, and if necessary, the Agency to wield that blunt tool with a degree of sensitivity. No such sensitivity has been shown by the Council here, nor was it shown by the Inspector in his earlier recommendation. The matrices would be rendered a nonsense if no value judgment is made as to whether in any given case a known resource may be more worthy of protection than a known source.

46. The Council also seek to argue, as apparently accepted by the Inspector, that a properly engineered landfill provides sufficient protection. With respect, the protection matrix is predicated on a landfill being designed in accordance with EPA guidelines. Preservation of groundwater requires that all elements required to ensure protection are in place.

7. Sustainable Development

47. A working definition of sustainable is that it comprises *"development that meets the needs of the present without compromising the ability of future generations to meet their own needs."*

48. The Inspector in his report stated that he was not required to have regard to sustainable development. He erred in this regard, and it is submitted that it was this error which led him to accept the sterilisation of the water resource.

49. Section 52(2) of the Environmental Protection Agency Act 1992 specifically mandates the Agency to have regard to sustainable development.

> "In carrying out its functions, the Agency shall—
>
> (a) keep itself informed of the policies and objectives of public authorities whose functions have, or may have, a bearing on matters with which the Agency is concerned,
>
> (b) have regard to the need for a high standard of environmental protection and the need to promote sustainable and environmentally sound development, processes or operations,
>
> (*c*) have regard to the need for precaution in relation to the potentially harmful effect of emissions, where there are, in the opinion of the Agency, reasonable grounds for believing that such emissions could cause significant environmental pollution,
>
> (*d*) have regard to the need to give effect, insofar as it is feasible, to the "polluter pays" principle, as set out in Council Recommendation 75/436/EURATOM, ECSC, EEC of 3 March, 1975 , regarding cost allocation and action by public authorities on environmental matters,
>
> (*e*) ensure, in so far as is practicable, that a proper balance is achieved between the need to protect the environment (and the cost of such protection) and the need for infra-structural, economic and social progress and development."

50. There is no definition of sustainable development in either the 1992 or in the Planning Acts where the expression is also found, but in the context of the functions of the Agency, it is submitted that the definition endorsed by the Department of the Environment appears appropriate - *"development*

that meets the needs of the present without compromising the ability of future generations to meet their own needs."

51. The Council appear to have interpreted 'sustainable' in section 52(2) in a sense wholly divorced from the objects of the Agency, merely interpreting it as 'built to last'. There appears to be no policy or legislative basis for this interpretation, and it appears to be entirely contrary to the concept of sustainability incorporated into the EPA Draft Manual on Site Selection, and in particular section 2.2 thereof

52. It is submitted that a decision to site a landfill based on a supposed cost-benefit analysis which apparently supports discarding a rare groundwater resource which has not even been quantified flies in the face of the concept of sustainability and flies in the face of reason, and would represent a total failure by the State to meet its obligations pursuant to the Water Framework Directive.

8. Failure to comply with Article 14

53. As noted above, where the Agency considered that the licence application did not meet the requirements of the Waste Management (Licensing) Regulations 2004, requirements were made of the Council to submit certain information. It is clear that in order to impose such a requirement on the Council, the Agency must have determined that the information was considered necessary for compliance with the Regulations to be achieved. This is clear from the wording of Article 14. Without such a determination, the Agency it would be *ultra vires* the Agency to make such a requirement.

54. Notwithstanding that the information was required to comply with Regulations, it was not submitted either prior to the issue of the proposed decision, or indeed prior to or during this oral hearing. In our submission, both as a matter of law and as a matter of common sense, in making its decision on this licence application, the Agency is bound by its earlier determination that this information is necessary in order to comply with

the Regulations, and in its absence, this application can not be said to be compliant, and no grant of a licence could therefore be lawful. There is simply no provision in the Regulations which gives the Agency discretion to grant a licence in respect of an application which does not contain the information deemed necessary to meet compliance with those Regulations.

55. As a matter of common sense, it is submitted that the Agency must also consider why the model is absent and what could have been learned from it. It is clear from the evidence adduced at this hearing that the model would have informed the Agency of the manner in which the hydrogeology beneath this proposed landfill works, and of the extent of the resources thereunder. At the very least, it would have enabled the Agency to assess the assumptions the Council has made in its development of this application and to assess the validity thereof.

9. Conclusion

56. To justify the licensing of this proposed facility, the Council have placed reliance on the provisions of the current Waste Management Plan. There are echoes of the reliance placed on the Landfill Matrix in this regard – it is repeated as an empty mantra with no real effort to back it up with substance. The Council have contended that there is an urgent need for landfill capacity in Dublin. Rather there is an urgent need for Dublin's residual waste to be landfilled which is quite a different matter.

57. Although this proposal is being presented as the only solution to a growing crisis, there are alternatives, some of which you have heard evidence in relation to, none of which appear to have been considered by the Council. In particular, you have heard evidence from CEWEP as to how greater flexibility in the management of available landfill capacity both in Dublin and in the surrounding regions could address any short and medium-term difficulties, and give the Council time to think again, perhaps to return to one of the other suitable sites identified during the landfill siting study.

58. It is in any event, difficult to see how a licence which the Council will have 8 years to put in place could ever be said to meet an urgent need. There is time to get this right. There is no need to rush headlong into an irreversible mistake.

59. There is one final matter which we would ask the Agency to consider, and that is the role of the Council as applicant in this process. As noted above, the Agency itself has different roles and different duties to fulfil, to all of which regard must be had in assessing this application. But this applies equally to the Council. The Council is supposed to be the first line of defence in tackling unregulated waste activity, and in protecting groundwater resources. This proposal represents not merely a failure to perform those functions, but a serious step to undermine them. If the Agency were to grant this application, it will be accepting a standard from a local authority which will wholly undermine the efforts of the Agency and local authorities in the enforcement of regulations to stop environmental pollution.

60. In our submission Inspector, on the basis of the information before the Agency, it cannot be said that requirements of section 40(4) of the Waste Management Act 1996 have been met, and must therefore we ask you Inspector to recommend to the Board of the Agency that this application be refused.

Rory Mulcahy

13 March 2008