To: Commissioner of Environmental Information

From: Pat Swords BE CEng FIChemE CEnv MIEMA

Subject: Clarifications related to An Bord Pleanala Appeal to Commissioner for Environmental Information

Date: 17-2-2010

Attached: Submission from Pro Gas Mayo

The Irish Academy of Engineering in their Review of Ireland's Energy Policy, 2009, which formed a Submission to the Joint Oireachtas Committee on Climate Change and Energy Security, stated:

- *"It is difficult to have any confidence in the ability of Ireland's planning, regulatory and legal framework to facilitate the delivery of new energy projects on time or on budget. Large infrastructural projects in Ireland cannot be planned and completed in a predictable economic timeframe. The risk return calculations for such projects are currently little better than a lottery. Whether it is the experience with the Corrib project, construction of wind farms of delivery of new electrical transmission infrastructure (or indeed Ireland's road infrastructure), there is huge uncertainty about the final delivery date and overall cost which is not the case in other jurisdictions. Indeed following what can only be described as a debacle in relation to the Corrib field, Ireland is viewed as a high risk location for such large scale international investment precisely because of the unpredictability of its permitting processes".*

StatoilHydro, who have a share in the Corrib project, stated to the Media in August 2009:

- *"When we look at political risk with practical consequence to project progress then Ireland unfortunately stands out as an example".*

Furthermore we now have the situation where a large industrial operation in this jurisdiction is no longer financially viable given that their costs for regulatory compliance with their new permitting arrangements are over €30 million. This has been demonstrated to be eight times greater than what is required for compliance with the relevant EU environmental legislation. Given that the EU allows State Funding for Environmental Protection in these circumstances, to a maximum of 50% of the costs which go beyond Community Standards, the Industrial Development Authority is now arranging emergency grant aid for this company. Note the Irish State can in these circumstances approve up to €8 million in grant aid with having to receive approval from Brussels.

It is unfortunate that the above circumstances are occurring given that the legal framework in this jurisdiction regulating industrial development is the same as it is in other Member States, namely the three hundred or so EU Directives in the environmental sphere, commonly know as the Environmental Acquis.

The conduct of An Bord Pleanala is regulated by the Environmental Acquis. The Mission Statement of An Bord Pleanala is clearly presented on their website in which the word legislation does not feature once. Sustainable Development is mentioned but this is not an arbitrary term which grants unlimited powers in its interpretation. For instance we are now currently at the end of the EU 6th Environment Action Programme, which runs from 2001 to 2010. The 5th Environment Action Programme from 1993 to 2000 defined the Community's concept of sustainable development and started a shift from purely regulatory measures to market led (fiscal) measures – sustainable development being defined as "*meets the needs of the present without compromising the ability of future generations to meet their own needs*". Waste Management formed one of the seven themes and targets of the 5th Environment Action Programme and this led to the Landfill Directive (1999/31/EC). Ireland has significantly failed to meet the 2010 targets set in the Landfill Directive due to repeated refusals of An Bord Pleanala to approve projects in the waste sector that met all the requirements set in the Environmental Acquis. Proceedings will therefore be taken by the EU against Ireland which will lead to significant fines.

Under Directive 2003/4/EC on Access to Information on the Environment (S.I. No. 133 of 2007), Articles 1, 2 and 7 require the widest possible systematic availability and dissemination to the public of environmental information. This environmental information includes administrative measures, policies, legislation, plans, programmes, environmental agreements, measures or activities designed to protect environmental elements.

The Environmental Acquis is clear in that both the planning and the Integrated Pollution Prevention and Control (IPPC) process are subject to Access to Environmental Information, Public Participation and Access to Justice, i.e. the requirements of the United Nations Economic Commission for Europe's (UN-ECE) Aarhus Convention. The situation in Ireland is that while Directive 2003/4/EC is on the statute book, Directive 2003/35/EC providing for public participation in respects of the drawing of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61, is subject to ongoing legal challenges. Indeed the European Court of Justice (C-427-07) has found in a case taken by the European Commission against the Irish State:

- On the requirement that the procedures must not be prohibitively expensive, the European Court Justice found that mere judicial discretion to decline to order the unsuccessful party to pay the costs of the procedure cannot be regarded as valid implementation of the directive.

- The Court found that Ireland had not fulfilled its obligation to inform the public about access to judicial review procedures as the mere availability on the internet of rules and decisions cannot be regarded as ensuring, in a sufficiently clear and precise manner, that the public concerned is in a position to be aware of its rights on access to justice in environmental matters.

Furthermore Ireland has not ratified the Aarhus Convention as the EU has found that the Irish Justice System does not meet minimum requirements for Access to Justice on environmental matters given the costs and timeframes involved.

With regard to the request to An Bord Pleanala originally made on 22nd September 2009, the first two sections related to:

- The legislative basis for the recent Oral Hearing of circa 19 days on the Corrib pipeline rerouting.
- The procedures for conducting an Oral Hearing to this legislative basis, such as choice of staff, training of staff, specific areas of legislation to be addressed, areas outside of the legislation that should not be addressed, recommended time frame for oral hearing, relationship to competent authorities for Environmental, Safety, etc.

When Oral Hearings, which are often called public debates, are held in other Member States their purpose is to act as a clarification exercise to the public. The authorities there are competent in the relevant subject matter, the requirements of the legislation and their duties in disseminating this information to the public. After all this is what is specified in the legislation, namely Directives 2003/4/EC and 2003/45/EC, in which environmental information has to be actively and systematically disseminated to the public to achieve the widest possible systematic availability. In particular with regard to projects involving an Environmental Impact Assessment procedure the main reports and advice issued to the competent authority have to be made available to the public. On a personal level and as a German speaker I have had a number of German technical personnel, who have had to attend oral hearings in this jurisdiction, comment to me the astonishment they had in the disjointed manner these proceedings were conducted in which they seemed to be a public debate on how the relevant legislation that would regulate the project would be interpreted or developed to suit the occasion.

Furthermore consideration of chapter 6 of my Submission to the Joint Oireachtas Committee on Climate Change and Energy Security http://www.oireachtas.ie/viewdoc.asp?fn=/documents/Committees30thDail/J-Climate_Change/Submissions/document1.htm clearly highlights a number of examples of the completely unsatisfactory manner in which An Bord Pleanala is conducting oral hearings and making decisions outside the relevant legislation and its proper implementation.

With regard to the safety issues relevant to the Corrib Project, neither EU nor National Legislation is based on zero risk. It is recognised in legislation that an element of 'residual risk' remains even after applying 'all necessary measures' to protect man and the environment. For instance Article 5 of the Directive on Control of Major Accident Hazards involving Dangerous Substances (96/82/EC as amended) clearly states that:

- Member States shall ensure that the operator is obliged to take **all necessary measures to prevent major accidents and to limit their consequences for man and the environment.**

- Member States shall ensure that the operator is required to prove to the competent authority that he has taken **all measures necessary as specified in this Directive.**

The EU has issued Guidance on preparing Safety Reports. Safety Reports are required for operators of establishments that fall under the 'top tier' requirements of the Directive on Control of Major Accident Hazards involving Dangerous Substances, which is available from the EU Major Accidents Hazard Bureau. As the EU Guidance on Safety Reports states; "although '**necessary measures**' are taken there will be some element of residual risk. The decision as to whether a residual risk is

acceptable depends on national approaches and practices. Nevertheless there are some widely accepted supporting principles for this decision:

- The efficiency and effectiveness of the measures should be proportionate to the risk reduction target (i.e. higher risk require higher risk reduction and, in turn, more stringent measures).
- The current state of technical knowledge should be followed. Validated innovative technology might also be used. Relevant national safety requirements must be respected.
- There should be a clear link between the adopted measures and the accident scenarios for which they are designed.
- Inherent safety should be considered first, when feasible (i.e. hazards should always be removed or reduced at source).

It is also critical to fully understand and differentiate between the two parameters hazard and risk. The Directive on Control of Major Accident Hazards defines them as:

- "Hazard is the intrinsic property of a dangerous substance or physical situation with a potential to create damage".

- "Risk shall mean the likelihood of a specific effect occurring within a specified period or in a specified circumstances"

Risk is therefore a combination of the **likelihood** of occurrence of a defined hazard and the severity of the **consequences** of the occurrence. The established methodology is therefore based on identification of the possible hazards. These are then subject to a risk assessment in which the components relating to likelihood and consequences are assessed using a combination of qualitative and quantitative approaches. For risks which are deemed to be significant it is necessary to identify the necessary measures to prevent, control and limit the risks, this is the risk mitigation step. If the risk is deemed to be acceptable then no further measures need to be taken. Alternatively if the risk is deemed as unacceptable then further control measures need to be identified and assessed. A hazard is therefore only a 'stepping stone' for determination of risk and the legislation is clear in that a level of residual risk remains after all measures necessary have been applied.

Furthermore the EU Commission's Non-binding Guide to Good Practice for Implementing of Directive 1999/92/EC (Explosive Atmospheres) is clear in that assessment of explosion risks initially focuses on:

- The likelihood that an explosive atmosphere will occur; and subsequently on:

- The likelihood that sources of ignition will be present and become effective.

Consideration of effects is of secondary importance in the assessment process, since explosions can always be expected to do a great deal of harm, ranging from major material damage to injury and death. Quantitative approaches to risk in explosion protection are secondary to the avoidance of hazardous atmospheres.

Unfortunately the reports of those who attended the Corrib Oral Hearing, such as the attached Submission from Pro Gas Mayo, clearly show how no attempt was made during the Oral Hearing to clarify or even adhere to the legislative basis above.

The request for information above relating to the legislative basis for the Corrib Oral Hearing is therefore crucial to understanding how the role of the EU Environmental Acquis, in particular Directives relating to Access to Information, Public Participation and Industrial Risk and Safety, was addressed.

With regard to the Request for Information dated 22nd September 2009:

- The specific approach of the Bord to moving from a previous system of decision making based on Patronage to one which implements the Environmental Acquis.

Member States which are compliant with EU legislation regulate development according to the Environmental Acquis. A statement to this effect should be available on documentation produced by An Bord Pelanala.

With regard to my request for information of 13th December 2009 relating to:

- The recent decision of the Bord to refuse permission for a 25 mm thick steel gas pipeline of 500 mm diameter clearly did not follow accepted engineering practices for risk associated with thick walled large diameter pipelines, such as is established in the attached risk methodologies of the Dutch Authorities (RIVM). Furthermore if one considers that there were eight accidents involving fatalities with the wind energy industry in 2008 alone and established risk contours for the population in the vicinity of these turbines have been established, see summary of Dutch (Novem) guidance attached, then why are the Planning Guidelines for Wind Turbines developed in conjunction with An Bord Pleanala saying in Section 5.7 and other sections the very opposite? Furthermore it is clear, such as in Dundalk, that turbines have been erected in Ireland in close proximity to populated areas. There is therefore no consistent approach taken by the Bord to the considerations of costs, benefits and alternatives in relation to risk and land use planning and decisions are clearly been made on what suits political considerations. I am therefore requesting the parameters the Bord applies to assessing risk and determining acceptance criteria.

Directive 2003/35/EC is perfectly clear in that with regard to projects involving an Environmental Impact Assessment procedure the main reports and advice issued to the competent authority have to be made available to the public. This information should by law have been made available to all parties before the Oral Hearing. The fact that no such parameters are publicly available with active and systematic dissemination is a clear breach of the relevant EU Directives.