



An
Bord
Pleanála

Inspector's Report ABP-303535-19

Development	Oyster Processing Facility.
Location	Moat, Ring, Co. Waterford.
Planning Authority	Waterford City and County Council.
Planning Authority Reg. Ref.	92/20
Applicant	Meitheal Trá na Rinne Teo
Type of Application	Leave to apply for Substitute Consent for unregulated development.
Date of Site Inspection	22 nd May 2019.
Inspector	Susan McHugh

1.0 Introduction

1.1. This is an application for leave to apply for substitute consent in respect of an oyster farm under section 177C(2)(b) of the Planning and Development Act, 2000, as inserted by Section 57 Planning and Development (Amendment) Act 2010. The applicant is of the opinion that exceptional circumstances exist that should permit an application for substitute consent to be made so as to regularise the development.

2.0 Site Location and Oyster Farm Operation

2.1. The site of the oyster farm lies along the shoreline at Moat (An Móta), Ring (An Rinn), approx. 8km south of Dungarvan town, County Waterford. The village of Ring is located approx. 2km to the east. A cluster of one-off houses are located to the south which adjoin a small scheme of detached houses within Knockenpower estate.

2.2. The oyster processing facility (Meitheal Trá na Rinne Teo), is accessed via a short cul de sac road L-6118 connecting to the R674 which connects to the N25 to the west and Helvic Head to the east. The road also provides access to a slipway into the harbour directly east of the subject site. The Maoil an Choirnigh stream runs along the eastern side of the access road.

2.3. The coastline at this location forms part of Dungarvan Harbour SPA (Site Code 004032) and the Dungarvan pNHA (Site Code 000663). There is evidence of coastal erosion along the coastline. (See attached maps/photographs).

2.3.1. The facility comprises the following elements;

- The Oyster Processing Plant which was granted planning permission by Waterford County Council in January 1992. It has a stated area of 250sqm, and comprises a forecourt, yard and parking area, a pumping chamber with associated pipe and power line and associated works.
- A covered area comprising canopy/open ended structure for storage and to facilitate the sheltered loading /unloading of produce. This is located on the southern side of the permitted building and has a stated area of approximately 180sqm.
- A rock revetment, within the lower yard to the north within the foreshore, which was constructed as emergency protective works in 2002/2003. It comprises mainly

stones and boulders. The lower yard is currently in use as an equipment store area by third party oyster farmers.

- A storage, packing and purification structure at the northern elevation of the permitted structure. It is approximately 130sqm in area and has a height of 6.9m at its highest point. The extension was built within the facility's yard, previously in use for storage. The development is designed to house a large tank for the storage of oysters in seawater for purification purposes. The area is also used for clean packaging and clean storage of materials for sanitary reasons. The material used for the development consists of Kingspan cladding panels fixed to steel beams on the roof and to steel columns.
- The development includes sea water intake from the permitted water pump located above the rock armour. Discharge from the development is seawater only which is discharged to the nearby Maoil an Choirnigh stream at Móta under licence.

3.0 Planning History

3.1. *Parent Permission*

P.A. Reg. Ref. 20/92: Permission **granted** February 1992 for an Oyster Processing Plant subject to 12 no. conditions. (File attached).

3.2. *Enforcement*

UD Ref. 01622: Warning Letter issued June 2012 in respect of unauthorised infilling of the Foreshore Area in an area of Dungarvan Harbour Designated a SPA. (File attached with correspondence from the NPWS).

3.3. *Section 5 Determination*

Ref. D5/2017 4: Section 5 request as to whether the covering of an existing yard with a shed is development or is or is not exempted development. Determination by the P.A. March 2017 concluded that:

- The covering of an existing yard with a shed constitute works which come within the scope of Section 2(1) of the Planning and Development Act 2000-2010.

- The said works constitute development which comes within the scope of Section 3(1) of the Planning and Development Act 2000-2010.
- The said works do not come within the scope of the exemption set out in Part 3 of schedule 2 of the Planning and Development Regulations 2001-2013.

3.4. *Subsequent Retention Applications*

P.A. Reg. Ref. 17/298: Application for **retention** permission May 2017 (on foot of the Section 5 Determination) for the storage, packaging and purification structure at rear of existing building and connection to sewerage system and other necessary on site works. Application **withdrawn** June 2017 due to concerns raised by the Planning Authority regarding the other unregulated development on Meitheal Trá na Rinne's lands.

P.A. Reg. Ref. 17/549: A consolidated planning application for **retention** permission was submitted to the Planning Authority July 2017. This included the following;

1. The roof structure over the loading and unloading yard on the south side of the existing building.
2. The storage shed to the south of the existing building.
3. The concrete yard and storage yards to the north of the existing building.
4. Change to the site boundary of P.A.20/92.
5. The storage, packing and purification building including toilets to the north of the building and existing service connections.
6. Changes to car parking spaces.

A request for further information issued September 2017 which included in short;

- Address issues regarding the lower yard area and rock armour embankment (sea defence) wall to be included within the site area,
- Clarify the full hours of operation of the oyster production facility and
- Having regard to the location of the proposed development for retention adjacent to the Dungarvan Harbour SPA, requirement to submit a Stage 2 Appropriate

Assessment (NIS) report to assess if the proposed retention development in consideration of cumulative and in-combination effects has adverse impacts on the integrity of the Natura 2000 site.

The P.A. advised the applicant that a request for a Stage 2 Appropriate Assessment in the case of an application for retention under section 177 of the Planning and Development Act 2000 (as amended) would require the applicant to apply to An Bord Pleanála for substitute consent. Due to this requirement, the application was **withdrawn**.

3.5. *Enforcement*

UD. Ref. 2535: Warning Letter issued April 2018 in respect of the unauthorised steel structure located at the premises. The P.A. requested a composite map indicating;

- The new line of the Dungarvan Harbour SPA relative to the mapping submitted.
- Location of the outer edge of the Rock Armouring constructed, and
- Line of the applicants' folio map indicating ownership relative to the above.

UD. Ref. 2535: Enforcement Notice issued July 2018 requiring the removal of the unauthorised steel structure and to reinstate the site to its condition prior to the commencement of unauthorised development within a period of 8 weeks of the date of the notice. (File attached)

3.6. *Most Recent Planning Application*

P.A. Reg. Ref. 18/481: Application for retention of the extension behind the existing oyster building comprising a storage, packing and oyster cleansing building 130 square metres in area.

The application included an Appropriate Assessment Screening document. The Screening concluded that no individual or cumulative impacts were identified with regard to the storage, packing and purification structure. WC&CC corresponded with the applicant as follows;

'The Planning Authority is not satisfied based on the information provided to it, that the impacts associated with the subject development in combination with the other unauthorised development on the Dungarvan Harbour SPA were not and are not significant. Therefore, in accordance with Section 34(12B) of the Planning and Development Act, 2000, as amended, the application is being returned.'

4.0 Policy Context

4.1. Waterford County Development Plan 2011-2017

- 4.1.1. The Waterford County Development Plan 2011-2017 is the overarching policy document in relation to planning in the County area and includes the Maoil a Choirne zoning map.
- 4.1.2. The appeal site is located in an area zoned **Green Belt** with the stated objective '*To provide for a green belt area as a clear physical demarcation to the adjoining urban area, to provide for the development of agriculture and to protect and improve rural amenity and to restrict residential development*'. (See map attached).
- 4.1.3. **Section 4.11** refers to Green Belt and Buffer Zone Restrictions.

4.2. Natural Heritage Designations

The following European sites are within the vicinity of the subject site.

Site Name	Designation	Site Code	Distance
Dungarvan Harbour	SPA	004032	Adjoining
Helvick Head to Ballyquin	SPA	004192	1.1km SE
Helvick Head	SAC	000665	1.4 km SE
Blackwater River	SAC	002170	5.5km SW
Glendine Wood	SAC	002324	7.2km N
Mid-Waterford Coast	SPA	004193	8km NE
Comeragh Mountains	SAC	001952	14km N
Ardmore Head	SAC	002123	14.3km SW

5.0 The Appeal

5.1. Grounds of Appeal

5.1.1. Fehily Timoney and Company (Consultants in Engineering and Environmental Sciences) the agent acting for the operator submitted a report, which outlines the following;

- Meitheal Trá na Rinne Teo's facility was permitted by Waterford County Council in January 1992 pursuant to planning reference 92/20 for the construction of an Oyster Harvesting Plant.
- A discharge licence was granted to Meitheal Trá na Rinne Teo (reference number WPW/01/92) in January 1996. This licence allows for the facility to discharge effluent arising from the process and washing of oysters, to the Maoil an Choirnigh stream. Sewerage waste is discharged separately into the public sewerage system.
- The lower yard along the shoreline to the north of the facility has been in use as part of the business since the early 1990's. A rock revetment was constructed in 2003 to protect the yard from coastal erosion. Further emergency rock armour was put in place in 2007, following severe storms and upgrade works were carried out in 2009 following further severe storms. Consent was not sought for this element of the development. The rock revetment is stated by the applicant to be outside the Dungarvan Harbour SPA.
- The lower yard borders the Dungarvan Harbour SPA which was designated in 1994 and further expanded to include the lower yard and foreshore within its boundary in 2011. On foot of an oral hearing in 2012, the Designated Areas Appeals Advisory Board recommended the area be '*excluded from the SPA as the rock armour constituted a practical boundary and was clearly identifiable*'.
- A canopy/open ended structure for storage and to facilitate the sheltered loading/unloading of produce was constructed on the southern elevation of the permitted building in 1997.
- An extension to the northern side of the building was constructed in 2016 to facilitate new industry practices. This extension has been subject to retention permission but was deemed by WC&CC to require a Natura Impact Statement (NIS).

- It is therefore the intention of Meitheal Trá na Rinne Teo to apply for substitute consent for the regularisation of unauthorised developments and produce a remedial NIS in relation to the unauthorised developments.
- The canopy/open ended structure which was constructed in 1997 and the rock revetment constructed in 2003 and upgraded again in 2007 and 2009 were built without the benefit of planning permission and have been in place for a period in excess of 7 years and therefore are immune from enforcement proceedings pursuant to Section 157(4) of the Planning and Development Act 2000 (as amended).
- The agent notes that this is a locally run commercial company operating since 1990 in a Gaeltacht area. The company is a sales, marketing, grading and packaging facility for oyster producers operating in the Dungarvan Bay area.
- The company currently employ 3 no. people in total in sales, marketing and quality control. The facility is supplied by 4 no. local oyster farms in Dungarvan Bay who employ approximately 32 no. people.

5.1.2. The agent considers that further to the refusal for retention permission, and considering the Planning Authority's enforcement notice, the applicants lack of funding for the removal of the storage, packing and purification structure and their lack of understanding of the planning regulations with regard to exempt development and unauthorised development, as well as the structures' economic function, has forced the applicant to seek leave to apply for substitute consent. Through this process it is hoped that the developments are considered unregulated, including those stated barred from enforcement, will be regulated.

5.2. The application is accompanied by the following;

- a petition signed by 300 local community members in support of the proposal,
- a copy of the Discharge Licence dated January 1997,
- appeal decision from the National Parks and Wildlife Service in respect of the boundary of the Dungarvan Harbour SPA dated June 2016, which excludes the subject site,
- an AA Screening and Natura Impact Statement dated January 2019,
- Site layout plan Drawing no. P1832-0100-0002 Rev A.

5.3. Exceptional Circumstances

5.3.1. *'whether regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive'*

The rock revetment associated with the lower yard, the storage, packing and purification structure and covered area has not caused any pollution, nuisance or other significant effects. Discharge from the facility is sea water only. There is no requirement for EIA as the coastal works are sub threshold. The storage, packing and purification structure and covered area do not fall within Schedule 5 Part 1 or Part 2 and therefore an EIAR is unlikely to have been required. An amended AA screening report has been submitted which found that no individual or cumulative impacts were identified with regard to the storage, packing and purification structure and therefore has not adversely affected the integrity of a European site.

5.3.2. *'whether the applicant had or could reasonably have had a belief that the development was not unauthorised'*

The applicant was under the impression that the works within the curtilage of the facility (storage, packing and purification structure and covered area) did not require planning permission as they were considered minor modifications and were carried out over a number of years. The rock revetment on the shoreline was carried out as emergency works to protect the applicants' yard.

The applicant responded to a warning letter issued in October 2016 outlining that it was their belief that the storage, packing and purification structure was a farm shed type building and as such considered to be agricultural and therefore exempt.

In relation to the rock revetment works, this was carried out at a time when the area did not fall within or proximate to the SPA boundary which was extended to the shoreline in 2011.

5.3.3. *'whether the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or an*

appropriate assessment and to provide for public participation in such as assessment has been substantially impaired'

In the event that a substitute consent application is allowed the rNIS and application documentation will be subject to full public participation. It is considered that the ability to carry out such assessments has not been compromised.

5.3.4. *'the actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development'*

The updated AA screening report and NIS concludes that the potential for significant impacts to the qualifying interest of the Dungarvan Harbour SPA will be considered further within the Stage Two NIS. It is noted that the integrity of the SPA could be indirectly affected by the development through a potential impact on the ornithological interests of the SPA.

5.3.5. *'the extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated'*

The development has not caused significant impacts on the environment or the integrity of a European site therefore no remedial measures are required for the works to date.

5.3.6. *'whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development'*

The applicant is attempting to regularise all development at their facility. It was through urgent actions thought to be exempt that the unpermitted development came to be.

5.4. The applicant submitted a report entitled 'Stage One Appropriate Assessment Screening Report and Stage Two Natura Impact Statement'. The following is noted from this submission;

- The report details the works undertaken, presents analysis of desktop study and field study results, assesses impacts on the ecology of the area, and then focuses on potential impacts on the Natura 2000 sites and their conservation objectives.
- Seven of the eight European sites were screened out while the Dungarvan Harbour SPA is considered within a Stage 2 Statement.
- The qualifying interests and potential pathways for impacts on protected habitats and species were examined.
- It was concluded that there is the potential for the development works, to have significant indirect impacts on one of the European sites due to proximity. It is also concluded that there was no significant impact on any European site during the construction phase and it is not envisaged that there will be a significant impact during operational phase of the project.

6.0 Planning Authority Response

6.1. The planning authority responded to the application. In summary, it states;

- 'The applicant has set out a brief history of the development of the larger site and operations but has sought to separate aspects of the development and has not fully set out what consents were in place or required for all aspects of the development/operations.
- Portions of the larger development as existing were carried out without the required consent processing being followed.
- While the applicant states that concerns raised by Waterford City and County Council (WC&CC) regarding recent works the concerns raised by WC&CC related to recent works and works previously carried out and the impacts of these works individually and in combination.
- While the applicant acknowledges that some of the works carried out without the benefit of planning permission are in place more than 7 years and immune from enforcement it should be noted that these works remain unauthorised.
- The applicant is now seeking to enter a process to regularize all development on site, both recent and historic, this is not a process that WC&CC can facilitate through normal planning avenues.

- The applicant has screened the proposal in terms of the requirement for an Environmental Impact Assessment Report and formed the view that same would not be required. The applicant has also carried out a more robust AA screening and formed the view that the developments as existing do not negatively impact on any Natura 2000 site. These developments did not go through the appropriate consent process and now require regularizing or removal.
- The applicant contends that regularizing of these developments would not circumvent the purpose and objectives of the EIA Directive or Habitats Directive as there was minimal impact during construction works only and no long-term impacts.
- The applicant contends that they had the belief that the development was not unauthorized as the individual parts were generally minor or necessary emergency works, the issue not arising is the combination of these works and the impact same could have had or could have on the relevant Natura 2000 sites.
- The applicant contends that no third parties are disadvantaged should substitute consent process be engaged in as same includes for formal public consultation.
- The applicant contends that the actual or likely significant effects on the environment or adverse effects on the integrity of a Natura 2000 site resulting from the carrying out or continuation of the development is minor to non-existent.
- The applicant contends that there are no remedial works required to the works to date, the overall development, authorized and unauthorized will be assessed in combination should the Board allow for the substitute consent process to be entered into.
- The applicant believes that they sought to comply with the requirements of the parent permission, the applicant believed the works carried out which are now unauthorized did not require planning permission.
- It is possible that had the applicant engaged in the correct process that the potential impacts on the environment and on Natura 2000 sites could have been considered and screened out or fully addressed.

- It is the opinion of the Planning Authority that the regularization of all development concerned would not circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive.
- The Planning Authority cannot require much of the unauthorised development to be removed as same is statute barred.

It is also noted that if the Board is mindful to allow an application for 'substitute consent' all existing unauthorized development on site should form part of any application to regularize same.'

7.0 **Assessment**

7.1. **Introduction**

The Board is asked by the applicant to confirm that the works carried out should or should not have been subject to Appropriate Assessment, and therefore, whether or not a remedial Natura Impact Statement is required, or not and therefore, to confirm that an application for Substitute Consent can be sought.

7.2. **Scope for application**

It is noted that the application as described in this instance includes a permitted element, in addition to the various retention elements as set out. As an application for substitute consent can only be made in respect of development that has already been carried out, the Board's determination in this case, whether or not to grant leave to make such an application, must be confined solely to the retention elements of the development.

7.3. **Tests for Leave**

- 7.3.1. Section 177D(1)(b) of the Planning and Development Act specifies that the Board can only grant leave to apply for substitute consent in respect of an application under section 177C where it is satisfied that an environmental impact assessment, a determination as to whether an environmental impact assessment is required, or an

appropriate assessment was or is required in respect of the development concerned and where it is further satisfied that exceptional circumstances exist such that the Board considers it appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent.

7.3.2. Section 177D (2) provides that in considering whether exceptional circumstances exist the Board must have regard to the following:

'(a) whether regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive;

(b) whether the applicant had or could reasonably have had a belief that the development was not unauthorised'

(c) whether the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or an appropriate assessment and to provide for public participation in such as assessment has been substantially impaired'

(d) the actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development;

(e) the extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated;

(f) whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development;

(g) such other matters as the Board considers relevant.'

7.4. Observations

7.4.1. I draw the Board's attention to Figure 2-1 of the applicant's submission, which is a map of the areas associated with each element of the development for ease of understanding the various elements. This can be read in conjunction with the site layout plan Drawing no. P1832-0100-0002 Rev A lodged with the application which outlines the application site in red.

7.4.2. I also draw the Board's attention to the applicant's landholding and attached folio map which indicates an extended site area to the north to include the lower yard and rock armour compared to the original site outlined in the parent permission.

7.5. Requirement for EIA

7.5.1. The agent on behalf of the applicant submits a map (Figures 2-1) with the individual elements identified and dates of construction.

7.5.2. Schedule 5, Part 2, Class 10 (k) of the Planning and Development Regulations 2001 (as amended) states that an EIAR is only required for coastal works that exceed 1km in length. It reads as follows:

(k) Coastal work to combat erosion and maritime works capable of altering the coast through the construction, for example, of dikes, moles, jetties and other sea defence works, where the length of coastline on which works would take place would exceed 1 kilometre but excluding the maintenance and reconstruction of such works or works required for emergency purposes.

7.5.3. The rock armour which was installed to combat coastal erosion is approx. 80m in length and is significantly below the threshold of 1km. I accept therefore that in the first instance that the development is sub-threshold.

7.5.4. The storage, packing and purification structure and covered area do not fall within Schedule 5 Part 1 or Part 2, and therefore an EIA is not required.

7.5.5. I have had regard to Article 103(1)(2) of the Planning and Development Regulations, 2001, as amended. The site is immediately adjacent to the Dungarvan Harbour SPA (Site Code 004032). The site is within 1.5km of Helvick Head to Ballyquin SPA (Site Code and Helvick Head SAC (Site Code 000665).

7.5.6. I also note the appeal decision from the National Parks and Wildlife Service in respect of the boundary of the Dungarvan Harbour SPA dated June 2016 which excludes the rock armour which it was considered '*constituted a practical boundary and was clearly identifiable*'.

7.5.7. I also note that the location of the permitted water pump positioned above the rock armour which is used for sea water intake to the facility. I also note that discharge

from the development is seawater only which is discharged to the nearby Maoil an Choirnigh stream at Móta under licence (WPW/01/92).

7.5.8. I note that an EIS was not submitted with the original planning application or any of the subsequent applications for retention, but at the very least a determination as to whether an environmental impact assessment is required.

7.5.9. Having regard to the above considerations, I am of the opinion that the likelihood of significant effects on the environment cannot be excluded by the Board and that an environmental impact assessment or determination as to whether an environmental impact assessment is required, is necessary in this case for all areas seeking retention. The Board's determination must be confined solely to the retention elements of the development.

7.6. **Appropriate Assessment (AA)**

7.6.1. As noted above the Dungarvan Harbour SPA (Site Code 004032) is located c.30m from the Meitheal Trá na Rinne Teo's facility, while the rock armour abuts the boundary of the SPA. The Dungarvan Harbour SPA was designated in 1994 (S.I. 349/1994), was re-designated and advertised on 26th May 2010 and expanded in 2011. The 2011 expansion was included within the boundary of the lower yard. I have reviewed the Site Conservation Objectives for this site.

7.6.2. WC&CC requested that a Stage 2 Natura Impact Assessment (NIS) be submitted as part of a further information request under P.A. Reg. Ref. 17/549. WC&CC requested the NIS in relation to the potential impacts affecting the integrity of Natura sites, including the Dungarvan Harbour SPA. WC&CC also noted that the lower yard is included in the Dungarvan pNHA (Site Code 000663) The application was subsequently withdrawn.

7.6.3. For the most recent application under P.A. Reg. Ref. 18/481 the applicant submitted an Appropriate Assessment Screening document. This concluded that no individual or cumulative impacts were identified with regard to the storage, packing and purification structure. WC&CC determined that they were not *satisfied based on the information provided to it, that the impacts associated with the subject development in combination with the other unauthorised development on the Dungarvan Harbour SPA were not and are not significant. Therefore, in accordance with Section*

34(12B) of the Planning and Development Act, 2000, as amended, the application was returned to the applicant.'

- 7.6.4. The Dungarvan Harbour SPA is designated for waterbirds during the non-breeding season, Helvick Head to Ballyquin SPA is designated for birds and Helvick Head SAC for vegetated sea cliffs of the Atlantic and Baltic coasts, and European dry heaths.
- 7.6.5. Discharge from the development is seawater only and is discharged to the nearby Maoil an Choirnigh stream at Móta under licence (WPW/01/92). There is therefore a hydrological link between the site and the Dungarvan Harbour SPA.
- 7.6.6. As part of the subject application the applicant has submitted a Stage 1 Screening report and a Stage 2 NIS which concludes that the development could not be screened out at Stage 1. Having regard to the contents of the NIS, I consider that it is required as it cannot be excluded on the basis of objective information that the development would have had or would have a likely significant effect on the SPA's and SAC, having regard to the qualifying criteria of each designated site, the Conservation Objectives for each site and having regard to a potential pathway between the facility and the designated sites.
- 7.6.7. The NIS acknowledges that there is the potential for the development works, to have a significant indirect impact on one European site due to proximity. It concludes beyond reasonable scientific doubt that there are no significant impacts to any European sites during the construction phase and it is not envisaged that there will be a significant impact during operational phase of the project.
- 7.7. In conclusion, a Stage 2 NIS was submitted by the applicant and I consider and concur with the Planning Authority that it is required for the subject site.

7.8. **Conclusions**

- 7.8.1. The development, therefore, does qualify for consideration for leave to apply for substitute consent being a development in respect of which *an environmental impact assessment or a determination as to whether an environmental impact assessment is required* and a Stage 2 NIS is required.

7.9. Exceptional Circumstances

- 7.9.1. Section 177D(2) of the Planning and Development Act provides that in considering whether exceptional circumstances exist, the Board shall have regard to the matters as listed in Section 6.2 above.

My consideration on each of these are as follows:

(a) Whether the regularisation of the development concerned would circumvent the purposes and objectives of the Environmental Impact Assessment Directive or the Habitats Directive;

In relation to the EIA Directive it is noted that the original permission for the oyster farm development, granted in 1992, predated the first advertisement of the Dungarvan Harbour SPA in 2011. While it is acknowledged that the rock armour was initially installed 2002/2003 with further upgrades in 2007 and 2009 this was also prior to the designation of the SPA. As indicated in Section 7.5 above the rock armour is still sub-threshold for EIA purposes.

It is also the case that had permission been sought for the rock armour and the other elements of the development to be retained then there is at least a strong possibility that EIA would not have been required at that time, not alone because the SPA had not been advertised at that time, but also because of the requirements of the legislation at that time and which laid down significantly less onerous requirements in relation to EIA, and determination of EIA, than is the case now.

On balance, therefore, I do not consider that the regularisation of the development would circumvent the purpose and objectives of the EIA Directive.

In relation to the Habitats Directive it follows from the conclusion at Section 7.6 above, discounting any requirement of AA, that regularisation of the development could not be considered to circumvent the purpose and objectives of that Directive.

(b) Whether the applicant had or could reasonably have had a belief that the development was not unauthorised

I note that the constructed canopy/open ended structure on the southern side of the permitted facility and the storage, packing and purification structure at the northern elevation do not have the benefit of planning permission. One would have anticipated that the applicant would have understood that he required authorisation to carry out the works undertaken.

In relation to the rock armour, it is conceivable that the applicant could reasonably have had the belief that the development which included the rock armour was permissible as an emergency response, comprising works adjoining a public road edge from which there is public access to a shoreline. Refusing leave to appeal on this matter would appear unreasonable in my opinion.

(c) Whether the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or an appropriate assessment and to provide for public participation in such an assessment has been substantially impaired

It is my submission that the provision of information to allow the competent authority to undertake an assessment of the environmental impacts of the development for the purposes of an appropriate assessment has not been substantially impaired. I acknowledge the NIS presented with this application for leave to apply for substitute consent. I consider that the submission of an application that includes the relevant level of information to allow the Board to undertake appropriate assessment can so be provided to determine whether there were effects on the integrity of the European sites at this location. Furthermore, I am satisfied that the making of an application for substitute consent will permit public participation in the assessment process. It is further notable that the planning authority has no objection to the making of such an application.

(d) The actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development

In my opinion, the first point of interest in relation to the development must be the circumstances in which the development itself was undertaken.

The construction of the canopy/open ended structure on the southern side of the permitted facility and the storage, packing and purification structure at the northern elevation was in response to providing enhance facilities for staff and changes in the oyster market.

Placing the rock armour works in the context of this environmental damage arising from natural events would suggest that the impacts of the applicant's emergency response works could not be construed as being 'likely significant' in relative terms. However, one now has the procedural mechanism that places the applicant in a position that requires him to regularise both extensions to the south and north of the permitted facility and the rock armour works that was not subject to any formal assessment procedure or application process.

It is my submission, firstly, that the continuation of the development is likely to have no known actual or potentially significant effects on the environment at this location that could have adverse impacts on the integrity of any European site at or adjoining this site.

In relation to the impacts that resulted from the carrying out of the development on the European sites, I again acknowledge the AA and NIS documents submitted with the current application and the finding that the works have not adversely affected the integrity of any European site. I am satisfied to conclude that the making of an application for substitute consent would allow for adequate detail to be submitted as part of that application to allow the public to be informed of the likely effects to have arisen, to allow comment thereon, and for the Board to be in a position to adequately address the likely impacts that may have resulted and, arising therefrom, to undertake an Appropriate Assessment. At this time, there is no reason to conclude that works caused actual or likely significant effects on the environment or adverse effects on the integrity of a European site.

(e) The extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated

There is no understanding that the construction of the extensions to the facility and the installation of the rock armour during the period of adverse weather conditions caused disturbance, disruption or damage to the habitats and/or species for which the European sites at this location have been designated or caused notable effects on the environment. With regard to this observation, the potential for 'significant' effects having occurred are not regarded as likely to have arisen. The need for specific remediation is not reasonably quantifiable at this time in light of the information at hand which suggests that there has been no effect on the integrity of any European site. Evidently, the making of any application for substitute consent would examine the need for any such remediation.

(f) Whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development

The Planning Authority (Section 6 above) indicate that the applicant has not received planning permission to date for the extensions to the facility and the rock armour along the shoreline and has carried out unauthorised development.

(g) Such other matters as the Board considers relevant

The final matter which I consider should be acknowledged is the planning authority's position in relation to the application. In its submission to the Board, the planning authority noted they 'cannot require much of the unauthorised development to be removed as same is statute barred'. The P.A. also note that 'the applicant is now seeking to enter a process to regularize all development on site, both recent and historic, this is not a process that WC&CC can facilitate through normal planning avenues.

I would also refer the Board to the relevant policies/objectives in the Waterford City and County Development Plan in relation to the protection of the Greenbelt (Section 4 above).

It is, thus, clear that the planning authority is satisfied that an application for substitute consent can allow the assessment of such impacts and it could reasonably be inferred that it considers that exceptional circumstances existed in the context of the development.

7.9.2. **Conclusion**

It is noted that the legislation does not provide any guidance as to the weight to be attributed to each of the matters considered above or whether a positive outcome must be recorded in relation to all or just some of them in order for the Board to conclude that exceptional circumstances exist. I conclude, therefore, that the Board must come to an overall judgement having regard to all of the aforesaid matters.

It is my conclusion that exceptional circumstances do exist in this case. In coming to this conclusion, I place particular emphasis on the environment resulting from the development; that regularisation would not circumvent the purpose and objectives of both the EIA and Habitats Directives; and given the planning history of the development.

8.0 **Recommendation**

- 8.1.1. I recommend that leave to apply for substitute consent should be **granted** for the following reasons and considerations.

9.0 **Reasons and Considerations**

Having regard to Section 177D, Planning and Development Act, 2000, as inserted by Section 57, Planning and Development (Amendment) Act, 2010, the Board is satisfied that:

- (a) the development is one where a determination as to whether environmental impact assessment is required, and an appropriate assessment is required, and
- (b) that exceptional circumstances do exist by reference, in particular, to the following:

- the fact that the regularisation of the development would not circumvent the purpose and objectives of the Habitats Directive,
- the nature and limited scale of the development,
- that the ability to carry out an Appropriate Assessment and provide for public participation has not been substantially impaired,
- the limited nature of the actual/likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the development, and
- the extent to which such significant effects, if any, on the environment can be remediated,

and, therefore, concluded that it would be appropriate to consider an application for the regularisation of the development by means of an application for substitute consent.

The Notice to the applicants advising of the decision should also direct that:

- (a) the application be made within 12 weeks of the giving of the notice or such longer period as the Board may, on request, consider appropriate, and
- (b) The application includes a remedial NIS.

Susan McHugh
Planning Inspectorate

28th May 2019