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The Secretary,
An Bord Pleanála,
64 Marlborough Street,
Dublin 1.

27th October 2010.
Our ref: 21106-09/JN/PW
Your ref: 04.PA0010

By email and fax bord@pleanala.ie

RE: Planning Application by Indaver Ireland under the Planning and Development (Strategic Infrastructure) Act 2006. Response to Further Information.

Dear Sir,

On behalf of our clients Mary O'Leary & Others known as CHASE (who are parties to the within application) we make the following response to the invitation extended by the Board to comment on the further information received by the Board from the applicant.

Our response also incorporates a report by Mr. Shane Bennet of SM Bennet & Co., Consultant Hydrogeologists on coastal erosion and flooding, and a separate report from Mr Bennet on certain other issues, and a report from Hazel McCarthy, Architect and Planning Consultant, copies of which are attached.

We submit that the applicant Indaver Ireland has responded inappropriately to the request made by the Board in its letter dated 21 January 2010. The Board's letter requested the applicant to furnish revised drawings and particulars omitting the municipal waste element of the development as originally proposed. This was consistent with the Board's indication that it now regards the site as unsuitable for municipal incineration. Despite this clear Board request, the applicant has submitted drawings and particulars that include elements designed to be part of a municipal incinerator housed within a building large enough to incorporate a municipal incinerator. See *inter alia* section 1.3 of the 'Addendum to EIS'. We submit that this is a profoundly unacceptable approach to the Board's request. We will return to this issue below, and it is further addressed in the Report of Hazel McCarthy BA, MRUP, MIPI.

The report on the applicant's coastal erosion and flooding proposals which has been prepared by Mr Bennet demonstrates the poor quality and vague nature of those proposals.

As set out in the report of Hazel McCarthy, the coastal protection works and road works would themselves require planning permission. The applicant is careful to point out that it is not seeking permission for those works in this application. If planning permission is granted for the revised application under consideration now by the Board that will predetermine the result of those future applications. The Board will have prejudiced consideration of those applications. It will have done so in breach of the principles of natural and constitutional justice and disregarding the procedural requirements laid down in the EIA Directive 85/337/EC.

Overview of the Current Application

Before turning to certain specific issues, we wish to draw the Board's attention to the context within which the further information has been sought and is being considered by it.

This is the second application by the Applicant for permission to develop an incineration plant at this site. The planning authorities have been considering the salient points since the first application was lodged in November 2002 with Cork County Council. That application - which was for a hazardous waste incinerator only - was dealt with by the Board under reference no. 04.131196. At all material times the unsuitability of the site has been an essential part of the case advanced by our clients. The site unsuitability argument includes specific issues relating to the vulnerability of the site to coastal erosion and flooding. These issues were a cause of concern to the Board's Senior Inspector Mr. Philip Jones as reflected in his report of January 2004. Reason number 5 of the 14 refusal reasons proposed by Mr Jones stated:

5. *Having regard to the scale, nature and purpose of the proposed development, it is considered that the site, by reason of its topography, its climatic conditions, its geological and hydrogeological characteristics, and the risk of erosion and flooding of parts of the site, would be fundamentally unsuitable to accommodate the proposed development, and the applicants have not demonstrated that the proposed site is suitable, on the basis of objective criteria in a rational site selection process based on international best practice.*

The Board's view as set out in its 21 January 2010 letter that the current EIS is deficient in relation to flooding and coastal erosion echoes that 2004 paragraph and also recalls the first refusal reason proposed by Mr Jones:

1. *By reason of:-*

   a) Lack of sufficient date necessary to identify and assess the main effects of

the proposed development,
b) Inadequate consideration of the interactions between the factors, and
c) Inclusion of technical terminology within the non-technical summary,
it is considered that the Environmental Impact Statement submitted with the application is inadequate and fails to comply with the mandatory requirements as to content, contrary to the provisions of the 1999 European Communities (Environmental Impact Assessment) (Amendment) Regulations, and applicable European Directives, and the Board is not satisfied, on the basis of the information provided in the submitted E.I.S., than the proposed development would not be likely to have significant adverse impacts on the environment.

The first planning application having withered, the present application was submitted on November 28th 2008. On this occasion the application followed private consultations between Indaver and the Board under the Strategic Infrastructure Procedure. The Board and Indaver therefore had an opportunity to discuss certain aspects of the application before it was completed and lodged with the Board and made available to the public.

The matter was dealt with at Oral Hearing over a four week period between April and June 2009. The Oral Hearing itself had to be split in two when the Board belatedly accepted the validity of our submission that material presented by the Applicant, including that dealing with erosion and flooding, needed further consideration. When the hearing resumed however, the flooding/coastal erosion expert witness who had been tendered by Indaver initially was said to be unavailable to attend to answer questions. The hearing proceeded to a conclusion in June 2009.

With this history it is extraordinary that the Board found itself in a position in 2010 where it was still asking the applicant to provide information on flooding and erosion.

On 21 January 2010 the Board wrote to the applicant inviting it to make further information available inter alia on issues of erosion and flooding. It requested the applicant to furnish this information by April. Shortly before the April deadline, the applicant's agent wrote to the Board seeking an extension due to the supposed complexity of the work it was required to undertake in order to meet the Board's request. They sought an extension until August and the Board gave that extension without reference to any other party including our clients. They also sought not to submit a revised EIS but instead to submit an *'Addendum'* to the existing EIS. That Board granted that request again without reference to any other party.

On August 3rd 2010 the Board received further information from Indaver. The information comprised over 500 pages of text and illustrations and thirty technical drawings. Despite its extent, the information did not address the matter in the manner in which the Board had required in its January letter. By letter dated 13 September the Board notified my clients and the public that the information had been received and gave a period of just six weeks for responses to be submitted to the Board. The Board had discretion to allow a longer period. It chose to allow a minimal time only. The latitude extended by the Board to the applicant stands in stark contrast to the rigid minimalist deadlines imposed on our hard pressed clients and on the public.

With regard to flooding the information sought by the Board from the applicant in its January 2010 letter was to be in the form of a revised Environmental Impact Statement which was specifically requested to address -

> *"b) flooding of the public road serving the site, the necessary remedial works to prevent such flooding and the consequential impact of same (the EIS is deficient in this matter),*
>
> *c) any necessary remedial measures in relation to coastal erosion and their consequential impacts (the EIS is deficient in this matter),"*

Having received the applicant's response a disturbing letter issued to our clients from the Board. That letter was dated 5 October 2010 and was addressed to our client Mary O'Leary, Chairperson of CHASE by way of reply to an enquiry from Ms O'Leary to the Board. In the letter to Ms O'Leary the Board stated:

> *"The Board is satisfied at this stage of the adequacy of information submitted, and will proceed to determine the matter following consideration of submissions/observations received on foot of the notice".*

This letter appears to indicate that the Board has already made its determination on the adequacy of the information on the issues of flooding and coastal erosion in advance of hearing the submissions and observations of third parties.

Failure to circulate material, lack of clarity and EIA requirements

The Board refused our clients' request to release the report of Inspector Öznur Yücel-Finn. We have no doubt that such a report exists. We believe it formed a basis for the Board's January 2010 letter. The report's summary of the available information and the Inspector's analysis of it constitute material that would have assisted our clients in preparing their response. By withholding the Inspector's report,

the Board is improperly placing a barrier in the path of our clients' effective participation in this stage of the process.

The Board did not see fit to copy our clients with the 'further information' received by it from the applicant. Instead the Board referred interested parties to a website maintained by the Applicant or suggested they consult the material at the County Council offices. From our examination of it, the material on that website does not appear to be a complete match of the material submitted to the Board. In our experience this is the first time in a case of this nature that significant further information has been requested and furnished, and the parties to the application have not been circulated with it as a matter of course.

Having reviewed the material received by us (at a price) from the Board it is evident that there is a lack of clarity with regard to the EIS and with regard to the drawings. It is exceptionally difficult to relate what is now proposed to what was originally proposed. For this type of complex application, the law requires of the applicant an EIS. That EIS is to be accompanied by a non-technical summary capable of being understood by the layperson. The Board requested a revised EIS in its January 2010 letter. No revised EIS has been submitted. Instead a lengthy volume described as an *'Addendum'* to the EIS has been submitted. There is no revised non-technical summary. None of this is in compliance with the EIA Directive or with the Irish implementing regulations.

In relation to the drawings, the position is unacceptably and unnecessarily obtuse. There is no list of each element 'as proposed', and no effort to give information on those elements which have *not* changed, so as to facilitate understanding of what the effect of the changes would be. In the ordinary way this should have been provided in the form of separate drawings including exact measurements of all elements/use areas, including heights and areas of changed elements and including heights and areas that have not changed. A separate drawing to the same scale should also have been provided showing the original proposal. None of this has been done.

Fair Procedures and Costs

The inordinately extended procedure which the Board has permitted with regard to this application is oppressive and objectively unfair to our clients. We have repeatedly submitted to the Board both in advance of the Oral Hearing and during the hearing that the requirements of natural justice mandated the Board to give reasonable consideration to the financial position in which our clients find themselves. They have participated in good faith throughout a process which has now in effect been ongoing for almost a decade. The Board left our clients to carry the entire cost of their participation in first planning application process.

The Board has lately moved to recognise that the law requires third parties to have their participation costs and expenses defrayed in appropriate cases at least to a certain extent. However notwithstanding

that recognition by the Board in recent times, our clients' request to have their participation costs in this second application process defrayed has not yet been dealt with by the Board. The Board has stated that it will only make a decision when the application itself has been finally decided. That approach by the Board has meant that it has not been possible for our clients to consult adequately with their professional advisors in order to prepare their response to the 'further information'. Those advisors' invoices are outstanding in large measure since June 2009 when the last Oral Hearing concluded. It is only through the exceptional forbearance of certain of their consultants that the additional reports attached hereto have been prepared. It will be of inadequate comfort to our clients for the Board to recommend reimbursement of their costs after it makes its final decision on the application. The protracted manner in which the process has been dealt with by the Board has effectively excluded our clients from proper participation.

We are instructed by our clients that Councillors at yesterday's Cork County Council Meeting (26 October 2010) adopted a motion to the effect that Indaver Ireland's revised plans do not meet any of the concerns expressed by the Council in their 2009 report to An Bord Pleanála on the application. This reflects the continuing widespread cross-community support throughout Cork for the provisions of the County Development Plan which promote coherent alternative waste management strategies and which specifically zone this particular site as inappropriate for contract incineration.

Conclusion

The applicant is attempting to lead the Board into granting an application for a hazardous waste incinerator in conjunction with skeleton housing and facilities for a municipal waste incinerator. For the Board to grant such an application would be entirely at odds with the Board's views as set out in its 21 January 2010 letter. Such a grant of permission would also indicate Board approval in principle for municipal waste incineration on this site. It would also prejudice the outcome of the inevitable future applications for permission to carry out coastal erosion protection works and road works which entail works outside the site boundary. Such an outcome would amount to an egregious abuse of procedure.

We ask the Board to refuse the application.

Yours sincerely,

Joe Noonan,
NOONAN LINEHAN CARROLL COFFEY