FPLOGUE SOLICITORS

Our Reference: FPL/178/
Your Reference:

27 September 2019

By post and email

Richard Bruton TD
Minister for Communications, Climate Action and the Environment
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Public participation in the approval of Irish projects of common interest under Regulation (EU) No 347/2013 (the "TEN-E Regulation")

Dear Minister

We act for Friends of the Irish Environment CLG, an eNGO interested in seeking proper implementation of environmental and planning law to support sustainable communities including the pursuit of concerns and cases in both the built and the natural environment.

Introduction

We write in relation to the approval by Ireland of individual proposals for projects of common interest under article 3(3)(a) of the TEN-E Regulation. Specifically, our client has asked us to write to you in relation to public participation in the approval procedure under Directive 2001/42/EC (**SEA Directive**) and Directive 92/43/EEC (**Habitats Directive**).

These two directives require public participation and access to justice in relation to decisions within their scope, however our client has been unable to find any relevant information such as a draft plan, an environmental report, screening reports, natura impact assessments or any notices in relation to the approval procedure. It has therefore been prevented from exercising its rights of public participation as an eNGO.

We are now asking you to ensure that our client has the opportunity to consult all the relevant information, to be given an opportunity to comment and for its observations to be taken into account in any decision that may be taken by Ireland pursuant to the TEN-E Regulation.

With that in mind we would be obliged if you could forward to us without any delay full details of the approval procedure, when a decision is anticipated and give a commitment to provide a copy of any approvals as soon as they are made along with all other documents which are relevant to the decision-making.

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In the alternative our client wishes to be given a copy of any approvals that have already been made under article 3(3)(a) of the TEN-E Regulation in relation to the adoption of a new Union list so that it can consider whether it may access a judicial remedy as it is entitled to do.

For the avoidance of doubt our client has a right to challenge the substantive and procedural legality of any approval that is made including the right to challenge any approval (explicit or implicit) not to carry out strategic environmental assessment or appropriate assessment. The time limits for bringing such challenges do not begin until the public (including our client) is notified of the decision. We therefore urge you to respond to this letter as quickly as possible.

Background – the PCI Procedure

Under the TEN-E Regulation proposed projects of common interest must meet certain criteria set out in article 4. The proposed projects of common interest are ultimately added to the Union list by the European Commission under article 3(5). Once adopted on the Union list projects of common interest become integral parts of national investment plans under article 12 of Regulations (EC) 714/2009 and (EC) No 715/2009 and of the relevant national 10-year network development plans under article 22 of Directives 2009/72/EC and 2009/73/EC. These projects shall be conferred the highest possible priority within each of those plans.

In addition, these projects benefit from specific expedited permitting procedures reflective of the status conferred on them under the TEN-E regulation as well as access to incentives and Union financial assistance.

In the same vein the TEN-E Regulation anticipates that projects of common interest may adversely affect the integrity of Natura 2000 sites under article 6(3) of the Habitats Directive and/or may cause Member States to breach Directive 2000/60/EC. Accordingly article 7(8) of the TEN-E Regulation designates projects of common interest as being of public interest from an energy perspective and anticipates that they may be considered as being of overriding public interest provided all of the conditions of the those two Directives are met.

Thus, projects added to the Union list are projects that are already anticipated to be permitted even where the integrity of Natura 2000 sites or compliance with Directive 2000/60/EC cannot be guaranteed.

EU law requirements

We will briefly outline below how the approval procedure adopted by Ireland breaches EU law.

As a preliminary point it is clear that the approval of proposed projects of common interest relating to Ireland is both a “plan” for the purposes of the Habitats Directive (as transposed by S.I. 477 of 2011) and a “plan or programme” for the purposes of the SEA Directive.

According to the Habitats Directive, specifically article 6(3), a plan can only be agreed if it can be excluded on the basis of objective information that it will have a significant effect on a Natura 2000 site whether individually or in combination with other plans or projects. Unless such significant effects can be excluded a competent authority lacks jurisdiction to agree to a plan unless the provisions of article 6(4) of the Habitats Directive apply.

In addition, a strategic environmental assessment procedure must be carried out for plans or programmes which are likely to have significant environmental effects and which set the framework for future consents under the EIA Directive or which require an Appropriate Assessment pursuant to the Habitats Directive. The approval of a proposed project of common interest is a plan or program in the energy sector which sets the framework for future development consent as set out in detail in

the TEN-E Regulation (for example article 7 outlines the concept of “priority status” for such projects) and/or requires appropriate assessment.

The purpose of the SEA Directive is to ensure public participation takes place at an early stage when all options are open, including the zero-option. Strategic options must be subject to environmental assessment (as that term is defined in the SEA Directive). In reaching a decision the competent authority is required to document how environmental considerations have been integrated into the plan or programme. Within the framework of strategic environmental assessment, the competent authority is required to define and implement a programme to monitor the significant environmental effects of the implementation of the plan or programme so that unforeseen adverse effects can be identified at an early stage allowing appropriate remedial action to be taken.

Our client’s concerns

Our client has real concerns, in particular in relation to the Shannon LNG proposal for the construction of an LNG terminal and associated plant on the banks of the Shannon estuary in or adjacent to the Shannon Estuaries and River Fergus SPA (site code 4077) and the Lower River Shannon SAC (site code 2165).

As you are no doubt aware this project is currently subject to litigation in relation to an extension of the period of planning permission by An Bord Pleanála (*Friends of the Irish Environment v An Bord Pleanála* 2018/734 JR). In that litigation the validity of the screening for appropriate assessment has been called into question and a preliminary reference has been made to the Court of Justice of the European Union to assist the High Court in that regard. Our client has been unable to find any indication that you have excluded significant effects on at least the SAC and SPA in the Shannon Estuary for the purposes of approving Shannon LNG as a proposed project of common interest in which case it is clear and well settled that you lack the jurisdiction to grant such an approval.

In terms of SEA, the choice of projects of common interest sets the strategic direction of energy policy in Ireland and Europe generally. Ireland along with other Member States has strategic options in terms of the infrastructure that it builds or supports and therefore must conduct a strategic environmental assessment of those options and design and implement a monitoring program to identify at an early stage unforeseen adverse effects and to be able to undertake appropriate remedial action.

At a strategic level our client is extremely concerned that the Shannon LNG project will involve the importation of fracked gas from abroad. This is one of the most polluting forms of hydrocarbon. In addition, the choice of Shannon LNG has the potential to lock in hydrocarbon infrastructure at the expense of other forms of energy that are more suited to the rapid decarbonisation of our energy system an objective that becomes increasingly urgent as each day passes. None of this has been assessed strategically at a national level in Ireland despite EU law imposing obligations on the Irish public authorities to do so.

Moving forward

Our client therefore asks you in the first instance to ensure that whatever approvals are due to be made under the TEN-E Regulation are compliant with the SEA and Habitats Directives and that our client is given the opportunity to participate in the approval procedure.

Second it requests that a copy of all such approvals are provided as soon as they are made and if any approvals have already been made that copies of them together with the supporting documentation be made available to it.

Our client trusts that Ireland will be anxious to ensure that the overall adoption of the Union list is not jeopardised through breaches of EU law and expects that full public participation will be provided.

However, if that turns out not to be the case our client will not hesitate in seeking a judicial remedy to protect its and the public's rights to environmental protection under EU law. We would therefore request a response to this letter before **Friday 4 October 2019**.

We look forward to hearing from you in relation to this urgent matter. In the meantime our client fully reserves its rights.

Yours faithfully

FP LOGUE

Copy to:

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Mr Paul Byrne, Commission for Regulation of Utilities (By email pbyrne@cru.ie)

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