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Learning Lessons from the Ringaskiddy Incineration Story

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ABSTRACT

The inclusion of incineration in waste management policies has proven very contentious in the Republic of Ireland. Even though the Cork Region Waste Management Strategy (1995-2020) acknowledged the role of incineration it came as no surprise that a planning application in May 2001 by Indaver Ireland for two incinerators in Cork Harbour was met with fierce local opposition. This paper tells the story which unfolded from May 2001 to May 2007 and examines the roles played by public bodies such as Cork County Council, An Bord Pleanála, the Environmental Protection Agency and the Health and Safety Authority. The Indaver case reveals flaws in the planning process and highlights the need for a more coordinated approach which fosters trust, credibility and legitimacy.

BACKGROUND

In May 2001 the Belgian company Indaver announced its intention to build two incinerators[1] at Ringaskiddy in Cork Harbour. It did so safe in the knowledge that local, national and European Union policy supported incineration as a waste treatment option. The Cork Region Waste Management Strategy 1995-2020 introduced the concept of separation of household and commercial waste at a mechanical separation plant and the use of some form of thermal treatment through incineration. The National Climate Change Strategy 2000 and the National Hazardous Waste Management Plan 2001 headed in the same direction; the latter document stated that "a thermal treatment facility for the

[1] Phase 1 of the proposal was for a 100,000 tonnes per annum incinerator for hazardous and non-hazardous industrial and commercial waste. Phase 2 of the proposal included a 100,000 tonnes per annum facility for non-hazardous commercial and household waste.

management of hazardous waste currently exported for disposal is required if Ireland is to become self sufficient in hazardous waste management" (2001: 90). The focus on self sufficiency had been driven by the European Union's 'Proximity Principle' which essentially called for waste to be dealt with (recycled, incinerated, landfilled) as close as possible to its origins. The EU waste strategy gave top priority to waste prevention, followed by treatment measures such as recycling, re-use, incineration and, as a last resort, landfilling. Against this background Indaver Ireland formally lodged its planning application with Cork County Council on 13 November 2001 (Planning file 01/6215). A full five and-a-half years later, in April 2007, the company announced its intention to shelve its plans to build the two incinerators in Ringaskiddy with planning permission and the Environmental Protection Agency (EPA) operating licence still subject to High Court challenges.

THE FIRST BATTLE: CORK COUNTY COUNCIL

Unsurprisingly the announcement by Indaver of its intention to submit a planning application for two incinerators was met with fierce opposition. In September 2001, the various local opposition groups in Cork united under one umbrella body called the Cork Alliance For A Safe Environment which later changed its name to the Cork Harbour For A Safe Environment (CHASE). Inevitably Indaver and CHASE were now locked into a cycle of confrontation which, according to Flynn (2007), is the regular way of dealing with environmental problems in Ireland. He refers (2007: 15) to the '*ad hoc* fire brigade of heroic citizens who must face off a hostile commercial sector or an Irish state whom they assume are both always intent on placing a priority on development over

environmental concerns.' The decision on the planning application would normally have been an executive matter for the Cork County Manager, Maurice Moloney. In this case, however, a material contravention of the County Development Plan was required which put the issue in the hands of the forty-eight local councillors. Under planning law, a material contravention requires 75% support, in other words thirty-six of the councillors. Throughout 2002 the application bounced back and forth between the council and Indaver with the local authority seeking further information and clarifications about the proposed development. Brendan Kelleher, the council's Chief Planning Officer at the time, notes:

> There was a considerable amount of interaction between the manager and the council because the proposed development would have required a material contravention of the Development Plan because a waste facility is not an industry. The manager had to work with the council and three-quarters of the council would have to vote in favour of it. It was never likely to happen. It was a bit of a hot potato and he [Moloney] kept looking for more information, extending, and getting extensions to the time for considering the application.

Meanwhile CHASE was accumulating evidence and building up its own case. The group's chairperson, Seán Cronin, issued statements focussing on health-related concerns and drawing attention to countries where incinerators were being closed down. Indaver was boosted by a couple of things at this time. First, the Health and Safety Authority (HSA) expressed its willingness to issue a safety certificate for the proposed facility. Secondly, the County Manager, Maurice Moloney, publicly came out in support of the application and, in March 2003, he announced his intention to seek a material contravention from the council. The forty-eight councillors were strongly lobbied and came under intense pressure. CHASE was confident that when it came to the meeting, Indaver would not secure the thirty-six votes required. In advance of the meeting

Moloney – controversially but accurately – made the point that the vote of Cork County Council was of limited importance because the application would ultimately be passed by An Bord Pleanála. In the event, thirty councillors voted in favour of the material contravention with thirteen against. Five councillors were either absent or abstained. Moloney had no choice but to issue a planning refusal to Indaver Ireland on 27 May 2003 even though a significant majority of councillors supported the application. CHASE had won the first battle but it was apparent to all concerned that there would be other battles ahead. This was confirmed within the month when Indaver Ireland lodged an application with An Bord Pleanála to overturn the Cork County Council refusal.

THE SECOND BATTLE: AN BORD PLEANÁLA

In truth, Indaver had not been particularly perturbed by the planning refusal as it felt that it would win the subsequent appeal. CHASE – and twenty other parties – lodged counter appeals with An Bord Pleanála to uphold the initial decision. In addition, CHASE demanded an oral hearing. In August 2003, An Bord Pleanála agreed to hold an oral hearing and this commenced on 22 September in the Neptune Stadium under the chairmanship of Philip Jones, one of the Board's Senior Planning Inspectors. The oral hearing lasted until 9 October with a lot of detailed evidence being provided.

Indaver's case was predicated on the fact that Cork harbour was a natural and obvious choice for an incinerator given the concentration of pharmaceutical and chemical industries already operating there and that 60% of Ireland's hazardous waste was created in Cork (a figure disputed by CHASE). It was also noted that there were already six licensed incinerators operating in the area courtesy of the pharmaceutical sector. The

company's argument centred on the need for Ireland to behave responsibly regarding the disposal of its toxic waste. It pointed out that Ireland, along with Greece and Portugal, were the only member states of the EU forced to export all of their toxic waste due to a lack of incineration facilities. Managing director of Indaver Ireland, John Ahern, stated, 'the project is proposed to the highest standards within the industry and our waste management expertise is clearly required in Ireland which, to date, has been forced to export its toxic waste for treatment and disposal' (2003). Additionally, Indaver stressed that the incinerators would provide important national infrastructure and lessen the vulnerability of Irish industry to decisions made by other EU governments. It also argued that objections on traffic grounds were not valid as the proposed developments would only result in a 2% increase of traffic at peak periods.

The second day of the hearing proved to be acrimonious when the chairman ruled, on the basis the Waste Management Act 1996 and other environmental legislation, that health and safety issues were outside the remit of the enquiry and that the hearing would concentrate exclusively on spatial planning matters. CHASE reacted angrily to this decision pointing out that, for them, the kernel of the incineration debate was the impact on people's health and the environment and that to deny evidence of this nature was to deny a community's fundamental concerns.

The oral hearing was told that there were 20,000 people in the Cork harbour catchment area opposed to the plant. A number of residents from the area gave evidence, raising concerns and fears regarding the consequences of a possible disaster at the plant and the

implications for quality of life. During the three week hearing local residents frequently expressed huge disappointment about the actual hearing process itself viewing it as a charade. The Health and Safety Authority also gave evidence at the hearing stating that it was not against the granting of permission for the incinerator, particularly in the context of Major Accident Hazards, and that certain commitments made by Indaver should be considered as planning conditions. The HSA had come to the conclusion that the Indaver proposal represented a 'tolerable' level of risk.

The oral hearing chairman, Philip Jones, issued his report on 5 January 2004 and recommended, on fourteen different grounds, that the Indaver's application should be refused. The first reason for refusal was that the Environmental Impact Statement submitted was inadequate and failed to comply with the provisions of the 1999 European Communities (Environmental Impact Assessment) (Amendments) Regulations and applicable European Directives (this particular issue would prove to be central to subsequent court proceedings.). He also found, *inter alia*, that the application was premature in relation to progress on the National Hazardous Waste Management Plan, the site was unsuitable, and the proposed development was in contravention of the County Development Plan and would pose significant risks to public safety.

Despite the strong recommendation by Jones, An Bord Pleanála overrode his report and, by a vote of nine to one, approved the application on 16 January. The Board admitted that the decision was in breach of the Cork County Development Plan - the reason why Cork County Council originally refused Indaver Ireland planning permission in May 2003.

However, it justified the approval on the basis of national policy which states that Ireland must become self sufficient in relation to its handling of toxic waste. Ireland was exporting approximately 100,000 tonnes of waste overseas for disposal and the Board said that it made its decision on the basis of the Waste Management Act 1996, the *National Hazardous Waste Management Plan* published by the EPA in 2001 and the Government's waste policy document *Changing our Ways/Delivering Change* (1998). It found that the proposed site was an appropriate location for the plant; that it would not negatively impact on the local amenities or on traffic safety and convenience; would not impede future development in the area; and was in line with national priorities which had to be given precedence over local planning.

A number of conditions were attached to the approval:

- The incinerator would not be allowed to handle waste imported from outside the state.
- Indaver would make a contribution of €500,000 to Cork County Council for road, sewage and environmental works in the area.
- Indaver would pay an annual levy to the Cork County Council of €127,000.
- Indaver would have to set up a local liaison committee to monitor the operation of the plant. The committee would comprise two planners from Cork County Council, two councillors, two local residents and two representatives from Indaver.
- The plant would have to operate strictly within EPA and EU guidelines
- The plant's impact on the Ringaskiddy environment would have to be kept to a minimum.

The decision to grant permission for the country's first toxic waste incinerator - widely acknowledged as a decision likely to pave the way for future national incineration policy - was received with shock by residents and environmentalists. CHASE was outraged, pointing out that it had put together an excellent case with huge technical detail and it questioned the point in having a planning process if this was to be the outcome

considering the board inspector's recommendations and the breach of EU law in relation to the absence of a health risk assessment. CHASE spokesperson, Mary O'Leary (2004) claimed: 'It certainly does not indicate a transparent, independent planning process and smacks of anarchy.' Even Cork Government TDs reacted angrily with Batt O' Keeffe (2004) describing the decision as 'preposterous and ridiculous' and calling into question the independence of An Bord Pleanála.

The manner in which the announcement of the Board's decision was made caused widespread anger amongst objectors. The first CHASE heard of the decision was when it was announced on the Pat Kenny radio show. To further rub salt in the wound when Pat Kenny made the announcement John Ahern of Indaver was sitting in the studio. Clearly, Indaver knew of the decision before CHASE and all parties to the case were not dealt with in an even-handed manner. 'We felt badly treated if that is the way democracy works. After all they didn't even have the manners to ring up and say, look this is the decision" (O'Leary 2006: 159).

Indaver was now in pole position but it still required an EPA waste licence and the company was also aware that there was the possibility of a judicial review of the planning decision. As events transpired, CHASE opted on a dual strategy of challenging the EPA licence and commencing High Court proceedings.

POLITICAL DEVELOPMENTS

Environment Minister Martin Cullen welcomed the decision of An Bord Pleanála and rejected claims that the waste incinerator would threaten public health and safety, stating (2004),

> Incineration is part of the solution to our waste management problem. A lot of myths and legends have been put out about it that are totally without foundation. The old mass burners are gone and now we have cutting edge technology.

Fellow Government Minister and Cork TD, Michael Martin, also stated his belief that the proposed incinerator would not pose a health threat. At the same time Minister Martin expressed reservations about Ringaskiddy as a suitable choice for the plant on the basis that the residents there had borne their fair share of national development.

The story took a twist in July when Minister Cullen announced the appointment of Laura Burke, a former Indaver Ireland executive, as a director of the EPA. CHASE immediately pointed out a conflict of interest and both the Green Party and Sinn Féin criticised the appointment on the grounds that it compromised the independence and impartiality of EPA. The agency responded with assurances that Burke would not be part of any Board meeting where decisions would be made regarding the incinerator licence. Three months later, on 27 October, the EPA confirmed that it intended to grant waste licences for the development of incinerators at Ringaskiddy in Cork and Carranstown in Meath. This was a significant hurdle for Indaver, for together with the planning permission granted by An Bord Pleanála, the licence was a prerequisite for the development of a waste disposal facility. Under legislation, the EPA had the sole power to grant waste disposal licences to

both public and private organisations under the Integrated Pollution Control (IPC) licensing system.

CHASE reacted to the issuing of the licence by pointing out that the EPA's Director General, Dr. Mary Kelly, was formerly an employee with IBEC while a newly appointed director, Laura Burke, had previously been an executive with Indaver Ireland. The group also questioned the timing of the EPA decision, claiming that the agency was fully aware of the plans to seek permission for a judicial review in the High Court.

At the beginning of November 2004, the new Environment Minister, Dick Roche, stated his support for the EPA's decision, insisting that both the EPA and An Bord Pleanála were independent agencies, and that he had no intention of interfering with that independence. Meanwhile, the *Irish Examiner* reported that the EPA, despite issuing the licences in both the Cork and Meath cases, had sent a letter of warning to the Department of Health regarding the lack of any system being in place to monitor the health of those living in the vicinity of the incinerator sites. In particular the EPA admitted that Irish health information systems were unable to support monitoring of the health of residents living near waste sites. The letter, which was dated 25 March 2003 also referred to the lack of information on the current health status of people living near waste facilities and stated its support for the implementation of systems which would alleviate public concerns about such facilities (Dundon, 2004).

THE THIRD BATTLE: ENVIRONMENTAL PROTECTION AGENCY

On 28 October anti-incineration community groups and CHASE announced that they would be seeking an oral hearing on the EPA's decision to grant the incinerator licences to Indaver. Explaining this decision CHASE said that it had no confidence in the state agency and claimed its decision was an affront to democracy and demeaning to local communities. The same day, gale force winds, high tides and heavy rains resulted in the incinerator site being submerged in three feet of water. According to CHASE, this provided further proof of the total unsuitability of the site as it explicitly failed to meet World Health Organisation criteria.

The Irish Doctors Environmental Association (IDEA) also publicly announced its disappointment with the EPA's decision, referring to research which showed that particles from incinerators cause respiratory and cardiovascular disease. In addition, Dr Philip Michael, Chairman of IDEA, pointed out that the stringent controls being forced upon the incineration facilities would not have any effect, based on the fact that similar controls in other countries have been shown to be ineffectual (Barnes, 2004). In a letter sent by Dr. Michael to all thirty-three members of the Southern Health Board on behalf of IDEA, he stated that 'incineration poses unacceptable risks to both the health of people of Carrigaline, and the wider community, both now and in the future'(*ibid*).

This was followed by the lodging of an appeal against the EPA's licensing decision by An Taisce, the environment agency, on the 19 November. Citing health and safety concerns regarding emergency evacuation procedures and pollution risks, An Taisce stated that the EPA had failed to observe a number of rules imposed by planners and that

they were also concerned about EPA operations and the lack of any independent review procedure. In CHASE's appeal documentation the group claimed that the draft licence granted differed from the original planning application. CHASE also argued that the licence was granted on the basis of waste categories submitted by Indaver to the EPA that were incorrect and furthermore that the licence itself did not comply with World Health Organisation and EU guidelines. Indaver Ireland also lodged a submission with the EPA, objecting to a condition which they say would prevent them from burning certain waste which was suitable for incineration, denying that the lifting of this restriction would result in increased emissions. In all there were fifteen objections to the EPA licence.

The oral hearing ran from the 14 February to 1 March 2005 under the chairmanship of Dr Jonathan Derham of the EPA. There was early frustration for the objectors as the chairman ruled that EPA officials would not be required to answer questions as to their reasons for granting the licence. A further frustration for the objectors was that questions on health and safety, which had previously been ruled outside of the remit of the An Bord Pleanála hearing, were now also ruled as outside the remit of the EPA hearing. Despite this ruling there were some attempts during the hearing to raise health-related concerns. For example, Dr Anthony Staines, senior lecturer in Epidemiology at University College Dublin's Department of Public Health Medicine (and co-author of a Health Research Board report for the government that found that existing health information systems were incapable of monitoring the health status of people living near waste management facilities) told the enquiry that the health information contained in the EIS provided by Indaver was totally inadequate. Dutch medical expert, Dr Gavin Ten Tuscherr, informed

the hearing that it would have been wise to assess the extent of the harm that pollutants could cause to people before deciding to grant a licence. He lamented that no such assessment had been carried out. The primary avenue through which objectors could raise health and safety issues was in relation to accident and emergency provisions. The HSA had issued a safety certificate for the facility even though CHASE was able to prove that key issues, such as regular spontaneous combustion at a scrap metal facility on an adjoining site and flooding of the proposed site, had not been considered and that the HSA was not even aware of these issues. On 22 November, after two deferrals, the EPA – based on the oral hearing - upheld its own initial decision to grant the respective licences to Indaver Ireland.

THE FOURTH BATTLE: HIGH COURT

On 11 March 2004, residents from the Ringaskiddy area went to the High Court to lodge an application for a judicial review of the An Bord Pleanála decision. The case was adjourned in April, May, June and July before a date was finally set for 27 October. On that occasion no judge showed up and the case was deferred until November. The case was not finally heard until 24 January 2005. The judge ruled in favour of the residents after finding that there were significant grounds for granting a judicial review. As of June 2007 there is still no date for the hearing of the action. A case was also taken in relation to the Meath incinerator and this went all the way to the Supreme Court. The nub of this case was whether an EIA or EIS should be submitted and the timing of same. On 10 May 2007 (Case Ref. 531 & 535/04) the court held against the objectors and ruled that the procedures adopted were both fair and constitutional. This was a victory for both An

Bord Pleanála and Indaver and will impact on the Ringaskiddy case when it eventually comes to court. In a parallel development, High Court proceedings were initiated in January 2006 by the Ringaskiddy and District Residents' Association Ltd. for a judicial review of the EPA licencing decision. No date has yet been set for this hearing.

LESSONS AND CONCLUSIONS

The Ringaskiddy incinerator case is an interesting and valuable one from many perspectives. In particular, it shows how the various organs of the state operate and how the planning process unfolds. The rules of the game have altered somewhat since Indaver's planning application in 2001 due to the Planning and Development (Strategic Infrastructure) Act 2006. The purpose of the legislation is to fast-track planning applications for major infrastructural projects straight to the newly-formed Strategic Infrastructure Division of An Bord Pleanála. According to Reilly (2005: 41) the aim is 'cut the local authorities out of the planning loop on some of the bigger decisions.' While the legislation has been criticised on the grounds that it undermines the rights of communities to have an input into the planning process, the business community has been broadly supportive. Reg McCabe of the Irish Business and Employers Conference (IBEC) offers an appealing logic, mirroring the view expressed by Maurice Moloney in the Ringaskiddy case: 'Invariably, these projects end up with An Bord Pleanála anyway, we all know that. So why not take one step out and go straight to the Board?' Only time will tell how the strategic infrastructure legislation will change the nature of the planning system; Flynn (2006: 2) believes that it will have 'a profound impact on all major stakeholders.' If the act had been in place in 2001 the main difference in the process as

described above is that Indaver and CHASE would have arrived at the High Court phase sooner but it would not have solved the issues relating to a fragmented institutional approach in that waste management and integrated pollution prevention and control licences would still be required from the EPA, as would approval from the HSA. Flynn (2006: 17) correctly points out that the legislation 'adopts a one-dimensional solution to a multidimensional problem.'

After six years, all of the stakeholders involved in the Ringaskiddy incinerator case have learned valuable lessons. To some extent Indaver Ireland mis-read the market place and its planning application in 2001 was premature. While incineration has been part of Government policy on the treatment of waste the concept is not yet 'embedded' in local communities and in local authorities. Tactically Indaver was probably a little naïve in announcing its intention to submit a planning application six months in advance of so doing as it gave CHASE the opportunity to get organised.

From the CHASE perspective it is clear that the group ran a professional and successful campaign and won important battles along the way, for example the refusal issued by Cork County Council and the planning inspector's report after the An Bord Pleanála oral hearing. Yet, it was always likely that An Bord Pleanála would ultimately play the 'national policy' card and grant permission. Joe Noonan, a Cork-based solicitor representing CHASE, described the oral hearing as 'a sham' and the exclusion of health-related evidence was a significant blow for the group. This leads to an important point

about An Bord Pleanála and what its role is, especially in the light of the aforementioned strategic infrastructure legislation. Flynn (2007: 190) notes:

> An Bord Pleanála should be clear about what it is. Either it is a quasi-judicial body that offers independent evaluation and adjudication over planning proposals or it is an executive agency of government whose job is to implement their planning policies. One body cannot do both of these tasks.

For An Bord Pleanála to fulfill its statutory mandate as an independent agency it must be seen to treat all parties equally. This certainly did not happen with the announcement of the appeal decision on the Pat Kenny radio show.

Questions must also be asked of the role played by the EPA. Inevitably, given the nature of the industry concerned, the EPA did not satisfy all stakeholders but the debate did highlight major faults in the whole operation of the EPA and the legislation under which it operates. Appeals of EPA licencing decisions are heard by the EPA itself - a clear breach of one of the basic principles of law: *nemo iudex cusa sua* (no one should be a judge in their own case). Furthermore, at the EPA oral hearing, the chairman, Dr Jonathan Derham, ruled that EPA officials could not be questioned on their reasons for granting the licence and also, critically for CHASE, that health concerns were outside the remit of the enquiry. It raises the fundamental question: why bother with a public hearing or a review process? Interestingly, the recent Programme for Government agreed between Fianna Fáil and the Green Party promises a review of the EPA.

As with the EPA, the role of the HSA raises matters of public concern. Its admission that it did not know that the site at Ringaskiddy was subject to flooding and that the adjoining scrap metal site was subject to spontaneous combustion does not inspire confidence.

Six years after Indaver announced its intention to build incineration facilities in Ringaskiddy it has acquired the necessary planning permission, secured EPA and HSA approval and complied with all legal requirements. Yet, not only has no sod been turned on the site but Indaver announced, in early April 2007, that it was not proceeding with either of its Irish projects for the time being on economic grounds. According to Indaver, increased landfill capacity and reduced gate fees make incineration economically unviable. With the new Programme for Government (2007) containing the assurance that the Government will not alter the landfill levy in such a way as to give a competitive advantage to incineration it seems that the economic disadvantage of incineration is likely to continue for the immediate future.

As previously stated the Supreme Court has ruled on the issue of EIA versus EIS and cleared the legal challenge on the Meath project. A judicial review of the Ringaskiddy project is still pending and no date has yet been set for its hearing. Also the judicial review process regarding the EPA licence has not been resolved. In other words, the story has yet to run its full course especially with Indaver stating that it will return to Ireland when there is greater certainty in the market.

The unfortunate legacy of the Ringaskiddy case is that the six year process - which began in Cork County Council and which will ultimately end in the courts – has, from a public participation perspective, failed to create trust, credibility and legitimacy. This realisation is exacerbated by a fragmented approach by the public bodies involved and a lack of

coordination or ‘joined-up thinking’ between them. Where you have fragmented responsibility you have no responsibility.

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