



7<sup>th</sup> December 2010.

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### **Report of the Reviewing Board on the Dwejra Case**

Following our appointment by your good self to act as Members of the Reviewing Board with regard to the Dwejra case, please find hereunder our report.

#### **1. Introduction**

We were appointed to review the processes adopted by MEPA in issuing development permissions for film-shooting applications in environmentally sensitive areas in the Maltese islands. Such a request emerged following the case of the MEPA development permission issued to a filming company to film at Dwejra, Gozo. We have also been asked to make recommendations for the future in order to ensure that when filming takes place in sensitive environmental sites, it is carried out in an environmental friendly way thereby ensuring that no form of damage is caused to our natural and cultural patrimony and to the landscape.

#### **2. Terms of Reference**

The Reviewing Board was given the following terms of reference:

1. To review the administrative process adopted by MEPA in issuing permits to filming companies, including the form of consultation that takes place,
2. To review the conditions imposed,
3. To review the mechanism of approval of permits and monitoring thereof;
4. To recommend measures that should be adopted, aimed at ensuring that sensitive sites, which include Natura 2000 sites and other cultural and natural heritage sites are given utmost protection in view of their patrimonial value.

### 3. Facts of the Case

#### 3.1. *The Development Permission Application*

By means of an application dated 8 July 2010, Pellikola Limited applied for MEPA development permission for:

‘filming at several heritage locations around the island and since the story is set in a fictional medieval world a considerable amount of dressing and construction will be required at all locations. All builds will be of a temporary [nature] and every location will be re-instated to its original status. Once filming is completed. Permission for the relevant location owners are being sought by production.’<sup>1</sup>

In addition to a covering letter attached to the application, Pellikola Limited filed a MEPA ‘Permit Application for an Organised Outdoor Activity’ and submitted various other documentation relating to the seven sites where filming had to take place. Dwejra, Gozo, was one of these sites. The other natural and cultural sites were:

- Fort Ricasoli, Kalkara
- Mdina (various streets)
- Fort St. Elmo, Valletta
- Rdum id-Delli, limits of Mellieha
- San Anton Palace
- Verdala Palace, Buskett.

However, this report is concerned with only one such site, namely that situated at Dwejra, Gozo. No complaints have been submitted with regards to the other six sites apart from Dwejra which is the subject of this review.

According to the application, all these seven sites were to be used for the purpose of filming of a television series entitled ‘Game of Thrones’ produced by Home Box Office (HBO). This series was described as an ‘upcoming medieval fantasy based on author George R.R. Martin’s *A Song of Ice and Fire* series of novels’.

Filming had to commence on Monday 27 September 2010 for 6 weeks. The application further states that filming had to come to an end on 5 November 2010.

Section B of the application entitled ‘Activity Details’ states, amongst other things, the following:

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<sup>1</sup> Covering Letter dated 8 July 2010 by Mr. Oliver Mallia, Director, Pellikola Ltd. addressed to Mr. Chris Borg, Director of Planning.

- ‘Wherever filming will take place the production is looking at dressing the various locations according to script requirements. Production will ensure that location owners, private or public will be informed and compensated for the work done and if MEPA permission will be required for filming on these locations all conditions established by MEPA will be respected.’
- ‘Prior to filming at any location production would have to dress each location to meet the demands of the story.’
- ‘Following completion of each filming day, a location team would make sure all equipment brought by production will be removed and each location will be reinstated accordingly.’
- ‘It is the aim of the production team to leave minimal impact on each location visited. In most cases production will make sure it leaves each location in a better state than that found.’

In so far as **filming requirements** at Dwejra were concerned the application made the following statements:

- ‘There are two areas at Dwejra that we would like to use as indicated on the enclosed site map.’
- ‘At the first area close to the Azure Window we would like to construct a two-tiered platform with steps. The platform is to include an iron frame on which awning and guide ropes will be hung. The area is to be covered with sand or shingle. The existent steps would have to be replaced with a ramp to improve access for crew and the horses that will appear galloping in the scene.’
- ‘At the second area no dressing and construction are required, as we’ll be shooting a small walk-talk scene that should last only a couple of hours.’

In so far as **construction requirements** at the first area at Dwejra were concerned, the following construction works had been applied for:

- ‘Construct earthen ramp/two tiered platform with steps’
- ‘Iron frame secured & fixed into platform with fabric awning & guide ropes’
- ‘Large amounts of ground coverage. Either shingle/earth/sand TBD’
- ‘Build incline ramp for access/crew/action – scaffolding clad with timber’.

### 3.2. *Development Permission*

A development permission was issued by the Malta Environment and Planning Authority on 9 September 2010 to Pellikola Limited. The permission listed all the sites where filming had to take place together with the respective statutory protection each site enjoyed. The advantage of adopting this approach is to use one application for a number of different sites. In so far as Dwejra was concerned, the development permission reads as follows:

‘Id-Dwejra – Proposed Scheduling, Partly within the highest level of protection – Level 1 Area of Ecological Importance/Site of Scientific Importance; Level 2 Area of Ecological Importance; Area of High Landscape Value; Coastal Area, Rural Lands.’

From the above description, it results that the site at id-Dwejra has not yet been scheduled but it has been proposed for scheduling. Dwejra has nevertheless been given the status of a special area of conservation under the European Union’s Natura 2000 network following EU accession. It is currently a candidate to become a UNESCO World Heritage site. The highest level of protection has been proposed for this site and its value has been indicated in terms of ecological importance, scientific importance, ecological importance, landscape value, coastal value and rural value. It does not result to the Review Board that an emergency conservation order has been issued preventively by MEPA in the interim until the scheduling process takes its due course. No specific reference is made above to the geological features of the site.

### 3.3. *Conditions Imposed in the Development Permission*

The development permission in question imposed several noteworthy conditions relevant to this review. The text of the conditions imposed in the said development permission under examination are reproduced *verbatim* below:

#### “CONDITIONS

##### *General*

1. It is the **responsibility of the applicant/production agency organising the activity** to ensure to take all reasonable precautions to prevent damage to cultural and natural heritage, including the environment in its broadest sense and protected sites or areas; and to ensure that the activity conforms to the conditions in this permit. Fixtures and fittings within cultural heritage sites, habitats and their component flora or fauna are also subject to the conditions as specified by MEPA.
2. **All works shall be carried out strictly in accordance with this consent and approved** application, plans and supporting documents. However, where ambiguities or discrepancies arise between the approved plans and the conditions on this decision notice, the conditions set out in this letter shall take precedence over the approved plans.
3. **Only the sites indicated on the site plans** submitted with the ‘Permit Application for an Organised Outside Activity’ shall be used for filming purposes.

4. **All sets and new constructions** in masonry or in any other material **are to be of a temporary nature and free standing**, must not be fixed to the ground where this is still the original fabric, are to have impermeable protection to the historical fabric and natural features and in no way are to endanger the historic and natural elements or their stability. The use of cast concrete as building material is prohibited. No direct fixing of sets is allowed to historic fabric and natural features, including rocky outcrops. No interventions, including drilling into walls and/or floors to affix sets, removal/alterations of elements are allowed on the historic structures and natural features. Existing structures shall not be removed or dismantled.

5. All **temporary structures and equipment** should be removed from site within not more than four (4) working days after the date of the event and MEPA to be duly informed so that its monitor/s can inspect the site and issue the necessary clearance.

6. The applicant is to ensure that if **open fires and/or pyrotechnics** and contained explosions are to be used, relevant details are to be supplied and authorization from the competent authorities shall be obtained by the applicant. No excavations are to be made for the planting of pyrotechnics or open fires and that no damage, inclusive by burning or emissions, is suffered by the historical and natural elements or the surrounded grounds. Supervision by qualified personnel is required for each site.

7. **Only existing tracks are to be used** for vehicular access and manoeuvring, inclusive of generators and other equipment. The areas to be used as base camps and for logistic purposes are to be indicated separately from the filming area. **Parking of vehicles**, inclusive of filming crew, extras and contractors, shall be restricted to existing parking areas. Where no such parking spaces exist the applicant shall provide for a ferry/shuttle service from parking area(s) to the filming location.

8. In natural and ecologically-sensitive areas, **cordoning of the grounds** beyond the approved areas is to be made (using temporary measures such as cordoning tape). This also applies to existing tracks leading to and from filming locations. Crew and staff on site should be guided not to wander off existing tracks and approved filming locations.

9. Any **use of animals** in the filming production shall not be allowed to feed on vegetation and shall be kept on existing tracks at all times, except for during the film shots that involve the use of such animals.

10. No **rubble walls** (protected by Legal Notice 160 of 1997) are to be dismantled or disturbed during preparatory, filming and reinstatement works.

11. **Any changes** in the dressing of the sites, extensions to the boundaries or change of approved site as approved by MEPA for filming are decided by applicant/production should be immediately communicated in writing to MEPA and no work or the placement of equipment and material is permitted until written consent by MEPA is issued.

12. All reasonable precautions are to be taken **to keep the site clean** and any refuse left on site after the event shall be completely cleaned and disposed of in line with approved procedures within not more than four (4) working days after the date of the event.

13. If any location or site chosen by applicant/production is considered to be either **unstable or unsafe** or can become unsafe by certain filming activities such as pyrotechnics, fires or heavy loads, applicant/production are to submit a report by their architect or structural engineer.

14. All reasonable precautions are to be taken **to ensure safety of all participants**, to the satisfaction of the respective authorities. The applicant should also provide adequate firefighting equipment and first aid on all sites, especially where fires and/or pyrotechnics are to be used, to the satisfaction of the competent authorities.

15. **This consent does not remove or replace the need to obtain the consent of the land/building owner** to this development before it is carried out. Furthermore, it does not imply that consent will necessarily be forthcoming nor does it bind the land/building owner to agree to this development. Where the land/building is owned or administered by the Government of Malta a specific clearance and agreement must be obtained for this development from the Land and/or Estate Management Departments.

16. **This consent is granted saving third party rights.** The applicant/production agency is not excused from obtaining any other permission required by law.

17. Given the production is using scheduled properties the applicant is required to contribute the sum of €7000, as a **Planning Obligation** in terms of Article 40 of the DPA, towards MEPA's EIPP fund for the restoration of scheduled property.

18. The applicant shall deposit a **bank guarantee** of €15,000 to cover all the sites and works approved for any eventual shortcomings, degradation of the historic structures and their fittings and damage to the natural environment resulting from wilful or accidental damage and the complete removal and reinstatement of the site to the satisfaction of MEPA. The Bank Guarantee can be called on demand in part or in full and the original amount must be topped up at all times.

19. On completion of the film, the **bank guarantee shall be released** to the applicant, provided that all conditions listed in this permit are satisfied. Forfeiture of the bank guarantee does not preclude applicant from the obligation to comply fully with the permit as approved, whilst if necessary the Enforcement Unit will use all its powers to ensure compliance.

20. **Applicant/production agency is to inform MEPA at least two (2) weeks prior of commencement** of works for monitoring by MEPA officers at expense of applicant.

21. MEPA shall reserve the right for its monitors to ensure the safeguarding of the natural, ecological and cultural heritage assets and to act as a liaison between the film producers and MEPA. The **monitoring service shall be at the expense of the applicant** at €23.29 per hour, VAT included, (plus overtime rate at 1.5 times on weekdays, or twice at weekends and public holidays if required), and travelling time and expenses to and from MEPA office to sites in the case of work in Gozo. Any failure of payment of monitoring fees and expenses and other charges will be deducted from the bank guarantee.

22. **Monitoring of sites** is at the discretion of MEPA's monitors who are to be provided with passes by applicant, similar to those issued to filming crews, for all the filming sites prior to commencement of the filming that will allow free movement on sites and cover the period from commencement until completion of all works according to this permit. MEPA monitors are to be freely allowed to take photographs as part of the monitoring process. Should during filming or work connected to the filming production in Comino or Gozo, the return passage to Malta is not possible due to bad weather, monitor/s shall be hosted like the rest of the filming crew at the applicant's expense. The applicant is to provide insurance coverage for MEPA inspectors/monitors, while on set/filming location and during travelling to and from these locations.

#### ***Site specific conditions***

23. No activities and/or interventions of any form are permitted within designated Level 1 Areas of Ecological Importance and/or Sites of Scientific Importance. In this regard, it is necessary that any activities are set back from the highest level of protection. At *Dwejra*, permitted activities within "Area 1" shall be confined to a spatial extent of 750m<sup>2</sup>, whereas in "Area 2" the permitted activities shall be confined to an area of not more than 400m<sup>2</sup>.

24. Surfacing and dressing of sites within *Dwejra* and *Rdum id-Delli*, other to the levelled rock surface at *id-Dwejra*, is prohibited. The use of lighting, especially at *Rdum id-Delli* and *id-Dwejra* should be directed to the ground,

when it is coming from a high up source such as a cherry picker, scaffolding or poles. Shades should be used to direct light and avoid light being aimed at the sky and/or open sea. Other to the application of these conditions for the use of lighting during preparations, filming and reinstatement works, they are also applicable for when the site is guarded at night. Any use of flares and up-lighters are prohibited.

25. The application of latex and painting in red of the masonry gate and armoured door of **Fort Ricasoli** as proposed by the applicant in the application for filming is not acceptable and thus is not covered by this consent. Only the works approved in MEPA's Conservation Architect's report dated 1st September 2010 may be carried out on the masonry gate, the armoured door and vaulted entrance of **Fort Ricasoli**. The application of latex must thus be restricted to: a) sections of graffiti on the lower levels of the braided columns, pedestal and adjacent walls and painted in stone colour finish, b) the painting of approved cement rendered patches within the main gate, and c) the approved temporary cladding on the main gate. These interventions must be carried out under supervision and direction of the MEPA monitor. Any alternative works should be communicated to MEPA in a timely manner and may only be carried out under monitoring as conditioned in this permit on formal approval by MEPA.

26. Consent is also given for the enlargement on the outer modern masonry wall at casemated vault referred to as Room 5 at **Fort Ricasoli**, as indicated in the front elevation submitted by applicant and dated 31st August 2010."

#### *3.4. Observations on the Conditions Attached to the Development Permission*

The Reviewing Board is of the view that the above conditions are clear and are set out in the development permission with the specific aim of ensuring the protection of the natural environment at Dwejra. General conditions 1, 2, 4, 5, 11, 15, 17, 18, 19, 20, 21, 22 and site specific conditions 23 and 24 appear to be sufficient to cover the environmental protection of the site at Dwejra.

For instance Condition 24 prohibits the surfacing and dressing of sites within Dwejra except for those areas where the rock surface is level. From a reading of this condition it results that, as requested in the development permission application, the applicant was given development permission in one site at Dwejra to cover the site where the rock was level with 'sand or shingle' only after the same applicant would have laid impermeable sheating under the said sand or shingle. Furthermore condition 11 establishes that MEPA's written consent was required before any changes to the development as approved and required by MEPA could take place and condition 20 clearly stipulates that the applicant had to inform MEPA at least two weeks before the work would commence. MEPA did receive notice of the intended date of sand laying but this was received too near the actual day of sand laying such that when MEPA officers went on site the sand had already been laid.



Whether any damage has been sustained to the rock surface at Dwejra – bearing in mind also the mechanical equipment used – is not for this reviewing board to establish: this can only be ascertained through a technical evaluation. Such technical evaluation is taking place and Dr. Louis Cassar is heading the team of experts responsible therefor. Apart from potential damage to the rock surface, it should also be established whether any further damage has been occasioned to the habitat and ecosystem where the sand was deposited and whether any damage was sustained to the surface level, the habitat and ecosystem during reinstatement works (whether mechanically or manually carried out), whether any damage occurred to the rock pools and ecosystems therein as well as to the marine conservation area and its ecosystem.

The conditions of the permit imposed for the filming at Dwejra as a Natura 2000 site should aim at fulfilling the obligations imposed by article 6 of the Habitats Directive 92/43/EEC, which specifically addresses the management of such sites. The Habitats Directive is transposed into Maltese law via LN 311/2006, The Flora, Fauna and Natural Habitats Protection Regulations.

The Habitats directive in article 6 (3) refers to activities in Natura 2000 sites and provides:

*“3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to **appropriate assessment**<sup>2</sup> of its implications for the site in view of the site's conservation objectives.”*

The terms of reference of this reviewing committee require it to enter into the merits of how to interpret this provision not to assess whether MEPA has fulfilled the obligations imposed by this article 6 (3) of the Directive or not, but in order to identify how such activities in Natura 2000 sites should be best regulated in the future. This reviewing committee is of the opinion that an appropriate assessment does not necessarily mean that an EIA is required since the Habitats directive does NOT specifically refer to an EIA in accordance with the Directive 85/337 but that an assessment suffices as long as it is **appropriate**. Nevertheless the link between the EIA directive and the Habitats directive does emerge since the EIA directive the latter provides for an appropriate assessment according to the same criteria. Whilst it appears that an appropriate assessment would be best carried out in accordance with the EIA Directive, this may not be the best and most practical option for one off activities such as filming activities.

The wording of the article 6 (3) also implies that such an “*appropriate assessment*” is mandatory if “*it is likely to have significant effect*” on the Natura 2000 site. Therefore the assessment becomes mandatory if there is the likely hood that such an activity would have a significant effect on the Natura 2000 site. The provisions of article 6 (3) may therefore not apply only if such an appropriate assessment has already been carried out

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<sup>2</sup> Emphasis added

because the competent authority has the necessary information due to previous studies and/or because it considers that the activity on the Natura 2000 site would not lead to having a "significant effect", even due to appropriate monitoring and permitting conditions once the conditions it imposed were to be followed.

Article 6 (3) also continues to say that, *"in the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public<sup>3</sup>."*

This provision does not make public consultation mandatory but in the spirit of the Aarhus Convention to which Malta is a Party, it is recommendable albeit in an expeditious form than that normally applied for the EIA process given the nature of this activity as a one off activity.

This line of interpretation regarding these three salient conditions appears to be the same as that suggested by the EU Guidelines to the Implementation of Article 6 of the Habitats Directive<sup>4</sup> which aim to assist the competent authorities of Member States to determine what is meant by an *"appropriate assessment"* and *"significant effect"*.

With respect to the meaning of *"appropriate assessment"*, the guidelines provide:

*"The European Court of Justice has emphasised that, in relation to the transposition of Directive 85/337/EEC<sup>5</sup> (and by implication its application), it is necessary to take into account sensitivity of location (see Annex I, point 9 of the Guidelines). For a project likely to have a significant effect on a site protected by Article 3, it will therefore often be appropriate to undertake an assessment that fulfils the requirements of Directive 85/337/EEC. Where an assessment for the purposes of Article 6(3) takes the form of an assessment under Directive 85/337/EEC, this will provide obvious assurances in terms of records and transparency. Where an assessment for the purposes of Article 6(3) does not take the form of an assessment under Directive 85/337/EEC, questions arise as to what may then be considered 'appropriate' in terms of form. In the first place, an assessment should be **recorded**. A corollary of the argument that the assessment should be recorded is the argument that it should be **reasoned**. Article 6(3) and (4) requires decision-makers to take decisions in the light of particular information relating to the environment. If the record of the assessment does not disclose the reasoned basis for the subsequent decision (i.e. if the record is a simple unreasoned positive or negative view of a plan or project), the assessment does not fulfil its purpose and cannot be considered 'appropriate'.*

*Finally, **timing** is also important. The assessment is a step preceding and providing a basis for other steps — in particular, an approval or refusal of a plan or project. The*

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<sup>3</sup> Emphasis added

<sup>4</sup> [http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision\\_of\\_art6\\_en.pdf](http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision_of_art6_en.pdf)

<sup>5</sup> The Environment Impact Assessment (EIA) Directive

*assessment should therefore be considered as only comprising what is in the record of the assessment pre-dating these further steps. Of course, where a plan or project undergoes redesign before a decision is taken on it, it is quite in order to revise the assessment as part of an iterative process. However, it should not be open to authorities to add retrospectively to an assessment once the succeeding step in the sequence of steps set out in Article 6(3) and (4) has been taken.”<sup>6</sup>*

With respect to the interpretation as to when an activity in a Natura 2000 site is likely to have “significant effects”, the guidelines provide:

*“Determining whether a plan or project is likely to have a significant effect will have practical and legal consequences. Therefore, when a plan or project is proposed, it is important that, firstly, this key issue is considered, and that, secondly, the consideration is capable of standing up to scientific and expert scrutiny. Proposals that are considered as not likely to have significant effects can be processed without reference to the succeeding steps of Article 6(3) and (4). However, Member States are advised that the reasons for reaching such a conclusion should be justified, and that it is good and prudent practice to record them.”<sup>7</sup>*

The Guidelines also explain how the competent authorities should determine whether a project is likely to have a significant effect and provide,

*“The notion of what is a ‘significant’ effect cannot be treated in an arbitrary way. In the first place, the directive uses the term in an objective context (i.e. it does not qualify it with discretionary formulae). In the second place, a consistency of approach to what is ‘significant’ is necessary to ensure that Natura 2000 functions as a coherent network. While there is a need for objectivity in interpreting the scope of the term ‘significant’, clearly such objectivity cannot be divorced from the specific features and environmental conditions of the protected site concerned by the plan or project. In this regard, the conservation objectives of a site as well as prior or baseline information about it can be very important in more precisely identifying conservation sensitivities. Some of this information will be present in the data that accompanies the site selection process under Article 4 of Directive 92/43/EEC (see Section 4.5.3). Member States may also have available detailed site conservation management plans which describe variations in sensitivity within a site. Against this background, it is clear that what may be significant in relation to one site may not be in relation to another.”<sup>8</sup>*

With respect to the need for seeking public opinion the guidelines establish that,

*“Directive 92/43/EEC does not indicate when it is appropriate to obtain the opinion of the general public. However, consultation of the public is an essential feature of*

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<sup>6</sup> See above link at footnote 4 Managing Natura 2000 Sites, Provisions of Article 6 of the Habitats Directive 92/43/EEC, pg 36.

<sup>7</sup> See above link, at footnote 4 Managing Natura 2000 Sites, Provisions of Article 6 of the Habitats Directive 92/43/EEC, pgs 33 and 34.

<sup>8</sup> As above

*Directive 85/337/EEC. Clearly therefore, where the assessment required by Article 6(3) takes the form of an assessment under Directive 85/337/EEC, public consultation is necessary. In this context, it is worth mentioning the possible longer-term implications of the Aarhus Convention, which emphasises the importance of public consultation in relation to environmental decision making.”<sup>9</sup>*

#### **4. Meetings Held**

In order to get a better picture of the situation, we met the MEPA Director of Environment Protection, the MEPA Director of Planning, the Film Commissioner, and two representatives of environmental organisations. Meetings were scheduled not in any order of priority but according to the availability of the persons interviewed. The persons we met were the following:

- 30 November 2010 - Ms. Louisa Bonello, Film Commissioner
- 1 December 2010 - Ms. Astrid Vella and Ms. Lesley Kreupel, *Flimkien ghall-Ambjent Ahjar*
- 2 December 2010 - Mr Vincent Attard, CEO Nature Trust
- 6 December 2010 - Mr. Martin Seychell, Director of Environmental Protection, MEPA
- 6 December 2010 - Mr Chris Borg, Director of Planning, MEPA

Once our terms of reference did not request us to determine whether there was any fault on MEPA’s part, we decided that we did not need to meet the applicant, the sub-contractor and MEPA employees involved in the processing, approval and subsequent monitoring of the development permission application under study as this would have been too much of a time consuming effort and would thus have delayed the presentation of our report.

##### *4.1. Views of the Environmental Organisations*

We meet representatives of two environmental organisations – *Flimkien ghall-Ambjent Ahjar* and Nature Trust – to discuss the implications of the Dwejra case and to seek their views on how to avoid a recurrence of this incident.

##### **4.1.1. Flimkien ghall-Ambjent Ahjar**

At no point were environmental organisations consulted by MEPA before the issue of the development permission authorising film shooting at Dwejra and the other 6 sites where film-shooting took place. *Flimkien ghall-Ambjent Ahjar* (FAA) are of the view that it should be mandatory that environmental NGOs are consulted with regard to development in environmentally sensitive areas, especially in Natura 2000 sites such as that of Dwejra.

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<sup>9</sup> See above link at foot note 4 Managing Natura 2000 Sites, Provisions of Article 6 of the Habitats Directive 92/43/EEC, pgs 39

FAA estimates that between 45 to 50 heavy trucks were used to transport the sand to Dwejra. A bulldozer was also used as well as the largest crane in Gozo was commissioned for the overhead lighting. The use of all such vehicles and equipment in a Natura 2000 site should have been prohibited as their weight could have contributed to damaging the geological formation at Dwejra. The heavy machinery could have indeed contributed to the shattering of the rock surface because of its load bearing. The heavy trucks transported the sand to Dwejra whilst the bulldozer was originally used to remove the sand before it was ordered to stop from doing so and the works continued manually. The sand was dumped twice as the first time this happened it was washed away. When finished, it was higher than 1 metre. In the past, divers were not allowed to access the site and park their private vehicles on the rock surface. Now the heavy machinery was instead allowed to have access to Dwejra and it was placed on the protected rock surface. The rock pools all ended covered with sand.

FAA held that the development permission had so much conditions inserted in it that it was difficult to monitor it and that it was doomed to fail in safeguarding a Natura 2000 site. The plastic used was not strong impermeable plastic and therefore could not achieve the purpose intended. There was no MEPA officer who was on site overseeing and directing the development works, both when the sand was being laid and removed. It was only after the alarm bells were rung that a MEPA officer was present at site, after the damage had already been caused. Nor was an environmental impact assessment carried out. MEPA should have been more vigilant because there had already been two similar cases in the past. In one case, at Comino – another Natura 2000 site – a road was carved on the natural terrain.

FAA maintain that the Local Council in question had a role to play in the protection of the Natura 2000 site at Dwejra. The San Lawrenz Local Council did not intervene or sound the alarm bells to stop the illegalities taking place at Dwejra.

FAA is of the view that the protection of the environment should always precede economic gain. The fossils took millions of years to form and thus it is not possible to redo all this. FAA holds that there is only one site in Malta which is scheduled for its geological importance and that such sites should increase. For instance, Fomm ir-Rih is a possible candidate for scheduling on geological grounds.

FAA is of the view that the conditions to be imposed in a development permission in a Natura 2000 site should form the object of consultation with environmental NGOs. A very short period of say 10 working days should be given to environmental organisations to submit their views on the draft development permission before it is issued. One must remember that MEPA has missing area of expertise and that environmental NGOs can fill in this gap. Environmental NGOs can also assist MEPA in drawing up and, from time to time, revising guidelines on outside activities at Natura 2000 sites and other sites which form part of the patrimony of the Maltese islands.

FAA argues that foreign filming producers come and go but the local filming producers need to be more responsible and brought into the loop. Developers who have a track record of infringing development permissions should not be granted new development permissions. If this rule were to be adopted, then no local production company would want to lose the possibility to obtain new development permissions as it would be automatically forfeiting the livelihood of its employees. Even the Superintendent of the Cultural Heritage needs to be involved in so far as the protection of the cultural heritage is concerned.

There should be a better line of communication between environmental NGOs and the MEPA. The monthly meetings which were agreed to be held between MEPA and NGOs are not materialising mainly because of MEPA inaction. And this when the Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in the Environmental Matters 1998 obliges Malta to give support to NGOs. FAA have been awaiting for the last two years for Government to provide it with a government officer to assist it in its work. Government has too much to gain by making use of the services provided free of charge by environmental NGOs. More synergy is thus required.

#### 4.1.2. Nature Trust

We also meet the Chief Executive Officer of Nature Trust who told us that an Action Plan had been approved for Dwejra and that a Management Plan had to follow to implement the Action Plan together with the relevant legislation. The Action Plan was approved in December 2005 but there did not seem to be any sight yet of the Management Plan and the required Legal Notices. If no legal framework is adopted, it would be difficult to implement the Management Plan.

MEPA does not want to act piecemeal. Its holistic approach however means that damage will continue to take place until the Management Plan and Legal Framework are up and running by 2014. The precautionary principle however dictates otherwise. In the meantime, not much can be done. Provisional measures should be taken until then. A staggered and incremental approach is more sensible in these cases as it will halt some abuse and degradation. For instance, if a site manager is appointed, that would be a move in the right direction. Then other measures will follow.

Although MEPA is responsible for Dwejra, there is no site manager there. Were a site manager appointed at Dwejra, s/he would have sounded the alarm bells when the sand was to be laid. Nature Trust has been managing quite a number of sites and is willing to assist Government to manage other sites as well. Nature Trust is also willing to provide feedback on any consultations MEPA might make on the Management Plan and the relevant legal framework.

#### 4.2. *Views of the Film Commissioner*

Malta is marketed as a film-shooting location for foreign filming. When these companies film in the Maltese Islands, they bring with them important economic benefits. Malta is put on the film-marketing map. Government is very much supportive of the filming industry to such extent that it provides financial incentives to foreign filming companies to attract this form of business to Malta. Since 2007 there has been active shooting taking place every day of the year except for the few months in 2009 due to the financial crisis.

The Film Commissioner is not consulted by MEPA when it processes development permission applications for film shooting purposes but normally the Commissioner is the contact person of the filming industry in Malta. The Film Commissioner has been in touch with MEPA to try and fast track film-shooting applications. MEPA does not have a Film Desk Officer who deals specifically with film-shooting applications and who can serve as a contact point for the film industry.

The Film Commissioner considers the development permission issued by MEPA to Pellikola Limited be too generic as it covers various sites at one go. Conditions need to be streamlined better per filming site.

In the relevant development permission MEPA imposed a planning obligation of €7,000 as well as a daily monitoring fee upon the filming industry. It could be that if the application form is more detailed, the monitoring costs can be cut down. Moreover, it always helps if the monitor assigned should be knowledgeable of the practices of the film industry.<sup>10</sup> The planning obligation is considered to be on the high side.

#### *4.3. Views of MEPA Directors*

Both the Director of Planning and the Director for Environment Protection thought that MEPA was exercising a dual role: it had to safeguard the integrity of Natura 2000 sites but at the same time it is called upon to give its consent or otherwise to activities taking place at these sites. They thought that MEPA should move out of the first function and that such function should be carried out by a Management Committee independent from the MEPA so that it could regulate such Committee from a distance without having such a dual role. They also pointed out that MEPA has given its consent for various film shooting in the past with no difficulties being encountered. They observed that currently multiple permits were required for film shooting and could not understand why there was the need of such permits when the procedure could be better streamlined.

#### *4.4. Other Views*

The reviewing board has taken note of various articles published in the local newspapers on the Dwejra case. One such opinion is that voiced in an article entitled 'Talking Point – Dwejra: Gone with the wind' written by Mr. Alfred E. Baldacchino which sets out what type of damage might have been caused on site. Mr. Baldacchino has served as an

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<sup>10</sup> See also: Luisa Bonello, 'Talking Point – Why the cameras roll in Malta', *The Times of Malta*, 23 November 2010.

Assistant Director at MEPA's Environment Protection Directorate.<sup>11</sup> In his article Mr. Baldacchino states that:

'A substantial area of the rocky coast was covered with crushed construction waste of hardstone aggregate, rich in lime which kills micro-organisms with disastrous effects ... Sedentary species present in the area covered by the plastic mesh had heavy weight dumped on them, trampled upon when the sand was laid and again when it was removed. Furthermore, the left over quarry limestone sand which passed through the mesh will continue to impact the habitat until this disappears. The brushing up process carried out to "clean" the Natura 2000 site also has a negative impact and may damage biota, sweep it up with the sand or will sweep up naturally occurring sediment as well, thus changing the habitat characteristics. Species included in the Species Data Form forwarded by MEPA to the EU when Dwejra was proposed as a special area of conservation includes plants, lichens and small crevice-dwelling invertebrates. The area harbours two endemic woodlice, an endemic pseudoscorpion and also endemic snails, not excluding other species, such as insects.'

Another relevant opinion is that of Mr. Peter Gatt.<sup>12</sup> Mr. Gatt writes that:

'The rocky surface now soiled by quarry "sand" not only hosts a bed of the Oligocene sea urchin *Scutella* but also several metres of rock densely strewn with trace fossils that consist of a reticule network of burrows made by soft-bodied animals when the rock was still an ooze on the seabed some 20 million years ago. The trace fossils show evidence of tiering and succession to more oxygenated environments that reflect a temporary drop in sea level. The area covered by the "sand" is one of the few places in the Maltese islands where such trace fossils are exceptionally well preserved and conveniently exposed along a wide wave-cut platform.'

Journalist Mr. Ivan Camilleri states that MEPA has not yet submitted a management plan in terms of the EU Habitats Directive for Dwejra under the Natura 2000 network even if, it has to be admitted that according to EU rules, Malta has until 2014 to do so.<sup>13</sup>

## **5. Analysis of the Terms of Reference of the Reviewing Board**

An analysis of the terms of reference of this review indicates the following:

- that it is not within the scope of this review to investigate the events taking place in the other 6 sites (other than the Dwejra site) referred to in the application/development permission that in so far as the Dwejra site is concerned,

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<sup>11</sup> *The Times of Malta*, 13 November 2010.

<sup>12</sup> 'Much more than bare rock', *The Times of Malta*, 27 November 2010.

<sup>13</sup> *The Times of Malta*, 24 November 2010.



it is not within the scope of this review to establish whether MEPA was at fault (or otherwise) in dealing with the Dwejra case

- that this review has not been entrusted with establishing whether environmental damage has occurred (or otherwise) at the Dwejra site during or after shooting of the series in question – this forms the merit of another study
- This review is to recommend with the benefit of hindsight, measures that should be adopted, which aim to ensure that sensitive sites, which include Natura 2000 sites and other cultural and natural heritage sites are given utmost protection in view of their patrimonial value.

## **6. Findings**

6.1. The application can be considered as a development permission application delegated to the Director of Planning in terms of the Instrument of Delegation which he had to decide upon. The Instrument of Delegation enables MEPA to delegate its decision making powers to the Environment and Planning Commission and to the Director of Planning. The latter had consulted the Director for Environment Protection when processing the film company's request. The question which, nevertheless, should be asked is whether such type of applications should, as a matter of procedure, be decided by the Director of Planning or by higher authority such as the Environment and Planning Commission, especially in those cases where film shooting takes place at sensitive environmental sites (as opposed to film shooting at insensitive environmental sites or in the case of minor shoots at environmentally sensitive sites). This is a matter which MEPA should consider although we do provide our views on this point below.

6.2. By and large the conditions imposed in the development permission were satisfactory. Indeed, the permission did allow sand laying on the surface level at one indicated area at Dwejra even though condition 11 and 20 were not respected when this laying took place. Whilst we do appreciate that it is not possible for MEPA enforcement officers to be always present when development, even if lawfully sanctioned, is carried out, MEPA can be assisted in its enforcement monitoring duties through a condition in the development permission which requires a designate representative of the film company to be personally responsible for any breaches of the law. Furthermore MEPA charges separately for monitoring as we have noted in the permit conditions. It is therefore in a position to farm out monitoring if it does not have the human resources itself. If the Management Plan is in place there could be 24/7 monitoring for all activities but in the meantime it could ask NGOs/other entities to coordinate monitoring on site. In turn NGOs can appoint the experts that are particularly suited for each activity and thus provide the appropriate monitoring. The continuous presence of a site manager should prevent any operations in such sensitive sites that may be carried out without MEPA's consent or which are in conflict with any conditions imposed in the development permit imposed by the Authority.. Below we suggest how environmental NGOs can be empowered to assist in the safeguarding of the natural and cultural environment and the landscape.

6.3. Our brief was to come up with concrete proposals to avoid such a recurrence in the future. What we have concluded is the following:

- (a) that there is room for improvement in the current licensing and enforcement set up with regard to the processing of development permission applications relating to the film industry;
- (b) such applications should still continue to be fast tracked bearing in mind the financial benefits such type of development brings to Malta whilst however at the same time ensuring that no environmental damage is suffered by the Maltese environment, in particular, scheduled property and Natura 2000 sites. Hence a balance should be reached between Malta's economic benefits whilst at the same time safeguarding the cultural and natural patrimony of the Maltese Islands in the interest of present and future generations. Nevertheless, it must be pointed out that not all sites in the Maltese archipelago merit the same environmental protection. Hence there are environmentally sensitive sites and environmentally insensitive sites and the nature of the development at environmental sensitive sites vary from cases of minor film shooting to more environmental intrusive filming techniques. From a regulatory point of view a distinction should be drawn between 'sensitive environmental development' and 'insensitive environmental development'. By insensitive environmental development we mean that type of development which, when carried out, does not bring about any environmental damage such as when the development takes place in a film studio (e.g. within the television studios at PBS Ltd. or outside in a water tank filming facility). It could also include filming at other developed sites which are not scheduled sites or Natura 2000 sites such as filming at the airport, port or freeport. Moreover, it could also include those cases where no construction of, or alteration to, a site is required such as filming on roads, bridges, etc. where no set or props need be constructed even though such filming might take place at environmentally sensitive sites.

## 7. Proposals

### 7.1. *Development at Insensitive Environmental Sites*

In so far as film shooting at **insensitive environmental development** is concerned, MEPA could retain the current arrangement whereby it is the Director of Planning – as a delegate of the Authority – who continues to issue such development permissions. This will ensure a faster processing period and will continue to meet the aims of economic well-being and safeguarding of the cultural and environmental patrimony. On the other hand:-

- (1) If the Director of Planning disagrees with the development application, he should refuse the application as per current standard law and procedure.

(2) If the Director of Planning agrees to issue the development permission, before doing so, he should always consult the Director of Environment Protection and seek as well the advice of the Heritage Advisory Committee before taking any decision.

(3) Should these two internal consultees agree with the development proposal, the Director of Planning should issue the development permission; should one of the internal consultees object to the grant of the development permission, then it should be the Environment and Planning Commission that should decide the application.

(4) A bond should be imposed for each development permission. Different amounts should be established by MEPA with regard to insensitive sites (e.g. filming in a water tank, filming in a public place, etc.). Again, even within these categories different amounts should apply depending on the circumstances of each case.

(5) This procedure would require an amendment in the Instrument of Delegation.

This procedure can continue to apply also to film shooting at sensitive environmental development in the case of minor shoots where:

- There is a limited number of vehicles (five or less) used
- No sets, props or major equipment is required
- No alteration to the surface level, facilities, furniture, signs, environment characteristics, etc. takes place
- Ten or less persons are present on such site
- Use is made of hand held photographic equipment, including a tripod
- There is no requirement of any monitoring or very minimal monitoring is required by MEPA.

## 7.2. *Development at Sensitive Environmental Sites*

In so far as film shooting at **sensitive environmental development** is concerned, then a different procedure than the current one should be adopted, as follows:-

(1) The decision making body should be the Environment and Planning Commission and not the Director of Planning .

(2) In view of the benefit that such type of applications bring to the Maltese economy, they should also be fast tracked and a decision taken by the Environment and Planning Commission within five working days from when the development permission application report (DPAR) is submitted to the same Commission.

(3) The DPAR should be endorsed in writing by both the Director of Planning and the Director for Environment Protection in the case of a recommendation to grant the development permission for film shooting.

(4) As the sites in question are critical sites and require full protection, it is being proposed that when development takes place (both prior to the building of the film's set or placing of props and any other lawful intervention which might need to take place at the filming site as well as when the film's set is dismantled and the props are removed) a designated representative should be appointed by the local filming company to ensure compliance with the provisions of the permission and, should there be a difficulty as to the interpretation of any condition in the permission, through the application of the precautionary principle, the designate representative should not proceed further with the implementation of the development until s/he has obtained from MEPA the required clarifications. Such interpretation shall be given by the Chairman of the Environment and Planning Commission which issued the development permission (or in his absence a Member of that Commission) within two working days (one must keep in mind that the Chairmen of the Environment and Planning Commission will be full-timers).

(5) A bond should be imposed which reflects the cultural and natural significance and value of the site. Different amounts should be considered which regard to sensitive sites (filming in a Natura 2000 site or in a UCA or scheduled property). Again, even within these categories different amounts should apply depending on the circumstances of each case.

(6) In addition to the designated representative, the MEPA Enforcement Unit should inspect the development at regular intervals when development is taking place, both when the set is being erected and when it is being dismantled and to ensure that both the set and props are free standing. The developer should continue to bear all reasonable regular inspection costs.

(7) All these proposals should be factored in the MEPA permission.

(8) MEPA should draw up a list of sites which are considered sensitive and map them out so that when a development permission is applied for on those sites, the Case Officer and the Environment and Planning Commission would be aware of such constraints. The constraints maps should thus be updated accordingly. This information should be given to the Film Commissioner, environment NGOs, the Film Commissioner and local film production houses.

(9) MEPA should establish before hand the appropriate amount which should be attached to a bond and such amount should be categorised depending on the type of the sensitivity of the environment e.g. Grade 1, 2 and 3 for buildings and a similar grading system should be adopted for the natural environment and the landscape, if this is not already in place. Once again this information should be provided to environment NGOs, the Film Commissioner and the local film production houses.

An alternative procedure to the above – but which requires the active co-operation of the Film Commissioner – is for MEPA to grant development permission to the Film Commissioner for film shooting purposes in pre-identified sites with the said Commissioner giving a concession to local film companies to shoot at these pre-

identified sites. MEPA will draw up a data sheet for each site, following consultation with the Film Commissioner and environmental NGOs, which will contain the general and special conditions for each site in the Maltese islands where filming can take place. As a matter of fact there are not more than a dozen or so of these sites which are frequently resorted to for filming purposes. The film producer will apply to the Film Commission to obtain such a concession and the Film Commissioner will provide the producer with a copy of the said data sheet and other MEPA requirements which would need to be observed. This will ensure that there is no need for the producer to apply directly to MEPA if s/he is just simply going to fall in line with the standard requirements set out in the data sheets (should this not be the case, then a fully fledged application would be required).

This procedure will speed up the whole application process, reduce costs and ensure that there is a one stop shop. The Film Commissioner might have to boost administrative capacity by employing one person to process such applications, be the contact person with MEPA and be also trained by MEPA as to what s/he has to look out for. Such an officer can then be tasked with supervising film shooting at sensitive environmental sites. The Film Commissioner can levy the planning obligation and bank guarantee on behalf of the MEPA. This procedure is already in place with regard to applications for aquaculture where MEPA has granted development permission to the Department of Fisheries in terms of pre-established rules and the latter Department provides concessions to third parties in terms of such rules. Furthermore, if this option is adopted, one has to see why, for instance, local councils should levy a fee for film-shooting activities. Better regulation requires a one stop shop approach.

### *7.3. Involving Environmental NGOs in Safeguarding the Cultural and Natural Patrimony*

MEPA can still be effective in its enforcement machinery by involving environmental NGOs to assist it in its enforcement duties. Such action can take place not only through consistent vigilance carried out through its enforcement officers but also with the collaboration of environmental non-governmental organisations who can act as the Authority's eyes and ears. Indeed, environmental non-governmental organisations should have a direct link with a MEPA key officer who can be contacted when environmental NGOs become aware of any infringements of the law so that MEPA can forthwith initiate the necessary action. The Enforcement Director could well be such official. This special *rapport* between MEPA and NGOs is of direct benefit to both organisations to ensure that environmental legislation is promptly enforced. A contact person should thus be appointed by MEPA for this purpose to liaise with environmental NGOs. Indeed, at times, NGOs might be aware of environmental law infringements before MEPA personnel are. Thus mutual co-operation between MEPA and NGOs is of direct benefit to both organisations in achieving their aims to safeguard the natural and historic patrimony. For instance, *The Times of Malta* reported that the Gaia Foundation, when allowing the shooting of numerous films at Ramla Bay and Ghajn Tuffieha Bay, 'its rangers were always present to monitor activities from beginning to end.'<sup>14</sup> MEPA can indeed contract

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<sup>14</sup> *The Times of Malta*, 19 November 2010.

out these monitoring services to environmental NGOs with such expenses being covered in the development application process as is the case in condition 21 of the development permission. This will empower environmental NGOs to assist in the protection of the natural and historic patrimony whilst democratising further the development planning process.

For this to be achieved, it is necessary that the NGO sector is organised. In this respect, it is being proposed that Parliament should enact a law to make provision for the establishment of a voluntary environmental service. The role of the voluntary sector should be expressly recognised by law. Its functions should include -

- promoting and disseminating information on environmental matters, with particular reference to environmental legislation, and performing duties of protecting the environment;
- monitoring infringements of environmental legislation and assisting in the enforcement of such legislation;
- carrying out such duties as the MEPA may assign to it;
- at the request of MEPA, intervening in any environmental emergency or disaster.

The State cannot govern by itself. In a liberal democracy the government should involve the citizenry in the day-to-day governance of the State. In so far as the environmental sector is concerned, sustainable development has to be achieved by the participation of all actors involved. Environmental voluntary NGOs have a seminal role to play in the protection of the environment and the State should encourage a participatory democracy through the empowerment of the voluntary sector to achieve the commonly shared aims which the State and NGOs have in so far as the environment is concerned, with a view of achieving sustainable development. Such mutual aim can be achieved through the enactment of a law establishing on a sound footing a voluntary environmental service.

#### *7.4. Insertion of new conditions in a development permission related to film-shooting*

Although the conditions imposed in the development permission under consideration are considered, by and large, to have been adequate and sufficient to regulate the development taking place in the film shooting in question, now, with the benefit of hindsight, and to better assist the developer in such cases, it is being proposed that MEPA should consider the adoption of all of the following new conditions to be attached to a development permission related to film shooting:

(1) *Submission of a Method Statement:* A method statement should be submitted by the applicant for development permission in those cases where any surface level changes are going to take place at environmentally sensitive areas and the said development should not take place after the method statement is approved with or without amendments by MEPA. A separate fee shall apply for the processing of, and approval by, the Environment and Planning Commission of such method statement. The method statement

is intended to supplement the information given in the application and MEPA's consent will be given in terms of condition 11 in the development permission under consideration.

(2) *Filming Schedule*: The applicant should abide by the dates in the application for film shooting. Should the applicant need to change such dates, s/he should provide an updated filming schedule (setting out the date, time, location and activity) for approval by the Environment and Planning Commission.

(3) *Environmental Damage Caused During and After the Shooting*: The applicant should be required by an express provision in the development permission to report to the Director, Enforcement Directorate, any damage caused to the environment where film shooting takes place. Such report should reach the said Director not later than one day from the occurrence of the environmental damage. The Director, Enforcement Directorate, depending on the gravity of the case, should be empowered to give directions to the applicant to take remedial actions within a specified period of time.

(4) *Applicant's Designated Representative*: The applicant film company should appoint one legally designated representation who should be responsible for all film company activities applied for. The Designated Representative should:

- Be present at the film shooting site during all filming activity
- Provide the MEPA with a 24 hour contact number
- Be responsible to ensure the applicant film company staff and contractors are informed of and abide by applicable primary laws, subsidiary laws, plans, policies, conditions and guidelines relevant to film shooting
- Be responsible for ensuring that no filming activities beyond what has been approved in the development permission is undertaken without prior approval from the Environment and Planning Commission
- Be responsible for carrying out all instructions and orders, whether verbal or written, received from any officer, employee, delegate or sub-contractor of the MEPA

(5) *Activities not covered in a Development Permission*: The following activities should be clearly indicated as being reserved matters, that is, not covered in a development permission related to film-shooting:

- Placing of artificial snow
- Crash scenes
- Helicopters/aeroplanes and other flying objects
- Introduction of foreign (non-native) plants or plant material or animals
- Filming at sea

All such activities may not be carried out unless covered by a separate approval. MEPA should draw up additional forms for requesting such further approvals. These forms

should be drawn up in consultation with the Film Commissioner, environmental NGOs and other relevant public authorities.

(6) *Signage*: Signage as approved by the MEPA should be used to inform the public that filming is under way.

#### *7.5. Wider Consultation Before Development Permission Approval in View of Government's Eco Gozo Vision*

Bearing in mind the ecological status of Dwejra, MEPA should consult with the Gozo Ministry in so far as the Eco Gozo vision is concerned with regard to development at Natura 2000 sites in Gozo.<sup>15</sup> Further consultation is required with environmental NGOs and with the public. This can take place both through the environmental impact assessment process or any other appropriate assessment and whilst processing the application by the Directorate of Planning. The Directorate for Environment Protection should be actively involved also during the processing of the development permission application when this concerns a Natura 2000 site, scheduled property (whether land, building, coastal or development at sea) or sites which are of natural or cultural significance.

#### *7.6. Management Plan*

Although it is correct to state that Malta has till the end of 2014 to draw up a Management Plan for Dwejra, the drawing up of this plan should be expedited to be in place by end 2012. There is indeed no harm if such plan were to be finalised before 2014. On the contrary, it would be to Malta's benefit at achieving sustainable development goals to have such plan approved and implemented by end of 2012.

#### *7.7. Increasing the Amount Stipulated in the Bank Guarantee for Film Shooting in Environmentally Sensitive Areas*

The amount of €15,000 by way of bank guarantee was on the low side especially if one considers that it was covering filming at seven distinct sites and that, at least at Dwejra, endemic species and exceptional geological features are found. This amount should be revised upwards depending on the outcome of the environmental assessment carried out before the development permission is issued. Where habitats, biodiversity and ecosystems are concerned, the amount should be excessively higher so that it is proportionate to the sensitivity and value of the heritage in question.

#### *7.8. Insurance Coverage*

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<sup>15</sup> Minister Giovanna Debono has stated that her Ministry was not consulted before the development permission was issued notwithstanding Government's Eco Gozo Vision. See *The Times of Malta*, 24 November 2010.



Although the covering letter attached to the development permission application states that the company has a 'public liability insurance of €5m to cover any occurrence', there is no condition in the development permission requiring the applicant to have an insurance coverage for any damage caused to the environment. Whilst the forfeiture of the bank guarantee can provide an administrative sanction, there is no requirement imposed on the applicant to issue an insurance policy to cover any environmental and civil liability which the film shooting might give rise to.

#### *7.9. Applying the Precautionary Principle: Issuing an Emergency Conservation Order for Dwejra and other Natura 2000 sites*

The precautionary principle should be applied by MEPA for the safeguarding of Natura 2000 sites and scheduled property. The MEPA should apply the precautionary principle with regard to Natura 2000 sites by ensuring that:

- (a) if such sites are not yet scheduled, an emergency conservation order is issued until the scheduling process is concluded;
- (b) in so far as Natura 2000 sites are concerned, a set of temporary regulations be drawn up, following consultation with environmental organisations, on the immediate protection of these sites until a Management Plan and the relevant legislative framework is adopted;
- (c) a site manager is appointed forthwith at Dwejra (and at other Natura 2000 sites where no site manager has been appointed).

#### *7.10. Appointment of a Film Shooting Board*

A Film Shooting Board should be established. It should be composed of the following:

- (a) the Chairman of MEPA as its Chairman
- (b) the Director of Planning
- (c) the Director for Environment Protection
- (d) the Enforcement Director
- (e) the Superintendent of Cultural Heritage
- (f) the Film Commissioner
- (g) the President of the Local Councils Association
- (h) two representatives of environmental NGOs.

The functions of this Board should be the following:

- (a) to discuss this report with a view to its implementation by Government and MEPA;
- (b) to approve general standard conditions which should be inserted in a development permission relating to the film industry;
- (c) to appoint one Case Officer to deal specifically with filming development permission applications. Such officer might need to be given appropriate training

- in filming. The Film Commissioner can assist in this process. Such Case Officer can be the contact person for both the film industry and environmental NGOs;
- (d) to appoint one Monitor within the Film Commissioner's office to process applications for concessions for film shooting at environmental sensitive sites and to ensure compliance by concessionaires with MEPA data sheets;
  - (e) to establish how environmental organisations can assist MEPA in the enforcement of development permission conditions relating to the film industry (environment NGOs might be sub-contracted by MEPA to act as Monitors);
  - (f) to train the environment NGO monitors and the MEPA Enforcement Officers/Environment Inspectors to ensure that they know what they have to look out for in the case of film shooting development;
  - (g) to appoint one Enforcement Officer and one Environment Inspector to monitor film shooting types of development and to provide relative training;
  - (h) until a one stop shop procedure is adopted, to ensure that local councils are made fully aware when film-shooting takes place in their locality and to establish how local councils can assist in the enforcement of the relative development permission;
  - (i) to ensure that before a development permission relating to development at an environmentally sensitive site, environmental NGOs are consulted on the same lines as external consultees of MEPA are, both when the application is filed and on the draft conditions to be imposed in a development permission. In such latter instance, environmental NGOs should provide their feedback within 10 working days from the date of receipt of the request for feedback on the said draft conditions;
  - (j) to revise guidelines on outside activities at Natura 2000 sites and other sites which form part of the patrimony of the Maltese islands;
  - (k) to discuss any other matters relevant to development permissions concerning the film industry with a view to expediting the processing and approval of such applications in full respect of the safeguarding of the environment;
  - (l) to study the above measures with a view to extending them, where feasible, to other one off activities such as discos, fun fares, etc.

#### *7.11. Curbing abuse through Amendments to the Law*

The Environment and Development Planning Act should be amended in the sense that any developer who has a track record of infringing development permissions or who carries out development illegally should not be granted new development permissions.

#### *7.12. Seeking Judicial Remedies for Environmental Damage*

Condition 19 in the development permission states that if the bank guarantee is forfeited, such action 'does not preclude applicant from the obligation to comply fully with the permit as approved, whilst if necessary the Enforcement Unit will use all its powers to ensure compliance.'

Perhaps this condition should spell out what further action MEPA can take, if it concludes that there has been a breach of development permission. This will serve to act as a further deterrent whilst making aware a contravenor of a development permission that the forfeiture of the bank guarantee is but the first of a series of steps intended to ensure the enforcement of the conditions in a development permission. Other steps which could follow include the institution of a law suit for civil damages, seeking a judicial remedy under the Environmental Liability Directive as well as the institution of criminal proceedings.

713. *Seeking a Remedy under Directive 2004/35/EC on Environmental Liability and Legal Notice 126 of 2008 on Prevention and Remedying of Environmental Damage Regulations, 2008.*

This report assesses to what extent can LN 126 of 2008 be applied to bring forward environmental liability claims for any damages to protected species and the natural habitats that have been caused in Dwejra due to the laying of sand in the area identified as a NATURA 2000 site.

#### 7.13.1. Introduction

Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage came into force on the 30<sup>th</sup> April, 2007. It is transposed into national legislation as LN 126 of 2008, the Prevention and Remedying of Environmental Damage Regulations. The Directive establishes a common framework for liability with a view to preventing and remedying damage to animals, plants, natural habitats and water resources and damage affecting the land. The Directive imposes a strict liability scheme with respect to specified occupational activities listed in Annex III, whilst for other activities liability arises where the operator is at fault or negligent. The public authorities are also responsible for ensuring that the operators responsible take or finance the necessary preventive or remedial measures themselves.

It applies to **environmental damage**, defined<sup>16</sup> as, “*damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status<sup>17</sup> of such habitats or species. The significance of such effects is to be assessed with reference to the baseline condition, taking account of the criteria set out in Schedule I to LN 126 of 2008*”. LN 126 of 2008 transposing *at litteram* the Directive specifies<sup>18</sup> that these Regulations shall apply to damages arising from activities listed in Schedule III and also to any, “*damage to protected species and natural habitats caused by any occupational activities other than those listed in Schedule III<sup>19</sup>*”. **The breach of environmental regulations that may**

<sup>16</sup> Regulation 3 of Legal Notice 126 of 2008.

<sup>17</sup> Article 3 also defines what is a “*favourable conservation status*”.

<sup>18</sup> Article 3 (1) (b) of the Directive 2004/35/EC and article 4 (1) (b) of LN 126 of 2008.

<sup>19</sup> Article 3 (1) (a) of Directive 2004/35/EC and article 4 (1) (a) of LN 126 of 2008. Annex III of the Directive transposed as Schedule III of LN 126 of 2008 provides an exclusive list a operators that are subject to strict liability if damages ensue from their activities these are: landfills, composting plants,

**have occurred in Dwejra would fall under the latter category of applicability.**

### 7.13.2. The Objective

Environmental liability is a form of liability that is **separate** and is **additional to** civil and criminal liability. Its purpose is to award damages for harm caused to the environment *per se*, and the fines paid would be used to reinstate the environment that has suffered such damages. This concept already existed under the Environment Protection Act, 2001 which stipulates that an action for environmental damages may be made whenever there is a breach of environmental law, that is, a breach of the Environment Protection Act 2001 or the regulations issued there under. It has however never been applied, basically because an action for environmental liability under current Maltese law can only be initiated **at the discretion of the Chairman of the Environment Fund** and the chairman has to this day never taken such an initiative. The environmental liability directive obligates member States to introduce proceedings for environmental damages, apart from the usual legal actions for civil damages and criminal punishment. If the operators do not take the necessary steps, the competent authority should intervene in their stead and **recover expenses from the operator apart from awarding the operator the environmental damages.**

### 7.13.3. The Obligations

The Directive and Legal Notice 126 of 2008 introduce various legal provisions that supersede the manner how, liability used to arise and environmental damages could be previously awarded under the Environment Protection Act 2001.

- An action for environmental damages **becomes mandatory** if the conditions established by the directive/LN 126 of 2008 occur. It no longer depends upon the discretion of the Chairman of the Environment Fund.
- Liability arises both as a remedial as well as a preventive measure. This means that under the Directive and the LN 126 of 2008, liability would arise even if there is an imminent threat that such environmental damage would occur. Previously under the Environment Protection Act 2001 the Chairman of the Fund could only initiate proceedings for environmental damages as a remedial action i.e. if the harm already resulted. If in the Dwejra case it is proved that environmental damage has occurred any liability action would be remedial.
- In the case of occupational activities listed in Annex III to the Directive, which cause or pose an imminent threat to cause environmental damage, **liability for environmental damages is strict**, as opposed to the system of liability based on tort /negligence for all other cases where liability is based on tort and or negligence. This however is not applicable to the Dwejra case.

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transfer stations, IPPC installations; shipyards; energy industries; power stations; large farms; laboratories and institutions dealing with GMOs.

- The Directive/LN 126 of 2008 shifts the onus of proof on the operator to prove he is not liable.
- The Directive and LN 126 of 2008 impose an obligation upon the competent authority to enter into third party property, to rectify or prevent the threat of imminent damage if the operator fails to do so, cannot be identified or is not required to do so under the directive.
- The Directive establishes that any legal or natural person as well as NGOs have the legal standing and may obligate the competent authority to institute an action for environmental damages<sup>20</sup>.

The Directive obliges operators of occupational activities to bear costs for preventive and remedial measures taken in accordance with the Directive. Such costs may be covered by financial guarantees before operator starts activity. This system however is not new for Malta as it is already applied in practice both under the Development Planning Act and under the Environment Protection Act as under both there is the *vires* to include it in the granting of licenses for various activities, which have an impact on the environment. There are instances where the operator is exempted from bearing costs, but the onus of proof to qualify for such an exemption is upon him. If he is exempted the competent authority must provide for measures whereby he can recover these costs. It appears that the costs exceed the financial guarantee imposed on the operator. The costs for clean up etc. are over and above the environmental damages incurred.

#### 7.13.4. The Scope

The Environment Protection Act establishes an action for environmental damages in case of a breach of the provisions of the said enactment and the regulations issued there under but such an action is at the discretion of the government who would instruct the Chairman of the Environment Fund to institute the action on its behalf. The Directive as afore mentioned, provides for a mandatory action for environmental damages albeit in seemingly more restricted circumstances. Environmental liability arises in the case of environmental damage and under the directive environmental damage means damage to:

- Protected Species and their Habitats as stipulated under the Birds and Habitats Directives. (Except where derogations have been granted under the Directive).
- Water Resources as stipulated under the Water Framework Directive.
- Land when creating a significant risk to adversely affect human health as a result of direct and indirect introduction in, on or under land of substances, preparations, organisms, micro-organisms.

The term 'damage' itself is defined as measureable adverse change in natural resources, measureable impairment of a natural resource service, which may occur directly or indirectly.

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<sup>20</sup> LN 126 of 2008, regulation 13.

Some of these circumstances namely, those listed in Annex III, which are considered to be high risk give rise to strict liability in all other cases liability is based on tort and negligence.

#### 7.13.5. The Competent Authority

The competent authority, which under LN 126 of 2008 is the Malta Environment and Planning Authority, has the following obligations:

- Upon the receipt of a request for action from a person/institution, which has a legal interest makes and it is to provide it with the necessary information and data that show there is a plausible reason to follow the request for action
- The competent authority is to inform operator accordingly and give him time to submit make his views known

The competent authority has to reach a decision based on these views but may waive the whole process and proceed with remedying/preventing damage in cases of emergency. In its decision the competent authority must:

- State grounds upon which decision was based
- Notify decision to operator
- Inform operator of available legal remedies under laws in force in member state
- Inform on time limits to which such remedies are subject

The competent authority shall:

- Act as Regulator to see to the fulfillment of the obligations under the Directive.
- Establish which operator has caused damage or threat<sup>21</sup>
- Assess Damage<sup>22</sup>
- Determine which remedial measures are to be taken in accordance with Annex II of the Directive<sup>23</sup>
- Require operator to provide information on imminent threat of environmental damage<sup>24</sup> and to take all the necessary preventive measures<sup>25</sup> and instruct him accordingly<sup>26</sup>

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<sup>21</sup> LN 126 of 2008, regulation 12 (1)(a).

<sup>22</sup> Ibid regulation 12(1)(b).

<sup>23</sup> Ibid regulation 8(2) and 12(1)(c).

<sup>24</sup> Ibid regulation 6 (3).

<sup>25</sup> Ibid regulation 6(3)(b).

<sup>26</sup> Ibid regulation 6(3)(c).

- Carry out necessary preventive and remedial measures itself if operator fails to do so, or cannot be found, or is exempt<sup>27</sup>
- Invite 3<sup>rd</sup> parties on whose land remedial measures will be taken to submit their observations<sup>28</sup>
- Enter into third party property if necessary to take action and prevent/remedy environmental damage.
- Recover costs via securities or other financial guarantees imposed upon the operator<sup>29</sup>

The operators have the following obligations:

- When there is an imminent threat of damage even if it has not occurred yet the operator should take preventive measures without delay<sup>30</sup> and inform the competent authority accordingly.
- To identify in accordance with schedule II potential remedial measures and submit them to the competent authority for approval<sup>31</sup>.
- To bear the costs for preventive and remedial measures taken pursuant to LN 126 of 2008<sup>32</sup>.

The Directive also establishes that the operator has the right to lodge an appeal against an action for damages. The member States may choose to establish an Appeals Board specifically for this Directive but may also consider going to arbitration or using an existing tribunal or appeals boards give this power to the law courts themselves.

#### 7.13.6. Conclusion

If it is established that environmental damages have occurred in Dwejra, it appears that MEPA has the legal standing and sufficient grounds to claim environmental damages under LN 126 of 2008. As the said Regulations do not establish a procedure how this may be done, it is understood that the provisions for claiming environmental damages under the Environment Protection Act 2001 may apply. This entails that the Chairman of the Environmental Fund would institute an action for environmental damages on behalf of the government as prescribed by article 24 reproduced hereunder:

*(1) Any person who causes damage to the environment, shall without prejudice to any other civil liability to make good any damages to any person or authority, be liable to pay to the Fund established under Part VIII of this Act, such sum, as may in the absence of agreement be fixed by the court*

<sup>27</sup> Ibid regulation 6(4) for preventive measures and regulation 7 for remedial measures.

<sup>28</sup> LN 126 of 2008, regulation 8(4).

<sup>29</sup> Ibid regulation 9(2).

<sup>30</sup> Ibid regulation 6(1)(2).

<sup>31</sup> Ibid regulation 8 (1).

<sup>32</sup> Ibid regulation 9 (1).

*arbitrio boni viri, to make good for the damage caused to environment and suffered by the community in general by the non-observance of any law or regulation by such person or by his negligence or wilful act or inability in his art or profession.*

*(2) An action on behalf of the Government in accordance with sub-article (1) hereof shall be instituted by the Chairman of the Fund, or by his delegate, as established under Part VIII of this Act, and shall be prescribed by the lapse of eight years.*

Another option to consider is the compromise penalty that provides an out of court settlement under article 26 of the Environment Protection Act 2001. This provision reads as follows:

*Where before criminal proceedings have been instituted in connection with any offence under this Act, the offender pays to the Fund established under Part VIII of this Act, such sum as may be agreed with the Authority, not being a sum higher than the fine to which the offence is liable, all such person's criminal liability with respect to that offence shall be extinguished:*

*Provided that the agreement to pay to the Fund a compromise penalty shall not extinguish any civil liability to make good any damages to any person or authority and any liability arising under article 24 (ie. environmental liability).*

Yours sincerely,



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