

**Dorota Richards**

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**Sent:** 30 November 2015 14:01  
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**From:** davidmalone12@gmail.com [mailto:davidmalone12@gmail.com] **On Behalf Of** David Malone  
**Sent:** 30 November 2015 13:23  
**To:** Wexford Receptionist  
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Can you please acknowledge that the Agency has received this submission concerning Donal Brady's license.

*David Malone*

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# Environmental Action Alliance-Ireland

Promoting Sustainable Development through a process of Democracy, Human Rights and the Rule of Law

## Environmental Action Alliance-Ireland

### Submission

## Environmental Protection Agency

### Re: Donal Brady's Integrated Emission License

License Reg: P0408-02

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## Introduction

Environmental Action Alliance-Ireland (EAA-1) was formed in 1990 as a Non- Governmental Environmental Organisation. Its fundamental objective is the promotion of sustainable development through a process of democracy, human rights and the rule of law. Since 1990 EAA-I has drafted and registered over 250 complaints with the European Commission concerning infringements of the EIA Directive. The Commission has taken Ireland to the European Court on five different occasions (Cases C-392/96; C-66/06; C-215/06; C-427/07 and C-50/09) for failing to fulfil its obligations under the EIA Directive.

One complaint concerned Donal Brady's intensive pig rearing installation at Ballyglasson, Edgeworthstown, County Longford. This was the subject of a Reasoned Opinion sent by the European Commission to the Irish authorities in 2005 concerning Case C-215/06. Although the pig development was unauthorised, Mr. Brady (without clean hands) was allowed to take High Court and Supreme Court cases against the Environmental Protection Agency (the Agency).

The Supreme Court requested a preliminary ruling from the European Court (Case C-113/12). The Court ruled that pig slurry is a waste, because it is not covered by any other legislation (Para 59). It also ruled that the Agency could not place strict conditions on Mr. Brady, in respect of the slurry, being generated by the farm as a secondary product, when selling it to other farmers for use as fertiliser. (Para 21).

However, as this submission will show if Longford County Council and the Agency were implementing the European Court of Justice (ECJ) judgement in case C-215/06 (*Commission v Ireland*), Mr. Brady would not be operating the pig development or selling slurry. This is because the intensive pig rearing installation and the waste activities taking place on the Ballyglasson site are both unauthorised developments. As a result, the license issued by the Agency is legally flawed.

In relation to ECJ Case C-50/09 (*Commission v Ireland*), EAA-I registered four separate complaints (2000/4002; 2000/4793; 2002/4311 and 2003/4203) concerning infringements of Articles 2 to 5 of the EIA Directive. In March 2014, the European Commission informed EAA-I, it had closed the four complaints on 30 May 2013, after Ireland put in place all the measures required to implement that judgment.

However, as this submission will show neither Longford County Council nor the Agency are implementing or enforcing the new legislation enacted into Irish law to implement the ECJ judgement. That they are both ignoring the rights of citizens to participate in the decision making process.

### **Failure to Implement CJEU judgement in Case C-215/06**

The pig rearing installation located at Ballyglasson, was included in the European Commission Reasoned Opinion in C-215/06, which related to two issues-

- (1) planning enforcement legislation and retention provision in relation to unauthorised projects, which require Environmental Impact Statements and Environmental Impact Assessment under the EIA Directive 85/337/EEC, as amended, and
- (2) alleged non-conformity with EIA Directive for the Derrybrien Wind Farm project

On 2<sup>nd</sup> June 2006, Mary Lane of Department of Environment Heritage and Local Government (DEHLG) sent Mr. Tim Caffrey, County Manager, Longford County Council a copy of the Reasoned Opinion for comments. Section 69 of the Reasoned Opinion raised the following concerns in relation to Donal Brady's pig-rearing installation:

*"In its additional Reasoned Opinion, the Commission referred to a large-scale pig rearing installation located at Ballyglasson, Edgeworthstown, County Longford, which was granted retention permission on 14 October 1994 (planning register reference number: 12485). A further planning application was approved by the local authority in 2005 for work at the same pig-rearing installation despite additional unauthorised development having occurred there after the original retention permission was granted.*

*In its response dated 8 March 2005 to the additional Reasoned Opinion (ANNEX 13), Ireland did not deny that further unauthorised development had occurred at the pig-rearing installation but argued that it was of an environmentally insignificant nature and that the installation in question "has been operated to high standards at all times."*

The Commission would point out that, even if the more recent unauthorised developments were to be considered environmentally insignificant, it illustrates the fact that, under the Irish legislation, it is possible for a developer to serially benefit from retention permission in respect of the same installation.

As regards Ireland's assertion that the pig-rearing installation has operated to high standards at all times, the Commission cannot understand how the development or expansion without prior authorisation of a large-scale pig-rearing installation can amount to operating "to high standards at all times." Moreover, the assertion is rebutted by a letter dated 14 March 2005 of Ireland's EPA, which is responsible for supervising the pig-rearing installation's operating licence (ANNEX 30). This shows that there has been serious non-compliance by the pig-rearing installation with the terms of its operating licence.

The ECJ judgement in C-215/06, rendered retention planning permissions granted for which an environmental impact assessment (EIA) was required unlawful and removed the provision in Irish planning legislation that facilitated such developments. To implement this judgement, Section 23(c) of the Planning and Development (Amendment) Act 2010 amended section 34(12) of the 2000 Act, to provide that a retention application cannot be accepted by a planning authority for a development which would have required environmental impact assessment (EIA).

However, the ECJ ruling did, allow EU Member States to provide for the regularisation of developments requiring EIA in exceptional circumstances. The nature of what entail exceptional circumstances is expanded upon in Section 177D(2) of the PDA, which lists seven relevant factors that an Bord Pleanála must consider in making its decision about an application lodged under Section 177C(2)(b).

These include:-

- whether the application is being used as a way of circumventing the purpose of the EIA or Habitats Directive;
- whether the applicant realistically could have been unaware that the development was unauthorised or has a history of non-compliance with previous permissions;
- whether public participation in the EIA/AA process still remains possible;
- the possible environmental effects of the development and whether such effects can be remediated.

As I previously stated the EPA submitted a letter dated 14 March 2005 to the European Commission, which shows that there has been serious non-compliance by the pig-rearing installation with the terms of its operating licence.

The applicant pig farm was cited in the Reasoned Opinion concerning C215/06. Accordingly, the applicant is fully aware that the pig development was unauthorised. The applicant is also fully aware of the unauthorised waste activities, which have taken place since the ruling in Case C-113/12. Paragraph 21 stated that Mr. Brady, the appellant in the main proceedings, is the owner of a pig farm in Ireland. Although his main activity centres on pig breeding, he also exploits the slurry generated by the farm as a secondary product, by selling it to other farmers for use as fertiliser. At paragraph 59, the Court ruled that pig slurry is a waste, because it is not covered by any other legislation.

Under Article 4(3) of the Treaty European Union (TEU), Member States are required to nullify the unlawful consequences of a breach of Community law. The competent authorities are therefore obliged to take the measures necessary to remedy a failure to carry out an environmental impact assessment, for example, the revocation or suspension of a consent already granted in order to carry out such an assessment, subject to the limits resulting from the procedural autonomy of the Member States.<sup>1</sup>

There was no environmental impact assessment in accordance with Article 3 of the EIA Directive carried out for any development consents granted to Donal Brady for the pig rearing installation at Ballyglasson, Edgeworthstown, County Longford. In addition, PL 94/12485; PL 98/547 and PL 04/1205 were all development consents granted for Retention of unauthorised developments.

<sup>1</sup> C-215/06, Commission v. Ireland, paragraphs 57 and 59.

Accordingly, the Agency must now inform DDS Brady Farms Ltd that it cannot process the license until it applies to An Bord Pleanála for substitute consent under Section 177B (of Part XA) of the Planning and Development Act 2000. A failure to do so would result in the Agency violating the judgment in C-215/06 and the legislation adopted by Ireland to implement the judgment.

The next section will show that the Agency is also failing to implement or enforce several other ECJ judgments by allowing Donal Brady to seriously infringe national and European law.

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### Failure to Implement the CJEU judgement in Case C-50/09

The CJEU in Case C-50/09, ruled that Ireland had failed to ensure that, where Irish planning authorities and the Environmental Protection Agency both have decision-making powers concerning a project, there will be complete fulfilment of the requirements of Articles 2 to 4 of the EIA Directive, as amended by the Public Participation Directive 2003/35/EC.

As previously stated EAA-I had four complaints registered with the European Commission, concerning the infringement of Articles 2 to 4 of the EIA Directive. The reply EAA-I received from the European Commission in March 2014, stated:

*"In order to implement the second ground of the judgment, in 2012 Ireland adopted legislative amendments to the Waste Management Act 1996, the Planning and Development Act 2000, the Environmental Protection Agency Act 1992. The relevant legislative acts are listed below.*

- *European Union (Environment Impact Assessment) (IPPC) Regulations 2012 (S.I. No. 282 of 2012)*
- *European Union (Environment Impact Assessment) (Waste) Regulations 2012 (S.I. No. 283 of 2012)*

*The new provisions now require that a planning application must precede an application for a licence with the Agency, that the Planning authorities and the Agency must cooperate in issuing development consent and that the Agency is required to carry out an environmental impact assessment (where required under the Directive) and to coordinate that with the local planning authority."*

This means that in a case where EIA is required, the Agency will not in the future consider such a licence application unless the development consent process, including EIA, has been concluded or at least, the application for the consent lodged with the planning authority/Board.

On 18<sup>th</sup> December 2014, the Agency wrote to Donal Brady, advising him that, in accordance with Section 87(1) (b) of the EPA Acts, that the Agency intends initiating a review his existing Industrial Emissions Licence, Register Number: P0408-01, for an installation located at Carrickboy Farms, Ballyglasson, Edgeworthstown, Co. Longford and advised that the "review is being initiated in accordance with the provisions of Section 90(4) (iv) of the EPA Acts in order to bring your licence into compliance with new legislation introduced since your existing licence was issued, including:

- *Protection of the Environment Act 2003;*
- *Directive 96/61/EC on Integrated Pollution Prevention and Control;*
- *Directive 2010/75/EU on Industrial Emissions (Integrated Pollution Prevention and Control);*
- *Regulation 1069/2009 on Animal By-Products;*
- *European Communities (Industrial Emissions) Regulations 2013 (SI 138 of 2013); and*
- *European Union (Good Agricultural Practice for Protection of Waters) Regulations 2014."*



However, the Agency failed to include the two regulations adopted to implement the judgement in C-50/09. In addition, the Agency is incorrect in stating that Mr. Brady has an existing Industrial Emissions Licence, Register Number: P0408-01. The Agency is presently processing the IE license for the pig development, but has excluded the waste activities. Donal Brady decided to take this opportunity to further intensify his unauthorised developments by submitting another planning application to erase condition 2 attached to permission previously granted under PL 04/1205 and PL 14.212342. This is the Retention permission that was part of the ECJ Case C-215/06.

The ECJ judgement in C-50/09, in paragraph 81 highlighted a defect in Irish legislation, which was that *"it is not inconceivable that the Agency, as the authority responsible for licensing a project as regards pollution aspects, may make its decision without an environmental impact assessment being carried out in accordance with Article 2 to 4 of Directive 85/337"*.

To remedy this defect Ireland had to make amendments to the Environmental Protection Agency Act, 1992, the Waste Management Act, 1996 and the Planning and Development Act, 2000. The amendments to 173A and 173B of the Planning and Development Act 2000, Revised updated 27 December 2012.

Under the provisions of Section 173A(2), of the PDA where a planning authority or the Board is considering an application for permission and is requested by the applicant for a grant of permission to confirm in writing that the development the subject of the application for permission relates to an activity in respect of which an **integrated pollution prevention and control licence** under Part IV of the Act of 1992 is required; the planning authority or the Board shall, as soon as possible, confirm in writing that the development the subject of the application for permission so relates to the activity.

Section 173B (2) of the PDA requires that where a planning authority or the Board is considering an application for permission and is requested by the applicant for a grant of permission to confirm in writing that the development the subject of the application for permission relates to an activity in respect of which a **waste licence** under Part V of the Act of 1996 is required, the planning authority or the Board shall, as soon as possible, confirm in writing that the development the subject of the application for permission so relates to the activity.

With respect to this license application, the amendments mean that in a case where EIA is required, the Agency cannot consider it unless:

- 1) It has received written confirmation from the applicant that Longford County Council is considering the planning application (PL 15/176) for permission for development comprising or for the purposes of an activity requiring both an Integrated Emission and a Waste licence. When requested by the applicant to give written confirmation of that matter, the Council must do so as soon as possible (section 173A(2) and section 173B(2) of the Planning and Development Act 2000).
- 2) In a case where the Council claims that the development does not require EIA the planning authority must include confirmation that the proposed development does not require EIA under the Planning Act (section 173A(3) and section 173B(3)).

- 3) When the Council is consulted by the Agency in relation to a licence application, in a case where permission, as part of which EIA was carried out, for the associated development has been given prior to the making of the licence application, and is asked to confirm that the activity in question is permitted by the permission given and to forward all documentation in relation to the EIA and any observations it has on the licence application.

Accordingly, Longford County Council should have responded within the period specified by the Agency, which in accordance with Section 173A (4) and Section 173B(4) of the Planning and Development Act 2000) is 4 weeks.

- 4) It has received a copy of the EIS submitted as part of the application for permission or a screening decision from the planning authority determining that EIA is not or was not required under the Planning Act.

The new subsection 173A(5) and the new subsection 173B(5) provide that for this IE licence, the Council must request observations from the Agency to assist it in making its determination as to whether EIA is required and must take any such observations into account when making its determination. Such requests for observations should be as specific as possible.

On 18<sup>th</sup> December 2014, the Agency informed the applicant that the licence was to be reviewed, in order to bring it into compliance with new legislation introduced since the existing licence was issued. On 6<sup>th</sup> November 2015, the Agency wrote to Longford County Council, stating that the licence may need to be reviewed or amended to accommodate the expansion proposed in the planning application.

The Agency is incorrect as the review is to implement the judgement in C-50/09 and has nothing to do with the illegal planning application submitted by Mr. Brady after the Agency wrote to him in December 2014.

The Agency stated that it noted that an EIS did not accompany the planning application (PL 15/176). Please note that under Section 87(1 G)(b) of the EPA Acts 1992, as amended, and Section 173A(5) of the Planning and Development Acts 2000, as amended, where a planning authority is obliged under the Planning and Development Acts to make a determination on whether an EIA is required for a development or proposed development, the planning authority shall request the Agency to provide observations to assist its deliberations if the development comprises or is for the purposes of an activity that requires a licence under the EPA Acts, 1992, as amended.

Please be advised that if an Environmental Impact Assessment is required in relation to the activity, (and should a licence review be required), consultation on the planning application, licence application and EIS must be carried out in accordance with the EU (Environmental Impact Assessment) (Integrated Pollution Prevention and Control) Regulations 2012.

The Agency in the above instance is advising the Council of its obligations under the new legislation enacted to give effect to judgement in C-50/09. However, Mr. Brady instructs the Agency in a letter of 26<sup>th</sup> January 2015, that it must comply with his law.

The letter states, "*I respectfully suggest that the appropriate course of action is for the Agency to consent to the reliefs sought by the applicant in the application for judicial review, including an order that the licence application be remitted back to the Agency so that it can be determined in accordance with law and in accordance with the decision of the CJEU in this case.*"

The Agency on Mr. Brady's 'request' decided to disapply the ECJ judgements in Cases C-215/06 and C-50/09 and take orders from Mr. Brady. On 10<sup>th</sup> March 2015, the Agency informed Mr. Brady that it intends to proceed to process the application when the applicant supplies the information requested by it on 18<sup>th</sup> December 2014.

The Agency has therefore decided that it does not have to comply with the judgement in C-50/09 or the new legislation adopted to implement the judgement. In other words. The Agency, as the authority responsible for licensing a project, believes it can make its decision in respect of Mr Brady's unauthorised developments without an environmental impact assessment being carried out in accordance with Article 2 to 4 of the EIA Directive 2011/92/EU

On 16<sup>th</sup> October 2015, Mr. Brady applied to the Agency for a transfer of the licence from Donal Brady Licensee to Donal Brady Director of DDS Brady Farm Ltd to be effective from 17<sup>th</sup> October 2015. The application states that Donal Brady is involved in the day to day management of the pig farm.

Therefore, the Agency must inform Mr. Brady that a new licence is required by DDS Brady Farm Ltd and not a transfer of an existing licence from "Donal Brady, Licensee" to "Donal Brady Director..." as Article 3(15) of the IED states that the 'Operator' means any natural or legal person who operates or controls in whole or in part the installation.

The Agency has also decided to disapply the information mandatory under the IE Directive, which introduces a new requirement in Article 12(1)(e) over the original permit application requirements in the IPPC Directive (2008/1/EC).

Under Article 12(1) (e) an operator is required to submit, where applicable, a baseline report in accordance with Article 22(2). Article 22(2), requires that a baseline report, as defined in Article 3(19) be prepared by operators to provide quantified information on the initial state of soil and groundwater contamination before starting operation of an installation or before a permit for an installation is updated for the first time after 7 January 2013. The Agency also decided not to request the information under Articles 12 and 22 of the EID.

Article 20(2) requires that no substantial change planned by the operator is made without a permit granted in accordance with the IED. The application for a permit and the decision by the competent authority shall cover those parts of the installation and those details listed in Article 12, which may be affected by the substantial change. Article 20(3) provides that any change in the nature or functioning or an extension of an installation shall be deemed to be substantial if the change or extension in itself reaches the capacity thresholds set out in Annex I.

The capacity threshold set out in Annex I is for 750 sow places, whereas the pig farm in this instance has 2,000 sow places. Accordingly, any change in the nature or functioning or an extension of the installation shall require an EIA.

Article (3) of the IED states that 'installation' means a stationary technical unit within which one or more activities listed in Annex I or in Part 1 of Annex VII is carried out, and any other directly associated activities on the same site which have a technical connection with the activities listed in those Annexes and which could have an effect on emissions and pollution.

Annex 1, Category 6.6 lists "*Intensive rearing of poultry or pigs: (a) with more than 40 000 places for poultry; (b) with more than 2000 places for production pigs (over 30 kg), or (c) with more than 750 places for sows.*"

The ECJ Case C-113/12, stated that Mr. Brady, the appellant in the main proceedings, is the owner of a pig farm in Ireland. Although his main activity centres on pig breeding, he also exploits the slurry generated by the farm as a secondary product, by selling it to other farmers for use as fertiliser. (Para 21). The Court ruled that pig slurry is a waste, because it is not covered by any other legislation. (Para 59)

Article 10 of the IED states that this Chapter shall apply to the activities set out in Annex I and where applicable, reaching the capacity thresholds set out in that Annex. Accordingly, the Agency has to include two activities in the IE license, namely category 6.6 as described above and category 6.5. "*The disposal or recycling of animal carcasses or animal waste with a treatment capacity exceeding 10 tonnes per day.*"

It is evident from this submission that the Agency is not carrying out its statutory duties pertaining this pig and waste activity. It is ignoring the new legislation transposed into Irish law to give effect to the CJEU judgements in Cases C-215/06 or C-50/09. It is ignoring the provisions of the IED and citizens rights under the Aarhus Convention (see preamble 27 IED) and the Charter of Fundamental Rights of the European Union (see preamble 45 IED).

The Agency concerning ECJ Case C-113/12 (Para 89) is fully aware that Article 2 of the Treaty European Union states that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. Public participation within the EU is clearly connected with the basic democratic requirements of the TEU.

Art. 1: "*This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen*". Art. 10 (1): "*The functioning of the Union shall be founded on representative democracy.*" Art. 10 (3): "*Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen*"

EAA-I has presently a complaints with the Aarhus Convention Compliance Committee (Ref: ACC/C/2010/54) and another with the European Charter of Human Rights. Accordingly, unless the Agency notify EAA-I that it intends to resolve the issues raised in this submission it will register another complain with the European Commission and include this submission as part of its complaints with the Aarhus Convention Compliance Committee and the European Charter of Human Rights.

## Conclusion

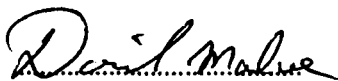
This submission has clearly demonstrated that:

- Donal Brady has operated a large-scale pig development without complying with any national or European law;
- The Irish planning authorities granted development consent on three different occasions for Retention of unauthorised developments;
- The Agency fully aware that Mr. Brady never complied with the conditions of the licenses, never took enforcement action against the applicant;
- The Agency is now reviewing the license in accordance with the provisions of Section 90(4) (iv) of the EPA Acts in order to bring it into compliance with new legislation, but has chosen to disapply the judgements in Cases C-215/06 and C-50/06 and the provisions of the IE Directive.
- The Agency is ignoring the rights of citizens under the Treaty of European Union violation citizens rights under Aarhus Convention and the European Charter of Human Rights.

In addition, the submission has identified that there was never an environmental impact assessment carried out in accordance with Article 3 of the EIA Directive for any of the 10 development consents granted for Mr. Donald Brady's pig developments.

Accordingly, now that the Agency is fully aware of the unauthorised developments (pig rearing and waste disposal and recovery) at Carrickboy Farms, it must inform DDS Brady Farms Ltd that the Agency cannot process the licence until the company (not Donal Brady) applies to An Bord Pleanála for substitute consent under Section 177B (of Part XA) of the Planning and Development Act 2000 and submits an EIS in accordance with the EIA Directive 2011/92/EU.

Yours sincerely,



David Malone

Eurolaw Environmental Consultant EAA-1

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