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Environmental Action Alliance- Ireland (EAA-I)

Observations to EPA

Concerning GCHL Limited, Licence Application W0298-01

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Unauthorised Development at Ballinderry Site

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Introduction

European case law ruled on many occasions that the provisions of a Directive must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the need for legal certainty, which requires that, in the case of a directive intended to confer rights on individuals, the persons concerned must be enabled to ascertain the full extent of their rights.[1]

This legal submission explains why the Licence Application (Ref: W0298-01) submitted by GCHL Limited is legally flawed. That the Environmental Protection Agency (the Agency) in accepting and validating the Waste Licence Application (Ref: W0298-01) infringed the codified EIA Directive 2011/92/EU; the Public Participation Directive 2003/35/EC, and the jurisprudence of the European Court of Justice (ECJ) in Cases C-427/07; C-50/09; C-494/01 and C-215/06.

The proposed waste activity is of a class that requires both planning permission with an EIS and a waste licence. The European Union (Environmental Impact Assessment) (Waste) Regulations 2012 Was transposed into Irish law to give further effect to Article 3 and Articles 2 to 4 of the EIA Directive 2011/92/EU, insofar as it applies to certain licensable activities that require both a land-use consent and a waste licence. These Regulations amend the Waste Management Act 1996 (No. 10 of 1996) and the Planning and Development Act 2000 (No. 30 of 2000) so as to ensure that an environmental impact assessment is carried out, where required under Directive No. 2011/92/EU, in relation to relevant decisions of the EPA to grant a waste licence.

This submission will show that the licence application is incomplete and contains misleading information concerning numerous unauthorised developments. The ECJ judgement in Case C-215/06, rendered it unlawful for a planning authority to accept a retention planning application for a project that requires an environmental impact assessment (EIA). The European Court has ruled on several occasions that it is the planning authority and not the Agency that is the designated competent authority to give effect to the EIA Directive.

In order to implement the judgement in Case C-215/06, Ireland amended Section 23(c) of the Planning and Development (Amendment) Act 2010, which states:

> *"A planning authority shall refuse to consider an application to retain unauthorised development of land where the authority decides that if an application for permission had been made in respect of the development concerned before it was commenced the application would have required that one or more than one of the following was carried out:*
>
> *(a) an environmental impact assessment,*
>
> *(b) a determination as to whether an environmental impact assessment is required, or*
>
> *(c) an appropriate assessment."*

Accordingly, the Agency violated the ECJ judgement in Cases C-215/06 and C-50/09 and the Irish legislation adopted by Ireland to implement these judgements by accepting and validating this licence application, which clearly involves numerous unauthorised developments.

[1] *Case C-427/07, Commission v. Ireland, paragraphs 54-55 and CaseC-332/04, Commission v. Spain, paragraph 38.*

Description of Unauthorised Developments

In 2002, Goode Concrete Ltd applied to Kildare County Council (PL 02/1475) for permission to extract 1.6 million tonnes of sand and gravel from the site. The production would be 200,000 tonnes per annum. The extraction area would be 7.8 hectares out of the total site area of 13.9 hectares. The Council on 21 October 2003, **refused** permission and its decision was appealed by Goode Concrete Ltd to An Bord Pleanala (PL09.205039). The Board Inspector also recommended **refusal.**

However, the Board decided not to accept the Inspectors recommendation claiming that:

"In deciding not to accept the Inspector's recommendation to refuse permission, the Board noted the Inspector's positive position in relation to the planning authority's reasons for refusal and considered that the inclusion of a condition restricting the quarry operations to a level one metre above the highest water table level would overcome the Inspector's concerns with regard to the impact of the quarry on wells in the vicinity of the site."

On 17 September 2004, the Board Granted permission subject to 24 conditions.

Condition 2 states:

*"**Subject to compliance with condition 12 of this order, relating to restoration of the site, this permission shall be valid until the 30th day of September, 2012, by which date all development on site shall otherwise be complete.**"*

Condition 4 states:

"*No extraction or excavation shall take place below one metre above the highest water table recorded at the point of extraction/excavation.*"

Condition 12 states:

"The extraction site, reduced in accordance with Conditions 1 and 4 above, shall be restored in accordance with a phased restoration programme, the final phase of which shall be completed within one year of the cessation of production of materials. The restoration plan shall include the following: -

(a) provision for the removal from the site of structures and plant associated with the extraction operations and of waste materials that are not required for restoration purposes

(b) details of the nature of any filling materials that may have to be imported on the site for restoration purposes and the method and timing of any filling operation arising from such importation,

(c) provision for the suitable preparation and grading of the area to be restored by the use of imported materials, waste materials or overburden materials,

(d) provision for spreading over the area to be restored, the sub-soil and topsoil or imported sub-soil and top-soil if required,

(e) details of the final surface levels of the restored area, which levels shall be such as to allow satisfactory drainage of and outfall from the site and provision for the restoration of the natural surfaces and sub-soil drainage of the area to be restored,

(f) details of the slopes to which the face of the pit shall be graded. The plans submitted shall be revised to ensure a more natural appearance rather than the engineered finish proposed in the application,

(g) details of the after-care measures, such as cultivation, seeding, planting and subsequent maintenance and management, which it is proposed to take in order to render such area of land restored and its condition suitable for use which shall be appropriate to the area, and

(h) a detailed programme for the implementation of the restoration or operations required by this condition, including an indication of the dates relative to the progress of the sand and gravel extraction by which each phase of restoration shall be completed.

Conditions 1, 2, 4 and 12 were not complied with and in March 2016 Kildare County Council took a case on indictment under Section 160 of the Planning and Development Acts, 2000 as amended concerning unauthorised developments taking place on this site. On the 21 November 2016, the High Court ordered (App No: 2015/383MCA) that the company cease forthwith the unauthorised use of the lands at the Ballinderry site.

The Non-Technical Summary submitted with the license application contains incorrect information concerning High Court Order (App No: 2015/383MCA). The applicant claims that the restoration was ordered by the High Court on the 21 November 2016 under Section 160 of the Planning and Development Act, 2000.

This is misleading information, because the High Court Order directed the Respondents their successors and assigns to cease forthwith the unauthorised quarry development being carried out at the property situate at Ballinderry, Carbury in the County of Kildare. The Order lists the **unauthorised development** as the use of a quarry for the excavation and processing of quarry materials consisting of sand and gravel and breaches of conditions 1, 2, 4 and 12 of Planning permission register reference 02/1475

This unauthorised developments are in violation of the European Court Justice (ECJ) judgements in the Cases against Ireland C-215/06; C-50/09 and C-494/01 and the legislation adopted by Ireland in order to implement these judgements. Accordingly, the Irish Court cannot and did not Order the Respondent to restore the quarry. The Irish Court can only Order that:

- an unauthorised development should not continue;
- that, in so far as possible, the land be restored to its original state and
- that the development be carried out in accordance with any permission related to it.

The development cannot be carried out in accordance with the permission, because Condition 2 of the permission granted by An Bord Pleanala Ref: 09. 205039 (Council Ref: 02/1475) states that:

> *"**Subject to compliance with condition 12 of this order, relating to restoration of the site, this permission shall be valid until the 30th day of September, 2012, by which date all development on site shall otherwise be complete.**"*

Condition 4 states:

> "*No extraction or excavation shall take place below one metre above the highest water table **recorded at the point of extraction/excavation.**"*

Condition 12 (see p/s 3 & 4) inter alia states that:

> *"**The extraction site, reduced in accordance with Conditions 1 and 4 above, shall be restored in accordance with a phased restoration programme, the final phase of which shall be completed within one year of the cessation of production of materials***

It is evident from photograph 1 of Pond C taken in 2017, that condition 12 was not complied with and the unauthorised development is causing seriously injure to the amenities of property in the vicinity and is prejudicial to public health and consequently, is contrary to the proper planning and sustainable development of the area.

Photograph 1

The largest pond, Pond C, has a surface area of approximately 2.65 ha and a volume of approximately 74,000 m3 below a reference level of 78.5 m OD. (EIS submitted with application)

The Respondent failed to comply with the High Court Order and on 2 March 2017, violated the Order by illegally disposing of waste without seeking planning permission or a license from the Agency. Following several complaints by EAA-I and the concerned residents.

On the 6 March 2017, Colm Lynch, Executive Engineer, Kildare County Council inspected the Ballinderry quarry and observed that approximately 20-25 trucks were entering the site on a daily basis. Dockets in the office were checked, which established that the waste was coming from Sybil Hill, Raheny, Dublin.

This unauthorised waste activity was reported to the EPA, who on 8 June 2017, determined, that it required a waste licence. The EPA states that *"it cannot be stated with any assurance that the use of the notified material at the destination site will not lead to overall adverse environmental or human health impacts."*

Kildare County Council responses to the EPA dated 13 March 2017 and 4 April 2017, expressed the opinion that the importation of the soil and stone to this site is an activity which requires waste authorisation and stated:

> *"There is an environmental risk at the site as there are contaminants in the waste being brought into the site. The groundwater vulnerability in the area is extreme. There is open water on the site i.e. ponds and the River Glash runs along the entrance boundary of the site. Also there are numerous private wells surrounding the site. There is no waste authorisation at the site and the imported waste soil is not being inspected on site prior to disposal. Therefore, the activity on site may lead to adverse environmental and/or human health impacts."*

On 8th June 2017, the EPA determined, in accordance with Article 27(3)(a) of the European Communities (Waste Directive) Regulations 2011 that the natural soil and stone illegally disposed on the site owned by GCHL Ltd at Ballinderry, Carbury should be considered a waste.

Photographs 2, 3 and 4 show further unauthorised developments that took place on 16 March 2018, which was reported to Kildare County Council and Ms Ciara Corrigan came out to investigate.

Photograph 2

Photograph 3

Photograph 4

Photograph 1 shows the unauthorised roadway created adjacent to the River Glash. Photo 2 shows the borehole installed in the River Glash, which runs along the entrance boundary of the site as shown in photograph 4.

The application to the Agency fails to identify the above unauthorised developments or the fact that many of the private wells surrounding the site are now polluted. On 20 August 2018, the Council informed me that it received my complaint sent Office of Environmental Enforcement - EPA and it is now under investigation by the Environment and Planning Technical Teams for review (Reference 16118).

Violation of the ECJ Judgement in Case C-215/06

The ECJ in Case C-215/06, ruled that Ireland failed to adopt all measures necessary to ensure that projects which are within the scope of the EIA Directive are, before they are executed in whole or in part, first, considered with regard to the need for an environmental impact assessment and, secondly, where those projects are likely to have significant effects on the environment by virtue of their nature, size or location, that they are made subject to an assessment with regard to their effects in accordance with Articles 5 to 10 of the EIA Directive.

The judgement rendered unlawful retention planning permissions granted for which an environmental impact assessment (EIA) was required and removed the provision in Irish planning legislation that facilitated such development. The ruling however, did allow for the regularisation of developments requiring EIA in exceptional circumstances. The new Part XA of the Planning & Development Act 2000, as inserted by Section 57 of the Planning & Development (Amendment) Act 2010, makes provision for a substitute consent process for the regularisation of certain developments coming within the scope of EIA or appropriate assessment.

Section 177B (of Part XA) of the Act makes provision for applications to be made to An Bord Pleanála for substitute consent arising from notification from the planning authority to do so following their consideration of specific planning matter relevant to each site. The ECJ ruled that Member States are required to take appropriate action to counteract the unlawful consequences of a breach of Community law and that Irish planning authorities are obliged to take measures to remedy situations where an EIA should have been carried out prior to the granting of planning permission.

Ireland was obliged, before 3 September 2008, to notify the European Commission of the measures that the relevant authorities here have taken in order to comply with the terms of the ECJ judgement. In this regard, the Minister has received approval of Government to the drafting of the General Scheme of a Planning and Development (Amendment) Bill, which removed the possibility of retention for unauthorised development, which would otherwise have been subject to environmental impact assessment, other than in exceptional circumstances, and revoked the seven-year time limit within which enforcement action may be taken in respect of unauthorised development. (section 157(4) of the 2000 Act).

Accordingly, the Agency should have requested GCHL Limited to apply to An Bord Pleanala for substitute consent prior to accepting and validating the licence application. In accepting the EIS the Agency violated inter alia, the judgements in Cases C-215/06 and the legislation adopted by Ireland to implement the judgement.

Violation of ECJ Judgements in Cases C-50/09 and C-494/01

The ECJ 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.

Paragraph 52 states:

> *"As regards Article 2 of Directive 85/337, the Commission notes that it requires an environmental impact assessment to be undertaken for a project covered by Article 4 'before consent is given'. The Commission submits that there is a possibility under the Irish legislation that part of the decision-making process will take place in disregard of that requirement. First, the Irish legislation does not require that an application for planning permission be lodged with the planning authorities before a licence application is submitted to the Agency, which is not empowered to undertake an environmental impact assessment. Second, the planning authorities are not obliged to take into account, in their assessment, the impact of pollution, which might not be assessed at all"*

Paragraph 78 states:

> *"The Commission maintains that it has identified, in the Irish legislation, a gap arising from the combination of two factors. The first is the lack of any right on the part of the Agency, where it receives an application for a licence for a project as regards pollution aspects, to require an environmental impact assessment. The second is the possibility that the Agency might receive an application and decide on questions of pollution before an application is made to the planning authority, which alone can require the developer to make an environmental impact statement."*

In this regard, there is no remedial EIS submitted to An Bord Pleanala for the unauthorised waste developments identified in pages 3 to 6.

EAA-I had four complaints registered with the European Commission, concerning the infringement of Articles 2, 3 and 4 of the EIA Directive. In March 2014, the European Commission informed EAA-I that:

> *"In order to implement the second ground of the judgement, 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 license 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."

These Regulations, place an onus on the EPA to carry out an EIA in respect of the matters that come within the functions of the Agency, prior to determining relevant applications for licences. In addition, the Regulations require the Agency to consult with the relevant planning authority or the Board as appropriate in such cases and require the relevant authority to furnish observations to the Agency within four weeks of such being requested (new sections 173A and 173B of the Planning Act).

It appears that the Agency did notify the Council and An Bord Pleanala, but has not received any observations. If this is correct then the Agency is prohibited from continuing to process the licence application.

Section 172 (1B) of the Planning & Development Act 2000, as (Amended), states that *"an applicant for consent to carry out* a *proposed development referred to in subsection (1) shall furnish an environmental impact statement to the planning authority or the Board, as the case may be, in accordance with the permission regulations."*

Section 2 of the PDA states that the 'Permission Regulations' means the Regulations under section 33, 172(2) or 174. Section 172 (2), states that in addition to the matters set out in section 33(2), the Minister may make Permission Regulations in relation to the submission of planning applications which are to be accompanied by environmental impact statements. Section 33 (1) states that the Minister shall by Regulations provide for such matters of procedure and administration as appear to the Minister to be necessary or expedient in respect of applications for permission for the development of land.

Therefore, the Agency erred in law in accepting the EIS (EIA Report) that was not prepared under the 'Permission Regulations' as defined in Section 2 of the PDA. Under Irish legislation the Council and the EPA have to carry out separate EIAs. This cannot be done because the EIS fails to contain the mandatory information specified in Annex IV of the EIA Directive 2011/92/EU. The observation by Health & Safety Authority states that the EIS is inadequate.

The licence application contains an Appropriate Assessment Screening carried out by Golder Associates Ireland Limited on behalf of the applicant GCHL Limited. The Appropriate Assessment must be carried out by Kildare County Council (and not the applicant) in accordance with Regulation 42(11) and 42(12) of the European Communities (Birds and Natural Habitat) Regulations 2011-2015 and must have regard to the findings of the Natura Impact Statement, carried out by the applicant.

As an exception to the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive, Article 6(4) can apply only after the implications of a plan or project have been analysed in accordance with Article 6(3) (Case C-239/04 Commission v Portugal EU:C:2006:665, paragraph 35, and Sweetman and Others EU:C:2013:220, paragraph 35).

On 25 July 2018 the ECJ in Case C-164/17 ruled that:

> *"Article 6 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as meaning that, where it is intended to carry out a project on a site designated for the protection and conservation of certain species, of which the area suitable for providing for the needs of a protected species fluctuates over time, and the temporary or permanent effect of that project will be that some parts of the site will no longer be able to provide a suitable habitat for the species in question, the fact that the project includes measures to ensure that, after an appropriate assessment of the implications of the project has been carried out and throughout the lifetime of the project, the part of the site that is in fact likely to provide a suitable habitat will not be reduced and indeed may be enhanced may not be taken into account for the purpose of the assessment that must be carried out in accordance with Article 6(3) of the directive to ensure that the project in question will not adversely affect the integrity of the site concerned; that fact falls to be considered, if need be, under Article 6(4) of the directive."*

Therefore, EAA-I is requesting the EPA to refuse to further consider the licence application until it has a remedial EIS that was prepared in accordance with the EIA Directive 2011/92/EU and an Appropriate Assessment Screening carried out by Kildare County Council in accordance with Article 6 of the Habitats Directive 92/43/EEC.

Yours sincerely,

David Malone

Dated 21st August 2018

David Malone EAA-I