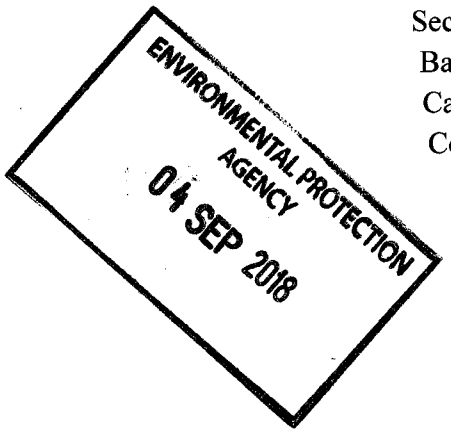
Submission No. 4

# *Balyna Environmental Action Group*

Secretary BEAG,
Ballinderry,
Carbury,
Co Kildare




Licencing Section
Environmental Protection Agency
PO Box 3000,
Johnstown Castle Estate,
Wexford.

30th August 2018

**Re**: BEAG Submission concerning GCHL Ltd Waste Licence Application (Ref W0298-01)

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The following is the Balina Environment Action Group's submission concerning the licence application W0298-01, submitted by GCHL Limited (the Applicant) to dispose of 1,234,335 tonnes of waste at the Ballinderry site in Carbury County Kildare.

The submission will show that Kildare County Council and the Environmental Protection Agency (EPA) have violated inter alia, the European Court of Justice (ECJ), judgements in Cases C-215/06, C-50/09, C-427/07 and C-494/01. That they have also failed to take the measures necessary to implement the provisions of the following body of EU legislation (the acquis), which was transposed into Irish law under Section 3 of the European Communities Act 1972, in order to give effect to the judgements in the above ECJ Cases: -

- European Union (Environmental Impact Assessment) (Planning and Development Act 2000) Regulations 2012 and its amendments to Section 2 (a) (i) and (ii) and section 171 A and subsections (I B), (I C), (I D), (I G) and (I J) (c) of section 172 of the Planning and Development Act 2000, as amended;

- The European Union (Environmental Impact Assessment) (Waste) Regulations 2012 and its amendments to the Waste Management Act 1996. Articles 3(3) to (7) and Article 4(2) to (4) of the Public Participation Directive 2003/35/EC, Articles 2(2) and 6 (4) of the codified EIA Directive 2011/92/EU and Article 6 of the Aarhus Convention;



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- The European Communities (Public Participation) Regulations 2010 (S.I. No. 352 of 2010) or the provisions of Article 6 of the Aarhus Convention;

- Article 3 (2) (a) of the European Union SEA Directive 2001/42/EC, which provides that a systematic environmental assessment is to be carried out for all plans and programmes which:

  (i) are prepared for certain sectors and

  (ii) set the framework for future development consent of projects listed in Annexes I and II of the EIA Directive. In particular, the Council and EPA erred in law in failing to consider the legal relationship between the SEA and EIA Directives.

The Council and EPA in failing to ensure compliance with the abovementioned acquis has seriously encroach its duties of administrative transparency, which has been recognised by courts, constitutions and treaties as a fundamental right of individual. The ECJ held that the principle of legal certainty is part of Community law and should be respected by the Community institutions and Member States when they exercise their powers conferred by EU Directives.[1]

In this regard, 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.[2]

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The European Communities Act 1972 (No. 27 of 1972) grants legal status to Community law within Ireland, and is protected by Article 29.4.10 of the Irish Constitution. Statutes are the laws enacted by the Houses of Oireachtas, pursuant to Article 15.2.1° of the Constitution of Ireland. European Directives are generally transposed into Irish law under Section 3 of the European Communities Act 1972.

The Applicant submitted an EIA Report prepared under the EIA Directive 2014/52/EU with the license application. This EIA was not transposed into Irish law under the provisions of Section 3 of the European Communities Act 1972. Therefore, it has no legal standing in Irish law.

[1] Case C-381/97, Belgocodex, Collection 1998, p. I-8153, par. 26, idem.

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



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**Non-compliance with the Aarhus Convention**

In order to implement the Aarhus Convention, the European Union has adopted a series of new legislative acts and revised several existing ones since 2003. In particular, Directive 2003/4/EC; Directive 2003/35/EC; Directive 2010/75/EU; EIA Directive 2011/92/EC; Regulation No. 166/2006 and Regulation No. 1367/2006.

Article 1 of the Aarhus Convention states:

> *"In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention."*

Article 6 (1) (a) of the Convention states that:

> *"Each Party shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I." Article 6 (4) states that "Each Party shall provide for early public participation, when all options are open and effective public participation can take place."*

The judgment of Ms Justice Baker in a High Court Case [Record No. 2015/50 MCA] delivered on the 16 day of February, 2016 stated:

> *"Having regard to the approach identified by O'Donnell J. I consider that the Environmental Commissioner in applying the Regulations must have regard to their purpose, and ipso facto to the Aarhus Convention itself. The Aarhus Convention recognises that public participation relating to the environment is to be achieved, inter alia, by making available to members of the public the information necessary to fully so participate." (Para52)*

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Despite this the Applicant failed to submit a Non-Technical Summary (NTS) of the information provided under headings 1 to 6 of Annex 1V of the EIA Directive 2011/92/EU. Article 3 of the Public Participation Directive 2003/35/EC amended the EIA Directive with a view to implementing Article 6 of the Aarhus Convention. This Directive only concerns pre-existing Directives, which means the codified EIA Directive 2011/92/EC and not the EIA Directive 2014/52/EU, which is not yet transposed into Irish law.

The fundamental objective of the NTS is to allow the public concerned to participate in the decision-making process. A failure to provide an adequate NTS is a violation of the fundamental rights of the public concerned under the following International and European law:

- Article 6 (4) of both the Aarhus Convention and the EIA Directive 2011/92/EU;
- Article 3 (4) of the Public Participation Directive 2003/35/EC; and
- Article 1 of Treaty of European Union (TEU).



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The Applicant in preparing the EIS's should have complied with the Aarhus Convention by 'integrating' and 'implementing', all relevant EU law and policies. Integration is a legal requirement since the entry into force of the Single European Act in 1987. It is now contained in Article 11 of the Treaty on the Functioning of the European Union (TFEU), as well as in Article 37 of the EU's Charter of Fundamental Rights. As a result of settled case law, the provisions of the Convention now form an integral part of the legal order of the European Union.[3]

The licence application is legally flawed because the public concerned were not notified under Article 6(2) of the Aarhus Convention or informed about the procedure and possibilities to participate. They were not contacted by the Applicant, under the provisions of Article 6(5) nor given access to all relevant information under Article 6(6) (the relevant information is NTS). With the exception for paragraph 5, all other paragraphs of Article 6 of the Convention, are expressed by the term **'shall'**, which clearly means a legally binding obligation.

## Not a Sustainable Development

An early definition of sustainable development was that it is development that meets the needs of the present without compromising the ability of future generations to meet their own needs (World Commission on Environment and Development, 1987). In other words, sustainable development involves the search for a path of economic progress that does not impair the welfare nor destroy the environmental and natural resources of future generations.

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Section 34 (2) (a) of the Local Government (Planning & Development) Regulations 2001, states that "*When making its decision in relation to an application under this section, the planning authority shall be restricted to considering proper planning and sustainable development of the area.*"

The environmental impact assessment procedure is a fundamental instrument of environmental policy as defined in Article 130r of the Treaty and of the Fifth Community Programme of policy and action in relation to the environment and sustainable development. The principle of sustainable development is referred to in Article 2 of the European Treaty.

When preparing the EIS GCHL Limited should have carried out a Sustainable Development Assessment (SDA). This involves incorporating environmental and social assessments into the conventional economic decision-making process. This process requires individuals and groups of people to work together to achieve shared objectives.

The significant adverse effects of the proposed waste development at Ballinderry goes beyond what could reasonably be allowed for when considering the economic, social and environmental consequences of the area. The proposed waste development is unsustainable as it only meets the needs of the developer from an economic point of view, and certainly does not meet the social or environmental needs of the local residents or future generations or the principles of sustainable development.

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[3] Case C-344/04 IATA and ELFAA [2006], paragraph 36, and Case C-459/03 **Commission v Ireland** [2006] ECR, I-4635, paragraph 82.



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**Non-Compliance with the ECJ Judgements in Case C-215/06**

On 3 July 2008, the ECJ Case C-215/06 (*Commission v Ireland),* ruled that Ireland had failed to fulfil its obligations under Articles 2, 4 and 5 to 10 of the EIA Directive 85/337/EEC before or after amendment by Directive 97/11/EC. In compliance with this judgement, a planning authority cannot adjudicate on a planning application for the **Retention** of projects that require an EIA under the provisions of the European EIA Directive.

The EPA was cited over 40 times in Case C-215/06, it which the Court ruled that the EPA had no powers to request an applicant to prepare EIS. It also ruled that the processing of a license application before an EIS was submitted to the planning authority was an infringement of Articles 2 to 4 of the EIA Directive 85/337/EEC.

Article 2 (1) of the codified EIA Directive 2011/92/EU states:

> *"Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. Those projects are defined in Article 4."*

Article 4 (2) states:

> *"Subject to Article 2(4), for projects listed in Annex II, Member States shall determine whether the project shall be made subject to an assessment in accordance with Articles 5 to 10. Member States shall make that determination through:*
>
> *(a) a case-by-case examination; or*
>
> *(b) thresholds or criteria set by the Member State."*

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The proposed project is of a class that requires an EIS, because it is listed in Annex II Category II (b) of the EIA Directive 2011/92/EU: *"Installations for the disposal of waste (projects not included in Annex I)"*

On 15 June 2018, the EPA in accordance with Section 42(1E) (a) of the Waste Management Act 1996 as amended, requested Kildare County Council to respond to the Agency within 4 weeks of receipt of this notice with the following information:

1. State whether the activity to which the licence application relates is permitted by the grant of permission referred to above.
2. Furnish all documents relating to the EIA carried out by your authority in respect of the development or proposed development to which the grant of permission refers. Alternatively, where such EIA documents are available to view on your website, please provide the Agency with a list of the names of those documents and provide a link to their location on your website.
3. Provide any observations your authority has in relation to the licence application

It appears that Kildare County Council nor An Bord Pleanala replied to the EPA request.



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Nonetheless, BEAG can confirm that:

- That the Applicant has not submitted a planning application with an EIS to Kildare County Council for permission to dispose of 1,234,335 tonnes of waste at Ballinderry;

- There was no EIA carried out by Kildare County Council for planning permission PL 02/1475;

- The Council refused this permission and it was appealed to An Bord Pleanala, (Ref: PL 09.205039) and there was also no EIA carried out by the Bord. On 17 September 2004, the Board Granted permission subject to 24 conditions. This permission was only valid until the 30 September and there was no extension of time sought.

In addition, BEAG wish to inform the EPA that the Planning and Development (Strategic Infrastructure) Act 2006, amends the Planning and Development Act 2000. The 7th Schedule of the Planning and Development Act 2000 lists the classes of infrastructural development which will be considered by the Board as Strategic Infrastructure Developments (SIDs). The list includes *"An installation for the disposal, treatment or recovery of waste with a capacity for an annual intake greater than 100,000 tonnes."*

**The GCHL Ltd waste application to the EPA is for an annual intake of 400,000 tonnes.**

The Applicant failed to comply with planning permission conditions 1, 2, 4 and 12, of PL 02/1475, which resulted in sand and gravel been extracted in excess of 20 meters below the water table level. As a result, 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.

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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 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. On 13 March 2017 and 4 April 2017, Kildare County Council informed the EPA that:

> *"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."*



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On 8 June 2017, the EPA determined, that the waste illegally disposed at the Ballinderry site required a waste licence. The EPA stated 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."*

Despite this neither the Council nor the EPA took enforcement action and now numerous private wells surrounding the site are polluted. The EPA has accepted and validated a waste licence in which the Applicant claimed that *"The site requires restoration as ordered on 21 November 2016 by the High Court under Section 160 of the Planning and development Acts, 2000 as amended (App No: 2015/383 MCA)."*

BEAG claims that the Applicant knowingly has supplied the EPA with this disingenuous information concerning the High Court Order. The fact is 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.

Item 2 of the Order states that:

> *"Order directing the unauthorised use of the property, consisting of the excavation and processing of quarry material on the property, together with the importation of subsoil and inert material into the property to cease forthwith pending the Respondents their successors and assigns being in receipt of the appropriate Article 27 permission, licence, permit, authorisation, permission, approval or consent, as required by the EPA"*

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The Applicant violated the High Court Order on 2 March 2017, by illegally disposing of over 4,000 tonnes of waste without seeking planning permission from Kildare County Council or a license from the Agency. Because of the unauthorised waste activities before and after the High Court Order Kildare County Council cannot accept a planning application.

In this regard, the Minister of the Environment (Circular PD6/08 of 8 October 2008), stated that a retention application could not be made where an EIA was required and therefore any retention application should be returned to the applicant as invalid.

In addition, the Applicant cannot comply with Condition 12 of the ABP Planning Permission (PL 09.205039), because there was to be no extraction or excavation below one metre above the highest water table recorded at the point of extraction. The Applicant extracted sand and gravel in excess of 10 meters below the highest water table. In addition, there was no EIA carried out in accordance with Article 3 of the EIA Directive and the planning permission PL 09.205039 granted by An Bord Pleanala ceased over 6 years ago



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This means that the Applicant shall submit a new planning application accompanied with an EIS prepared under the provisions of the codified EIA Directive 2011/92/EU and the legislation transposed into Irish law to remedy the defect identified in Case C-50/09, concerning Ireland's failure to transpose Article 3 of the EIA Directive.

The new legislation relevant to the proposed waste project includes the European Union (Environmental Impact Assessment) (Planning and Development Act 2000) Regulations 2012 (S.I. 419 of 2012). This legislation made significant amendments to the Planning and Development Act 2000 (S.I. 30 of 2000) (PDA) which included:

- Section 2 (i) was amended by substituting for the definition of "Environmental Impact Assessment Directive" the following definition: *"Directive No. 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment'.*
- Subsection (1B) of section 172 of the PDA, 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."*
- Subsection (1C) of section 172 of the PDA states that *"a planning authority or the Board,* as *the case may be, shall refuse to consider an application for planning permission in respect of a development referred to in subsection (1) if the applicant fails to furnish an environmental impact statement under subsection (1B)."*

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In order to implement the **second ground** of the judgement, in Case C-50/09, Ireland adopted legislative amendments to the Waste Management Act 1996, the Planning and Development Act 2000, the EPA Act 1992.

The objective of the European Union (Environment Impact Assessment) (Waste) Regulations 2012 (S.I. No. 283 of 2012) is to give further effect in Irish law to Articles 2, 3 and 4 of the codified EIA Directive 2011/92/EU, insofar as it applies to certain licensable activities that require both a land-use consent and a waste license from the EPA.

The Regulations 2012, amended Section 5 (b) of the Waste Management Act 1996, by substituting the following definition for the definition of "environmental impact statement" a statement of the direct and indirect effects that a proposed development will have or is likely to have on the environment and shall include the information specified in Annex IV of the EIA Directive 2011/92/EU.

The ECJ judgement in Case C-210/02 (*Wells v. Secretary of State for Transport, Local Government and the Regions*) [2004] ruled that where the Court was asked to elaborate on the appropriate remedy where a National court finds that the requirements of the EIA Directive have not been met in a particular case. The Court confirmed the basic principle that pursuant to Article 10 EC *'the Member States are required to nullify the unlawful consequences of a breach of Community law'.*



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The EIAR submitted with the license application is not in accordance with the permission regulations and fails to include the information specified in Annex IV of the EIA Directive 2011/92/EU. Accordingly, the EPA in compliance with national and European law must refuse to consider such a licence application, until the Applicant submits an adequate EIS to An Bord Pleanala.

**Non Compliance with the ECJ Judgements in Case C-50/09**

The EPA was cited 32 times in the ECJ judgement in Case C-50/09, which stated:

> *"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." (Para 78)*

The ECJ ruled that Ireland failed to ensure that, where Irish planning authorities and the EPA 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 85/337/EEC, as amended. The Commission claimed that there was a possibility under the Irish legislation that part of the decision-making process could take place in disregard of that requirement.

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Paragraph 81 of the judgement states:

> *"It is therefore 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 Articles 2 to 4 of Directive 85/337."*

In addition, Article 4(3) of the Treaty of European Union states that the competent authority is obliged to take, within the sphere of their competence, all general or particular measures for remedying the failure to carry out an assessment of the environmental effects of a project as provided for in Article 2(1) of the EIA Directive.

Article 2 (2) of the EIA Directive, provides for two procedures, namely

(a) a joint procedure or

(b) a coordinated procedure to streamline environmental assessments of projects that are subject the EIA Directives and other environmental assessments under the applicable EU legislation.



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The proposed project involves a joint procedure involving planning permission and a license from the EPA. Such projects require a single, integrated environmental report covering the information obtained from all the assessments conducted;

Under Irish legislation the Council and the EPA have to carry out separate EIAs. This cannot be done because the applicant has not applied to the Council for planning permission and the EIS submitted to the EPA fails to contain the mandatory information specified in Annex IV of the EIA Directive 2011/92/EU.

Accordingly, the EPA violated the ECJ judgement in Case C-50/09, and the provisions of Articles 2 and 4 of the codified EIA Directive 2011/92/EU, in accepting a license application for a waste project, prior to the Applicant submitting the EIS to Kildare County Council and the Council assessing if the provisions of Article 3 and Articles 5 to 10 of the codified EIA Directive 2011/92/EU were correctly complied with.

Therefore, BEAG is requesting the EPA to return the licence application as it is presently incomplete and violates several ECJ Judgements and the legislation adopted by Ireland to implement the judgements. In other words, the licence application is legally fawed.

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## Non-Compliance with ECJ Judgements in Case C-494/01

The ECJ judgement in Case C-494/01, ruled that it was clear that Ireland was generally and persistently failing to fulfil its obligation to ensure a correct implementation of Article 9 of the Waste Management Directive 75/442/EEC, as amended by Directive 91/156/EC, by allowing undertakings or establishments lacking the permit prescribed by that provision to pursue waste disposal activities, and not ensuring that those activities were actually brought to an end and punished (*Para 184*).

The Applicant is regarded as the holder of waste for the purposes of Article 8 of the Directive. This provision imposes on the Irish authorities the obligation to take the steps necessary to ensure that that waste is disposed or recover by a person holding the appropriate license.[4]

Paragraph 149, of the judgement, states that the network should enable waste to be disposed of in one of the nearest appropriate installations, in accordance with Article 5 of the Directive, is among the objectives pursued by the Directive.[5]

The WFD also requires that Member States to establish an integrated and effective network of installations for waste disposal and *"An adequate transport network so that waste can be disposed in one of the nearest installations."* The Applicant claims that the waste will be transposed from the Dublin area but fails to identify why the waste should not be disposed in the following installations:

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| Facility Name / Licensee | Licence No | Status | Local Authority | Annual Soil Waste Authorised Capacity |
|---|---|---|---|---|
| Blackhall Soil Recovery (Behans Land Restoration Limited) | W0247-01 | Active | Kildare County Council | 344,000 |
| Clashford Recovery (Clashford Recovery Limited) | W0265-01 | Application | Meath County Council | 180,000 |
| Fassaroe Waste Recovery (Roadstone) | W0269-01 | Active unavailable | Wicklow County Council | 550,000 |
| Huntstown Inert Waste Recovery (Roadstone) | W0277-01 | Active | Fingal County Council | 750,000 |
| Kiernan Sand & Gravel (Kiernan Sand & Gravel Limited) | W0262-01 | Active | Meath County Council | 167,400 |
| Milverton Waste Recovery (Roadstone) | W0272-01 | Authorised Uncommenced | Fingal County Council | 400,000 |
| Murphy Concrete Manufacturing (Murphy Concrete Manufacturing Ltd) | W0151-01 | Active | Meath County Council | 738,000 |
| Murphy Environmental Hollywood (Murphy Concrete Manufacturing Ltd) | W0129-02 | Active | Fingal County Council | 500,000 |
| Mullaghcrone Quarry (Roadstone) | W0278-01 | Application | Meath County Council | 150,000 |
| Walshestown Restoration (Walshestown Restoration Limited) | W0254-01 | Authorised Uncommenced | Kildare County Council | 330,000 |
| Calary Quarry (Roadstone Limited) | W0293-01 | Application | Wicklow County Council | 300,000 |
| N&C Enterprises Limited (N&C Enterprises Limited) | W0292-01 | Application | Kildare County Council | 345,000 |
| | | | | |
| **Total (Authorised On Paper)** | | | | **4,754,400** |
| **Total (Active)** | | | | **2,499,400** |

[4] San Rocco, paragraph 108, the judgment of 9 September 2004 in Case C-383/02 Commission v Italy, not published in the ECR, paragraphs 40, 42 and 44, and the judgment of 25 November 2004 in Case C-447/03 Commission v Italy, not published in the ECR, paragraphs 27, 28 and 30).

[5] Joined Cases C-53/02 and C-217/02 Commune de Braine-le-Château and Others [2004] ECR I-0000, paragraph 33)



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In addition, Kildare County Council as recently granted planning permission to Michael Ennis (PL 16/528) to dispose of 1.5 Million tonnes of C&D waste. The EPA is processing a waste licence (W0295-01) submitted by Kildare Sand & Gravel Limited for this waste facility at Boherkill, Rathangan, County Kildare.

The EPA is fully aware of its obligations concerning processing a waste licence application as it was cited 20 times in the ECJ judgement 494/01, for inter alia taking considerable time to process a license and failing to enforce the permit requirement. The Court held that, as is apparent from the findings made in paragraphs 60, 63, 68, 75, 89, 94 and 101 of this judgment, a number of Irish local authorities had displayed tolerance towards unauthorised operations relating to significant quantities of waste in numerous places in Ireland, often over very long periods; failing to take appropriate measures to ensure that such operations ceased and were effectively punished and to prevent their recurrence.

In addition, the licence application contains an Appropriate Assessment Screening carried out by Golder Associates Ireland Limited on behalf of the applicant GCHL Limited. It is the planning authority and not the developer that **shall,** where appropriate, carry out a screening for appropriate assessment in respect of a proposed development as provided for by section 177U (10) at the same time as carrying out a screening for environmental impact assessment (within the meaning of section 176A (1)) in respect of the development under subsection (2).

Section 3 of the European Communities Act 1972, as amended gives Ministers the authority to pass whatever statutory instruments are necessary in order to ensure that section 2 of the 1972 Act would have full effect. Pursuant to the treaties governing the European Communities, the Act is binding on the State and is an integral part of the legal order of those Communities, and shall have the force of law in the State on the conditions laid down in those treaties for the purpose of giving full effect to a provision of the treaties governing the European Union, or an act, or provision of an act, adopted by an institution of the European Union

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In compliance with the provisions of the Waste Directive 2008/98/EC (Waste Framework Directive) the proposes waste activity shall only be carried out if it complies with the European Communities (Waste Directive) Regulations 2011 and the Waste Management Plan for the Eastern-Midlands Region 2015-2021. In compliance with the ECJ judgment in Case C494/01 planning permission and a license is required in order to remove the illegally disposed waste from the Ballinderry site.

The inadequate Non-Technical Summary fails to mention the Waste Framework Directive 2008/98/EC or the Waste Management Plan for the Eastern-Midlands Region 2015-2021. In addition, the Applicant has not ceased the unauthorised developments which infringes the European Waste Framework Directive (WFD and the Eastern Midlands Regional (EMR) Waste Management Plan 2015-2021.



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**Non-Compliance with the European SEA Directive 2001/42/EC**

Environmental assessment obligations, including screening requirements, derive from three key European directives:

1. The Habitats Directive 92/43/EEC;

2. The Strategic Environmental Assessment Directive 2001/42/EC; and

3. The Environmental Impact Assessment Directive 2011/92/EU.

Strategic Environmental Assessment (SEA) is a process by which environmental considerations are integrated into the preparation of plans and programmes prior to their final completion. The objectives of the process are to provide for a high level of protection of the environment and to promote sustainable development by contributing to the integration of environmental considerations into the preparation and adoption of specified plans and programmes.

European Union SEA Directive 2001/42/EC and the EIA Directive 2011/92/EU are structured approaches for obtaining and evaluating environment information prior to its use in decision-making in the development consent process. Article 3(2) (a) of the SEA Directive provides that a systematic environmental assessment is to be carried out for all plans and programmes which:

(i) are prepared for certain sectors, and

(ii) set the framework for future development consent of projects listed in Annexes I and II of the EIA Directive.

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The European Commission's first report on the application of the SEA Directive (produced pursuant to Article 12(3) of the SEA Directive) emphasises the complementary relationship between the SEA and EIA Directives, which is that *"The two Directives are to a large extent complementary: the SEA is 'up-stream' and identifies the best options at an early planning stage, and the EIA is 'down-stream' and refers to the projects that are coming through at a later stage."*

The objective of the SEA Directive was carefully explained by Advocate General Kokott in her opinion in Joined Cases C-105/09 and C-110/09 ***Terre Wallone ASBL v Région Wallone and Inter-Environnement Wallonie ASBL v Région Wallone*** [2010] ECR, I-5611. At points 31-32 of her opinion, she explained that:

> *"31. The specific objective pursued by the assessment of plans, and programmes is evident from the legislative background: the SEA Directive complements the EIA Directive, which is more than ten years older and concerns the consideration of effects on the environment when development consent is granted for projects.*



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*32. The application of the EIA Directive revealed that, at the time of the assessment of projects, major effects on the environment are already established on the basis of earlier planning measures (Proposal for a Council directive on the assessment of the effects of certain plans and programmes on the environment, COM (96) 511 final, p 6).*

*Whilst it is true that those effects can thus be examined during the environmental impact assessment, they cannot be taken fully into account when development consent is given for the project. It is therefore, appropriate for such effects on the environment to be examined at the time of preparatory measures and taken into account in that context.";*

This complementary relationship between the EIA and SEA Directives is of key importance so as to avoid a lacuna in environmental assessment. The Advocate General gave a useful example of this at point 33 of her opinion:

*"33. An abstract routing plan, for example, may stipulate that a road is to be built in a certain corridor. The question, whether alternatives outside that corridor would have less impact on the environment is therefore, possibly not assessed when development consent is subsequently granted for a specific road-construction project. For this reason, it should be considered, even as the corridor is being specified, what effects the restriction of the route will have on the environment and whether alternatives should be included";*

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The United Nations Economic Commission for Europe (UNECE) noted that the SEA has evolved as a result of inadequacies identified with the application at project level EIA. The UNECE suggests that the '*potential for environmental gain is much higher with SEA than with EIA'* as SEA supports the consideration of a wider range of development options or alternatives.

It influences the type and location of developments that takes place, provides a greater opportunity to consider and address cumulative effects of numerous development projects, facilitates sustainable development by enhancing consistency among plans and options, etc. The SEA streamlines and strengthens EIA as decisions taken at SEA level feed directly into the project level EIA.

Alternatives must consider economic (cost), social public & political support) and environmental considerations (severity of adverse effects). Figure 1 gives some of the issues that need to be considered in establishing the preferred alternatives.

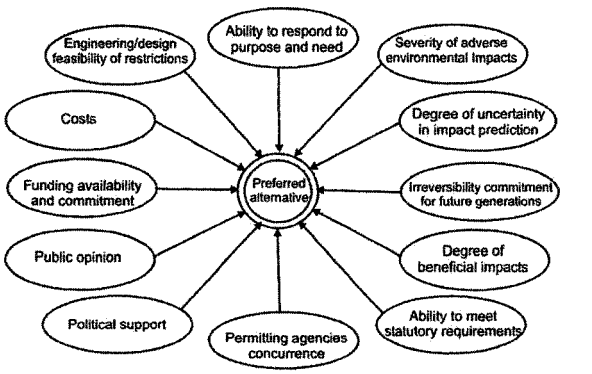


**Figure 1**



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The Non-Technical Summary makes no mention of alternatives or cumulative effects. The NTS failed to show what alternatives to the proposed project were tested and why they were rejected (Art. 5 (3) of EIA Directive. The NTS makes no mention whatsoever of alternative technologies which is mandatory for a waste licence in accordance with Art. 2 (12) of Directive 2008/1), which states that:

> *"'best available techniques' means the most effective and advanced stage in the development of activities and their methods of operation which indicate the practical suitability of particular techniques for providing in principle the basis for emission limit values designed to prevent and, where that is not practicable, generally to reduce emissions and the impact on the environment as a whole."*

The criteria for selecting alternatives for this type of project should include:

- Alternative locations where, it is proposed to undertake the proposed project;
- Alternative designs or layouts of the project;
- Construction, operation, and decommissioning alternatives;
- Project size and scale alternatives;
- Timescale for construction and operational alternatives;
- Demand alternatives.

One of the most important contributions of an initial overview assessment is the early input of environmental considerations for the design or development of the project. If coordination is efficient among the various members of the team for the project, the information provided by an initial overview can lead to better projects with fewer environmental impacts. The development and analysis of alternatives form the very core of environmental impact assessment which is nothing but a comparative analysis of alternatives.

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To comply with the codified EIA Directive 2011/92/EU the EPA in 2015, prepared Guidelines on information to be contained in environmental impact statements. The Guidelines include consideration of alternative locations, layout, design, processes and mitigation measures.



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## Conclusion

This submission has clearly described why the licence application (Ref W0298-01) submitted by GCHL Limited is legally flawed. That the EPA in accepting and validating the application fringed the following National and European legislation:

a) The codified EIA Directive 2011/92/EU and the SEA Directive 2001/42/EC;

b) The Public Participation Directive 2003/35/EC or the Aarhus Convention;

c) The jurisprudence of the ECJ in Cases C-427/07; C-50/09; C-494/01 and C-215/06;

d) The Waste Management Act 1996, the Planning and Development Act 2000 or the Environmental Protection Agency Act 1992;

e) The European Union (Environment Impact Assessment) (Waste) Regulations 2012;

f) The Waste Framework Directive 2008/98/EC or the Waste Management Plan for the Eastern-Midlands Region 2015-2021.

BEAG is requesting the EPA to return the licence application and inform the Applicant why it is legally flawed. If the EPA fails to return the application BEAG will register a complaint with the European Commission.

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Yours sincerely,

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Simon Mooney
Secretary BEAG



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