Submission	
Submitter:	Mr Simon Mooney
Submission Title:	rec'd by email
Submission Reference No.:	S005312
Submission Received:	28 December 2018
Application	
Applicant:	GCHL LIMITED
Reg. No.:	W0298-01
See below for Submission details. Attachments are displayed on the following page(s).	

21/12/18.

Ref: PAE 2018/57

To Damien,

We have been in correspondance this year in relation to an unauthorised development in Ballinderry, Co. Kildare. I am just enclosing our letter to the E.U and their reply.

Regards,

Sinon Mooney.
Secretary.
Baleyna Environmental Action Group.

Balyna Environmental Action Group

Secretary BEAG,
[redacted]

Secretariat-General,
European Commission,
Rue de Loi 200,
B-1049 Bruxelles/Westraat,
B-1049 Brussels,
Belgium.

26th September 2018

Re: Infringements of EIA Directive and Violation of ECJ Judgements

Introduction

The Balyna Environmental Action Group (BEAG) wish to register the following complaint against Kildare County Council (the Council) and the Environmental Protection Agency (EPA) for failing to implement and enforce several European Court Justice (ECJ) judgements concerning the EIA and Waste Directives. The complaint relates to a licence application (Ref: Number W0298-01), submitted by a company called GCHL Limited (the Company) to the Environmental Protection Agency (EPA) to dispose of 1,234,335 tonnes (400,000 tonnes per annum) of waste at the Ballinderry site in Carbury County Kildare.

Ireland's membership of the EEC in 1973 resulted in the *"historic transfer of legislative, executive and judicial sovereignty to the European Communities"*.[1] One of the primary characteristics of this new legal order is the development of a body of law that, within defined fields of Community competence, takes precedence over Member States' domestic law.[2]

The complaint will show that the Irish authorities, are persistently failing to comply with the the ECJ judgements in Cases C-392/96; C-66/06; C-215/06; C-427/07; C-50/09 and C-494/01 and/or the legislation transposed into Irish law under the provisions of section 3 of the European Communities Act 1972, in order to remedy the defect in these judgements. Most of the ECJ judgements finds that Ireland failed to comply with Articles 2-4 of the EIA Directive. This complaint also concerns a failure to comply with Articles 2-4 of EIA Directive. The complaint will show that the Irish authorities gave supremacy of domestic law over European law (the acquis).

[1] *Maher v. Minister for Agriculture* [2001] 2 I.R. 139 at 175 (H.C. & S.C.)
[2] Case 6/64, *Costa v. ENEL* [1964] E.C.R. 585; [1964] C.M.L.R. 425.

Description of Unauthorised Developments

The site was the subject of a planning application (Register Reference 02/1475) to the Council in 2002. The proposed project was 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 at Ballinderry, Carbury, County Kildare. An Environmental Impact Statement (EIS), accompanied the planning application as it was mandatory under the Planning and Development Regulations, 2001, Schedule 5, Part 2, Paragraph 2(b).

The proposed project involves the excavation of sand and gravel below the water table level using a dragline. The recommendation from the Planning Authority's Senior Environmental Health Officer, states that there is no objection to quarrying activities that take place 1 metre above the winter groundwater table level. In order to prevent pollution of groundwater she recommended that quarrying should not take place below 1 metre above the winter water table level. She pointed out that local residents are entirely dependent on groundwater for their water supplies. The Eastern Regional Fisheries Board was also concerned about the possible contamination of the River Glash running along the eastern boundary of the site. This river is an important salmonid nursery river.

These concerns were not addressed in a request for further information and on 21 October 2003 the Council refused permission for the proposed development. The Council decision was appealed by Goode Concrete to An Bord Pleanála (the Bord) (Ref: Number PL 09.205039). On 22 July 2002, ABP Inspector Mr. Andrew C. Boyle recommended refusal for the following reason:

> *"Having regard to the topography of the site and surrounding area and the levels of the water table indicated for the site, the Board is not satisfied, on the basis of the submissions made in connection with the planning application and the appeal, that the proposed development would not give rise to an unacceptable and adverse impact on the private wells in the vicinity of the site in terms of their levels and the risk of water contamination. These wells are the sole source of potable water in the area. The proposed development would thus seriously injure the amenities of property in the vicinity and would be prejudicial to public health and consequently, would be contrary to the proper planning and sustainable development of the area."*

There was no Environmental Impact Assessment (EIA) carried out in accordance with Article 3 of the EIA Directive and there was no Appropriate Assessment screening carried out in accordance with Article 6(3) of the Habitats Directive 92/43/EEC for this project. Despite this on 17 September 2004 the Bord granted planning permission subject to 24 conditions and gave the following reason for not accepting the Inspector's recommendation to refuse permission:

> *"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."*

In this regard, condition 4 of the permission states: *"No extraction or excavation shall take place below one metre above the highest water table recorded at the point of extraction/excavation."*

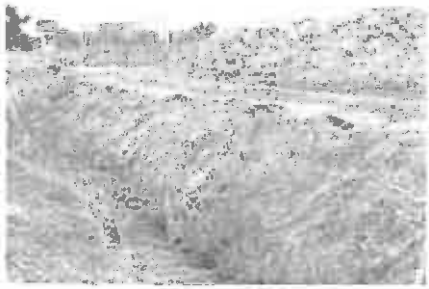
However, the Company failed to comply with conditions 1, 2, 4 and 12, of PL 02/1475, which resulted in sand and gravel been extracted up to 20 meters below the water table level. Photograph 1 shows the substantial lake created as a result of this unauthorised development.

Photograph 1

Photographs 2, 3 and 4 show further unauthorised developments that took place on 16 March 2018 which I reported 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.

As a result, of the unauthorised developments the Council in March 2016, took a High Court case under Section 160 of the Planning and Development Acts, 2000 as amended. 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.

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"*

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 the 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."*

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

Under Section 160 of the Planning & Development Act 2000, as amended the High Court by order require any person to do or not to do, or to cease to do, as the case may be, anything that the Court considers necessary and specifies in the order to ensure, as appropriate, the following:

(a) that the unauthorised development is not carried out or continued;

(b) in so far as practicable, that any land is restored to its condition prior to the commencement of any unauthorised development;

(c) that any development is carried out in conformity with the permission pertaining to that development or any condition to which the permission is subject.

However, the Council is now claiming that no planning permission with an Environmental Impact Assessment is not required, given the High Court Order dated 21st November 2016, which requires the restoration and rehabilitation of the site.

The Grounds for the Complaint

This complaint concerns a failure by the Irish authorities (in this case Kildare County Council and the EPA) to implement and enforce the legislation transposed into Irish law under the provisions of section 3 of the European Communities Act 1972, in order to remedy the defect in the ECJ judgements in Cases C-392/96; C-66/06; C-215/06; C-427/07; C-50/09 and C-494/01(the acquis). The environmental acquis concerning this complaint covers the environmental impact assessment, waste management, protection of water resources and biodiversity and the doctrine of supremacy of European law.

The doctrine of supremacy, developed by the ECJ in the Costa v ENEL case established that Union laws having primacy over domestic law of the Member States thereby rendering as non-applicable national law that was deemed to infringe EU Law.[3] The Third Amendment of the Constitution of Ireland explicitly provided for the supremacy of EU law within the Republic of Ireland. In other words, European Directives must be transposed into Irish law under the provisions of section 3 of the European Communities Act 1972, in order to give legal status to European law.

Violation of ECJ Judgement in Case C-215/06

The previous section of this complaint described numerous unauthorised development that have taken place at the Ballinderry site. 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.

Despite this the EPA accepted and validated a waste licence which includer an environmental impact assessment report prepared under the EIA Directive 2014/52/EU. Ireland has not yet transposed the EIA Directive 2014/52/EU into Irish law under the provisions of Section 3 of the European Communities Act 1972. This Act grants legal status to Community law within Ireland, and is protected by Article 29.4.10 of the Irish Constitution. Therefore, at present the EIA Directive 2014/52/EU has no legal standing under Irish law.

To implement the ECJ judgement in C-215/06, 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 an environmental impact assessment (EIA). The Planning and Development (Amendment) Act 2010, introduced a new type of environmental impact assessment and a "substitute consent" mechanism.

This new "*substitute consent*' procedure applies to any development prescribed for the purposes of either Annex I or Annex I1 of the EIA Directive. It also relates not only where there has been a failure to carry out an environmental impact assessment that was mandatory under the provisions of the EIA Directive, but also where there has been a failure to carry out a "screening" exercise.

[3] Case C-6/64 Costa v. ENEL [1964] E.C.R. 585, 593.

The requirement to obtain substitute consent also applies where there has been a failure to carry out an Appropriate Assessment for the purposes of Article 6 (3) of the Habitats Directive.

The licence application (W0298-01) to the EPA to dispose of 1,234,335 tonnes of waste at the Ballinderry site is to comply with condition 12 of the quarry permission granted under Pl. Reg. Ref 0211475 (PL. 09.205039). Because there was no Appropriate Assessment screening, carried out for that project the Company must now apply to An Bard Pleanála for Substitute Consent in respect of the Quarry. The application for Substitute Consent shall be accompanied by Remedial Natura Impact Statement undertaken in accordance with Section 177G of the Planning & Development Acts 2000-2011.

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)."* In this regard, on 18 July 2018, BEAG request information from the Council under the provisions of the European Communities (Access to Information on the Environment) Regulations 2007 to 2014. On 13 September 2018, the Council replied.

Item 2 of the Council reply states:

> *"Planning permission with an Environmental Impact Assessment is not required, given the High Court Order dated 21st November 2016, which requires the restoration and rehabilitation of the site. The remediation of the lands requires the authorisation/approval/consent/permission from the Environmental Protection Agency (EPA). From a planning perspective the remediation of the lands is authorised by the High Court pursuant to Section 163 of the Planning and Development Act 2000-2017, and planning permission is not required accordingly."*

BEAG claims that the Council is incorrect for the following reasons: -

a) There is no Section 163 of the Planning and Development Act 2000-2017. There is a Section 163 of the Planning & Development Act 2000, but it only relates to permission not required for any works. However, this was prior to the ECJ in Case C-215/06, in which the ECJ ruled that development consent included works. Item 2 of the Council reply states: *"Development was carried out after 26th February 1997, which development would have required, having regard to the Habitats Directive, an Appropriate Assessment, but that such an assessment was not carried out."*

Paragraph 112 of the judgement in C-215/06 states that:

> *"It follows from the foregoing that, by failing to take all measures necessary to ensure that the development consents given for, and the execution of, wind farm developments and associated works at Derrybrien, County Galway, were preceded by an assessment with regard to their environmental effects, in accordance with Articles 5 to 10 of Directive 85/337 either before or after amendment by Directive 97/11, Ireland has failed to fulfil its obligations under Articles 2, 4 and 5 to 10 of that directive."[emphasis added];*

a) There was no EIA carried out in accordance with Article 3 of the EIA Directive and no Appropriate Assessment screening carried out in accordance with Article 6(3) of the Habitats Directive 92/43/EEC for planning permission Ref: PL 02/1475 (ABP Ref: PL. 09.205039).

In this regard, the judgement in the High Court case (*Klaus Balz and Hanna Heubach v An Bord Pleanála*) 2013 No. 450 JR delivered by Mr Justice Bernard J. Barton on 25 February, 2016, stated that the permission must be quashed after finding that the process under which An Bord Pleanála had decided relevant issues concerning compliance with two European Directives – the Habitats Directive and the Environmental Impact Assessment Directive did not comply with European or Irish law;

b) The Irish Courts does not have jurisdiction to grant a "de facto" permission for a development, that clearly violates inter alia the ECJ Judgements in Cases C-215/06 and C-50/09 and the legislation transposed into Irish law under the provisions of section 3 of the European Communities Act 1972, in order to remedy the defect identified in Irish law in these judgements.

The ECJ judgement in Case C-427/07 (Commission v Ireland), ruled 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;

c) The proposed project involves disposing of waste (estimated 800,000 tonnes) below the water table level. This infringes Articles 1, 4 and 10 of the European Waste Management Directive 2008/98/EC. It also infringes the European Union (Environment Impact Assessment) (Waste) Regulations 2012, which was transposed into Irish law to give further effect 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;

d) Neither the Council nor the EPA can legally grant development consent to facilitate the Company's failure to comply with planning permission conditions 1, 2, 4 and 12, of planning permission. The ECJ judgement in Case 215/06 at paragraph 59 states:

> *"Lastly, Ireland cannot usefully rely on Wells. Paragraphs 64 and 65 of that judgement point out that, under the principle of cooperation in good faith laid down in Article 10 EC, 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 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."*

Violation of ECJ Judgement in Case C-50/09

The EPA was cited 32 times in the ECJ judgement in Case C-50/09. 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.

Paragraph 78 of the judgement 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."***

Paragraph 79 of the judgement states:

> *"In its defence, Ireland, which does not deny that, generally, the Agency is not empowered to require a developer to produce such a statement, contends that there is no practical benefit for a developer in seeking a licence from the Agency without simultaneously making an application for planning permission to the planning authority, since he needs a consent from both those authorities. However, Ireland has neither established, nor even alleged, that it is legally impossible for a developer to obtain a decision from the Agency where he has not applied to the planning authority for permission."*

However, concerning this proposed project to dispose of 1,234,335 tonnes of waste at Ballinderry the EPA required an EIS and accepted and validated a licence application prior to the developer applying to the Council for permission. The EPA also accepted an Appropriate Assessment screening that was prepared by the developer. It is the Council and not the developer that carries out the AA screening. Because of the unauthorised developments the developer must apply to An Bord Pleanála for Substitute Consent. The application must be accompanied by Remedial Natura Impact Statement undertaken in accordance with Section 177G of the Planning & Development Acts 2000-2011.

This infringes Articles 2 and 4 of the codified EIA Directive 2011/92/EU, and violates the ECJ judgement in Case C-50/09. It also infringes the European Union (Environmental Impact Assessment) (Planning and Development Act 2000) Regulations 2012, which was transposed into Irish law in order to implement the judgement in Case C-50/09. Under this regulation the Planning Authority or in this case ABP shall consider whether an environmental impact statement submitted under this section identifies and describes adequately the direct and indirect effects on the environment of the proposed development and where it considers that the EIS does not adequately describe such effects, shall then require the applicant to submit further information to remedy the defect.

It also infringes the European Union (Environmental Impact Assessment) (Waste) Regulations 2012. The purpose of these Regulations was to give further effect in Irish law 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.

Conclusion

This submission has shown that the proposed project involves numerous unauthorised developments. Accordingly, the developer must apply to An Bord Pleanála for Substitute Consent and the application must be accompanied by Remedial Natura Impact Statement. That the EPA in accepting and validated a waste licence application infringed Articles 2-4 of the EIA Directive and Article 6 (3) of the Habitats Directive. The EPA also violated the ECJ judgements in Cases C-215/06 and C-50/09 and the legislation transposed into Irish law in order to implement these judgements.

Yours sincerely,

Simon Mooney
Secretary BEAG

European Commission | Environment

Brussels, 04/12/2018

Balyan Environmental Action Group
Secretary SIMON MOONEY
[redacted]

Dear Sir,

Thank you for your letter of 26/09/2018 , which has been registered as a complaint under reference number CHAP(2018)03359 (please quote this reference in any further correspondence).

The Commission's services will consider your complaint in the light of the applicable European Union law. You will be informed of the findings and of any steps taken concerning your complaint by ENV-CHAP@ec.europa.eu.

You may opt for confidential or non-confidential treatment of your complaint. If you have not done so in the complaint form, the Commission's services will by default treat your complaint confidentially. If you choose non-confidential treatment, the Commission departments may disclose both your identity and any of the information submitted by you to the authorities of the Member State against which you have made your complaint. The disclosure of your identity by the Commission's services may in some cases be indispensable to the handling of the complaint.

Please note that, if the Commission decides to act following your complaint, including by launching a formal infringement procedure, its general aim is to ensure that Member State laws are compliant with EU law and correctly applied. The submission of a complaint to the Commission may thus not resolve your specific and individual situation. In order to obtain redress, including compensation if warranted, you should take action at national level in the Member State concerned. Submitting a complaint to the Commission does not suspend the time limits for starting legal action under national law. The Commission may also decide not to open formal infringement procedures, even if it considers that a breach of EU law has occurred.

You can find further information on infringement procedures for breaches of European Union law in the annex to this letter.

Yours faithfully,

Paul Speight
Head of Unit

Annex 1: Explanation of infringement procedures launched by the European Commission for breaches of European Union law
Annex 2: Specific privacy policy statement

Commission européenne, B-1049 Bruxelles / Europese Commissie, B-1049 Brussel - Belgium. Telephone: (32-2) 299 11 11.