Submission	
Submitter:	Mr. David Malone
Submission Title:	Letter to EPA
Submission Reference No.:	S005773
Submission Received:	03 October 2019
Application	
Applicant:	GCHL LIMITED
Reg. No.:	W0298-01

See below for Submission details.

Attachments are displayed on the following page(s).

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Environmental Action Alliance–Ireland

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

60 St Joseph's Terrace,
Portarlington,
County Offaly

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

3rd October 2019

Re: Request for Oral Hearing concerning W0298-01

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Dear Sir/ Madam,

Environmental Action Alliance-Ireland (EAA-I) is requesting an Oral Hearing concerning the waste licence application submitted by GCHL Ltd (Reg No. W0298-01) on the grounds that the public and/or the Agency is still not aware of the nature and extent of the proposed project.

1. The licence application (W0298-01) claims 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). However, 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 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. There was over 4,000 tonnes illegally disposed and dockets in the office were checked, by Kildare County Council, which established that the waste was coming from a development site at Sybil Hill, Raheny, Dublin;

2. The Agency is still not aware if it relates to planning permission Pl.09.205039 and/or the High Court Order (App No: 2015/383MCA). In this regard, on 24 September 2019, the Agency requested An Bord Pleanála to clarify whether the activity to which the licence application relates is permitted by the grant of permission Pl.09.205039. Accordingly, there was no "*early public participation*" because at this late stage it is still not established the class of the proposed project;

60 St Joseph's Terrace, Portarlington, County Offaly, Ireland
Email: davmalone@eircom.net
Mobile: 087-7754114 Home 0578623567

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3. The EIA Directive 2011/92/EU confers rights on individuals, the persons concerned must be enabled to ascertain the full extent of their rights (Cases C-427/07 (Commission v Ireland), paragraphs 54-55 and C-332/04, and (Commission v Spain) paragraph 38). However, the public concerned cannot effectively participate when the nature and extent of the project is unknown;

4. On 8th June 2017, the EPA determined, in accordance with Article 27(3)(a) of the Regulations, that Natural Soil & Stone notified to the Agency as a by-product in accordance with Article 27(2)(a) of the Regulations should be considered a waste. 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."*

As a result, of the determination, the project category changed to an activity, referred to in Article 4 (2) of the codified EIA Directive 2011/92/EU, as amended. In particular, Annex II under the heading Other Projects: (b) Installations for the disposal of waste with an annual intake greater than 25,000 tonnes not included in Part 1 of this Schedule;

5. 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 the quarry project under Pl.09.205039.

The High Court case (*Klaus Balz and Hanna Heubach v An Bord Pleanála*) 2013 No. 450 JR the judgment delivered by Mr Justice Bernard J. Barton on 25th 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 namely, the Habitats Directive and the EIA Directive did not comply with European or Irish law.

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6. On 8 November 2016, the Court of Justice of European Union (CJEU) in a Grand Chamber Case C-243/15 gave its interpretation of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and Article 9 of the Convention on access to information, public participation in decision-making and access to justice in environmental matters.

Paragraph 46 states:

> *"Article 6(1)(b) of the Aarhus Convention states that the provisions of Article 6 of the convention concerning public participation in decisions on specific activities are to apply to decisions on proposed activities not listed in Annex I to the convention which may have a significant effect on the environment. Article 6 of the convention, as is clear from Article 6(3), (4) and (7), confers on the public, in particular, the right to participate 'effectively during the environmental decision-making' by submitting, 'in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity'. There must be 'early public participation, when all options are open and effective public participation can take place'."*

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7. 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.

   Permission Pl.09.205039 is no longer valid as condition 2 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."*

8. Condition 4 states that "*No extraction or excavation shall take place below one metre above the highest water table recorded at the point of extraction/excavation."* There are three illegal ponds *on the site.* It is evident from photograph 1 of Pond C taken in 2017, that condition 4 was not complied with.

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Photograph 1

9. Considering the above in accordance with Section 177B, of the Planning and Development Act 2000, as amended, the relevant planning authority must inform GCHL Ltd that because the permission granted under Pl.09.205039 was a defective permission, it must now apply to An Bord Pleanála for permission to submit a Remedial EIS. The application to the Board shall be accompanied by Remedial Natura Impact Statement undertaken in accordance with Section 177G of the Planning & Development Acts 2000-2011.

10. 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."*

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11. The OPINION OF ADVOCATE GENERAL - PITRUZZELLA delivered on 13 June 2019 in Case C-261/18 *(European Commission v Ireland*).

Paragraph 36 states:

> *" It follows that, in line with the objectives of Directive 85/337 referred to in points 31 to 33 of this Opinion, in the event of breach of the obligation to carry out a prior environmental impact assessment of a project likely to have significant effects on the environment, Member States are required to adopt all necessary measures to ensure that such an assessment, or a remedial assessment, is carried out after consent has been granted, even if the project is under way or has already been completed. Where national law allows, the competent national authorities are required to suspend or set aside the consent already granted, so as to enable it to be regularised or a new consent to be granted that meets the requirements of the directive."*

Paragraph 47 states:

> *"According to section 177B(1) and (2)(b) of Part XA of the PDAA, introduced by the 2010 legislative amendment, where development consent for a project requiring an environmental impact assessment has been found, by 'final judgment of ... the Court of Justice of the European Union', to be unlawfully granted, the competent planning authority must give notice in writing directing the project manager to apply for substitute consent. Paragraph 2(c) of that section states that the notice is to require the project manager to furnish a remedial environmental impact statement with the application."*

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Paragraph 49 states:

> *"I would also point out that in its recent ruling in a case concerning, inter alia, the application of section 177B of the PDAA to the owner of a quarry the operation of which commenced in the 1960s, at a time when there was no need to obtain planning consent, the Supreme Court (Ireland) held that section 177B applied to a special category of projects for which a consent previously granted and otherwise valid was found by the Court of Justice to have been granted unlawfully owing to an incomplete environmental impact assessment, (21) without mentioning any limitation resulting from the finality or otherwise of the consent. Contrary to the view held by Ireland, it was by no means certain therefore that any attempt to subject the operator of the Derrybrien wind farm to the procedure laid down in section 177B of the PDAA would be blocked by the Irish courts."*

> 21 Judgment of 7 November 2018 in *An Taisce — The National Trust for Ireland* v *McTigue Quarries Ltd & ors*, paragraphs 31 and 74. In that judgment, the Supreme Court emphasises in particular the background to section 177B, pointing out that it was introduced in order to give effect to the judgment in *Commission* v *Ireland* (see paragraph 31).

As the EPA is aware An Taisce made a submission in relation to the waste licence application (W0298-01) by the GCHL Ltd. The submission stated that due to several unauthorised developments, the applicant must now apply to An Bord Pleanála (the Bord) for leave to seek substitute consent in respect of the development, where the applicant is of the opinion that "exceptional circumstances" exist such that it may be appropriate to permit the regularisation of the development through substitute consent."

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12. In a Supreme Court Judgment on 7 November 2018 in An Taisce v McTigue Quarries Ltd & Ors [2018]1ESC 54, Mr. Justice John MacMenamin states at Paragraph 44:

> *"The PD(A)A 2010 did set out pathways of regularisation of unauthorised developments which required an EIA, screening for an EIA, or an AA, under the Habitats Directive, but always subject to the caveats laid down by the CJEU in relation to exceptional circumstances, and for achieving substitute consent. One of these is to be found in s.177C(2)(b), which allows a person who has carried out a development where there should have been an EIA, a screening for an EIA, or an AA under the Habitats Directive, to apply to the Board for leave to seek substitute consent in respect of the development, where the applicant is of the opinion that "exceptional circumstances" exist such that it may be appropriate to permit the regularisation of the development through substitute consent."*

In order to implement the European Court of Justice judgment in Case C-215/06, Section 23(c) of the Planning and Development (Amendment) Act 2010, was amended by Section 34(12) of the 2000 Act, to allow for a "*substitute consent'* procedure. This applies to any development prescribed for the purposes of either Annex I or Annex II of the ElA Directive. The proposed waste activity is for an annual intake of 400,000 tonnes per annum, which exceeds the following threshold in Schedule 5, Part 2, of the Planning and Development Regulations 2001 as amended:

> *11. Other Projects: (b) Installations for the disposal of waste with an annual intake greater than 25,000 tonnes not included in Part 1 of this Schedule.*

Accordingly, it is clear that the proposed development involves unauthorised developments and in accordance with National and European Court Cases the proposed waste development requires substitute consent from An Bord Pleanála. Accordingly, the licence application is legally flawed.

The above are just some of the reasons why EAA-I is requesting An Oral Hearing in order to effectively participate in the decision-making process.

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Yours sincerely,

David Malone

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