Submission	
Submitter:	Mr. David Malone
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Application	
Applicant:	GCHL LIMITED
Reg. No.:	W0298-01
See below for Submission details. Attachments are displayed on the following page(s).	

EAA-I
Environmental Action Alliance-Ireland
Promoting Sustainable Development through a process of Democracy, Human Rights and the Rule of Law

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Portarlington,
County Offaly.

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

13 May 2020.

Re: Legal Submission concerning GCHL Ltd Licence Application W0298-01.

European case law has 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.

Ireland's membership of the EEC in 1973 resulted in the *"historic transfer of legislative, executive and judicial sovereignty to the European Communities"*. One of the primary characteristics of this new legal order is the development of a body of law (the acquis) that, within defined fields of community competence, takes precedence over member states' domestic law.

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.

This submission will show that Kildare County Council and the Environmental Protection Agency (the Agency) failed to implement the new legislation transposed into Irish law under Section 3 of the European Communities Act 1972, in order to give effect to European Court of Justice (ECJ) judgements against Ireland in Cases C-50/09 and C-215/06.

Accordingly, Kildare County and the Agency has seriously encroached their duties of administrative transparency, which has been recognised by courts, constitutions and treaties as a fundamental right of individuals. In other words, it would appear, prima facie, that any licence permission if granted would not constitutes development consent, within the meaning of Article 1(2)(c) of the EIA Directive.

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Licence Application for Incorrect Project Category

Section 261(1) (aa) of Planning and Development Act 2000 (PDA), as amended states that *"Notwithstanding any other provisions of this Act, the operation of a quarry in respect of which the owner or operator fails to comply with conditions imposed under paragraph (a)(i) shall be unauthorised development."*

In March 2016, Kildare County Council took a High Court case (App No: 2015/383MCA) under Section 160 of the PDA, against LCP Manufacturing Limited trading as Leinster Aggregates and Goode Concrete Ltd for failing to comply with conditions 1, 2, 4 and 12, of planning permission PL 02/1475 (An Bord Pleanala Ref: PL.09.205039). The development consent was for the extraction of sand and gravel over an area of 7.8 hectares and all associated development on an overall site of 13.9 hectares at Ballinderry, Carbury, Co. Kildare.

This project required an EIA because it was an Annex II project referred to in Article 4(2) of the EIA Directive, namely quarries, open-cast mining and peat extraction (projects not included in Annex I). It also exceeds the threshold under Schedule 5, Part 2, of the Planning and Development Regulations 2001 as amended, for the extraction of stone, gravel, sand or clay, where the area of extraction would be greater than 5 hectares.

On 21 November 2016, the High Court made an Order under Section 160 (1) of the Planning and Development Act 2000, as amended stating that:

> *"The Respondents cease forthwith the unauthorised quarry development at Ballinderry, Carbury in the County of Kildare, 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."*

Section 160 (2) states that in making an order under subsection (1), **where appropriate**, the Court may Order the carrying out of any works, including the restoration, reconstruction, removal, demolition or alteration of any structure or other feature.

It is evident that the Court did not consider it appropriate to grant an Order under Section 160 (2). Instead, under Section 160 (1) requested the Respondents to cease the quarry development until it had the appropriate Article 27 permission, licence, permit, authorisation, permission, approval or consent, as required by the Agency. The Court made this Order, because the Respondents claimed that the material was a by-product and not a waste.

Article 27 of the European Communities (Waste Directive) Regulations, 2011, was introduced into Irish law to implement article 5 of the 2008 Waste Framework Directive (2008/98/EU). It allows an *"economic operator"* to decide, under certain circumstances, that a material is a by-product and not a waste.

On 17 February 2017, the Agency received an Article 27 notification from GCHL Limited, (Ref: ART27-0579), relating to the classification as by-product of some 10,000 cubic metres of soil and stone arising at a brownfield site at Sybil Hill, Raheny, Dublin disposed on Ballinderry site.

On the 6 March 2017, Colm Lynch, Executive Engineer, Kildare County Council inspected the Ballinderry site 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.

On 8 June 2017, the Agency 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 County Kildare should be considered a waste.

The Agency has made this determination due to the notifier's failure to satisfy the requirements of articles 27(1)(b) and 27(1)(d), details as follows:

27(1)(b):

During a site visit conducted by Kildare County Council on the 9 March 2017, imported notified material was inspected and was observed to be contaminated with plastic, plastic piping, timber, polystyrene, textile bag, concrete blocks and concrete containing reinforcement, hence indicating that the notified material is not clean soil and stone and requires further processing prior to use.

27(1)(d):

I. The original planning application submitted to Kildare County Council in 2002 contained an Environmental Impact Statement (EIS) which was completed on the basis of the extraction of sand and gravel. The Agency has concluded that at the time of the grant of planning permission, it was not envisaged that restoration of the void space would involve its backfilling, and the environmental aspects of a backfilling activity were not therefore taken into consideration by An Bord Pleanala prior to grant of planning permission;

2. The instruction in condition 12 of the planning permission to restore the quarry is not taken to be permission to accept soil and stone in very large quantities for backfilling activities at the quarry;

3. The planning conditions imposed by An Bord Pleanala are the sole explicit environmental conditions governing activities at the facility. The planning conditions imposed by An Bord Pleanala are relatively general when compared to the conditions that would be imposed in a waste licence. Thus, the level of regulatory control that can be exerted through planning conditions is considerably less than that available through licence conditions. The level of regulatory control available through licence conditions is deemed necessary in this instance due to the scale of the overall backfill activity and the potential risk of environmental pollution.

The Agency determination clearly established that the project to dispose of to dispose of 1,234,335 tonnes of waste to dispose of 1,234,335 tonnes of waste was a different category of project and not part of the quarry project. The Agency determination 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."*

The interpretations provided for project categories are based on the purpose of the Directive, the experience gathered in its application, and Court interpretations. European case law defines the term '**project**', specifically in the context of the wording of the first indent of Article 1(2)(a) of the EIA Directive, as work or interventions involving alterations to the physical aspect of the site. (judgment of 19 April 2012, *Pro-Braine and Others*, C-121/11, EU:C:2012:225, paragraph 31).

Had the Agency carried out an EIA Screening in accordance with Section 40(2A) of the Waste Management Act 1996, as amended it would have established that the proposed project to dispose of 1,234,335 tonnes of waste is of a class 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)."* That the project exceeds the threshold in Schedule 5, Part 2, of the Planning and Development Regulations 2001 as amended, namely installations for the disposal of waste with an annual intake greater than 25,000 tonnes.

Despite this, in June 2018, the Agency accepted and validated the licence application from GCHL Ltd for the recovery of inert soil and stone for the restoration of the Ballinderry site. The application states that the restoration was ordered by the High Court on the 21 November 2016 under Section 160 of the Planning and Development Act, 2000. The application fails to identify that the disposal project involves disposing of waste up to 20 metres below the water table level, which is an infringement of Articles 1, 4 and 10 of the European Waste Management Directive 2008/98/EC.

As previously established in the Court Order was made in November 2016, in February 2017, the Agency received an Article 27 notification from GCHL Ltd and in March 2017, GCHL Ltd illegally disposed of waste at the Ballinderry site. Section 27(1)(b) of the Agency determination relates to the waste illegally disposed in March 2017. In addition, the High Court was dealing with unauthorised developments concerning the extraction of stone, gravel, sand or clay, where the area of extraction would be greater than 5 hectares. The proposed project is for the disposal of waste with an annual intake greater than 25,000 tonnes.

Accordingly, there are numerous reasons why the High Court did not Order the restoration of the Ballinderry site.

In May 2018, GCHL Ltd carried out Appropriate Assessment screening for the quarry restoration at the Ballinderry site, which was submitted to the Agency. It claimed that no Appropriate Assessment was required. Then in August 2019, the Agency also carried out an Appropriate Assessment screening for the quarry restoration project, claiming the it was in accordance with Regulation 42(8)(a) of the European Communities (Birds and Natural Habitats) Regulations 2011 as amended.

The Agency screening concluded that:

> *"The proposed activity is not directly connected with or necessary to the management of any European site and that it cannot be excluded, on the basis of objective information, that the proposed activity, individually or in combination with other plans or projects, will have a significant effect on any European site and accordingly determined that an Appropriate Assessment of the proposed activity is required, and for this reason determined to require the applicant to submit a Natura Impact Statement."*

Section 42 (8)(a) relates to a project for which an application for consent has been received. Accordingly, the Agency in August 2019, is still of the opinion that the licence application relates to the quarry project.

Section 177C (2) (b) of PDA, allows a person to apply to ABP 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. Therefore, as the waste disposal project involves unauthorised developments GCHL Ltd., must submit an application for leave to seek substitute consent to ABP.

If granted leave the application to ABP 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 ECJ judgment in Case C-323/17 *(Commission v Ireland)* affirmed that it is well established as a matter of European Union law that, where a development is proposed in the vicinity of a Natura site, the **competent planning authority** must carry out a screening exercise essentially to assess whether there is a prospect that the development may have a deleterious effect on the site in question.

Therefore, ABP the competent planning authority for the proposed waste disposal project must comply with the provisions of the European Union (Planning & Development) (Environmental Impact Assessment) Regulations 2018. The Regulations inter alia, amended the codified EIA Directive 2011/92/EU and the provisions of the EIA Directive 2014/52/EU and the Planning and Development (Housing) and Residential Tenancies Act 2016.

Section 176B. (1) of the European Union (Planning & Development) (Environmental Impact Assessment) Regulations 2018 states that:

> *"A **planning authority shall**, where appropriate, carry out 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 in respect of the development under subsection (2)." [emphases added]*

On 8 June 2017, the Agency determined, in accordance with Article 27(3)(a) of the European Communities (Waste Directive) Regulations 2011, that the instruction in condition 12 of the planning permission to restore the quarry is not taken to be permission to accept soil and stone in very large quantities for backfilling activities at the quarry. In August 2019, the Agency carried out an Appropriate Assessment screening for the quarry restoration project.

In September 2019, the Agency sent ABP a notification in accordance with 42(1E) (c) of the Waste Management Act 1996, as amended requesting ABP to state whether the activity to which the licence application relates is permitted by the grant of permission Pl.09.205039

In October 2019, ABP stated that any importation of fill for the purposes of quarry restoration going forward, would not be covered by the grant of planning permission under PL 09.205039. That all works associated with PL 09.205039, including the implementation of the Site Restoration Plan, expired on 30 September 2013. In addition, the permission granted in 2004 for PL 09.205039 was defective because 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.

On 23 January 2020, the Agency wrote to GCHL Ltd, stating that the licence application refers to a Court Order requiring remediation in accordance with Condition 12 of planning permission PL09.205039. It appears that this requires a plan approved by the planning authority. The licence application does not demonstrate that such approval has been obtained. Accordingly, the Agency will treat your application as an application not governed by the Court Order and Condition 12.

The Agency, under Section 42(1B)(a) of the Waste Management Act 1996 as amended, requested GCHL Ltd to submit confirmation in writing from a planning authority or ABP, as the case may be, that an application for permission comprising or for the purposes of the activity to which the application for a licence relates, is currently under consideration by the planning authority concerned or the Board, along with the EIA Report already submitted.

On 19 February 2020, Kildare County Council informed the Agency that what is now being proposed by the developer/applicant, insofar as the works proposed (1.2 million tonnes of imported fill material), will effectively regrade the entire land holding. The proposed works are not in compliance with Condition No 12.

The ECJ judgement in Case C-215/06, 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."* The ECJ judgment in Case C-50/09, ruled that *"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*." (Para 81)

What is clear is that the Agency is processing a licence application for an incorrect project and in doing so failed to implement the new legislation transposed into Irish law under Section 3 of the European Communities Act 1972, in order to give effect to European Court of Justice (ECJ) judgements against Ireland in Cases C-50/09 and C-215/06.

The EIAR submitted with the Licence Application is Legally Flawed

The previous section of this legal submission identified that the Agency is processing the licence application (W0298-01) under the wrong project category. In doing so the application failed to contain a copy of a substitute consent submitted to ABP under section 177K of the Planning and Development Act 2010. It also failed to contain a confirmation notice sent pursuant to article 97B(2) of the Planning and Development Regulations 2001 following the entering onto the EIA portal of the information referred to in article 97A of the European Union (Planning & Development) (Environmental Impact Assessment) Regulations 2018.

There was no EIA Screening in accordance with Section 40(2A) of the Waste Management Act 1996, and no Appropriate Assessment screening carried out in accordance with Section 176B. (1) of the European Union (Planning & Development) (Environmental Impact Assessment) Regulations 2018.

This section of this submission will further explain why the Environmental Impact Assessment Report (EIAR) submitted with the licence application is not in compliance with the EIA Directive 2011/92/EU, as amended by Directive 2014/52/EU and why it encroaches on the judgement ECJ judgements in Case C-215/06 and the legislation adopted by Ireland in order to implement that judgement.

When Ireland first transposed the EIA Directive into Irish law, it was possible to get retention permission on EIA projects. However, in Case C-215/06 *(Commission v Ireland)* the ECJ ruled that the provision made for retention planning permission under domestic law was inconsistent with the EIA Directive.

To implement the judgement, Section 23(c) of the Planning and Development (Amendment) Act 2010 amended section 34(12) of the 2000 Act, to provide that a retention application cannot be accepted by a planning authority for a development which would have required an environmental impact assessment (EIA).

The Act introduced a new system of development consent, namely **"substitute consent",** which involves persuading ABP that there are "**exceptional circumstances**" which would justify the making of an application for substitute consent.

The nature of what necessitates exceptional circumstances is expanded upon in Section 177D (2) of the PDA, which lists seven relevant factors that ABP must consider in making its decision about an application lodged under Section 177C(2)(b). There are no realistic exceptional circumstances that GCHL Ltd can rely upon that it was unaware that the developments were unauthorised. It was fully aware that extracting of sand and gravel up to 20 metres below the water table was a breach of condition 12 of permission PL 09.205039.

The permission granted by ABP states:

> *"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 addition, four months after the High Court Ordered the company to cease forthwith the unauthorised use of the lands, at the Ballinderry site, GCHL Ltd illegally disposed of 10,000 cubic metres (10,000 tonnes) of **waste** from a construction site at Sybil Hill, Raheny, Dublin on the Ballinderry site

On 26 July 2018, the EIA Directive 2014/52/EU was transposed into Irish law under the provisions of the European Union (Planning and Development) (Environmental Impact Assessment) Regulations 2018 (S.I. No. 296 of 2018). A number of the amendments brought about by the EIA Directive 2014/52/EU are a direct reflection of the clarifications provided in the CJEU's jurisprudence.

One such amendment was that the Department of Housing, Planning and Local Government (DHPLG) hosts an EIA Portal for all EIA applications to competent authorities in Ireland. Article 22(2) of the Regulations 2018 states:

> *"Upon satisfying itself of the adequacy of the information submitted by or on behalf of the applicant the Department of Housing, Planning and Local Government (DHPLG) will issue a* ***'Confirmation Notice'*** *to the applicant acknowledging and uploading of the required information on to the Portal. In accordance with Article 22(2) of the European Union (Planning & Development) (Environmental Impact Assessment) Regulations 2018, the Confirmation Notice must be submitted to the competent authority with the application documents."*

The licence application did not contain a confirmation notice from the EIA portal, which is required to accompany a planning application for development of a class set out in Schedule 5 of the Planning and Development Regulations 2001-2018, which equals or exceeds, as the case may be, a limit, quantity or threshold set for that class of development.

The proposed project to dispose of 1,234,335 tonnes of waste is of a class set out in Schedule 5 of the Planning and Development Regulations 2001-2018. It exceeds the threshold in Schedule 5, Part 2, of the Planning and Development Regulations 2001 as amended, namely installations for the disposal of waste with an annual intake greater than 25,000 tonnes.

The ECJ in Case C-215/06 *(Commission v Ireland)*, 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.

Because of the many unauthorised developments that has taken place at the Ballinderry site, GCHL Ltd have to apply in accordance with Section 177C(2)(b) of the Planning & Development Act 2000, as mended to ABP for leave to seek "substitute consent". This must be done **prior** to GCHL Ltd submitting a licence application to the Agency under Section 40 of the European Union (Environment Impact Assessment) (Waste) Regulations 2012.

The ECJ in Case C-215/06, declared that the Agency had no powers to request an applicant to prepare EIS and 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.

In the Supreme Court judgement (7 November 2018) in An Taise v McTigue Quarries Ltd & Ors [2018]1ESC 54, Mr. Justice John MacMenamin ruled:

> *" 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."(Para 44)*

In September 2018, the Balyna Environmental Action Group registered a complaint CHAP(2018)0335 with the European Commission. The grounds of the complaint were that the Irish planning authorities and the Agency both have decision-making powers pertaining to the proposed waste disposal project, failed to comply with the following EU legislation (the *acquis)*:

1) Articles 2 to 4 of the EIA Directive 2011/92/EU, as amended by Directive 2014/52/EU, pertaining to a proposed project to disposal of 1,234,335 tonnes of waste in a disused quarry site at Ballinderry, Carbury County Kildare;

2) The legislation adopted by Ireland under 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;

3) The measures notified by Ireland to the European Commission in order to comply with the terms of the CJEU judgements against Ireland in Cases C-50/09 and C-215/06.

Conclusion

This submission has show that on 8 June 2017, the Agency determined, in accordance with Article 27(3)(a) of the European Communities (Waste Directive) Regulations 2011 that the disposal of 1,234,335 tonnes of waste was not part of the planning permission granted in 2004 for PL 09.205039. Yet in June 2018, the Agency accepted and validated the licence application from GCHL Ltd for the restoration of the Ballinderry site. This submission identified that the Agency accepted a waste licence application was for the incorrect project category, because there was no EIA Screening in accordance with Section 40(2A) of the Waste Management Act 1996, and no Appropriate Assessment screening carried out in accordance with Section 176B. (1) of the European Union (Planning & Development) (Environmental Impact Assessment) Regulations 2018.

The submission explains why the EIAR submitted with the licence application is not in compliance with the EIA Directive 2011/92/EU, as amended by Directive 2014/52/EU and why it encroaches on the judgement ECJ judgements in Case C-215/06 and the legislation adopted by Ireland in order to implement that judgement.

The licence application did not contain a confirmation notice from the EIA portal, which is required under Article 22(2) of the European Union (Planning & Development) (Environmental Impact Assessment) Regulations 2018. This submission has shown that the Regulations 2018, were transposed into Irish law to further implement the ECJ judgements in Cases C-50/09 and C-215/05.

The submission identified that the Agency pertaining to this licence application has infringed:

a. Articles 2, 3 and 4 of the codified EIA Directive 2011/92/EU, as amended by Directive 2014/52/EU and the Public Participation Directive 2003/35/EC;

b. Section 40 of the European Union (Environment Impact Assessment) (Waste) Regulations 2012;

c. Article 6 (3) of the Habitats Directive and 176B. (1) of the European Union (Planning & Development) (Environmental Impact Assessment) Regulations 2018;

d. The jurisprudence of the ECJ judgements in Cases C-50/09 and C-215/06.

Accordingly, in exercising its powers conferred on it by the Waste Management Acts, 1996 to 2011, the Agency must return the licence application (W0298-01) and inform GCHL Ltd that because of the unauthorised developments it must apply to ABP for substitute consent.

Yours sincerely,

David Malone
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