Submission	
Submitter:	Mr. David Malone
Submission Title:	Submission
Submission Reference No.:	S010137
Submission Received:	26 October 2021
Application	
Applicant:	GCHL LIMITED
Reg. No.:	W0298-01
See below for Submission details. Attachments are displayed on the following page(s).	

[redacted]

Environmental Protection Agency,
Environmental Licensing Programme,
Office of Environmental Sustainability,
Johnstown Castle Estate,
County Wexford

26 October 2021

Re: GCHL Invalid Waste Licence Application W0298-01

The following is Environmental Action Alliance- Ireland (EAA-I) reply to the letter (dated 14 October 2021) from Ms. Ruth Treacy Technical Director GCHL Limited (GCHL), seeking another extension of time. The letter says that GCHL has been liaising with Kildare County Council (KCC) on the matter to persuade them to make certain necessary decisions, which will establish the planning status of the quarry. The letter states GCHL would appreciate if EPA did not process this matter further until such time as KCC approves the restoration plan for the quarry.

This submission will describe why KCC has no jurisdiction to modify the decision by An Bord Pleanala (the Board) concerning PL O9 205039. That the waste licence application is legally flawed for the following reasons.

1) The waste licence application is for the wrong class of project. The Environmental Impact Assessment Report (EIAR) submitted with the application is legally flawed.

2) GCHL has not applied to An Bord Pleanala for substitute consent. Therefore, the waste licence application submitted under Section 40 of the European Union (Environment Impact Assessment) (Waste) Regulations 2012 is invalid.

In compliance with the European Court of Justice (ECJ) judgment in Case C-215/06 and Section 23 (c) of the Planning and Development (Amendment) Act 2010, the Agency must refuse the extension of time. The Agency should inform GCHL it shall apply to the Board for leave to seek "**substitute consent**" before submitting a waste licence application.

[redacted]

Licence Application is for the Wrong Project

The Agency for the past 3 years is processing GCHL waste licence application as part of a planning permission (PL O9.205039), granted by An Bord Pleanala (the Board) in 2004. This was for a **quarry extraction project** listed in Annex II Category II (d) of the in the European Communities (EIA) Regulations 1989.

There was no waste licence required for the **quarry project.** Condition 12 provided for the restoration of the lands under a phased restoration programme, the final phase of which was to be completed within one year of the cessation of production. This permission was only valid until the 30 September 2012 and there was no extension of the duration of the permission applied for under Section 42 of the Planning and Development Act, 2000 as amended by Section 28 of the P&D (Amendment) Act, 2010.

GCHL could not apply for an extension of time, because of the breaches of planning conditions, resulting in many unauthorised developments being carried out at the Ballinderry site. In addition, the permission granted in 2004 for PL 09.205039 was defective because there was no EIA carried out under 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.

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, namely the Habitats Directive and the Environmental Impact Assessment Directive **did not comply** with European or Irish law

On 8 June 2017, the Agency determined, under 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 does not mean permission to accept soil and stone in very large quantities for backfilling activities at the quarry.

On 15 June 2018, the Agency sent the Board a notification stating that in accordance with Section 42 (1E) (a) of the Waste Management Act 1996, as amended the Board was requested to state whether the activity to which the licence application relates is permitted by the grant of permission referrers to PL 09.205039

In September 2018, An Bord Pleanala informed the Agency that the EIAR submitted with the Licence application appears not to be the same as that submitted to the Board under planning appeal reference number PL O9.205039. The Board stated the EIS submitted with the application and appeal to the Board was prepared by Declan Brassil and Company and was prepared under the European Communities (EIA) Regulations (S.I. No 349 of 1989).

The proposed waste licence application is for a different project and is not an exempt development. Section 9 (1) of the Planning and Development Regulations 2001-2021, under the heading restrictions on exemption, states that development to which Article 6 relates shall not be exempted development for the purposes of the Act if the carrying out of such development would:

- contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act;

- comprise development in relation to which a planning authority or An Bord Pleanala is the competent authority in relation to Appropriate Assessment and the development would require an Appropriate Assessment because it would be likely to have a significant effect on the integrity of a European site.

On 2 August 2019, the Agency in accordance with Regulation 42 (1) of the European Communities (Birds and Natural Habitats) Regulations 2011 as amended, carried out appropriate assessment screening to assess, in view of best scientific knowledge and the conservation objectives of the site, if the proposed activity individually or in combination with other plans or projects is likely to have a significant effect on a European Site (s).

The licence application claimed that a High Court ordered (App No: 2015/383MCA) the disposal of over 1.2 million tonnes of waste, in order to comply with breaches of conditions 1, 2, 4 and 12 of Planning permission from An Bord Pleanála (PL 09.205039) and the illegally disposing of over 10,000 tonnes of waste in March 2017 from a development site at Sybil Hill, Raheny, Dublin.

This is yet another reason the waste licence application is legally flawed. This submission has revealed that the waste disposal project is of a class listed in Annex II Category II (b) of the EIA Directive 2011/92/EU. The application has nothing to do with the planning permission from the Board (PL 09.205039) or the High Court Order concerning breached to conditions of that permission.

Therefore, the Agency, in continuing to process this legally flawed waste licence application, is violating:

- The ECJ judgement in Case C-215/06, which ruled that the processing of a license application before they submitted an EIS to the planning authority, was an infringement of Articles 2 to 4 of the EIA Directive;

- Section 42 (IC) of the Waste Management Act 1996, as amended in considering an application where the requirements under Section 42 (1B) have not been satisfied

Why Substitute Consent is Mandatory

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."*

The Agency is aware of the many unauthorised developments taking place on the Ballinderry site. EAA-I submission dated 10 September 2021 (Ref: S010097) contained photographic evidence that further unauthorised development is presently taking place. In fact, GCHL is removing material that was to be used for the renovation of the site. This depicts the contempt this company has for the High Court Order, which states that the company was to cease forthwith the unauthorised use of the property.

In order to implement the European Court of Justice (ECJ) 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 developer to apply to the Board 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 2011/92/EU. The proposed waste project is listed in Annex II Category II (b) of the EIA Directive.

The Supreme Court Judgement on 7 November 2018 (An Taisce v McTigue Quarries Ltd & Ors [2018] 1ESC 54), Mr. Justice John MacMenamin ruled that:

> *"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."*

The Agency failed to comply with the European Union (Environmental Impact Assessment) (Waste) Regulations 2012 (S.I. No. 283 of 2012 and the European Union (Environment Impact Assessment) (Planning and Development Act 2000) Regulations 2012 (S.I. No. 419 of 2012). The Regulations were transposed into Irish law in order to comply with the ECJ judgement in Case C-50/09 *(Commission v Ireland)*.

The fundamental purpose of the Regulations was to give further effect in Irish law to Article 3 and Articles 2 to 4 of the EIA Directive 2011/92/EU, where it applies to certain licensable activities that require both a land-use consent and a waste licence.

Section 177 of the Planning and Development Act, 2000, as amended in 2010, and provide for the following amendments to the Substitute Consent procedure:

- "*Exceptional circumstances*" must be considered by the Board in the substantive or second stage application for substitute consent, and
- Public participation is facilitated with respect to the consideration of "*exceptional circumstances*", as well as on the wider application of substitute consent

The judgment of Ms Justice Baker in High Court Case [Record No. 2015/50 MCA] delivered on the 16 February, 2016 states at paragraphs 52:

> *"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."*

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)

Also, the High Court Case judgement (Klaus Balz and Hanna Heubach v An Bord Pleanála) 2013, delivered by Mr Justice Bernard J. Barton on 25 February, 2016, affirmed 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

Therefore, any decision by the Agency concerning the proposed waste licence would be quashed because it does not comply with the Habitats Directive or the EIA Directive. It would also violate the ECJ judgements in Cases C50/09 and 216/05.

Conclusion

This submission has showed that: -

- Despite many requests over the past 3 years, GCHL has still not complied with the requirements under Section 42 (1B) of the Waste Management Act 1996, as amended;
- The waste licence application submitted to the Agency is for the wrong class of project. (quarry extraction instead of waste disposal);
- The EIAR submitted with the application is legally flawed, because GCHL has not applied to the Board for substitute consent;
- The licence application infringes the Aarhus Convention and the Public Participation Directive 2003/35/EC;
- That KCC has no jurisdiction to change/modify the decision by An Bord Pleanala (the Board) concerning PL O9.205039.

Therefore, the reasons for seeking another extension of time are neither relevant of credible and the Agency in continuing to processing this invalid application is violating several European Court of Justice (ECJ) judgements and the legislation adopted by Ireland in order to comply with the ECJ rulings.

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 it must apply to An Bord Pleanala under Section 177 of the Planning and Development Act 2010, as amended for substitute consent.

Your sincerely,

David Malone

Digitally signed by David Malone
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