



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).

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Environmental Action Alliance-Ireland

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

Environmental Action Alliance-Ireland

Submission to Environmental Protection Agency

Re: GCHL Waste Licence Application W0298-01

Dated 22 January 2022

Prepared by David Malone Eurolaw Environmental Consultant

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Submission S010200

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The following is Environmental Action Alliance- Ireland (EAA-I) response to the Environmental Protection Agency (the Agency) letter dated 12 January 2022 to Ms. Ruth Treacy on behalf of GCHL Limited (GCHL). The Agency is proposing to hold a virtual meeting with GCHL in January 2022 to progress the matter.

On 2 June 2018, GCHL submitted an Environmental Impact Assessment Report (EIAR) to support a waste licence application to the Agency. The licence application claims on the 21 November 2016, the High Court ordered the restoration of the site at Ballinderry in compliance with condition 12 of An Bord Pleanála permission PL 09.205039.

The Agency in accepting and validating this licence application has infringed the following European Union legislation (the *acquis*). The legislation was transposed into Irish law in order to remedy the defects established by the European Court of Justice (ECJ) in Cases C-50/09 and 215/06;

- European Union (Environment Impact Assessment) (Waste) Regulations 2012 (S.I. No. 283 of 2012);
- The European Union (Environment Impact Assessment) (Planning and Development Act 2000) Regulations 2012;
- Section 171A of the Planning and Development Act, 2000, as amended;
- The codified EIA Directive 2011/92/EU as amended by Directive 2014/52/EU;
- The Planning and Development Act 2000, as amended;
- The Public Participation Directive 2003/35/EC;

For example, the ECJ in Case C-50/09, ruled that Ireland had failed to ensure that, where Irish planning authorities and the Environmental Protection Agency 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, as amended by the Public Participation Directive 2003/35.

In order to implement this judgement the European Union (Environment Impact Assessment) (Waste) Regulations 2012, was transposed into Irish law to give further effect 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.

The Agency appears to be unaware of the imprecations of the ECJ judgment in case C-50/09 *Commission v Ireland* delivered on 3 March 2011. EAA-I had four complaints registered with the European Commission concerning the infringement of Articles 2, 3 and 4 of the EIA Directive.

In March 2014, the European Commission informed EAA-I that:

“In order to implement the second ground of the judgement, in 2012 Ireland adopted legislative amendments to the Waste Management Act 1996, the Planning and Development Act 2000, the Environmental Protection Agency Act 1992.

The new provisions now require that a planning application must precede an application for a licence with the Agency, that the Planning authorities and the Agency must cooperate in issuing development consent and that the Agency is required to carry out an environmental impact assessment (where required under the Directive) and to coordinate that with the local planning authority.”

On 24 September, 2019, the Agency requesting comments from An Bord Pleanála pertaining to the waste licence application under section 173A (4) of the Planning and Development Act 2000, as inserted by Article 10 of the European Union (Environmental Impact Assessment) (Waste) Regulations 2012.

On 29 October 2019, An Bord Pleanála reply to the Agency stated that: -

“On the basis of the information made available, it would appear 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. All works associated with PL 09.205039, including the implementation of the Site Restoration Plan, expired on 30th September 2013.”

The Agency was fully aware in 2018 that the licence application related to a site in which unauthorised developments had taken place. Therefore, the EIAR submitted with the application was legally flawed. In addition, the Agency should have sought clarification An Bord Pleanála if GCHL had applied for leave to seek substitute consent regarding 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 unauthorised development through substitute consent. In addition, as there was no EIA carried in compliance with Article 3 of the EIA Directive for permission PL 09.205039. Therefore, the grant of consent was legally flawed.

The ECJ in Case 215/06 observed that:

“The wording of Art. 2 (3) of the EIA Directive was entirely unambiguous and was, therefore, to be understood as meaning that unless an applicant had successfully applied for the required development consent, and had first carried out an EIA when it was required, works could not be commenced without disregarding the requirements of the Directive.” (para. 51)

The judgement in Case C-50/09 (*Commission v Ireland*) (2011) states:

“Article 3 of Directive 85/337 is of pivotal importance, since it sets out what constitutes an environmental impact assessment and must, therefore, be transposed explicitly. The provisions relied upon by Ireland as adequate transpositions of Article 3 of the directive are insufficient.” (Para 26)

In 2017, GCHL sought an interlocutory Order (Case Number is 2085/2017) to restrain three residents (Paddy Maguire, Ted Quinn and Tony Maguire) from trespassing upon their lands at Ballinderry, Carbury, in the County of Kildare.

Paragraph 4 of Affidavit of Barry Goode (Director of GCHL) states:

“I say and believe that Kildare County Council previously took section 160 proceedings in relation to the operation of the quarry pit last year 2016, and that the said proceedings were then compromised on foot of a Court Order, requiring inter alia the infill of the pit pursuant to the terms of the existing planning permission. I say that Kildare County Council and the Environmental Protection Agency have all been notified about the proposals in relation to the remediation of the said quarry pit and property under Article 27.

Colm Lynch Executive Engineer, Kildare County Council prepared an Affidavit which states, *“As can be seen from the aforementioned letter from the EPA, the EPA has not yet given the Plaintiff permission pursuant to Article 27 and is minded, at this point, to refuse the Plaintiffs application.”* (Paragraph 9)

They resolved this matter when Barry Goode gave the defendant’s solicitor Mr. George McGrath, Flynn & O’Donnell, Solicitors a letter signed by Mr. Barry Goode Director of GCHL stating:

“The plaintiff understands not to import any further material into the site until such time as the EPA determines whether the material is a by-product or waste all without prejudice to current legal position. Should the EPA determine that it is waste then no such operations can take place until the legal position is determined, which is a matter for entirely separate proceedings“ (see copy of Barry Goode letter and Colm Lynch Affidavit in Appendix 1)

In other words, GCHL knew that the High Court did not Order the restoration of the quarry under condition 12.

On 8 June 2017, the Agency determined, that 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. However, GCHL did not go back into Court to establish the legal position concerning the unauthorised developments.

The High Court case involved unauthorised developments. Therefore, legal position was clearly established by the ECJ in case C-215/06 (*Commission v Ireland*), which rendered it unlawful to seek retention for unauthorised developments. The ECJ 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. The Agency is fully aware of this as it was cited many times in case C-215/06.

The Supreme Court judgement on 7 November 2018 in *An Taisce v McTigue Quarries Ltd & Ors* [2018] 1ESC 54, Mr. Justice John MacMenamin states:

“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.”

Had the Agency carried out an EIA Screening determination under Section 40 (2A) of the Waste Management Act 1996, as amended, it would have concluded that the proposed project is of a class that requires “substitute consent” 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).”

Instead, it continued considering this legally flawed licence application. Then on 4 August 2021 the EPA informed GCHL that: -

“In the Agency’s view, the Court Order does not authorise the proposed works which are the subject of the licence application. If that was the case, there would be no direct planning oversight of the proposed development and the Agency cannot supplant the role of a planning authority.”

“The Agency is precluded by Section 42 (1C) of the 1996 Act from considering an application where the requirements under Section 42 (1B) have not been satisfied.”

The ECJ has ruled frequently that Community law is superior to national laws. Where a conflict arises between Community law and the law of a Member State, EC law takes precedence, so that the law of a Member State must be disapplied. Article 10 of the European Treaty states that Member States are required to take all appropriate measures to insure fulfilment of their duties under Community Law, including the obligation to nullify the unlawful consequences of a breach of Community law.

EAA-I do not believe that the appropriate measure is to facilitate GCHL with a meeting when it is violating several ECJ judgements and the Irish High Court Order (App No: 2015/383MCA) when this company is presently carrying out unauthorised developments at the Ballinderry site.

Conclusion

This submission has shown that the Agency accepting and validating the waste licence application W0298-01, which clearly infringed the following European Union legislation (the *acquis*).

- The legislation transposed into Irish law in order to remedy the defects established by the European Court of Justice (ECJ) in Cases C-50/09 and 215/06;
- European Union (Environment Impact Assessment) (Waste) Regulations 2012 (S.I. No. 283 of 2012);
- The European Union (Environment Impact Assessment) (Planning and Development Act 2000) Regulations 2012;
- Section 171A of the Planning and Development Act, 2000, as amended;
- The codified EIA Directive 2011/92/EU as amended by Directive 2014/52/EU;
- The Planning and Development Act 2000, as amended;
- The Public Participation Directive 2003/35/EC;
- Article 2 (1) and 4 (2) of the EIA Directive;
- Sections 172 (1D) or 176 B (4) of the PDA or Article 103 of the Planning & Development Regulations 2011;
- Article 6 of the Habitats Directive (92/43/EEC).

Therefore, in accordance with democracy, human rights and the rule of law, EAA-I is requesting the Agency in exercising its powers conferred on it by the Waste Management Acts, 1996 to 2011, to return the legally flawed application and inform GCHL it must apply to An Bord Pleanála for substitute consent prior to submitting a waste licence application. Also, inform GCHL that any new application shall include a remedial environmental impact statement and a remedial nature impact statement undertaken under Section 177 of the Planning & Development Acts 2000-2011.

Yours sincerely,

David
Malone

Digitally signed by David Malone
DN: cn=David Malone, o=EAA-I, ou,
email=davidmalone12@gmail.com,
c=IE,
Date: 2022.01.23 13:31:23 Z

David Malone EAA-I

Dated: 23 January 2022

Appendix 1

Barry Goode Director of GCHL Letter

Colm Lynch, Executive Engineer, Kildare County Council Affidavit

File No _____
Name _____
Address _____
Attendance _____

Time Engaged _____
Date _____
Attendance _____
Fee € _____

Name - record No.

- The Plaintiff undertakes not to import any further material onto the site until such time as the EPA determine whether the material is a by-product or waste. all without prejudice to the current legal position. Should the EPA determine it is a waste - then no such operations can take place until the legal position is determined, which will be a matter for entirely separate proceedings.

~~Signature~~ Director of SCOR.

THE HIGH COURT
Record No. 2017/2085P

BETWEEN

GCHL LIMITED

PLAINTIFF

AND

ANTHONY MAGUIRE, PADDY MAGUIRE AND TED QUINN

DEFENDANTS

AFFIDAVIT OF COLM LYNCH

I, Colm Lynch, Executive Engineer, Aras Chill Dara, Devoy Park, Naas, County. Kildare being aged 18 years and upwards **MAKE OATH** and say as follows:-

1. I am an Executive Engineer, employed by Kildare County Council at Aras Chill Dara, Devoy Park, Naas, County Kildare and I make this Affidavit from facts within my own knowledge save where otherwise appears and where so appearing I believe the same to be true and accurate in every respect. I am duly authorised on behalf of Kildare County Council to make this affidavit.
2. I beg to refer to the pleadings already had herein when produced.

3. I believe and I am advised that Kildare County Council became aware of the within proceedings as a result of an article on the Leinster Leader Newspaper website dated the 6th of March 2017. I beg to refer to a copy of this said article upon which and marked with the letters “CL1” I have signed my name prior to the swearing hereof.
4. I say that as a result of correspondence with the Plaintiff's Solicitors, Messrs Reidy Associates of 3 Mount Street Crescent, Grand Canal Dock, Dublin 2, the Plaintiff's pleadings were provided to Kildare County Council. I beg to refer to this correspondence upon which and marked with the letters “CL2” I have signed my name prior to the swearing hereof.
5. As appears from the Affidavit of Barry Goode, sworn on the 6th March, 2017, the Plaintiff seeks reliefs, inter alia, to prevent the Defendants interfering with access and egress at the Plaintiff's premises, situate at Ballinderry, Carbury in the County of Kildare (hereinafter referred to as “the lands”) and the interference with the operation of the Plaintiff's business thereat for the purposes of taking purported steps to reinstate the land and quarry pit back to its natural use, with infill and geolandscaping necessary to accommodate that goal.
6. I say that at paragraph 4 of the Affidavit of Barry Goode, Mr Goode makes reference to proceedings brought by Kildare County Council, pursuant to section 160 of the Planning and Development Act, 2000 as amended (hereinafter referred to as the 2000 Act) in relation to the unauthorised development and the operation of the quarry on the lands and how this Court Order

required, inter alia, the *'infill of the pit pursuant to the terms of the existing planning permission'*.

7. I beg to refer to a copy of the aforementioned Court Order, in proceedings entitled " *The High Court, Record No: 2015 no. 383 MCA, In the matter of the Planning and Development Act, 2000 as amended, Between, Kildare County Council, Applicant and LCP manufacturing limited trading as Leinster Aggregates and Goode Concrete Limited (In Receivership), Respondents"*, made on the 21st day of November, 2016 and perfected on the 22nd of November, 2016 upon which and marked with the letters "CL3" I have signed my name prior to the swearing hereof. As can be seen from the terms of the above Order, the unauthorised use of the lands, including the importation of subsoil and inert material, was to cease forthwith pending the Respondent, their successors and assigns, being in receipt of appropriate Permission, licence, permit, authorisation, approval or consent from the Environmental Protection Agency (EPA).
8. I say that at paragraph 6 of the affidavit of Barry Goode, Mr Goode refers to the steps which the Plaintiff has taken since December 2016, which steps include the "*importation to the site of inert material*" and that these steps have been taken and begun with the *'consent and support of the Environmental Protection Agency (EPA) and Kildare County Council, as necessary'*.
9. I believe and I am advised that Kildare County Council has never given the Plaintiff consent to bring onto the lands any material, in the absence of the requisite consent and approval being obtained from the EPA, as provided for in the Court Order herein exhibited. In this regard, I further beg to refer to correspondence

which Kildare County Council has received from the EPA in respect of the Plaintiff's application to obtain Article 27 Permission from the EPA in respect of the importation of inert materials onto the lands upon which and marked with letters "CL4" I have signed my name prior to the swearing hereof. As can be seen from the aforementioned letter from the EPA, the EPA has not yet given the Plaintiff permission pursuant to Article 27 and is minded, at this point, to refuse the Plaintiff's application.

10. I say that at Paragraph 10 of the affidavit of Barry Goode, Mr Goode avers as follows, -

'I say that the activities of the Plaintiff at the property are entirely lawful.....'

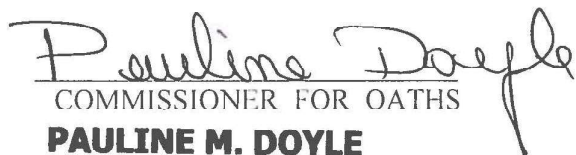
On the 6th of March 2017 this your deponent carried out an inspection of the lands. On that occasion I observed infilling of the site had commenced with the importation of soil and stone at the northwest corner of the site. The import material can be described as waste stone and soil containing a small percentage of contaminants consisting of plastic piping, plastic, timber and polystyrene. I beg to refer to a number of photographs taken during the inspection upon which marked with the letters "CL5" I have signed my name prior to the swearing hereof. I say that as a result of my observations I was of the opinion that the Court Order was not being complied with in that waste material was being brought onto the lands in the absence of appropriate permission, licence, permit, authorisation. I beg to refer to correspondence issued from the Solicitors for Kildare County Council, Messrs Regan McEntee & Partners to the Solicitors for

the Plaintiff, Messrs Reidy Associates exhibited within CL2 above .

11. I also beg to refer to Paragraph 14 of the Affidavit of Mr Goode, wherein he makes reference to certain confirmations made by my colleague Dan Costigan. Unfortunately Mr Costigan is not in the jurisdiction and is therefore not in a position to swear his own Affidavit in that regard. However, I believe and I am advised that Mr Costigan is an Environmental Overseer with Kildare County Council and would not have any authorisation or role in making observations or indeed any confirmations as regards applications made to the EPA by the Plaintiff.
12. I believe and I am advised that in the circumstances, the joinder of Kildare County Council as a Notice Party to the within proceedings is necessary in order for the Court to effectually and completely adjudicate upon and settle all the questions involved in the cause or matter before the Court and in particular the operation of the Plaintiff's business on these lands.
13. I therefore pray for an Order in the terms of the Notice of Motion herein.

SWORN by the said Colm Lynch
This 14th day of March 2017
at Main Street, Naas, County Kildare
before me a Commissioner for Oaths
and I know the Deponent.


COLM LYNCH


COMMISSIONER FOR OATHS
PAULINE M. DOYLE
Solicitor/ Commissioner for Oaths
16 South Main Street
Naas,
Co Kildare

This Affidavit is filed for and on behalf of Kildare County Council this
day of March 2017 by Regan McEntee & Partners, Solicitors
of High Street, Trim, Co Meath.

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THE HIGH COURT
Record No. 2017/2085P

BETWEEN

GCHL LIMITED

PLAINTIFF

AND

**ANTHONY MAGUIRE, PADDY MAGUIRE
AND TED QUINN**

DEFENDANTS

AFFIDAVIT OF COLM LYNCH

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**REGAN McENTEE & PARTNERS
SOLICITORS
HIGH STREET
TRIM
COUNTY MEATH**

Ref: KC44338/DMC/TH