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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5 August 2024

Re: Serious and Persistent Breach of EU Law and Treaties

Introduction

Since 1990, in my capacity as a Eurolaw Environmental Consultant with Environmental Action Alliance Ireland (EAA-I), I have lodged numerous complaints with the European Commission regarding Ireland's failure to adhere to the European EIA and Waste Directives.

This complaint focuses on the consistent non-compliance of the Environmental Protection Agency (the Agency) over the past 27 years with EU laws and European Treaties. As a member of the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL), the Agency has persistently neglected the EU's fundamental principles of human dignity, freedom, democracy, equality, and the rule of law, as outlined in Article 2 of the TEU.

The Agency is not meeting its obligations under Articles 2, 4(3), 10, and 19(1) of the Treaty on European Union (TEU), Article 291(1) of the Treaty on the Function of the European Union (TFEU), and relevant Court of Justice of European Union (CJEU) judgments, as well as legislation established by EU institutions under Article 288 of the Treaty on the Functioning of the European Union (TFEU).

The Agency's persistent failure to implement legislation transposed into Irish law under the European Communities Act 1972, in accordance with CJEU judgments and the European and Irish Constitutions, is concerning. Consequently, EAA-I strongly urges the Commission to take enforcement action under Article 7 of the TEU.

Note: The term CJEU will be used throughout, even though some judgments were issued by ECJ.

Persistent Breach of EU Laws and CJEU Judgements

In 1997, EAA-I filed its first complaint about violations of the Waste and EIA Directives, referred to as Pl997/4792. Another complaint was filed in 2000, reference P2000/4002. In 1997 and 1999, EAA-I lodged three additional complaints (Pl 999/5112, Pl 997/4792, and Pl 999/4351) regarding violations of the European Waste Directive.

In Case C-494/01, the CJEU found that Ireland had failed to fulfil its obligations under Articles 4, 5, 8, 9, 10, 12, 13, and 14 of European Waste Directive 75/442/EEC, as amended by Directive 91/156/EEC. In November 2002, the European Commission wrote to EAA-I, acknowledging the complaints (Pl 999/5112, Pl 997/4792, and Pl 999/4351) and expressing that the provided material was extremely valuable for the Commission's final written submission to the European Court.

In 2002, EAA-I lodged a complaint referenced Pl2002/43. In September 2002, the Commission informed EAA-I that it was still investigating this complaint, specifically to ascertain whether Irish legislation governing the approval procedures for this facility has complied with Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment. In addition to the licensing procedure involving the Environmental Protection Agency, this facility is also undergoing a development consent procedure before the Planning Appeals Board. I would greatly appreciate further clarification on this matter.

In 2002, EAA-I registered a complaint reference and Pl 2002/5220. In July 2023, the Commission confirmed it had written to the Irish authorities for 8 items of information, which included: -

Item 5: A copy of the Environmental Impact Statement (EIS) submitted to the local authority and the Environmental Protection Agency (EPA) with reference to the Sperrin facility, including a copy of the non-technical summary;

Item 6: If the excavated material already removed from the Sperrin construction site and deposited within the Tynagh Mines site was not covered by a prior permit for purposes of Directive 1999/3 I/EC (landfill) or Directive 75/442/EEC (waste), details of the steps taken to enforce the prohibition set out in Article 4 of Directive 75/442/EEC and the obligation set out in Article 8 of the same directive. The Commission stated that similar information had been requested regarding the three unauthorised dumps referred to in the complaint.

Between 2000 and 2003, EAA-I submitted four complaints (SG (2000) A/00138, SG (2000) A/10892, SG (2002) A/02671, and SG (2003) A/01946). In Case C-50/09, the Agency was cited 32 times. Paragraph 78 of the judgment C-50/09 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."

The CJEU judgement in C-50/09 determined that the Agency's processing of a waste license application before a planning application was submitted to the relevant planning authority violated Articles 2 to 4 of the EIA Directive, as amended by the Public Participation Directive 2003/35/EC. On March 6, 2014, the Commission notified EAA-I about the new legislation adopted by Ireland to implement the judgment in Case C-50/09. The letter outlines that the new provisions now mandate a planning application to precede an application for a license with the Agency.

On March 6, 2014, the European Commission notified EAA-I about Ireland's new legislation to enforce the ruling in case C-50/09. This included amendments to the Waste Management Act of 1996, the Planning and Development Act of 2000, and the EPA Act of 1992. EAA-I is satisfied that the new legislation transposed into Irish law by the Oireachtas was clear and precise and gave effect to the CJEU in Case C-50/09. The letter states that the new provisions now require a planning application to precede an application for a license with the Agency.

The European Union (Environmental Impact Assessment) (Waste) Regulations of 2012 have been incorporated into Irish law to comply with the CJEU judgments in Cases C-50/09 and C-494/01. These regulations require the implementation of the Waste Management Act 1996, as amended, the EPA Act 1992, as amended, the Planning and Development Act 2000, as amended by the 2010 Act, Articles 3(3) to (7) and 4(2) to (4) of the Public Participation Directive 2003/35/EC, Articles 2(2) and 6(4) of the codified EIA Directive 2011/92/EU as amended by Directive 2014/52/EU, and Article 6 and 9(2) of the Aarhus Convention.

The Agency has been processing a waste license application (Ref: W0298/01) for five years without adhering to the legislation established by EU institutions under Article 288 of the TFEU. The Oireachtas incorporated this legislation into Irish law pursuant to section 3 of the European Communities Act 1972 to enforce the CJEU's judgments against Ireland in cases C-50/09, C-215/06, and C-494/01.

The CJEU ruled in Case C-215/06 that Ireland failed to correctly transport Articles 2(1), 4(1) and (2) of the EIA Directive. To give effect to the CJEU judgment in C-215/06, the Oireachtas enacted the Planning and Development (Amendment) Act 2010 (Act 2010). Section 177C (3) of the 2000 Act states that an application for substitute consent that does not comply with the requirements of subsection (2) shall be invalid.

The amendment allows for the option to request substitute consent from An Bord Pleanála (the Board). The Agency is fully aware that GCHL Ltd, the company seeking the waste license (Ref: W0298-01), is carrying out numerous unauthorised developments at its quarry site at Ballinderry. Despite this knowledge, the waste license has been under review by the Agency

for the past five years. Throughout this lengthy process, GCHL Ltd, the company applying for the license, has not yet pursued substitute consent from the Board.

The Waste Management Act of 1996 was amended by the Environmental Impact Assessment Waste Regulations 2012. These amendments affected Articles 3(3) to (7) and Article 4(2) to (4) of the 2003/35/EC Public Participation Directive, Articles 2(2) and 6(4) of the 2011/92/EU EIA Directive, and Article 6 of the Aarhus Convention. Additionally, Section 42 of the 1996 Act made changes with the insertion of subsections (1B) to (1H). Subsection (1B) requires applicants for a license to provide written confirmation from the planning authority or An Bord Pleanála that an application for permission related to the activity under consideration is currently being reviewed by the planning authority or An Bord Pleanála.

Subsection (1C) of the Act 1996 states that where an application for a licence is made to the Agency in respect of an activity that involves development or proposed development for which a grant of permission is required, but the applicant does not comply with subsection (1B), the Agency shall refuse to consider the application and shall inform the applicant accordingly.

On July 12, 2023, EAA-I made a request for the screening documentation conducted by the Agency to ensure compliance with Section 87(1B) of the EPA Act 1992, as amended, and Section 42(1B) of the Waste Management Act 1996, as amended. On 9 August 2023, the Agency informed EAA-I that no EIA screening determination had been carried out to ensure compliance with Section 87(1B) of the EPA Act 1992, as amended, and Section 42(1B) of the Waste Management Act 1996, as amended.

The Agency, as part of the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL), has not complied with the following EU laws and Treaties: -

- Article 10 of the TEU, which requires taking all necessary measures, whether general or specific, to ensure compliance with the obligations arising from the TEU or resulting from actions taken by the Community's institutions;

- Article 291(1) of the TFEU, which requires Member States to adopt all measures of national law necessary to implement legally binding Union acts;
- Article 17 TEU, which requires Member States to not only adopt the provisions of European Directives into their national law but also guarantee that these provisions are adhered to by the state's institutions;

- The duty of consistent interpretation, as outlined in the CJEU judgment in Von Colson and Kamann, is based on Articles 288 TFEU and 4(3) of the TEU. This duty is crucial for ensuring the effective implementation of EU law within the legal systems of Member States. It places a responsibility on national courts and administrative authorities to interpret their respective national laws in a way that ensures compliance with obligations arising from European law;

- Article 19 (1) of the TEU, which states, in the second paragraph, that Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law;

- Article 2 of TEU, which is built upon principles of democracy, human rights, and the rule of law. According to Article 49 of the TEU, adherence to the rule of law is a fundamental requirement for membership in the EU.

The complaint highlights the Agency's 27-year history of non-compliance with EU laws, including the EIA and Waste Directives, the Public Participation Directive, CJEU judgments, and provisions of European Treaties. In addition, the Agency is not conforming with the Minister's Circular Letter PHFPD dated 06/12, which clearly outlines the requirements for compliance with CJEU Case C-50/09. (copy of circular attached

Accordingly, EAA-I is requesting the Commission to take enforcement action under Article 7 of the TEU.

Yours sincerely,

David Malone

David Malone
Eurolaw Environmental Consultant EAA-I

Appendix 6

Appendix 6

Circular Letter: PHFPD 06/12

27 August 2012

To: Directors of Planning

Borough and Town Clerks

An Bord Pleanála

EU (Environmental Impact Assessment) (Integrated Pollution Prevention and Control) Regulations 2012 (S.I. No. 282 of 2012) and EU (Environmental Impact Assessment) (Waste) Regulations 2012 (S.I. No. 283 of 2012)

Context

The Court of Justice of the European Union (CJEU) delivered its judgement in case C50/09 relating to Ireland's implementation of the Environmental Impact Assessment (EIA) Directive (2011/92/EU) on 3 March 2011. Irish legislation was found, *inter alia*, not to be fully in conformity with the EIA Directive with respect to projects involving both a land use consent (planning) and pollution control consent (licence). Specifically, the Court found that in a case where a project requiring EIA required both planning permission and a licence from the Agency, the fact that Irish legislation did not prevent the Agency from making a licensing decision before the planning permission application was decided,

and therefore before the EIA was completed, meant that part of the overall consent for the project (i.e. the licence) was being decided without an EIA being first carried out, contrary to Articles 2 and 4 of the EIA Directive.

In order to comply with the Court ruling it was necessary to make amendments to the Environmental Protection Agency Act, 1992 (the EPA Act), the Waste Management Act, 1996 (the Waste Management Act) and the Planning and Development Act, 2000 (the Planning Act) to, among other things, close the gap highlighted in paragraph 81 of the C50/09 judgement which states that *"it is 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 Article 2 to 4 of Directive 85/337".*

The above Regulations, which make the amendments referred to in the previous paragraph, have been signed by the Minister and will come into operation on 30 September 2012. Copies of the Regulations are attached.

Overview of Regulations

The European Union (Environmental Impact Assessment) (Integrated Pollution Prevention and Control) Regulations 2012 (S.I. No. 282 of 2012) amend the EPA Act and the Planning Act: the Planning Act is amended by the insertion of a new section 173A (see Regulation 8). The European Union (Environmental Impact Assessment) (Waste) Regulations 2012 (S.I. No. 283 of 2012) amend the Waste Management Act and the Planning Act: the

Planning Act is amended by the insertion of a new section 173B (see Regulation 10).

The principal amendments made are those to the EPA Act and the Waste Management Act.

Under the amended provisions the Agency may not in the future decide on an application for an Integrated Pollution Prevention and Control (IPPC) licence or a waste licence without ensuring that an EIA has been carried out if required by the EIA Directive. The Agency's responsibility in relation to EIA is confined to the matters coming within the remit of the Agency (i.e. the pollution control aspects): the Agency is required to ensure that an EIA has been carried out in relation to these issues. The Agency may satisfy this requirement in whole or in part by means of consultation with, or the submission of observations to, the planning authority or the Board as part of the development consent process (see new subsection 87(1G) of the EPA Act and new subsection 42(1G) of the Waste Management Act). The Agency will also be statutorily required in future to respond to planning authorities/the Board when notified about any proposed development requiring EIA which is associated with an activity requiring a licence, and to have any appropriate input into the EIA being carried out by the planning authority/Board.

In future, the Agency will not accept a licence application unless it is accompanied by:

- confirmation in writing from the planning authority/Board that an application for permission is currently under consideration together with a copy of the related EIS, if one is required, or confirmation in writing from the planning authority/Board that an EIA is not required, or
- a copy of the development consent together with the related EIS, if one was required, or confirmation in writing from the planning authority/Board that an EIA was not required.

This means that in a case where EIA is required, the Agency will not in future consider such a licence application unless the development consent process, including EIA, has been concluded or at least the application for the consent lodged with the planning authority/Board. Where consideration of the development consent application is ongoing at the time the licence application is submitted, the Agency may not make its decision until the development consent process, including EIA, has been completed.

The Agency has also been given the power to call for an EIS in the (unlikely) case of a project requiring EIA under the Directive which does not require any development consent.

The Agency's responsibility in relation to EIA and activities requiring an IPPC licence are set out in the new subsection (2A) inserted into section 83 of the EPA Act, and the new arrangements for processing an IPPC licence

application, in a case where EIA is required, are set out in the new subsections (1A) to (1H) inserted into section 87 of that Act.

The Agency's responsibility in relation to EIA and activities requiring a waste licence are set out in the new subsection (2A) inserted into section 40 of the Waste Management Act, and the new arrangements for processing a waste licence application, in a case where EIA is required, are set out in the new subsections (1A) to (1H) inserted into section 42 of that Act.

The amendments to the Planning Act – the new section 173A (re IPPC licences) and section 173B (re waste licences) – are relatively minor and consequential to the above, principally providing that:

- Where the planning authority or the Board are considering an application for permission for development comprising or for the purposes of an activity requiring a licence and are asked by the applicant to give written confirmation of that matter, they must do so as soon as possible (section 173A(2) and section 173B(2)).

- In giving this confirmation, in a case where the development does not require EIA the planning authority/Board must also include confirmation that the proposed development does not require EIA under the Planning Act (section 173A(3) and section 173B(3)).

- When consulted by the Agency in relation to a licence application, in a case where permission, as part of which EIA was carried out, for the associated development has been given prior to the making of the licence application, and asked to confirm that the activity in question is permitted by the permission given and to forward all documentation in relation to the EIA[1] and any observations it has on the licence application, the planning authority or the Board must respond within the period specified by the Agency, which will be 4 weeks (section 173A(4) and section 173B(4)).

- In making a determination as to whether an application for permission for sub-threshold development which the planning authority or the Board consider is development comprising of or for the purposes of an activity requiring a licence, requires EIA (on the grounds that it could have significant effects on the environment) the planning authority/Board must request the views of the Agency, and must consider any such views received in making its determination (section 173A(5) and section 173B(5)).

The paragraphs under the third heading below set out in more detail how the process of consent for a project requiring both a development consent under the Planning Act and an IPPC or a waste licence will operate after the new Regulations come into operation. The relevant consents under the Planning Act are:

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[1] Not including the EIS, which will already been forwarded to the Agency by the licence applicant.

- an application for permission for development under Part III,
- an application for approval under section 175,
- an application for approval under section 177AE,
- an application for approval under section 181A,
- an application for approval under section 182A,
- an application for approval under section 182C,
- an application for approval under section 226,
- an application for substitute consent under section 177E.

The term "permission" is used in the Regulations, and below, in respect of these various consents.

Processing of licence applications and planning consents for projects requiring EIA

1. After the commencement of the new Regulations, in order to ensure that the licence application is made subsequent to either an application for, or the giving of, permission for the associated development, the Agency will only be able to consider an application for an IPPC licence or a waste licence where it is accompanied by:

   (a) a written confirmation from a planning authority or the Board that an application for permission for the associated development is currently under consideration or

   (b) a copy of the permission given for the associated development.

(New subsections 87(1B) and (1C) of the EPA Act and new subsections 42(1B) and (1C) of the Waste Management Act).

2. An application for a licence must **also** be accompanied by either:

   (a) a copy of the EIS if one was required to be submitted as part of the application for permission or

   (b) a screening decision from the planning authority/Board determining that EIA is not or was not required under the Planning Act.

   (New subsections 87(1B) and (1C) of the EPA Act and new subsections 42(1B) and (1C) of the Waste Management Act).

3. In order that applicants for a licence can meet the requirement under (1)(a) above, the new subsection 173A(2) and the new subsection 173B(2) of the Planning Act provide that where a planning authority or the Board is considering an application for permission for development relating to an activity requiring a licence, and is requested by the applicant to confirm in writing that such development is the subject of the application for permission, the planning authority or the Board shall give such confirmation as soon as possible.

4. In order that applicants for a licence can meet the requirement under (2)(b) above (i.e. a case where EIA is not required) the new subsection

173A(3) and the new subsection 173B(3) of the Planning Act provide that when confirming that an application for permission is under consideration, in a case where EIA of the development is not required under the Planning Act, the planning authority or the Board must also confirm that fact (i.e. EIA not required).

5. The Agency will ensure that before a decision is made on a licence application or a revised licence, in a case where the activity relates to development of a type listed in Schedule 5 of the Planning and Development Regulations, the licence application is made subject to an EIA as respects the matters that come within the functions of the Agency: the new subsection 83(2A) of the EPA Act and the new subsection 40(2A) of the Waste Management Act refer.

6. Where an EIS is received along with a licence application, the Agency will, in a case where an application for permission is under consideration when the licence application is made (new subsection 87(1D) of the EPA Act and new subsection 42(1D) of the Waste Management Act) notify the planning authority or the Board as appropriate within 2 weeks, and will ask that any observations that the planning authority/Board has on the licence application be furnished to the Agency within 4 weeks of the date of notification. Requests by the Agency for observations should be as specific as possible. All documents in relation to the licence application will be available on the Agency's website. The planning authority/Board should respond to Agency within this 4 week period. The Agency is

required to consider any observations received from the planning authority/Board and to enter into any consultations with the planning authority/Board that it, or the planning authority/Board, considers appropriate. The Agency may not decide on the licence application until a decision has been made by the planning authority/Board, as appropriate, and the period for any appeal has expired.

7. Where an EIS is received along with a licence application in a case where permission for the associated development has been given prior to the making of the licence application, the Agency will (new subsection 87(1E) of the EPA Act and subsection 42(IE) of the Waste Management Act), notify the planning authority or the Board as appropriate within 2 weeks, asking it to respond within 4 weeks -

(a) stating whether the activity for which a licence is now being sought is permitted by the permission given,
(b) furnishing all documents relating to the EIA carried out, and
(c) furnishing any views it has in relation to the licence application.

Under the new subsections 173A(4) and 173B(4) of the Planning Act, the planning authority/Board are required to comply with the request of the Agency within the 4 week period referred to. As stated above, all documents in relation to the licence application will be available on the Agency's website. Again, the Agency is required to consider any observations received from the planning authority/Board and to enter into

any consultations with the planning authority/Board that it, or the planning authority/Board, considers are appropriate.

8. As is currently the position, the Agency will make its provisional licensing decision available to certain statutory consultees (including planning authorities): these will now include the Board (section 87(2) of the EPA Act and section 42(2) of the Waste Management Act as amended) and will, following that consultation, conclude the licensing process. Section 83(4) and section 41(2A) respectively of the EPA Act and the Waste Management Act have been amended to provide that where it grants a licence, the Agency will attach such conditions to the licence as it considers necessary to avoid, reduce and is possible, offset the major adverse effects (if any) on the environment. When the Agency makes its decision on a licence application, the Agency informs the applicant and the public and makes specified information available to the applicant and the public: amended provisions in this regard are contained in the new subsection 87(9A) of the EPA Act and the new subsection 42(11A) of the Waste Management Act.

9. A new subsection (3A) has been inserted into section 87 of the EPA Act to provide that the Agency may, in consultation with the planning authority/Board, extend the period of 8 weeks provided in section 87(3) in which to issue its proposed determination of an IPPC licence application if -

(a) it is necessary to complete the consultations with the planning authority/Board as now provided for in subsections (1D), (1E), (1F) or (1H) of section 87, or

(b) to enable the Agency to comply with the new requirement in section 87(1D)(d) that the Agency may not make its proposed determination of an IPPC licence application until the development consent process, including EIA, has been completed.

The same time-constraints provided in section 87(3) of the EPA Act do not arise in the context of the Waste Management Act, accordingly similar amendments were not required to the Waste Management Act.

10. Where a planning authority or the Board are dealing with an application for permission for development of a type listed in Schedule 5 of the Planning and Development Regulations, the planning authority or the Board are required, unless the likelihood of significant effects on the environment can be excluded, to make a determination as to whether the proposed development would have significant effects on the environment such that EIA is required. The new subsection 173A(5) and the new subsection 173B(5) provide that where the planning authority or the Board consider that the development for which permission is being applied will require an IPPC licence or a waste licence, respectively, it must request observations from the Agency to assist it in making its determination as to whether EIA is required and must take any such observations into

account when making its determination. Such requests for observations should be as specific as possible

11. The Agency is now required, under the new subsection 87(1G)(b) of the EPA Act in respect of an IPPC licence and the new subsection 42(1G)(b) of the Waste Management Act in respect of a waste licence application, to respond to a request by the planning authority or the Board for observations to assist the planning authority or the Board in making its EIA determination and those subsections also provide that the Agency will accept the determination of the planning authority or the Board so made.

12. The current position (prior to the new Regulations) is, of course, that the planning authority/Board is required to notify the Agency in relation to any application for permission for development comprising of or for the purposes of an activity requiring an IPPC licence or a waste licence and to inform the Agency that it may make submissions/observations. The new subsection (1F) of section 87 of the EPA Act and the new subsection (1F) of section 42 of the Waste Management Act require the Agency (provided it is satisfied that the development comprises or is for the purposes of an activity) to forward to the planning authority/Board such observations as it has on the application for permission, including the EIS, and to enter into such consultations with the planning authority or the Board in relation to the environmental impacts of the proposed development as the Agency, or the planning authority/Board considers necessary to complete the EIA.

13. As is the current position, the planning authority or the Board must take submissions received from the Agency into account in making its decision as to whether to give the permission concerned.

The EPA and CCMA (through the LUTS Committee) will develop together in the coming weeks detailed working arrangements to facilitate the implementation of these Regulations and will make these arrangements publically available.

Any queries in relation to this Circular Letter should be addressed to Ms. Joan Murphy, Environment Policy and Awareness, tel: (053) 911 7342, email: joan.murphy@environ.ie or Mr. Conor O' Sullivan, Planning and Housing (Finance and Policy Development), tel: (01) 888 2810, email: conor_o'sullivan@environ.ie.

Is mise le meas,

Philip Nugent

Principal Officer

Planning and Housing (Finance and Policy Development)