



An
Bord
Pleanála

Inspector's Report

ABP-305835-19

Development	Leave to apply for substitute consent for peat harvesting.
Location	Lands at Lower Coole, Mayne, Ballinealoe and Clonsura near Coole & Fineagh, County Westmeath.
Planning Authority	Westmeath County Council
Applicant(s)	Westland Horticulture.
Type of Application	Leave to Apply for Substitute Consent.
Observer(s)	None.
Date of Site Inspection	18 th March 2020.
Inspector	Deirdre MacGabhann

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1.0 Introduction

- 1.1. This report refers to an application for leave to apply for substitute consent, under section 177C (2)(b) of the Planning and Development Act, 2000, as amended, made by Westland Horticulture for peat harvesting on lands at two sites (i) Lower Coole, Mayne, Ballinealoe and (ii) Clonsura near Coole and Fineagh, Co. Westmeath. The application relates to the regularisation of peat harvesting carried out since 20th September 2012 on a site of 252ha, shown in Figure 1 (Site Location Map).

2.0 Site Location and Description

- 2.1. The application site lies to the west of Castlepollard in County Westmeath. It refers to two landholdings, one to the west of the village of Coole, in the townland of Lower Coole, and one c.3.5km to the south of the village of Finnea in the townland of Clonsura.
- 2.2. **Lower Coole.** This site is 164ha in size and comprises 65% of the overall site. the large site is divided by a regional road, the R395, with access to the site from the regional road and from a minor road, the L1826, to the south of the site.
- 2.3. **Clonsura.** This northern site is 88ha in size and represents 35% of the overall application site. Access to it is from the R394, via a minor local road, the L57671, which serves the bog and a small number of residential properties.
- 2.4. Both sites are described by the applicant as drained cutaway bogs (formerly raised bogs), and are situated in a flat rural landscape, generally removed from residential development. The Coole site is a large open site and is visible from the public road. Stockpiles of peat were evident close to access point at both sites. The Clonsura site is enclosed by forestry and the River Gore and River Inny run alongside its western boundary.

3.0 Proposed Development

- 3.1. The application before the Board is for peat harvesting carried out since 20th September 2012 on the subject site at Lower Coole and Clonsura, shown in Figure 1 (Site Location Map) comprising 252ha.

3.2. It is stated in the application that peat harvesting activities comprise a number of operations, typically taking place between April and September and including milling, harrowing, ridging and harvesting, with between 4 and 12 crop cycles during a season (weather dependent). Both sites contain a small hardstand area for the location of container units to house office and kitchen facilities and temporary toilet facilities. There are seven designated stockpile locations at Coole and a further three at Clonsura, with the mounds varying in height, up to a maximum of 12metres. Stockpiled materials are transported off site for further processing. Operations are served by sedimentation basins located on the perimeter of each site, to remove suspended solids from peat runoff.

4.0 Planning History

4.1. The following planning cases are relevant to subject site:

- PA ref. 92/347 – Permission granted to Hunt Peat Ltd for a temporary staging area for loading of peat at Coole and Mayne, County Westmeath.
- PL25.RL.2975 - The Board decided, in April 2013, that the drainage of boglands and extraction of peat at the Lower Coole, Mayne, County Westmeath (the subject site), after the 20th September 2012, was development and not exempted development, having regard to the introduction of section 4(4) of the Planning and Development Act, 2000, as inserted section 17 of the Environment (Miscellaneous Provisions) Act, 2011, and on the grounds that the development required an environmental impact assessment and appropriate assessment. The referral was the subject of a Judicial Review (2013/398/JR) and on 8th February 2018 the High Court upheld the Board's decision [2018] IEHC 58.

4.2. In addition, the following licences have been granted in respect of the development:

- Ref. ENV/W01/2009 - Discharge licence issue by Westmeath County Council to discharge to surface waters.
- Ref. P0914-01 - Application made by Westland Horticulture Ltd to the EPA in July 2013 for an Integrated Pollution Control Licence for peat harvesting activities at the subject site (extraction of peat from an area exceeding 50ha). The application document submitted to the EPA for the licence includes an

Environmental Impact Statement. The application was deferred by the EPA until the judicial review proceedings referred to were concluded and to date has not been formally decided.

4.3. In the application file, there is also reference to enforcement files opened in between 2009 and 2014 regarding activities at the subject site (Coole and Clonsura). The files deal with alleged unauthorised activity arising from the intensification of activities, the discharge of water to the River Inny (which discharges into Lough Derravarragh SPA/NHA), the need for EIA/AA and the impact on archaeological sites.

5.0 Legislative Context

5.1. The following legal provisions are relevant to the proposed development:

5.2. **Requirement for planning permission.** Section 4(4) of the Planning and Development Act, 2000 (as amended) requires that development which is exempt by virtue of certain sections of the act or the exempted development regulations, shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required. Section 4(4) of the Planning and Development Act 2000 was inserted by section 17 of the Environment (Miscellaneous Provisions) Act 2011, and came into effect on the 20th September 2012.

5.3. **The Peat Regulations.** In January 2019 the government introduced the Peat Regulations, two pieces of legislation which provided for an exemption from planning permission for large scale peat extraction activity (i.e. an area of 30 hectares or over) and the introduction of a regulatory framework for these developments to be operated by the EPA:

- European Union (Environmental Impact Assessment)(Peat Extraction) Regulations 2019, and
- Planning and Development Act 2000 (Exempted Development) Regulations 2019.

5.4. On the 20th September 2019 the High Court found that the Ministerial Regulations were invalid on the grounds that they were inconsistent with the requirements of the

EIA Directive and the Habitats Directive and the use of secondary legislation to give effect to the new licensing regime was *ultra vires* [2019] IEHC 685.

- 5.5. **Leave to apply for Substitute Consent.** Section 177D of the Planning and Development Act, 2000 (as amended), sets out the circumstances in which the Board can grant leave to apply for substitute consent. These include in section 177D(1) where it is satisfied that:
- a. an environmental impact assessment (EIA), a determination as to whether an EIA is required, or an appropriate assessment (AA), was or is required in respect of the development, and
 - b. that exceptional circumstances exist, such that the Board considers it appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent.
- 5.6. In considering whether exceptional circumstances exist, under section 177D(2) of the Act, the Board is required to have regard to:
- a) whether the regularisation of the development would circumvent the purpose and objectives of the EIA Directive or the Habitats Directive;
 - b) whether the applicant had or could reasonably have had a belief that the development was not unauthorised;
 - c) whether the ability to carry out an assessment of environmental impacts of the development for the purposes of EIA or AA and to provide for public participation in such an assessment has been substantially impaired;
 - d) the actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuing of the development;
 - e) the extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated;
 - f) whether the applicant has complied with previous planning permissions granted or had previously carried out an unauthorised development;
 - g) such other matters as the Board considers relevant.

6.0 Policy Context

6.1. Westmeath County Development Plan 2014 to 2020

- 6.1.1. Policies in respect of peatlands are set out in Chapter 5 of the current Westmeath County Development Plan (see attachments). These recognise the contribution that bogs make to the archaeological, cultural, natural history and landscape of the county. Policies seek to protect and conserve designated peatland areas and landscapes, to plan and prepare for the future sustainable and environmentally sensitive use of large industrial bog sites when peat harvesting finishes and to exercise control over peat extraction which would have significant impacts on the environment.

6.2. Natural Heritage Designations

- 6.2.1. The subject sites do not lie within any designated site, but there are a number of national and European sites in the vicinity of the site (see attachments). These include:

- Lough Bane, a pNHA that lies immediately east of Clonsura Bog,
- Garriskil Bog pNHA, SAC and SPA that lies to the south west of Coole Bog, and
- Lough Derravaragh pNHA and SPA that lies south of Coole Bog.

7.0 Grounds for Leave

- 7.1. The applicant sets out the following grounds for leave to apply for substitute consent for peat harvesting activities at Coole and Clonsura, 'the lands':

Context

- Peat harvesting activities have been carried out on site since the mid-1940s when turf was cut for fuel, with clearance and drainage of the lands to facilitate peat harvesting, prior to the introduction of planning controls on the 1st October 1963. The sites were further drained and developed in 1982 (funded by state aid) and taken over by the applicant in the mid-1990s and used for the production of milled peat for use in the horticultural industry.

- Irrespective of the above, the Planning and Development Act, 1963 included turbarry as an activity within the definition of ‘agriculture’ and agriculture as exempted development.
- All of the boglands were drained by 2000. Accordingly, harvesting activities were understood to have been exempt development by reference to Class 17(b) Part 3 of the 2001 Planning and Development Regulations.
- In the period between the Board’s decision under PL25.RL.2975 and the High Court judgement on the case and subsequent appeal by the applicant (which was refused), the law was unclear on the application of the legislation to peat harvesting
- Over the last number of years there has been a determined effort to create a new regulatory regime for peat harvesting in Ireland. This resulted in the introduction of the Peat Regulations, which were in place from 25th January 2019 to the ruling of the High Court on the 18th October 2019 (2019, No. 222 JR). The applicant stopped all works on the subject site on 22nd July 2019 pending the outcome of the challenge to the Peat Regulations.
- The current position is that at this point in time, and until/unless a new legislation regime is put in place, on-going peat extraction activity will require to be assessed under EIA and where appropriate AA and to be assessed through the planning system

Preliminary requirements

- The application is one where an **environmental impact statement** is required or a determination in respect of an EIS is required, as the activity was screened as requiring an EIA by the EPA having regard to the Planning and Development Regulations Part II Extractive Industry – (a) *Peat Extraction which would involve a new or extended area of 30 hectares or more*
- An **appropriate assessment** is required, on the grounds that an appropriate assessment was requested by the EPA having regard to the proximity and hydrological link between the sites and Lough Derravarragh SPA.

Exceptional Circumstances

- *Circumvention* – An Appropriate Assessment (AA) Screening Report, Natura Impact Statement (NIS) and Environmental Impact Statement (EIS) have

been prepared for the activities undertaken at the Coole and Clonsura sites. The NIS concluded that the development, by itself or in combination with other plans and projects would not adversely affect the integrity and conservation status of any Natura 2000 site or annexed species once mitigation measures and recommendations are adopted. The overall findings of the EIS were that ongoing activity would not give rise to significant negative impact on the environment, considering the controls and mitigation measures implemented in the operational management of the activity. If leave to apply is granted, the subsequent application would be accompanied by a Remedial NIS and Remedial EIAR therefore ensuring that regularisation would not circumvent the Habitats or EIA or Directive.

- *Belief* – Refers the Board to the legal advice received and protracted legal proceedings engaged in by the applicant to clarify the legal position, its parallel engagement in extensive consultation with the Department and other stakeholders, the ongoing lawful extraction of peat over the last 6 months (with the rest of the Irish peat industry) as evidence of grounds for having the reasonable belief that its peat extraction was not authorised.
- *Impairment* – The preparation of the NIS and EIS, which accompanied the IPPC licence application, involved extensive consultation and the information submitted is publicly available (www.epa.ie) and open for third party submissions on the processing of the application. On the 16th April 2019 the EPA requested the applicant to update the EIS originally submitted in 2013, to take account of legislation updating the EIA Directive, updated maps identifying the area for inclusion within the licence boundary and an AA and NIS. All reports submitted to the EPA are available for public inspection. Should leave be granted, the preparation of a rNIS and rEIAR will involve public consultation, be open for public participation and observations and notifiable bodies will be consulted. The ability to carry out the required assessments and to provide for public participation in assessments has not been impaired.
- *Effects* – The NIS for the development has concluded that no adverse effects on the integrity or status of any Natura 2000 site or annexed species will arise.

- *Remediation* – The EIS found that ongoing activity would not give rise to significant negative impacts on the environment, considering the controls and mitigation measures implemented in the operational management of the activity. The NIS concluded that that no adverse effects on the integrity or status of any Natura 2000 site or annexed species will arise. Remediation measures are proposed in both statements with the objective of ensuring that the potential for significant effects on the environment or adverse effects on the integrity of a European site are eliminated or mitigated in the first instance. The applicant is committed to the development of a fully costed site rehabilitation plan which will cover the measures to be implemented on the cessation of harvesting. Arrangements for covering the costs for these undertakings will be legally implemented through the Financial Provisions requirements in the IPC licence.
- *Compliance* – The site has not been subject to a planning application or permission before this. The activity is a pre-1963 development and consequently did not require planning permission. The applicant has carried out the activity either in accordance with the law, or in the reasonable belief that planning permission was not required until the recent decision of the High Court which struck down the Government scheme in which all of Ireland’s peat extraction industry was engaged in, including the applicant. The applicant has fully complied with the requirements and conditions of the licence to discharge to surface water (ENV/W01/2009).
- *Other such matters* – The applicant has reduced the use of milled peat in its products by over 70% in recent years. Ongoing management of the site will allow for the implementation of agreed post closure and rehabilitation plans to ensure that full advantage is taken of the biodiversity potential of the sites. Should harvesting operations and the applicant’s involvement cease, the potential for effective rehabilitation is reduced. The applicant, through the operation and management of the site, provides employment within the midlands area where there are few indigenous sources of employment.

8.0 Response by the Planning Authority

8.1. No response.

9.0 Assessment

9.1. Section 177D of the Planning and Development Act, 2000 (as amended), sets out the circumstances in which the Board can grant leave to apply for substitute consent. I consider these matters in turn.

9.2. Preliminary Matters (Section 177C(2))

9.3. **EIA/AA.** In the Board's determination of RL2975, in respect of the site, it was concluded that the development carried out since the 20th of September 2012 was not exempted development by virtue of section 4(4) of the planning and Development Act 2000, as it required an Environmental Impact Assessment and Appropriate Assessment. The Board's determination in respect of EIA and AA had regard to:

- i. The criteria set out in Schedule 7 of the Planning and Development Regulations 2001, as amended, the location and characteristics of the development involved and the potential effects of the development on the environment, and
- ii. The location of the development upstream of Lough Derravarragh SPA and the potential for peat extraction and drainage works to give rise to emissions to water that could affect downstream habitats.

9.4. The Board's decision was subject to Judicial Review and upheld in the High Court.

9.5. Having regard to the above, I am satisfied therefore, that an environmental impact assessment and an appropriate assessment would have been required for the development carried out on the subject site since 20th September 2012, and that the applicant has satisfied section 177D(1) of the Planning and Development Act, 2000, as amended.

9.6. Exceptional Circumstances (section 177D(2)(a) –(g))

- 9.6.1. *Whether the regularisation of the development would circumvent the purpose and objectives of the EIA Directive or the Habitats Directive.* The purpose of the EIA Directive is to provide an assessment of the likely environmental effects of a development prior to decision making, and to take account of these effects in the decision making process. The purpose of the Habitats Directive differs from EIA. It seeks to ensure the conservation of a wide range of rare, threatened or endemic animal and plant species and conservation of rare and characteristic habitat types.
- 9.6.2. From the information on file, it is evident that peat harvesting has taken place at the application site is long established, preceding the Planning Act of 1963 and the EU Directives in respect of EIA and AA. If the Board decide to grant the applicant leave to apply for permission, any application would be accompanied by a rEIAR and rNIS, and any subsequent decision to grant or refuse permission would be made on the basis of an assessment of the likely effects of the development on the environment and the likelihood of any significant effects on European sites. I do not consider therefore that an opportunity for regularisation of the development would circumvent the purpose or objectives of the EIA Directive or Habitats Directive.
- 9.6.3. *Whether the applicant had or could reasonably have had a belief that the development was not unauthorised.* It is evident from the information on file, including the Board's determination of RL2975 in 2013, the subsequent Judicial Review of the case and the Peat Regulations, which were ultimately set aside, that there has been a lack of clarity regarding the status of peat harvesting in planning law. I am satisfied, therefore, that the applicant had or could reasonably have had a belief that the development was not unauthorised.
- 9.6.4. *Whether the ability to carry out an assessment of environmental impacts of the development for the purposes of EIA or AA and to provide for public participation in such an assessment has been substantially impaired.* The application before the Board is for leave to apply for substitute consent for a development that commenced on the 20th September 2012 (i.e. when section 4(4) of the Planning and Development Act 2000 (as amended) came into effect). In July 2013 the applicant applied to the EPA, under Ref. P0914-01, for an IPC licence and that this included an Environmental Impact Assessment. The EIA is available to the public on the EPAs

website. It includes substantial baseline survey work, carried out in 2013, for all environmental parameters including terrestrial and aquatic ecology and for European sites and would provide a reasonable context for any subsequent application for substitute consent to the Board. I do not consider, therefore, that there is any substantial impediment to the applicant's ability to carry out an assessment of the environmental impacts of the development. Any application for substitute consent would require public and statutory consultation and would therefore provide for public participation in the assessment process.

- 9.6.5. *The actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuing of the development.* Peat harvesting activities has resulted in changes to the habitat and drainage characteristics of the subject site. These, and the effects of the development on other environmental parameters and downstream/related habitats, are examined in the applicant's EIS submitted to the EPA. It finds that with the implementation of mitigation measures, including a detailed Environmental Management System and implementation of a Rehabilitation Plan on closure, no significant environmental effects or adverse effects on any European site arise as a consequence of the development.
- 9.6.6. The applicant also refers the Board to the conclusions of an Appropriate Assessment Screening Report and Natura Impact Statement that have been lodged with the EPA¹ and states that these concluded that the development would not affect the integrity or conservation status of any Natura 2000 site.
- 9.6.7. Having regard to the above, and all of the information on file, there is no evidence to indicate actual or likely significant effects on the environment or on any European site resulting from the development. Notwithstanding this, if the Board decided to grant leave to the applicant to apply for substitute consent, the likely effects of the development on the environment or European sites would be addressed in the application, by way of an rEIAR and rNIS, and adjudicated upon on this basis.
- 9.6.8. *The extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated.* The applicant's EIA proposes a series of mitigation measures across environmental parameters to address any

¹ At the time of writing these were not available on the EPAs website.

adverse effects of the development. These are not unusual, for example, including measures for the settlement of suspended solids, control airborne dust emissions, limits for discharges from settlement basins, monitoring of seasonal changes to discharges, planting of windbreaks of trees alongside the River Inny (dust prevention), construction of new settlement basins and a Rehabilitation Plan (to include habitat and landscape rehabilitation and carbon sequestration). In principle, I would accept therefore that that it is possible to remediate potential significant effects or adverse effects of the development.

9.6.9. *Whether the applicant has complied with previous planning permissions granted or had previously carried out an unauthorised development.* There is no information on file to indicate that the applicant has not complied with previous planning permissions granted or carried out unauthorised development that is not addressed here.

9.6.10. *Such other matters as the Board considers relevant.* As stated by the applicant, I would acknowledge that peat harvesting provides a source of rural employment and that an application for substitute consent would allow the applicant to seek permission to regularise the development and provide a comprehensive assessment of the environmental effects of the development and means to rehabilitate the site.

10.0 Recommendation

10.1. Having regard to the foregoing, I recommend that the Board grant leave to apply for substitute consent for the following reasons and considerations.

11.0 Reasons and Considerations

Having regard to section 177D of the Planning and Development Act, 2000, as inserted by section 57 of the Planning and Development (Amendment) Act, 2010, the size and scale of the peat harvesting area that was carried out subsequent to the 20th September 2012 and to the location of the peatland development in proximity to European sites, the Board is satisfied that:

(a) an environmental impact assessment and an appropriate assessment was or is required in respect of the development concerned, and

(b) exceptional circumstances exist such that the Board considers it appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent.

In this regard, the Board considered that -

- the regularisation of the development concerned would not circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive;
- the applicant had or could reasonably have had a belief that the development was authorised;
- the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or an appropriate assessment, and to provide for public participation in such an assessment, has not been substantially impaired;
- the actual or likely significant effects on the environment or adverse effects on the integrity of a European site, if any, resulting from the carrying out of the development, could likely be substantially remediated; and
- applicant has not otherwise carried out any unauthorised development.

Deirdre MacGabhann

Planning Inspector

20th April 2020