



An
Bord
Pleanála

Inspector's Report ABP-306490-20

Development	Historic Peat Extraction
Location	Blackwater Bog Group, County Offaly
Planning Authority/s	Offaly County Council
Applicant	Bord Na Mona
Type of Application	Leave to Apply for Substitute Consent
Observer(s)	N/A
Date of Site Inspection	N/A
Inspector	Karla Mc Bride

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 in respect of an application made by Bord na Mona for peat harvesting on lands at the Blackwater bog group in County Offaly. This bog group includes 2 interconnecting sites at Ballaghurt. The application relates to the regularisation of peat harvesting carried out since 20th September 2012 on these sites within the Blackwater bog group, which are intended to be used in the future for peat harvesting activities.
- 1.2. The spatial extent of this bog group is described in Drawing No. BNM-LSC-502-03 and Table 3 of the accompanying report which indicates a cumulative production field 392ha on an overall landholding of 736ha. The red line boundary designates the entire lands within this peatland site and the shaded grey areas are taken to represent the works carried out on or after 20th September 2012 on lands which are intended to be harvested in the future.

2.0 Site Location and Description

- 2.1. The Blackwater bog group is located in the low-lying midland county of Offaly and the surrounding area is predominantly rural in character. This extensive bog group is located to the E and W of the River Shannon, and the subject sites are located the E of the River Shannon, and to S of Athlone and the M6 motorway.
- 2.2. The subject lands comprise a series of cutover bogs that have been industrially extracted by Bord na Mona for fuel and horticultural purposes. The site boundaries are mainly defined by hedgerows and laneways, and the lands are traversed by a network of drains that also manage the water regime within the peatlands. The subject sites and adjacent peatlands are interconnected by internal railway tracks. Access to the peatland sites is off the R444 and local road network. There are several sensitive heritage sites in the surrounding area (including the River Shannon Callows SAC and Middle Shannon Callows SPA), along several features of archaeological and historic interest.
- 2.3. The Blackwater bog group comprises 29 individual peatland sites and the following bog (2 interconnecting units) forms the basis of this application for Leave to Apply for Substitute Consent.

Bog	Ownership (ha)	Current Production Field Footprint (ha)
Ballaghurt	736	392
Totals	736	392

- 2.4. Peat harvesting activities comprise a series of operations which mainly take place between April and September and include milling, harrowing, ridging and harvesting, with between 4 and 12 crop cycles during a season (weather dependent). Sod moss is peat produced in block form for horticultural use, and is extracted mechanically with specially equipped excavators from mini face-banks and left on the bog to dry. Stockpiled materials are transported off site for further processing.

- 2.5. As part of the development of the bogs for milled peat production, parallel surface water drains at intervals of 15m have been created, and the strip of bog between the drains forms the peat production fields. The drains generally fall towards the ends of the production field and are directed by open drain or pipe to a settlement pond/s prior to discharge to a local watercourse by way of gravity.
- 2.6. Photographs and maps in Appendix 1 describe the sites in more detail.

3.0 Planning History

3.1. Planning application(s)

Offaly Co. Co.: No relevant planning history, S.5 referral declarations or record of current enforcement.

3.2. Referral case

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 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, as inserted section 17 of the Environment (Miscellaneous Provisions) Act, 2011, and on the grounds that the development requires 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.

3.3. Other licence application(s)

EPA Licence No. PO502-001: IPC Licence granted to BnM in April 2000 to carry out peat extraction on lands in excess of 50ha, this licence regulates activities over 29 bog units including the subject site, and it was amended in 2012.

4.0 Legislative Context

4.1. 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 EIA or AA is required. This section was inserted by S.17 of the Environment (Miscellaneous Provisions) Act 2011, and came into effect on the 20th September 2012.

4.2. The Peat Regulations:

The Peat Regulations which were enacted in January 2019 comprised the following two pieces of legislation that provided for an exemption from planning permission for large scale peat extraction activity (30ha or over) and the introduction of a regulatory framework for these developments to be operated by the EPA:

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

On the 20th September 2019 the High Court found that the 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.

4.3. 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 S.177D (1) where it is satisfied that:

- (a) environmental impact assessment (EIA), a determination as to whether an EIA was required, or an appropriate assessment (AA), was 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.

4.4. In considering whether exceptional circumstances exist, under S.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.

5.0 Policy Context

5.1. Development Plan(s)

The Blackwater Bog Group is located within a rural area covered by the current Development Plan for County Offaly.

County Offaly Development Plan 2014 to 2020: Chapters 2 & 3 deal with rural development and energy whilst Chapter 7 deals with cultural and natural heritage. The Plan recognises the contribution that bogs make to the archaeological, cultural, natural history and landscape of the county and Policy RDP-17 seeks to support the development of peatlands for appropriate alternative uses. There are no specific provisions for the subject site.

5.2. Natural Heritage Designations

The Ballaghurt bog and immediately surrounding lands are not covered by any sensitive heritage designations. However, there are several European sites in the vicinity which may be connected to the peatland site via onsite drainage arrangements and local watercourses, including the:

- River Shannon Callows SAC
- Middle Shannon Callows SPA,

There are a number of other sensitive natural heritage sites in the wider area (including bogs, lakes and eskers), and it is possible that mobile species from further afield European sites visit the peatland sites within this bog group.

6.0 Grounds for Leave to Apply

6.1. Context

Bord na Mona has been engaged in the production of milled peat for energy, fuel and horticultural uses for a prolonged period of time that predates the Planning and Development Act, 1963 and the relevant EU Directives, and it has operated under an EPA IPC licence since May 2000. It now seeks to regularise the planning status of historic peat extraction (and ancillary works) carried on out its lands since 12th September 2012. Details have been provided in relation to the operation (production process, drainage arrangements, and site area & production footprint), licencing compliance (annual environmental reports, audits, inspections & site visits) and the legal basis for the Leave to Apply for Substitute Consent request. Details of compliance with the consideration of the exceptional circumstances criteria set out under S.177D (2) (a)-(g) of the Planning & Development Act are summarised below.

6.2. Exceptional circumstances

- (a) ***Circumvention of the EIA Directive or Habitats Directive:*** as a remedial EIA and remedial AA will be carried out if Leave to Apply for SC is granted, then circumvention will not occur.
- (b) ***Reasonable belief that development was not unauthorised:*** considerable uncertainty regarding the planning status of peat extraction between 2012 & 2019. Historically it was exempted development under s.4 (1) (a) of the P&D Act 1963, this status was maintained under Class 17, Part 3, Schedule 2 of the P&D Regulations 2001, and up until the Environment (Misc. Provisions) Act 2011 amended s.4 (4) of the P&D Act 2000 to remove the exemption from development that required EIA or AA (from 20/09/2012). Following a series of planning referrals, court judgements and appeals which concluded that peat extraction was both works and use, and that peat extraction involving a new or extended area of 30ha or more required EIA & planning permission (Class 2(a), Part 2 Schedule 5), the Peat Regulations were published in early 2019 and subsequently quashed in late 2019.
- (c) ***Impairment of ability to carry out EIA, AA or provide for Public Participation:*** engaged in peat extraction at Ballaghurt bog since the late 1980s & have operated under an EPA licence since mid-2000 for sites in excess of 50ha. The IPC licence application involved statutory public participation (details on file) and the licence contains several conditions (including monitoring, emissions, water protection, waste management & bog rehabilitation). The site is subject to regular EPA visits & audits and the Annual Environmental Report (AER) can be accessed by the public on the EPA's website (most recent report on file). BnM participated in the preparation of a Code of Practice for peatlands, regularly engages with public bodies, local authorities & interest groups, and produces a periodic Biodiversity Plan. If Leave to Apply is granted, then a remedial EIAR & remedial NIS will be submitted which will allow for further public consultation.

(d) Actual or likely effects on the environment or integrity of a European

site: if Leave to Apply is granted, then a remedial EIAR & remedial NIS will be submitted with a detailed assessment of significant effects. Ongoing extraction activities since the late 1980s have changed the immediate & adjacent habitats (hydrology & vegetation). Subject site is not covered by any European designations but is connected to the River Shannon Callows SAC and Middle Shannon Callows SPA via on-site drainage. Ongoing monitoring of ammonia & sediments in drainage discharges and extraction works have been monitored in accordance with IPC licence conditions which predates the 2002 designation for the River Shannon Callows SAC.

(e) The extent to which such effects can be remediated: operating in accordance with IPC licence since 2000 (which predates some SAC designations), which has been amended to take account of evolving environmental protection legislation (including the 2009 EU Surface Water Regs.) with the object of achieving “Good Status”. Any historic effects on water quality (including aquatic ecosystems & protected species) have been enabled to remediate & recover by way of Licence conditions which also require the preparation of a Bog Rehabilitation Plan is required.

(f) Compliance with previous permissions or any unauthorised

development: own c.80, 000ha with c.240 planning applications from c.14 LAs for various development (details on file), whilst some developments are pre-1963. Never the subject of a S.160 enforcement action, although there have been some S.5 Referrals no decisions have yet issued for ABP.

(g) Other such matters: considerable reduction in production footprint of Blackwater Bog Group. Ballaghurt bog supplies the Derrinlough briquette factory, and if continued works are not permitted the supply will run out in mid-2020. BnM intend to move away from fuel production in an orderly manner in line with “Just Transition” and cease production in 2027. Employment impacts of closure of nearby West Offaly Power station would be compounded by premature closure of Derrinlough briquette factory.

6.3. Council Response

Offaly Co. Co.: No relevant or significant history documents and no issues raised

Decision Quashed

7.0 Assessment

This application for Leave to Apply for Substitute Consent for peat harvesting carried out since 20th September 2012 will be assessed with respect to:

- Preliminary matters (EIA & AA)
- Exceptional Circumstances.

7.1. Preliminary matters (EIA & AA)

- 7.1.1. **EIA:** The subject development comprises the peat harvesting activities at Ballaghurt Bog which forms part of Bord na Mona's extensive Blackwater bog group in County Offaly which includes 29 individual peatland sites. The 2 interconnecting bog units within the Ballaghurt site comprise a cumulative landholding of 736ha and a cumulative production field of 392ha, which the applicant intends to harvest in the future. Under section 172(1) of the Planning and Development Act 2000 (as amended), environmental impact assessment is mandatory for '*Peat extraction which would involve a new or extended area of 30 hectares or more*' (Class 2(a), Part 1, Schedule 5 of the Planning and Development Regulations 2001, as amended), indicating that substantial peat harvesting operations are likely to give rise to significant environmental effects. Under PL.25.RL.2975, the Board decided, that, having regard to the criteria set out in Schedule 7 of the Planning and Development Regulations, 2001 (as amended), continued works to extract peat on a substantial scale since September 2012 required environmental impact assessment.
- 7.1.2. The application refers to a significant site, in excess of the threshold area for EIA in the Regulations that occurs in an area where there is other large scale peat extraction and gives rise to potential pollutants, including the potential for substantial sedimentation and chemical pollution of downstream waterbodies. Ballaghurt bog is located in proximity to several European sites and may ultimately discharge into designated European sites for the River Shannon Callows SAC and Middle Shannon Callows SPA. There are also several other European sites in the wider area (including bogs, lakes and eskers) that may have a hydrological or mobile species connection to Ballaghurt Bog.

7.1.3. Having regard to the foregoing, I am satisfied that development carried out at this site since September 2012 would have required an environmental impact assessment to have been undertaken.

7.1.4. **Screening for AA:** The site lies within a wider landscape that is host to a number of European sites including the River Shannon Callows SAC and Middle Shannon Callows SPA. From the information on file and based on an examination of NPWS maps it would appear that at the Ballaghurt peatland site has the potential to drain into these European sites via onsite drainage arrangements and local watercourses. From an examination of NPWS maps it would appear that there is potential for a hydrological connection to several other designated European sites (including Mongan Bog SAC & SPA and Lough Fin SAC) which lie between Ballaghurt bog and the River Shannon. From a further examination of NPWS maps and it would also appear that there is potential for mobile species from SPAs within foraging range of Ballaghurt bog to visit this site (including Mongan Bog SPA).

7.1.5. The Qualifying Interests and Conservation interests for the European sites are:

European sites with a potential aquatic connection	Qualifying Interests (of relevance) / Special Conservation Interests
River Shannon Callows SAC (000216)	Molinia meadows Lowland hay meadows Limestone pavements Alluvial forests Otter
Middle Shannon Callows SPA (004096)	Whooper Swan, Wigeon & Corncrake Golden Plover, Lapwing & Black-tailed Godwit Black-headed Gull Wetland & Waterbirds
Mongan Bog SAC (000580)	Active raised bogs Degraded raised bogs (capable of regeneration) Depressions on peat substrates

Lough Fin SAC (000567)	Geyer's Whorl Snail Alkaline fens
European sites with a potential mobile connection	Special Conservation Interests
Mongan Bog SPA (004017)	Greenland white-fronted goose

Conservation objectives:

- To maintain or restore the favourable conservation condition of the Annex I habitat(s) and/or the Annex II species for which the SAC has been selected (River Shannon Callows SAC);
- To maintain or restore the favourable conservation condition of the Annex I habitat(s) and/or the Annex II species for which the SAC has been selected which is defined by a list of attributes and targets (Lough Fin SAC & Mongan Bog SAC);
- To maintain or restore the favourable conservation condition of the bird species listed as Special Conservation Interest (Middle Shannon Callows SPA & Mongan Bog SPA).

7.1.6. **Likely significant effects:** From the information on file and on the EPA's website under the applicant's IPC licence (PO502-001), it is evident that peat harvesting requires substantial drainage works and the discharge of water from the site, with the risk of sedimentation and pollution arising in discharge waters, from the subject application, and possibly from other peat harvesting operations in the area. Environmental controls are also in place for noise and dust. Consequently, there was a risk of siltation and chemical contamination (ammonia) in downstream waters with the potential for impacts on water quality and, therefore, water dependent habitats and species. There was also a risk of disturbance of mobile species. At a high level, therefore, it is evident that there was a risk of significant effects arising from the development, individually or in combination with other projects, on European sites.

7.1.7. **Appropriate Assessment Conclusion:** On the basis of the information provided with the application, it is not possible to establish that the development carried out since September 2012, individually, or in combination with other plans or projects would not have been likely to have had a significant effect on European site Nos. 000216, 004096, 000580, 000567 and 004017, or any other European site, in view of the site's Conservation Objectives and a Stage 2 Appropriate Assessment (and submission of NIS) would have been required.

7.1.8. **Overall conclusion:** Having regard to the foregoing, I am satisfied, that an environmental impact assessment and appropriate assessment of the development carried out at this peatland site since September 2012 would have been required, and that the ongoing operation of peat harvesting, without regularisation, would be defective by reason of the final judgements of the High Court.

7.2. **Exceptional Circumstances criteria set out under S.177D (2) (a) – (g)**

7.2.1. ***Whether regularisation of the development concerned would circumvent the purpose and objectives of the EIA Directive or Habitats Directive.***

7.2.2. The EIA Directive seeks to provide for an assessment of the likely significant effects of a development on the environment prior to decision making, and to take account of these effects in the decision making process. The Habitats Directive seeks to ensure the conservation of a wide range of rare, threatened or endemic animal and plant species and the conservation of rare and characteristic habitat types.

7.2.3. Peat harvesting has taken place at the Blackwater bog group over a prolonged period of time which predates the 1963 Planning Act and the EU Directives in relation to EIA and AA, and peat harvesting has taken place at Ballaghurt bog since the 1980s. If the Board decide to grant the applicant leave to apply for substitute consent, the application would be accompanied by a remedial EIAR and remedial NIS. Any subsequent decision by the Board to grant or refuse permission for substitute consent for development carried out since September 2012 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, as a result of past works.

7.2.4. Having regard to the foregoing, I am satisfied that the regularisation of the development would not circumvent the purpose or objectives of the EIA Directive or Habitats Directive.

7.3. ***Whether the applicant had or could reasonably have had a belief that the development was not unauthorised.***

7.3.1. For the reasons stated above, I am satisfied that the applicant had or could reasonably have had a belief that the development was not unauthorised.

7.3.2. It is evident from the information on file, including reference to the Board's determination of PL25.RL2975 in 2013, the subsequent Judicial Review and the 2019 Peat Regulations, which were ultimately set aside, that there has been a lack of clarity regarding the status of the subject development in planning law.

7.3.3. Having regard to the foregoing, I am satisfied, that the applicant had or could reasonably have had a belief that the development was not unauthorised.

7.4. ***Whether 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 been substantially impaired.***

7.4.1. The application for leave to apply for substitute consent relates to development that commenced on or after the 20th September 2012 when section 4(4) of the Planning and Development Act 2000 (as amended) came into effect. Since April 2000 the applicant has operated under an IPC Licence issued by the EPA (PO502-001) and has submitted Annual Environmental Reports. The IPC licence application included an Environmental Impact Statement which is available to the public on the EPAs website. The EIS includes substantial baseline survey work for a range of environmental receptors (including terrestrial & aquatic ecology and European sites). The baseline survey work provides a reasonable basis for any subsequent application for substitute consent to the Board.

7.4.2. The IPC Licence and environmental monitoring reports indicate how the development has operated over the period since September 2012 and would contribute to baseline information for any environmental impact assessment and

appropriate assessment. It is also noted that the applicant has engaged with the Department of Arts, Heritage and the Gaeltacht to develop principles for the protection of archaeology in the applicant's bogs and engages with other public bodies in relation to the work carried out on its peatlands.

7.4.3. Having regard to the foregoing, I am satisfied that there is no substantial impairment 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 consultation which would provide for public participation in the assessment process.

7.5. ***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 continuation of the development.***

7.5.1. The peat harvesting activities carried out since September 2012 have resulted in changes to the immediate and adjacent habitats, and to the drainage and hydrological characteristics of the site, however much of this would have occurred prior to September 2012 as the works have been ongoing for a prolonged period of time. Since 2000 much of the original emissions to air, water, waste, resource consumption, incidents and complaints have been actively managed under EPA licence, with the licence updated from time to time in light of changes in national or European legislation. Environmental protection measures are set out in Appendix 5.2 of the applicant's submission and most recent AERs indicate a high level of compliance with emission limit values.

7.5.2. Having regard to the foregoing, I am satisfied that there is no evidence to indicate actual or likely significant effects on the environment or on any European site resulting from the development. However, if the Board decide to grant leave to apply for substitute consent, the likely effects of the development on the environment and the likelihood of any significant effects on European sites, as a result of development carried out since September 2012, would be addressed in any subsequent application, by way of a remedial EIAR and remedial NIS, and assessed accordingly by the Board.

7.6. *The extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated.*

- 7.6.1. The applicant states that since 2000 the development has been operating under an EPA licence which seeks to protect the environment. During this period, changes in legislation have resulted in changes to the licence, to bring it in line with current, and often higher standards, which has presented the opportunity to remediate some of the historic effects of peat extraction, for example on water quality. The current IPC licence also requires the preparation of a Bog Remediation Plan to ensure proper closure of peat extraction activities and the protection of the environment.
- 7.6.2. Furthermore, any remedial EIAR or remedial NIS submitted by the applicant would be required to contain a series of mitigation measures to address any identified adverse effects of the development on wide range of environmental receptors and any European sites (since September 2012) that have a connection to the peatland site (including measures for the settlement of suspended solids and airborne dust emissions, discharge limits to protect water quality and ongoing monitoring).
- 7.6.3. Having regard to the foregoing, I am satisfied that it would be possible to remediate any significant effects on the environment or any adverse effects on the integrity of a European site that have occurred since September 2012.

7.7. *Whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development.*

- 7.7.1. There is no evidence to indicate that the applicant has not complied with previous planning permissions or carried out unauthorised development that is not addressed by means of the current application for leave to apply for substitute consent.

7.8. *Such other matters as the Board considers relevant*

- 7.8.1. Peat harvesting provides for significant employment opportunities, it makes a substantial contribution to national agricultural turnover and this bog supplies the Derrinlough briquette factory. The applicant states that bogs that cease production will be rehabilitated and put to other uses. An application for substitute consent would provide for a full assessment of the environmental and ecological effects of development carried out since September 2012, an opportunity to remediate any past adverse impacts, and a means to rehabilitate the site in the future.

8.0 Recommendation

8.1. I recommend that the Board grant leave to apply for substitute consent for the following reasons and considerations.

9.0 Reasons and Considerations

Having regard to the size and scale of the peat harvesting area which was carried out subsequent to 20th September 2012 and to the location the Ballaghurt peatland site (within the Blackwater bog group) to the River Shannon Callows SAC, Middle Shannon Callows SPA, Mongan Bog SAC and Lough Fin SAC, and to the location of the peatland site within the foraging range of bird species that are designated as being of Special Conservation Interest for the Shannon Callows SPA and Mongan Bog SPA, and to section 177D of the Planning and Development Act, 2000, as inserted by section 57 of the Planning and Development (Amendment) Act, 2010, the Board is satisfied that:

- (a) an environmental impact assessment and an appropriate assessment were 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.

Karla Mc Bride

Karla Mc Bride

Senior Planning Inspector

7th April 2020