



An
Bord
Pleanála

Inspector's Report ABP-306689-20

Question	Whether the drainage of wetland habitat (raised bog) & mechanical disturbance, removal of peat from a site is or is not development or is or is not exempted development.
Location	Corryourke, Cornakill, Mullagh, Co. Cavan
Declaration	
Planning Authority	Cavan County Council
Planning Authority Reg. Ref.	246
Applicant for Declaration	Dr Patrick Moran.
Planning Authority Decision	None (referred to ABP).
Referral	
Referred by	Cavan County Council.
Owner/ Occupier	Not stated.
Observer(s)	None.
Date of Site Inspection	29 th May 2020.
Inspector	Deirdre MacGabhann

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1.0 Site Location and Description

- 1.1. The subject site is situated c.5km to the east of Virginia, in the townlands of Corryrouke and Cornakill, north west of Mullagh in County Cavan. It comprises a broadly rectangular area of raised bog, on a north west/south east orientation. To the south of the site are a small number of one off houses alongside a minor public road. The site is generally removed from the public road and separated from it by agricultural land, hedgerows and woodland.
- 1.2. Access was not permitted to the site by the operator of the peat extraction process. From the public road, aerial photography and photographs on file it is evident that the subject site comprises a raised peat bog and that peat is being extracted from it by mechanical means with active draining of the bog to facilitate this activity. Access to the site is via a gated entrance. This opens into a paved yard with stored machinery, vehicles and broken rock. An internal access road runs along the southern edge of the site.

2.0 The Question

- 2.1. The question before the board is does the drainage of wetland habitat (raised bog) and mechanical disturbance and removal of peat from the site comprises development and exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

- 3.1.1. The planning authority did not make a declaration but have referred the matter directly to the Board.

3.2. Planning Authority Reports

Planning/Enforcement Reports

- 3.2.1. On file is a letter to the planning authority's Enforcement Section. It is from local residents in respect of the subject works and sets out the following concerns:

- *Impact on residential amenity.* Public road, L3900, is a busy link road with new housing alongside, with detrimental impact on amenity (traffic and noise from site, 7 days/week). Flood lighting of site and work carried out in early morning and late evening.
- *Ecological, visual and safety impact of peat extraction.* Peat is extracted with mechanical diggers (bog face up to 6m). Water is pumped away with mechanical pumps from peat extraction area. Construction of internal access roads with materials from site and imports. Loss of trees and visual impact of worked site.
- *Planning permission is required.* Development includes drainage of a wetland habitat in excess of 2ha (total area c.55ha).
- *Environmental impact assessment.* If sub-threshold for EIA, screening should be carried out.
- *Appropriate assessment.* Drains discharge to River Blackwater catchment.
- *Precedent.* ABP-305340-19.
- *Entrance.* Has been upgraded significantly, with 2m high palisade fence, gate and widened entrance for articulated lorries.
- *Parking and loading bay.* Created for vehicles accessing the site and loading of peat harvested. No permissions sought. No surface water drainage measures installed and run off flowing directly to adjoining watercourse.
- *Portacabin.* Erected without planning permission and may include a toilet with no appropriate disposal facilities.
- *Discharge licence.* Granted by Cavan County Council. Conditions not being complied with (one discharge point granted, two in use). Water pumped from low lying areas of the site to reservoirs by mechanical means in conflict with discharge licence. Discharge licence incompatible with waste taken into site.
- *Waste.* Unlicensed intake of waste material to site and illegal dumping.
- *IPC.* Requirement for Integrated Pollution Control licence and planning permission. Peat harvesting of >30ha requires and IPC licence. Site area is c.55ha. Planning permission required for peat extraction activities (recent

rulings by APB and the effect of the Environment (Miscellaneous Provisions) Act 2011.

- *Health and safety concerns.* Deep reservoirs on site are not fenced.
- *Ecological devastation.* Loss of habitat by deep JCB excavation, wildlife species and scarring of landscape.
- *Restoration.* No plans for restoration of site and water built up in ponds.
- *Loss making landowner.* Risk that there will be no funds for reconstitution actions.

4.0 Planning History

4.1. There is no planning history in respect of the subject site.

4.2. The following cases have been determined by the Board:

- RL.2975 – Referral. 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.
- RL2969 – Referral. The Board decided that the drainage of boglands, peat extraction, accesses from public roads, peat handling activities and other associated activities and works at Camagh Bog, Doon, Castlepollard, County Westmeath was development and was not exempted development.
- ABP-301243 – Referral. The Board decided that the cutting of small amounts of turf using a sléan within Mouds Bog, candidate Special Area of Conservation to demonstrate how turf is cut by hand to members of the public, at Hawkfield, County Kildare was development and was not exempted development.

- ABP-305340-19 – Referral. The Board decided that the drainage of wetland (raised bog) and mechanical disturbance, extrusion of peat and removal of turf at Drakerath, Wilkinstown, County Meath was development and was not exempted development.

5.0 Policy Context

5.1. Development Plan

- 5.1.1. Section 3.8 of the Cavan County Development Plan 2014-2020 deals with extractive industries and recognise the economic value of natural resources. Policies and objectives (EDP6-10 and EDO21-26) seek to ensure the protection of the built and natural environment in the exploitation of these and to require, where necessary, environmental impact assessment or appropriate assessment of development proposals.

5.2. Natural Heritage Designations

- 5.2.1. The appeal site lies c.4.3km to the north west of Kilconny Bog (Cloghbally) proposed Natural Heritage Area and Special Area of Conservation (shared site code 000006) and c. 4.2km east of Lough Ramor. Lough Ramor is designated as a proposed NHA (00008) and outflows into the River Boyne and River Blackwater SPA and (site code 004232 and 002299).

6.0 The Referral

6.1. Referrer's Case

- 6.1.1. The referrer submits aerial imagery of the site in 2009 and 2019 and states:
- The activity at the c.13ha site is unauthorised and includes drainage of a wetland habitat in excess of 2ha (Class 1(c) Part 2, Schedule 5 Planning and Development Regulations 2001 [development which requires environmental impact assessment]).

- This is a wetland site of high biodiversity value that is being drained and from which peat is being extracted. This development and similar developments nationwide are contributing to the climate and biodiversity emergency declared by the government.
- Even if sub-threshold the impact on the environment should require at a minimum EIAR screening in accordance with the Planning and Development Regulations (as amended) 2001.
- Precedent set by the Board under ABP-305340-19 (drainage of wetland habitat and mechanical disturbance, extrusion of peat and removal of turf from a site) who determined that the works were development and not exempted development and that they would require an environmental impact assessment and appropriate assessment.

6.2. Planning Authority Response

- None.

6.3. Owner/ occupier's response

6.3.1. The owner of the site (or part thereof) raised the following matters in response to the referral:

- Daly Peat Ltd is extraction peat from the portion of the bog owned by Thomas P Daly. The area is less than the 13ha indicated by the referrer and is less than 3ha. Neither Daly Peat Ltd or Thomas P Daly are owners of the entire bog.
- Lands used for extraction are owned by Thomas P Daly and comprise 2.48ha. A further c.3.2ha are leased but this area is only used for the purpose of access to the public road.
- Upon recommendation of the planning authority, silt traps have been installed (see Map attached to submission) and, since 2016, is subject to a discharge licence).
- The bog owned and used for the extraction of peat, c.2.5ha, falls significantly below the threshold for planning and screening of 10ha and could not be

considered to have a significant impact on the environment. Planning permission and EIAR should not be necessary. In these circumstances, it would be wholly unfair upon the owner/occupier that a section 5 declaration should be made.

- The referrer resides c.25 miles from the subject site and the owner/occupier questions the significance of his interest in the site.

6.4. Further Responses

- None.

7.0 Statutory Provisions

7.1. Planning and Development Act 2000 (as amended)

7.1.1. Section 2(1) and 3(1) of the Act defines the terms 'development' and 'works'.

7.1.2. Section 4(2) of the Act provides that the Minister may by regulation provide for any class of development to be exempted development, if he or she is of the opinion that by virtue of the size, nature or limited effect on its surroundings, the development would not offend against the principles of proper planning and sustainable development. Section 4(4) provides that such development shall not be exempted development if an environmental impact assessment or appropriate assessment of the development is required.

7.2. Planning and Development Regulations 2001 (as amended)

7.2.1. Article 63) of the Planning and Development Regulations 2001, as amended (the Regulations), provides that Classes of development set out in Part 3 of Schedule 2 shall be exempted development, subject to the development complying with the conditions and limitations set out alongside the Class and subject to Article 9.

7.2.2. Article 9 sets out certain restrictions on exempted development. These include where the development would endanger public safety by reason of traffic hazard or obstruction of road users and/or comprise development which would be likely to have an adverse effect on an area designated as a natural heritage area.

7.2.3. Schedule 2, Part 3 of the Planning and Development Regulations 2001, as amended (the Regulations), sets out Classes of rural development which are deemed to be exempted, including:

- Class 11 comprises development consisting of the carrying out of drainage and/or reclamation of wetlands. Conditions include that the area affected shall not exceed 0.1ha. Wetlands are defined in article 5 the Regulations as '*natural or artificial areas where biogeochemical functions notably depend on constant or periodic inundation, or saturation, by standing or flowing fresh, brackish or saline water*'.
- Class 17, peat extraction, comprises peat extraction in a new or extended area of less than 10ha, or peat extraction in a new or extended area where the drainage of boglands commenced prior to coming into force of the Regulations.

7.2.4. **Environmental impact assessment.** Section 172 of the Act requires environmental impact assessment (EIA) for development which would be of a class specified in Part 1 or Part 2 of Schedule 5 of the Regulations where the development is equal to or exceeds the limit specified in the Schedule, or where the development is sub-threshold and is likely to have significant environmental effects. Class 1(c), Part 2 of Schedule 5 requires environmental impact of development consisting of the carrying out of drainage and/or reclamation of wetlands where more than 2 hectares of wetlands would be affected. Class 2(g) requires environmental impact assessment for peat extraction which would involve a new or extended area of 30 hectares or more. Schedule 7 of the Regulations sets out criteria for determining whether the development listed in Part 2 of Schedule 5 should be subject to EIA.

7.2.5. **Appropriate assessment.** Section 177S of the Act requires that a competent authority take appropriate steps to avoid in a European site the deterioration of natural habitats and the habitats of species for which the site has been designated and, under section 177N, may only grant consent having determined that a proposed development shall not adversely affect the integrity of a European site.

8.0 Assessment

8.1. Is or is not development

- 8.1.1. The Planning and Development Act 2000, as amended, defines development as *‘the carrying out of works on, in, over or under land or the making of any material change in the use of any structures or other land’*. Works are defined as *‘any act any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal’*.
- 8.1.2. From the information on file and inspection of the appeal site, it is evident that peat is being extracted from the subject site and I would consider this to be an act of excavation. The lands are also drained, which I would consider to be an act of alteration. I would consider therefore that the activities on the subject site constitute the carrying out of works on land and therefore comprise development.

8.2. Is or is not exempted development

- 8.2.1. **Exemptions.** The subject development comprises land drainage works and peat harvesting. Whilst exemptions are provided for both classes of development in Schedule 2 of the Regulations (Class 11 and 17), as the development has been carried out to facilitate peat extraction, I consider Class 17 would be the appropriate Class against which to determine whether or not the development is exempted.
- 8.2.2. In this regard, as stated I would estimate the area of the referred site area to be c.11-12ha with active working of approximately one half to two thirds of the site c.5.5 to 7.5ha (see most recent aerial imagery). This excludes the access to the site which is not referenced in the referral. The subject development would therefore be under the limit of the exemption under Class 17. However detailed survey would be required to determine the actual site and working area.
- 8.2.3. **Article 9 limitations.** Notwithstanding the above, Article 9 of the Regulations de-exempts development if there is a risk of **traffic hazard** or adverse effects on a **designated natural heritage area**. In this instance, there is an existing access to the subject lands which links to an internal road along the southern boundary of the site. The entrance would appear to have been constructed/enlarged without planning permission and there is no assessment of the number or type of vehicles

that access the site or export material from it. I note that the submissions on file relate to the multiple articulated lorries using the entrance. Having regard to the minor nature of the public road providing access to the site I would have concerns that the arrangements for access have not been adequately assessed and that, without further information, there is a risk that the development could result in traffic hazard on the local road.

- 8.2.4. **Natural Heritage Areas.** The owner/occupier has submitted information on the location of silt traps which drain the worked area. However, there is no information to indicate how surface water is managed on site (including from the adjoining hardstanding areas) or water quality of discharge or receiving waters. From OSi and EPA mapping it is evident that a water body flows to the east of the subject site, Lislea_010, out falling, like all water bodies in the area, into Lough Ramor, c.4km to the south west of the appeal site. It is likely that the site drains to Lislea_10, or if via another route, would also discharge to Lough Ramor. It is probable therefore that the subject site is connected to Lough Ramor.
- 8.2.5. Lough Ramor is designated a proposed Natural Heritage Area. It also outfalls into the River Boyne and River Blackwater SPA/SAC. Given the distance of the subject site from the natural heritage area, significant effects on downstream water bodies are unlikely. However, there is no substantial information on which to base this conclusion and I consider that any conclusion of no effects in this context would conflict with the principles of the exempted development regulations which facilitate development which not '*offend against the principles of proper planning and sustainable development*' and a precautionary approach given the requirements placed on the Board under the Water Framework Directive.
- 8.2.6. **Environmental Impact Assessment.** With regard to the requirement for environmental impact assessment, the Regulations require environmental impact assessment for the carrying out of drainage and/or reclamation of wetlands where more than 2 hectares of wetland would be affected (Class 1(c)) and where peat extraction would be 30ha or more (Class 2(g)). The subject development involves the drainage of lands for the purpose of peat extraction and as stated, I consider the latter to be the more appropriate Class against which to consider the development.

- 8.2.7. The subject development would be sub-threshold for mandatory EIA. Schedule 7 of the Regulation set out criteria for determining whether development listed in part 2 of Schedule 5 should be subject to environmental impact assessment. This includes under 'characteristics of the development', the use of natural resources, and under 'location of the proposed development', the sensitivity of the geographical area likely to be affected having regard to the existing land use, the relative abundance, availability, quality and regenerative capacity of the natural resources in the area and the absorptive capacity of the natural environment pay particular attention to wetlands (amongst other things).
- 8.2.8. The subject site comprises a raised bog, a priority habitat under the EU habitats directive (Active raised bogs, raised bogs still capable of natural regeneration), and a habitat under pressure already in Ireland and an important carbon sink. There is little information on file to indicate the quality of the bog habitat on site, the implications of its loss or the potential for regeneration. I am also mindful that the Regulations set out a much lower threshold for environmental impact assessment where drainage and/or reclamation of wetlands is proposed, suggesting importance and/or sensitivity of the habitat. I would consider, therefore, that an EIA screening exercise would be necessary to determine the need for EIA and that it is not possible to conclude in the absence of this the likelihood of significant environmental effects.
- 8.2.9. **Appropriate Assessment.** Under the terms of the Planning and Development Act, the Board is precluded from granting permission for a development where there is a risk of an adverse effect on the integrity of a European site. In this instance the subject site would appear to drain to a water body that discharges some way downstream into a European site. At this distance, adverse effects on the integrity of the site are unlikely. However, there is no scientific evidence on file to support this conclusion i.e. there is no information on the materials being imported to the site (as suggested in the information on file), means to manage potential pollutants, the likely quality and volume of water to be discharged off sites and the likely effect on receiving water. In the absence of screening, I would be concerned that there would remain a potential risk of adverse effect on downstream European sites.

9.0 Recommendation

9.1. I recommend that the Board should decide this referral in accordance with the following draft order.

WHEREAS a question has arisen as to whether the drainage of wetland habitat (raised bog) and mechanical disturbance and removal of peat from a site is or is not development or is or is not exempted development:

AND WHEREAS Dr Patrick Moran requested a declaration on this question from Cavan County Council and on the 19th Day of February 2020, the Council referred the matter to An Bord Pleanála.

AND WHEREAS An Bord Pleanála, in considering this referral, had regard particularly to –

- (a) Section 2(1) of the Planning and Development Act, 2000, as amended,
- (b) Section 3(1) of the Planning and Development Act, 2000,
- (c) Section 4(1)(a) of the Planning and Development Act, 2000, as amended,
- (d) article 6(3) and article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (e) Parts 3 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (f) the planning history of the site,
- (g) the pattern of development in the area:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The drainage of wetland habitat (raised bog) & mechanical disturbance, removal of peat from a site is development;

(b) The drainage of wetland (raised bog), the mechanical disturbance and removal of peat from the site is not exempted development having regard to the risk to public safety by reason of traffic hazard, the sensitivity of the site and the need for screening to establish the requirement for environmental impact assessment and appropriate assessment.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (4) of the 2000 Act, hereby decides that the drainage of wetland habitat (raised bog) and mechanical disturbance, removal of peat from a site is development and is not exempted development.

Deirdre MacGabhann

Planning Inspector

1st July 2020.