



An
Bord
Pleanála

Inspector's Report ABP-310547-21

Question	Whether the harvesting of peat is or is not development or is or is not exempted development
Location	Doon Co. Westmeath.
Declaration	
Planning Authority	Westmeath County Council
Planning Authority Reg. Ref.	S5-9-21
Applicant for Declaration	Omard Mushrooms Ltd
Planning Authority Decision	No declaration
Referral	
Referred by	Westmeath County Council
Owner/ Occupier	Omard Mushrooms Ltd - occupier Cavan Peat - owner
Date of Site Inspection	30 th September 2021
Inspector	Dolores McCague

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1.0 Site Location and Description

- 1.1.1. The site is located in the townland of Doon in north Westmeath, between the settlements of Coole and Finnea and between the towns of Castlepollard and Granard. The site is close to where the River Glore joins the River Inny (which marks the county boundary between Longford and Westmeath); with the River Glore flowing in a north westerly direction close to the north-eastern boundary and River Inny flowing south west close to the north-western boundary. Lough Bane is on the opposite side of the River Glore (separated from the subject site by the river) and Lough Kinnale is on the River Inny upstream of the site. There is a low density of population in this rural area and the site is part of larger areas of bog, either side of the Rivers Glore and Inny. The site is accessed via a private (barrier controlled) road from a local road which joins the R396 (Coole to Granard) west of the site, to the R394 (Castlepollard to the N55 at Kilcogy) to the east. The local road and regional roads provide visibility over very large tracts of peat harvesting development at a landscape scale.

2.0 The Question

- 2.1.1. The question presented is: whether the extraction of peat is or is not development and is or is not exempted development.

The request is presented as a two page Westmeath County Council Section 5 application form, with the description of proposed development 'harvest peat from the bog'; and two maps, one a small scale map with an area outlined in red and the other an orthophoto or aerial photograph with an area outlined in red, stated to be 29.5ha, both prepared by Traynor Environmental Ltd. on behalf of Omard Mushrooms Ltd. The area outlined is an arbitrary division of a larger peat harvesting site.

3.0 Planning Authority Declaration

3.1. Declaration

- 3.1.1. The planning authority (PA) did not issue a declaration and referred the question to the Board.

3.2. Planning Authority Reports

- 3.2.1. Planning Reports

No report was prepared in relation to the referral.

4.0 Planning History

300686 – (in respect of a site which includes the subject site) planning permission granted for a 13 turbine wind farm with a 30-year operational life at Coole, Monktown, Camagh (Fore by), Doon, Clonsura, Mullagh, Boherquill, and Joanstown, County Westmeath; site located adjoining and to the northeast of the R396 regional road, which connects Coole village with Granard, and to the southwest of the R394 regional road, which connects Finnea village with Castlepollard. It is stated to measure 439ha and much of the site is in use as commercial peatlands, alongside fringe areas of commercial forestry (measuring c.9.5ha). An EIAR and NIS accompanied the application. The inspector's report refers to the submission from Inland Fisheries Ireland (IFI) which states that this section of the River Inny is an important holding area for adult salmonids and an important spawning channel for coarse fish; and the River Glore is an important spawning and nursery river for brown trout with significant numbers of Lough Sheelin trout coming to this river to spawn.

PL25.RL2969 – Whether the drainage of bogland, peat extraction and handling, the creation of accesses from public roads and other associated works are development or are exempted development at Camagh Bog, Doon, Castlepollard, County Westmeath (request by Friends of the Irish Environment). That site is south of the local road.

PL25.RL2975 – Whether the drainage of bogland, peat extraction and handling, the creation of accesses from public roads and other associated works are development or are exempted development at Lower Coole, Mayne, Ballinealoe, Clonsura, near Coole and Fineagh, County Westmeath (request by Friends of the Irish Environment). The site is across the River Glore.

The Board's decision in each of the above cases was that the drainage of the bogs, peat extraction, accesses from public roads, peat handling activities and other associated activities are development and exempted development until the 20th day of September 2012, after which they are development and not exempted development.

PL25.RL2815 – Whether certain peat extraction and associated works is development or not and whether it is exempted development or not, on three separate parcels of land at Lickny, Newcastle, Doon and Carlanstown, townlands, County Westmeath (request by Friends of the Irish Environment). In May 2013, the Board dismissed the referral, based on the following:

Having regard to the different parcels of land identified in this referral, which appear to be in multiple ownership, in varying size of individual holdings with numerous parties involved and in the absence of certainty in regard to ownership of the land, or the individual circumstances of the plots (not necessary adjoining), it is considered that the question is referred is not sufficiently particular or detailed enough to enable the Board to carry out its obligations under section 129 of the Planning and Development Act, 2000, as amended. Furthermore, the diversity of circumstances involved militated against a thorough evaluation of the referral question as posed. In light of the foregoing, the Board decided to dismiss this appeal.

5.0 Policy Context

5.1. Development Plan

- 5.1.1. Westmeath County Development Plan 2021-2027 is the operative plan. Relevant provisions include:

Re. peatlands, dealt with in section 12.17 of the plan, which includes:

The Council recognises the importance of peatlands as a major natural, archaeological and non-renewable resource in addition to recognising the important historical traditions and peat management skills associated with cutting turf for domestic use. In their natural state peatlands act as long-term sinks for atmospheric carbon dioxide. Peatlands are the most important long-term carbon store in the terrestrial biosphere. They sequester and store atmospheric carbon for thousands of years. Given the extent of intact and relatively intact raised bogs in Westmeath, considerable potential exists to use this valuable resource to mitigate against the impacts of climate change.

Policy objectives include:

CPO 12.64 Protect the county's designated peatland areas and landscapes, including any ancient walkways through bogs and to conserve their ecological, archaeological, cultural, and educational heritage.

CPO 12.65 Require the preparation of Hydrological Reports for significant developments within and in close proximity to peatlands, and to take account of same in the assessment of impacts on the integrity of peatland ecosystems.

CPO 12.66 Exercise control of peat extraction, both individually and cumulatively, which would have significant impacts on the environment, in accordance with legislative provisions, in the interest of protecting and enhancing biodiversity and addressing climate change.

5.2. Natural Heritage Designations

5.2.1. The nearest protected sites are:

- Special Protection Areas: Lough Kinale and Derragh Lough SPA 004061 approx. 3km straight line distance north. The protected site is upstream of the subject site.
- L Sheelin SPA 004065 approx. 4.5km straight line distance north-east. The protected site is upstream of the subject site (upstream of Lough Kinale).

As previously noted, in the inspector's report on 300686, Inland Fisheries Ireland is quoted as stating that this section of the River Inny is an important holding area for adult salmonids and an important spawning channel for coarse fish and the River

Glore is an important spawning and nursery river for brown trout with significant numbers of Lough Sheelin trout coming to this river to spawn.

- Moneybeg and Clareisland Bogs SAC 002340, approx. 4.5km straight line distance north-east.
- L Derravarragh SPA 000684 and Garriskil Bog SAC 000679 approx 7k straight line distance, and c9km downstream.

6.0 The Referral

6.1.1. The referral was made by the planning authority, on the basis of:

- Legal complexity of the matter, including issues with regard to the application of the EIA provisions including possible retrospective application,
- The altered legal framework over the duration of the use,
- The implications of compliance with requirements under the EU Habitats directive (92/43/EEC) for this use given the potential hydrological links to the Natura 2000 network and the requirement for planning permission including retention permission.

6.1.2. In response to the Board's correspondence the planning authority responded with the following details

The history is given as:

There are no decisions affecting the site,

Adjacent site 88/313 & S5-16-10 details already submitted to An Bord Pleanála under RL25.RL.2815,

Adjacent to site S5-23-11 details submitted to the Board under RL25.RL.2969,

Also adjacent is Coole Wind Farm SID Ref No 098770-21 (this appears to refer to 300686 which is referred to under the heading History below).

In relation to ownership:

Applicant indicates that the site is leasehold from Cavan Peat, Dublin Road, Cavan. An Bord Pleanála ref. RL25.RL.2815, indicates that Clover Peal Products Ltd. are the registered owners of certain lands at Doon, Castlepollard.

- 6.1.3. Neither the occupier, who submitted the question to the planning authority, or the owner, have responded to the Board's notification and invitation to make a submission or observation.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000, as amended

Section 3 (1) of the 2000 Planning and Development Act states:

In this Act, 'development' means, except where the context otherwise requires, 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.

Section 4 (1) of the Planning and Development Act identifies what may be considered as exempted development for the purposes of the Act, and Section 4(2) of the Act provides that the Minister, by regulations, provide for any class of development to be exempted development, where he or she is of the opinion that—

- (i) by reason of the size, nature or limited effect on its surroundings, of development belonging to that class, the carrying out of such development would not offend against principles of proper planning and sustainable development, or

(4) Notwithstanding paragraphs (a), (i), (ia) and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required (enacted 20th September 2012).

(2) The amendment to section 4 of the Act of 2000 effected by *subsection (1)* shall not apply as respects development—

(a) begun prior to the commencement of this section, and

(b) completed not later than 12 months after such commencement,

unless, immediately before such commencement, the development was being carried on in contravention of the Act of 2000 or regulations under that Act.

(4A) Notwithstanding subsection (4), the Minister may make regulations prescribing development or any class of development that is—

(a) authorised, or required to be authorised by or under any statute (other than this Act) whether by means of a licence, consent, approval or otherwise, and

(b) as respects which an environmental impact assessment or an appropriate assessment is required,

to be exempted development.”.

7.2. **Planning and Development Regulations, 2001, as amended**

Article 6(1) states:

Subject to article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 1.

Article 9(1) provides a number of scenarios whereby development to which article 6 relates shall not be exempted development for the purposes of the Act, including:

- (1) (a) if the carrying out of such development would—
 - (viiB) comprise development in relation to which a planning authority or An Bord Pleanála is the competent authority in relation to appropriate assessment and the development would require an appropriate assessment because it would be likely to have a significant effect on the integrity of a European site.
 - (viiC) consist of or comprise development which would be likely to have an adverse impact on an area designated as a natural heritage area by order made under section 18 of the Wildlife (Amendment) Act 2000.

Schedule 2 Part 3 sets out classes of rural development which are exempted, including:

Peat extraction

CLASS 17

(a) Peat extraction in a new or extended area of less than 10 hectares, or
(b) Peat extraction in a new or extended area of 10 hectares or more, where the drainage of the bogland commenced prior to the coming into force of these Regulations¹.

1. No such peat extraction shall be likely to have significant effects on the environment by reference to the criteria set out in Schedule 7.

2. Paragraph 1 shall not apply to peat extraction

(i) on a European site where such development is regulated by the European Communities (Natural Habitats) Regulations 1997, or any Regulations or enactment amending or replacing those Regulations, or

(ii) on a site prescribed under article 12 where such development is regulated by the Wildlife (Amendment) Acts 1976 and 2000, or any enactment amending or replacing those Acts.

Schedule 5 sets out development for the purposes of part 10 (Article 93) (i.e. requiring EIA)

Part 2

2. Extractive Industry

(a) Peat extraction which would involve a new or extended area of 30 hectares.

Schedule 7 sets out criteria for determining whether development listed in part 2 of schedule 5 should be subject to an environmental impact assessment, (i.e. sub-threshold requiring EIA).

1. Characteristics of proposed development

The characteristics of proposed development, in particular—

(b) cumulation with other existing development...

2. Location of proposed development

¹ 14th day of July 2005

The environmental sensitivity of geographical areas likely to be affected by the proposed development, with particular regard to—

(b) the relative abundance, availability, quality and regenerative capacity of natural resources (including soil, land, water and biodiversity) in the area and its underground,

(c) the absorption capacity of the natural environment, paying particular attention to the following areas:

(i) wetlands, riparian areas, river mouths.

7.3. Other

7.4. Referrals database

Of the numerous referrals in relation to peat extraction the following are the most relevant:

RL2297 whether the extraction of peat in an area of 38 hectares, out of a total area of 66.33 hectares of undesignated bog at Kilballyskea Bog, Co Offaly, where drainage works had previously taken place is or is not development or is or is not exempted development. The Board determined that it is development and is not exempted development.

RL2975 in respect of lands at Lower Coole, Mayne, Ballinealoe & Clonsura, Co. Westmeath owned by Westmeath Peat Ltd. and Cavan Peat Ltd. and occupied by Westland Horticulture Ltd. Whether the drainage of boglands, peat extraction, accesses from public roads, peat handling activities and other associated activities and works are or are not development or are or are not exempted development.

The Board decided that the works were exempted development until the 20th day of September 2012, and would thereafter not be exempted development, as follows:

- The extraction of peat and associated works (excluding peat handling) involved the carrying out of works on land in an intensive and sustained manner and that the commencement of such works involved a material change in the use of land even if peat extraction had occurred in an occasional and less intensive manner before then.

- Both the carrying out of the works on the sites and the material change of use to which their commencement gave rise, constituted development per S. 3 of the 1963 & 2000 Acts.
- The material change of the use and the works were exempted per S.4(1)(a) of the 1963 Act, (“use of land for turbary” was agriculture).

RL2969 a similar determination was made in relation to lands at Camagh Bog, Co. Westmeath, owned by Clover Peat Products Ltd., and occupied by Bulrush Horticulture Ltd.

7.5. Case Law

On a high court challenge to the Section 5 determinations of the Board (25RL.2969 & 25RL.2975, 15th April 2013 (referred to above)) in relation to a question regarding peat extraction, where the Board had determined that the extraction of peat is both the carrying out of works and material change of use, and that the continued works to extract peat was development and required EIA; Mr Justice Meenan, found that peat extraction being works as well as use gives rise to the requirement for EIA; that the development is no longer an exempted development; the removal of the exemption is not retrospective; Section 4(4) does not make unlawful that which was lawful at the time it was done; the effect of s. 4(4) is prospective; (IEHC 58 (2018) delivered 8th February 2018).

8.0 Assessment

8.1. The 2000 Act and consequent regulations

Since the introduction of the 2000 Act peat extraction is development, with any exemption limited by regulation. The definition of agriculture in section 2 of the 2000 Act omitted the reference to turbary (previously included in section 2 of the 1963 Act). Material changes of use and works to land are development, and this has included the extraction of peat since section 4 of the 2000 Act came into force on 21st January 2002. However regulations made under section 4(2) did provide specific exemptions for the development involved in peat extraction in certain circumstances. Article 6 and Class 17 of part 3 of schedule 2 of the 2001 Planning Regulations provided an exemption for peat extraction in a new or extended area of

less than 10ha, or in an area of more than 10ha where the drainage of bogland had commenced before the regulations came into force. A condition was introduced into this class on 14th July 2005 stating that it did not apply if the peat extraction was likely to have significant effects on the environment by reference to the criteria set out in schedule 7 of the regulations. Per Article 9(1)(c) development to which Part 10 (EIA) of the regulations applied, was not exempted development under article 6. This removed exemption under article 6 for peat extraction on a new or extended area of more than 30ha (part 2.2.a of schedule 5 of the regulations).

Ongoing works to extract peat are themselves development. Works to land to extract peat on those lands would require either a grant of permission or an exemption from the need for such a grant.

Article 11 of the 2001 regulations provides exemption for development, by stating that development that was commenced before the coming into force of the regulations and which was exempted development under the 1963 Act continues to be exempted development, this would allow the completion of works that could be reasonably seen as having been contemplated before the general exemption for peat extraction was removed in 2002. It would only apply to the continuation of the type of peat extraction works that had commenced as exempted development until the exhaustion of the peat resources on that land without abandonment or intensification. An intensification of operations or a resumption of abandoned operations that amounted to a material change in the use of the land would not benefit from the article 11 exemption. There was no limitation on the operation of article 11 with respect to development that would be likely to have significant effects on the environment and so require an EIA.

Further amendments to section 4 of the 2000 Act have sought to reconcile the law on exempted development with the state's obligations under the EIA directive to control and carry out a prior assessment of the impact of projects that are likely to have significant effects on the environment. The 2010 Act introduced an amendment with a section 4(4) that stated that no development that required environmental impact assessment or an appropriate assessment was exempted development if it commenced after the said section of the Act came into operation; did not come into force. Under the Environment (Miscellaneous Provisions) 2011, section 4(4) was inserted into the 2000 Act. It states that development is not exempted development if

it requires EIA or an appropriate assessment. Sub-section 17(2) of the 2011 Act stated that this new restriction on exemption would not apply to development that commenced before the relevant section of the 2011 Act came into operation (that date was 21st September 2011) and was completed not more than 12 months later. If the development is likely to have significant effects on the environment or on a Natura 2000 site, then its exempted status would have ceased on 21st September 2012. Works to extract peat that would be likely to have such effects and require EIA or AA were not exempted development post 21st September 2012 even if carried out on the same land and in the same manner as peat extraction works that were exempted development before that date.

8.2. The Question re-stated

- 8.2.1. Although not specifically stated in the question from Omard Mushrooms Ltd to the planning authority, it is clear that the question is in relation to the industrial extraction of peat. The question is therefore whether the industrial extraction of peat is or is not development and is or is not exempted development.

8.3. Is or is not development

- 8.3.1. Although not specifically stated in the question from Omard Mushrooms Ltd to the planning authority, it is clear that the question is in relation to the industrial extraction of peat.
- 8.3.2. The activity being carried out is the industrial extraction of peat.
- 8.3.3. The extraction of peat, being works and a material change of use is development.

8.4. Is or is not exempted development

- 8.4.1. The question before the Board is whether the extraction, which is currently on-going at this site, is or is not exempted development. The Board has before it sufficient information to enable a decision to be made on this question.

The area outlined on the map supplied with the referral shows an area of some 29.5ha. The subject area is part of a larger area of bogland at this location. As

presented the development is below the threshold at which EIA is mandatory. The area outlined is an arbitrary division of a larger peat harvesting site.

- 8.4.2. To consider whether or not the development would be likely to have significant effects on the environment by reference to the criteria set out in Schedule 7 and therefore require environmental impact assessment:

There is a real likelihood of significant effects on the environment, which would generate a requirement for EIA. In particular having regard to the nature and scale of the activity, the impact on climate change due to the release of the CO₂ into the atmosphere, which is currently sequestered within the bog, the impact on surface waters, the potential for impact on protected sites, and the potential for cumulative impact with other similar developments in the area, The development requires environmental impact assessment.

- 8.4.3. It is also necessary to consider the need for appropriate assessment. The subject area is ecologically connected to a number of protected sites including L Derravarragh SPA 004043 c9km downstream.

- 8.4.4. The qualifying interests of this protected site relies on maintaining good water quality. Peat extraction generates silt which has the potential to impact adversely on the water quality system downstream and therefore on the habitats and species of community interest for which the sites have been designated.

- 8.4.5. Upstream the site is connected to L Sheelin, and the River Glore. This section of the River Inny is an important holding area for adult salmonids and an important spawning channel for coarse fish. The qualifying species of L Sheelin SPA, include Great Crested Grebe, which have a diet of mainly fish, and therefore could potentially be affected by adverse impact on the water quality in this downstream section of the River Inny. Adverse effects on Great Crested Grebe via fish species, identified as using the adjoining River Glore would also require to be considered.

- 8.4.6. Accordingly appropriate assessment is required.

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 industrial extraction of peat is or is not development or is or is not exempted development:

AND WHEREAS Omard Mushrooms Ltd. requested a declaration on this question from Westmeath County Council and the Council did not issue a declaration.

AND WHEREAS Westmeath County Council referred this question to An Bord Pleanála on the 17th day of June, 2021

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

- (a) Section 2 of the Planning and Development Act, 2000, as amended,
- (b) Section 3 of the Planning and Development Act, 2000,
- (c) Section 4 of the Planning and Development Act, 2000, as amended,
- (d) article 6(1) and article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (e) Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (f) Schedule 5 to the Planning and Development Regulations, 2001, as amended,
- (g) Schedule 7 to the Planning and Development Regulations, 2001, as amended,
- (h) the planning history of the site, and
- (i) the pattern of development in the area:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) the industrial extraction of peat is development being both works and material change of use of land,
- (b) the industrial extraction of peat is not exempted development because of the location, nature and scale of the works which require both appropriate assessment and environmental impact 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 industrial extraction of peat is development and is not exempted development.

Planning Inspector

2nd December 2021