Derrybrien,
Loughrea,
Co Galway

An Bord Pleanala,
64 Marlborough Street,
Dublin 1
D01 V902

07th September 2021

Notice of objection to the Derrybrien Windfarm Substitute Consent "Exceptional Circumstances" Application by the ESB / GWL PL07 308019-20

A Chara,
I wish to formally request An Bord Pleanala to refuse Substitute Consent to the windfarm development at Derrybrien (application No PL07 308019-20) on the basis that "exceptional circumstances" do not exist in this case.

For almost 25 years this windfarm development at Derrybrien has being controversial, divisive for our community, destroyed our environment and is a failed monument to bad planning and decision making by Arms and Emanations of the Irish State.

This windfarm development is a prime example of a "KAFKAESQUE" planning and is a continuation of the failed actions of;
- An Bord Pleanala
- Coillte,
- the ESB and
- ESB subsidiaries (Hibernian Wind Power, ESBI, Gort Windfarms Ltd GWL)
- the Department of Environment,
- Galway County Council,
- The Department of Agriculture,
- The Forestry Service ,
- the High Court and
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decisions, changed laws and regulations and facilitated the continuation of wrong doing.

The "KAFKAESQUE" type planning associated with this development continues in 2021 with the latest substitute consent "Exceptional Circumstances" application by the ESB / Gort Windfarms Ltd (GWL) on the 9th August 2021.

We note in correspondence received from An Bord Pleanala dated 23rd July 2021 that the ESB / GWL in their submission states that;
"The application has been the subject of public consultation and 8 submissions or observations have been received from members of the public. In addition Galway County Council has made observations on the application. A response to those submissions was made by Gort Windfarms Ltd on 4th December 2020."

An Bord Pleanala did not make the people who lodged submissions in August 2020 aware of this course of action or give them an opportunity to view or to comment on the Gort Windfarms observations. One would presume that the law and natural justice would dictate that all parties in this application would be treated equally.

On an appointment to visit the planning office in Galway County Council on Tuesday the 31st August 2021 I requested to see copies of observations that Galway County Council made on the application and a copy of the response that Gort Windfarms Limited made to the 8 submissions. Neither of the two copies were available.
Of equal importance was the fact that the staff in the planning office were unable to tell him the closing date for receipt of submissions/ observations by An Bord Pleanala in this case. Also a search of the An Bord Pleanala website by the County Council staff was unable to establish the closing date or a copy of the two submissions.
The opaqueness, complexity and the inequity of arms in this substitute consent process will without a doubt exclude and silence the majority of the public which is contrary to EU Law on public participation in decision making.

I wish to submit the full text of Case C-215/06 and Case C-261/18 as evidence that the ESB / GWL were fully aware that the development was unauthorised and illegal. In addition at the time of writing Ireland has accumulated a fine of circa €15 million.

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Unfortunately, An Bord Pleanala is intrinsically implicated in this decision making as you granted permission to the three original planning applications associated with this development.
Therefore you are now the adjudicator on your own decision making.

This raises the critical point that; **Nemo judex in causa sua "No-one is a judge in their own cause". It is a principle of natural justice that no person can judge a case that they have an interest in.**

As a local resident in Derrybrien I have no confidence that you are independent due to your previous involvement in this decision making process and in addition your recent involvement in a decision to grant permission for a windfarm development on 25th June 2018 (Planning ref no ABP-300460-17) in Donegal which resulted in a most alarming and disturbing event. A landslide occurred at the site of a windfarm been constructed at Meenbog, Croaghonagh, Cashelnavean Co Donegal on the 12 November 2020. After all that has been said and written about the landslide at Derrybrien it is beyond belief that you and the arms and emanations of the Irish state has allowed a landslide to occur in very similar circumstances to that which happened at Derrybrien. It appears that the Irish authorities have learned nothing from Derrybrien.

I am not aware of any proper or detailed geotechnical or soil stability assessments carried out on this windfarm development before planning permission was granted in 1998 and 2001. As far as we are aware all soil investigations were carried out after the grant of planning permission by An Bord Pleanala. Therefore the original decision making was critically flawed, misleading and illegal.

One of the most prescient comments which encapsulates this saga came from the Opinion of the Advocate General Pitruzzella delivered on the 13th June 2019 in Case C- 261/18 European Commission v Ireland in which he states in point 60 and 63 that;

60. Contrary to what that Member State maintains, I do not consider that the length of time that elapsed between 22 December 2016 and 2 October 2017 — the dates on which the concept paper referred to in point 15 of this Opinion was submitted — can be blamed on the Commission. First, as Ireland itself admits, the letter accompanying the first submission of that document does not state that the Irish authorities would await formal approval from the Commission before proceeding to the next stage. ***Second, the version of that document sent in December 2016 was not signed by the operator of the Derrybrien wind farm,***

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which justified doubts as to the seriousness of the undertaking given by the operator. *Lastly, without being contradicted by Ireland, the Commission argues that the content of the document sent in December 2016 was substantially the same as that of a previous document on which it had made various observations which would appear not to have been taken into account by the Irish authorities.*

63. More than 10 years after the judgment in Commission v Ireland, not only has no environmental impact assessment been carried out regarding the construction works of the Derrybrien wind farm and the related activities in accordance with the requirements laid down in Directive 85/337 — although Ireland has never claimed that it is not possible to carry out such an assessment — but also no concrete measures have been taken with a view to obtaining such an assessment. Indeed, having stated in the defence that it was on the verge of obtaining a non-statutory a posteriori assessment from the operator of the wind farm, ***Ireland announced, prior to the hearing in this case, that as in a game of snakes and ladders, it was going 'back to square one', informing the Commission that it had once again changed its mind about the possibility of using the substitute consent procedure.*** *In those circumstances, and on the basis of all the foregoing considerations, it can only be concluded, in my view, that there was a genuine failure to fulfil obligations by Ireland and that the justifications put forward by it must be rejected.*

The cohesive nature of the "GROUPTHINK" that has engrossed this windfarm development since the first planning application in late 1997 which is almost 25 years ago IRISH MEMBER State Arms and Emanations have at various levels actively supported this windfarm project by making critical decisions in its favour and omitting and failing to take Competent Authority Actions and other actions against the State Emanation violators including but not limited to against the Irish Member State itself to both uphold Our EU Law and secure and ensure not only Enforcement and Application of Our EU Law, and Citizens rights, but to ensure the direct/indirect safety of citizens to prevent at source before environmental disaster strikes.

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1998 is the "baseline date"

In the documentation attached to this substitute consent application the ESB has identified 1998 as the "baseline date" environment.

Remedial Environmental Impact Assessment Report Chapter 1-Introduction
Document No.: QS-000280-01-R460-001-000 Date: July 2020

1.3.1 Baseline Environment for rEIAR
For the purpose of assessments undertaken for the remedial EIAR the baseline environment against which impacts have been assessed has been taken as that which existed prior to the planning process. The baseline date for assessment of environmental effects in the rEIAR is the date when the environmental impact assessment should originally have been carried out and taken into account by the decision-maker.5 As noted earlier, the planning consents were issued in the period 1998-2001. Therefore, for the purposes of this rEIAR, the baseline environment against which assessment of environmental effects is made is that which existed in 1998, referred hereafter as the "baseline date". Where there are information gaps related to the baseline environment these are highlighted in the "Difficulties Encountered" section within individual topic chapters.

The critical issue here is on what basis was permission granted in 1998 and 2001. Will An Bord Pleanala put themselves back to 1998 and 2001 and say that this area of blanket bog with some as deep as 6 meters mainly covered in forestry can be further damaged and destroyed by a massive industrial development?
There is the real live issue of cumulative effect. This blanket bog area was acting as a sponge retaining water and reducing the run off of water from the Slieve Aughty mountains down to the Gort lowlands. We would suggest that rather than granting permission Galway County Council and An Bord Pleanala should have refused permission on the basis that foisting another damaging and destructive development on top of an already damaged area was irresponsible and wreckless in the extreme. The entire development decisions smack of the worst type of **"corporate group think"**.

When is the start date for assessing the environmental impact assessment for this substitute consent application? Is the start date 1997 or 2003 at the commencement of construction?
On the Gort Windfarms Limited 2019 annual report and financial statement on page 24 under point 17;

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"Following a ruling of the Court of Justice of the European Union, the Irish State is arranging for an environmental impact assessment ***of the current and future operations of the windfarm from the start of construction to decommissioning*** *phase in its own right and in combination with other relevant development/activities. This environmental impact assessment is being carried out under the Planning and Development Acts under the Substitute consent provisions to An Bord Pleanala. The directors of Gort Windfarms Ltd have being advised that a refusal by An Bord Pleanala will lead to a notice being served on Gort Windfarms Limited ordering the cessation of all activities or to carry out remedial measures.*

We require urgent and unequivocal clarity in regard to when exactly the environmental impact assessment starts. If according to the statement on the 2019 accounts it is an assessment ***"of the current and future operations of the windfarm from the start of construction to decommissioning"*** we as local residents have a major difficulty with this selective and self serving timeframe. If the remedial Environmental Impact Assessment is to have any credibility and legal status it must assess the windfarm site as it was in 1997 and 2001 and as assessed under Planning Reference No 97/3652, 97/3470 and 00/4581at the date of decision. Otherwise all that is being done in this substitute consent application is leaping forward and justifying the construction and the continuation of the development. There is a serious risk that An Bord Pleanala will join with the ESB / GWL in commencing the assessment of the application from 2003 onwards. This would make a mockery and fly in the face of the EIA and Habitats Directives and all that they stand for. There is a major risk that what is taking place in this substitute consent application is a new version of **"RETENTION PLANNING PERMISSION".**

See extract from Case C-261/18;

96 It must further be noted that while it is not precluded that an assessment carried out after the plant concerned has been constructed and has entered into operation, in order to remedy the failure to carry out an environmental impact assessment of that plant before the consents were granted, may result in those consents being withdrawn or amended, this is without prejudice to any right of an economic operator, which has acted in accordance with a Member State's legislation that has proven contrary to EU law, to bring against that State, pursuant to national

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rules, a claim for compensation for the damage sustained as a result of the State's actions or omissions.

97 In the light of the foregoing, it must be held that, by failing to take all measures necessary to comply with the second indent of point 1 of the operative part of the judgment of 3 July 2008, Commission v Ireland (C-215/06, EU:C:2008:380), Ireland has failed to fulfil its obligations under Article 260(1) TFEU.

115 In the first place, as regards the seriousness of the infringement, it must be borne in mind that the objective of protecting the environment constitutes one of the essential objectives of the European Union and is both fundamental and interdisciplinary in nature (see, to that effect, judgment of 28 February 2012, InterEnvironnement Wallonie and Terre wallonne, C-41/11, EU:C:2012:103, paragraph 57 and the case-law cited).

116 An environmental impact assessment, such as that provided for by Directive 85/337, is one of the fundamental environmental protection mechanisms in that it enables, as recalled in paragraph 73 above, the creation of pollution or nuisances to be prevented at source rather than subsequently trying to deal with their effects.

117 In accordance with the case-law recalled in paragraph 75 above, in the event of a breach of the obligation to assess the environmental impact, Member States are nevertheless required by EU law to eliminate at least the unlawful consequences of that breach (see, to that effect, judgment of 26 July 2017, Comune di Corridonia and Others, C-196/16 and C-197/16, EU:C:2017:589, paragraph 35).

118 As is apparent from paragraphs 23 to 36 above, from the time it was held in the judgment of 3 July 2008, Commission v Ireland (C-215/06, EU:C:2008:380) that there was a failure to fulfil obligations, ***consisting in the breach of the obligation to carry out an environmental impact assessment before consent for, and construction of, the wind farm****, more than 11 years have elapsed without Ireland adopting the measures necessary in order to comply with the second indent of point 1 of the operative part of that judgment.*

119 Admittedly, in July 2010 Ireland enacted the PDAA, Part XA of which provides for a procedure for regularising the projects authorised in breach of the obligation to carry out an environmental impact assessment. However, a little over 2 years later, Ireland informed the Commission that it was not going to apply the

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regularisation procedure, whereas, from April 2009 it had been stating the contrary. On the other hand, Ireland proposed to carry out an unofficial, nonstatutory assessment. By letter of 29 March 2019, and thus 2 days before the hearing before the Court in the present case, Ireland changed its position again and now contends that the wind farm operator will request that the regularisation procedure provided for in Part XA of the PDAA be applied. At the hearing, Ireland was, however, unable to state whether that procedure would be commenced, on their own initiative, by the competent authorities, pursuant to Section 177 B of Part XA of the PDAA, or on the application of the operator, pursuant to Section 177 C of Part XA of the PDAA. Nor was it in a position to state the start date for the procedure. To date, the Court has received no other information in that regard.

120 It must be found that, in those circumstances, ***Ireland's conduct shows that it has not acted in accordance with its duty of sincere cooperation to put an end to the failure to fulfil obligations established in the second indent of point 1 of the COMMISSION V IRELAND (DERRYBRIEN WIND FARM) 25 operative part of the judgment of 3 July 2008, Commission v Ireland (C-215/06, EU:C:2008:380), which constitutes an aggravating circumstance.***

121 Since that judgment has not yet been complied with, the Court cannot, therefore, but confirm the particularly lengthy character of an infringement which, in the light of the environmental protection aim pursued by Directive 85/337, is a matter of indisputable seriousness (see, by analogy, judgment of 22 February 2018, Commission v Greece, C-328/16, EU:C:2018:98, paragraph 94).

As a local person who has already made a submission to the substitute consent application in August 2020, we are of the view that An Bord Pleanala set a bad and dangerous precedent by accepting that application. They were in the full knowledge that a Supreme Court case had determined that a case for "exceptional circumstances" must be established before a case proceed. An Bord Pleanala elevated the application by the ESB to a position contrary to the law and displayed favouritism to the ESB application. See attached a copy of correspondence and circulars issued following the 2008 ECJ Judgment C-215/06. See Circular PD 5/08 and 6/08. See appendix 1.
It is my view that An Bord Pleanala should have taken the same course of action as they did in 2008 and declared the substitute consent application as invalid and returned it to the ESB / GWL.

Other questions now arise.
Why did An Bord Pleanala contact the ESB / GWL as per letter dated 7th May 2021 and did not make contact with interested parties until after 23rd July 2021?

There is no doubt whatsoever that this is an exceptional case however in the context of this planning application for substitute consent the ESB application fails on all points to pass the "Exceptional Circumstances" criteria.

In evidence to support the argument that the ESB / GWL application should be refused we wish to refer to the full Judgment in Case C-215/06 and C-261/18 as incontrovertible evidence that under all points the ESB /GWL failed to comply with the spirit and law in relation to EIA Directive 85/337 as amended.

In early March 2021, the ESB erected a sign along the entrance roadway to Derrybrien bog warning turbary owners of peat instability.

This sign and the direct contact by ESB employees with the designated turf cutting contractor have resulted in the contractor not to enter Derrybrien bog to cut turf and therefore as a result no turf was cut there in 2021. See the photo of the sign attached below.

Approximately 30 local people usually cut turf for their own domestic use in this bog annually. There is no commercial turf cutting taking place at this bog.

It is my understanding that the ESB did not demand that the contractor stop cutting turf but it did clearly state that they would be held liable and responsible in the event that any future peat slippage. The contractor is of the firm opinion that a person in his position cannot risk entering the bog for turf cutting with such a threat hanging over his head.

In any event, the de facto result is that people who usually exercise their right and require turf to heat their home are left without turf from Derrybrien bog.

The local community will not accept the stopping of turf cutting on Derrybrien bog.

Has all the construction activity of machinery, drainage and the blasting from the quarry which is relatively near the plots in question destabilized the mountain?

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Is there a possibility that the wind turbines as situated in three parallel lines north, south and middle of the bog is creating some sort of vibration effect on the bog?

When rotating at full speed there is huge turbulence in the area.
Even though the turbines are built on rock/ glacial till there has to be some vibration carrying down and into the surrounding soil.

We would also pose the question, are the ESB / GWL aware of serious instability and deflecting attention onto turf cutting??

For the record, we reject and refute the claims by the ESB that turbary owners are the cause of the instability. A number of important points in the relevant report are misleading and factually incorrect.

See attached appendix 2 which is a report on Noise & Vibrations in particular pages 67 and 76.

The planning application states that there were repairs and replacement of parts carried out to almost all the turbines over the last 13 years. Some required multiple replacements of parts.
This indicates to us that there is a significant amount of stress and vibration on the structure of the turbines and taking into account that the windfarm was only producing approximately 24% of its capacity.

We are not aware of any reference to " TURBINE VIBRATION" being an issue that has was looked at and analyzed in the rEIA.

Even from a basic point of turf cutting on the ground, why is it that of all the bogs (possibly 7-8) in the area that the contractor cut turf, Derrybrien bog has been stoped from cutting turf because of peat instability???
This is not an issue in any other bog!!!!

The fact is, if there was no windfarm development on Derrybrien bog local people would not be stopped cutting their supply of turf to heat their homes in 2021.

An Bord Planala must now clearly and unequivocally establish the facts in relation to the instability at Derrybrien bog.
What is the level of instability?

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What is the level of instability?

Who or what is responsible for this instability?
As a planning authority you cannot grant substitute consent to the ESB /GWL with such instability highlighted by the ESB / GWL who are themselves the applicants in this case.

Also, I would strongly submit to An Bord Pleanala that "Exceptional Circumstances" do not exist and you cannot grant permission to the application for substitute consent taking into account that the integrity of the entire mountainside, the SPA and the environment has been severely damaged and according to the ESB / GWL there is a continuation of this damage with instability at Derrybrien bog.

How many of the "Exceptional Circumstances" criteria must a developer satisfy before they can proceed with their substitute consent application? Is it one of the criteria or is it all the criteria or a majority of the criteria?
As interested member of the public I am not aware of the answer to this question and it requires an urgent and clear answer.

The central and critical question is, would any responsible and independent planning authority grant planning permission in 2021 to this windfarm development on this very site if there was no windfarm in existence?

I would strongly suggest that there would be no possibility whatsoever of planning permission being granted to 70 windturbines on a European designated Special Protection Area (*Slieve Aughty Mountains SPA Site code: 4168)* with waterlogged bog up to approximately 6 meters deep, 650 acres of forestry and located in an area that is critical to the careful management for protection against flooding the Gort lowlands and the source of the public water supply for the town of Gort. Also the issue of Trihalomethanes have not been adequately addressed in the substitute consent application and rEIAR regarding the Gort public water supply.

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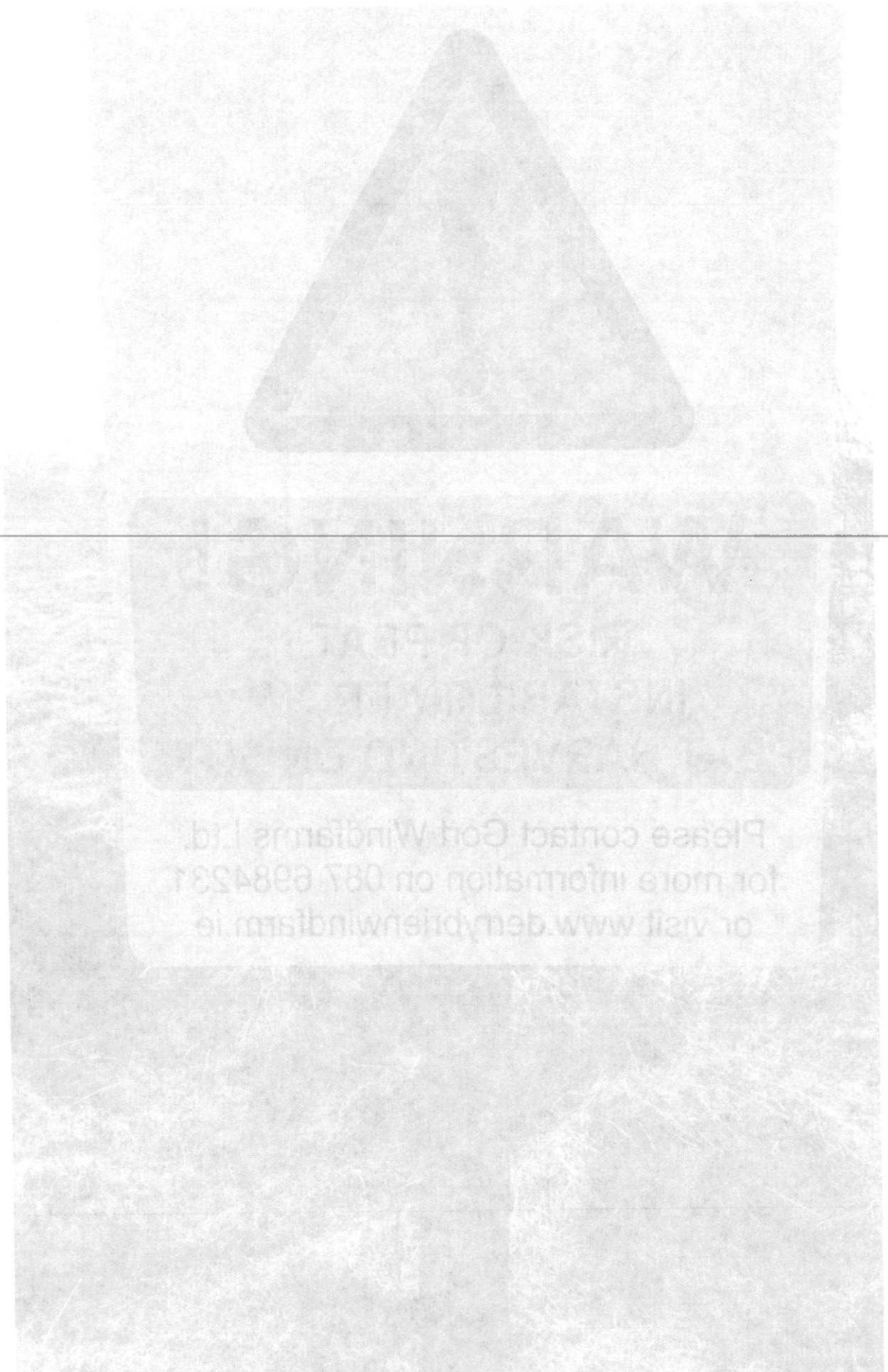
WARNING!
RISK OF PEAT
INSTABILITY FROM
PEAT HARVESTING ON SITE.
Please contact Gort Windfarms Ltd.
for more information on 087 6984231
or visit www.derrybrienwindfarm.ie



Criteria for exceptional circumstances.

- Whether regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive.
- Whether the applicant had or could reasonably have had a belief that the development was not unauthorised.
- Whether the ability to carry out an assessment of the environmental impacts of the development for the purposes of an environmental impact assessment or an appropriate assessment and to provide for public participation in such an assessment has been substantially impaired.
- 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.
- The extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated.
- Whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development.
- Such matters as the Board considers relevant.

(a) Whether regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive.

The regularisation of the development concerned would most defiantly circumvent the purpose and objectives of the Environmental Impact Assessment Directive and the Habitats Directive. In fact regularisation would make a complete nonsense of the EIA Directive.

Our objection is based on the fact that the fundamental principal of an Environmental Impact Assessment is that if you get it wrong as in this case you have to take down, remove the development and put the mountain back to the way it was before it was damaged.

Not alone should the Irish state be in compliance with Our EU Law but it must be seen to be in compliance with Our EU Law and Directives.

In ECJU Case C-215/06 in is made abundantly clear that the purpose and legal requirement of an EIA in conformity with the Directive was to carry out the assessment before planning permission was granted by the competent planning authority so that all risks associated with proceeding with a development could be

identified and assessed. The extract from C-215/06 clearly states that this preventive action was not undertaken in this case. Galway County Council and An Bord Pleanala as planning authorities failed in their duties and legal obligations to comply with the EIA or Habitats Directive.

See extract from CJEU C-215/06

104 The purpose of carrying out an environmental impact assessment in conformity with the requirements of Directive 85/337 is to identify, describe and assess in an appropriate manner the direct and indirect effects of a project on factors such as fauna and flora, soil and water and the interaction of those factors. In the present case, the environmental impact statements supplied by the developer had certain deficiencies and did not examine, in particular, the question of soil stability, although that is fundamental when excavation is intended.

105 Consequently, by failing to take all measures necessary to ensure that the grant of development consents relating to the first two phases of construction of the wind farm was preceded by an environmental impact assessment in conformity with Articles 5 to 10 of Directive 85/337 and by merely attaching to the applications for consent environmental impact statements which did not satisfy those requirements, Ireland has failed to fulfil its obligations under that directive.

106 Secondly, as regards the application for consent relating to the third phase of construction of the wind farm, submitted on 5 October 2000, and the application for consent to alter the first two originally authorised phases of construction, lodged on 20 June 2002, the complaint must be considered in the light of Directive 85/337 as amended, since the applications for consent concerned were submitted after 14 March 1999.

107 It is not disputed, first, that the competent authorities gave their approval to the change in the type of wind turbines originally planned without requiring an environmental impact assessment in conformity with Directive 85/337 as amended and, secondly, that the consent given for the third phase of construction was also not accompanied by such an assessment. In addition, such an assessment did not precede the deforestation authorised in May 2003, contrary to the requirements of the Irish legislation.

108 However, point 3(i) of Annex II to Directive 85/337 as amended refers to installations for the harnessing of wind power for energy production (wind farms) and point 13 of that annex refers to any change or extension of projects listed in

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Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment.

109 In addition, the relevant selection criteria in Annex III to Directive 85/337 as amended, which are applicable to the projects listed in Annex II and are referred to in Article 4(3) of that directive, include the risk of accidents having regard inter alia to the technologies used. Noteworthy among those criteria is the environmental sensitivity of the geographical area, which must be considered having regard, inter alia, to 'the absorption capacity of the natural environment', paying particular attention to mountain and forest areas.

110 Since the installation of 25 new turbines, the construction of new service roadways and the change in the type of wind turbines initially authorised, which was intended to increase the production of electricity, are projects which are referred to in Annex II to Directive 85/337 as amended and which were likely, having regard to the specific features of the site noted in paragraph 102 of this judgment and the criteria referred to in the preceding paragraph of this judgment, to have significant effects on the environment, they should, before being authorised, have been subject to a requirement for development consent and to an assessment of their effects on the environment, in conformity with the conditions laid down in Articles 5 to 10 of Directive 85/337 as amended.

111 Consequently, by failing to take all measures necessary to ensure that the grant of the amending consents and the consent relating to the third phase of construction of the wind farm was preceded by such an assessment, and by merely attaching to the applications for consent environmental impact statements which did not satisfy those requirements, Ireland has failed to fulfil its obligations under Directive 85/337 as amended.

112 It follows from the foregoing that, by failing to take all measures necessary to ensure that the development consents given for, and the execution of, wind farm developments and associated works at Derrybrien, County Galway, were preceded by an assessment with regard to their environmental effects, in accordance with Articles 5 to 10 of Directive 85/337 either before or after amendment by Directive 97/11, Ireland has failed to fulfil its obligations under Articles 2, 4 and 5 to 10 of that directive.

In Case C-216/18 delivered on 12 November 2019 European Commission V Ireland point 116 states that;

116 "An environmental impact assessment, such as that provided for by Directive 85/337, is one of the fundamental environmental protection mechanisms in that it enables, as recalled in paragraph 73 above, the creation of pollution or nuisances to be prevented at source rather than subsequently trying to deal with their effects."

An Bord Pleanala must issue a clear decision stating that the ESB / GWL application do not comply with the "Exceptional Circumstances" criteria and the precautionary principle requires to be applied to this Derrybrien windfarm project.

This is what happened in CJEU Case C – 258/11. See extract below.

46 Consequently, if, after an appropriate assessment of a plan or project's implications for a site, carried out on the basis of the first sentence of Article 6(3) of the Habitats Directive, the competent national authority concludes that that plan or project will lead to the lasting and irreparable loss of the whole or part of a priority natural habitat type whose conservation was the objective that justified the designation of the site concerned as an SCI, the view should be taken that such a plan or project will adversely affect the integrity of that site.

47 ***In those circumstances, that plan or project cannot be authorised on the basis of Article 6(3) of the Habitats Directive****. Nevertheless, in such a situation, the competent national authority could, where appropriate, grant authorisation under Article 6(4) of the directive, provided that the conditions set out therein are satisfied (see, to this Waddenvereniging and Vogelbeschermingsvereniging, paragraph 60). effect,*

48 It follows from the foregoing considerations that the answer to the questions referred is that Article 6(3) of the Habitats Directive must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of a site will adversely affect the integrity of that site if it is liable to prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat whose conservation was the objective justifying the designation of the site in the list of SCIs, in accordance with the directive. The precautionary principle should be applied for the purposes of that appraisal.

On those grounds, the Court (Third Chamber) hereby rules:

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Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of a site will adversely affect the integrity of that site if it is liable to prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat whose conservation was the objective justifying the designation of the site in the list of sites of Community importance, in accordance with the directive. ***The precautionary principle should be applied for the purposes of that appraisal.***

It states in CJEU C – 127/02 Waddenvereniging and Vogelbeschermingsvereniging

65 It should be recalled that the obligation of a Member State to take all the measures necessary to achieve the result prescribed by a directive is a binding obligation imposed by the third paragraph of Article 249 EC and by the directive itself. That duty to take all appropriate measures, whether general or particular, is binding on all the authorities of Member States including, for matters within their jurisdiction, the, courts (see Case C-72/95 Kraaijeveld and Others [1996] ECR I-5403, paragraph 55).

On those grounds, the Court (Grand Chamber) rules as follows:

1. Mechanical cockle fishing which has been carried on for many years but for which a licence is granted annually for a limited period, with each licence entailing a new assessment both of the possibility of carrying on that activity and of the site where it may be carried on, falls within the concept of 'plan' or 'project' within the meaning of Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

2. Article 6(3) of Directive 92/43 establishes a procedure intended to ensure, by means of a preliminary examination, that a plan or project which is not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site, while Article 6(2) of that directive establishes an obligation of general protection consisting in avoiding deterioration and disturbances which could have significant effects in the light of the Directive's objectives, and cannot be applicable concomitantly with Article 6(3).

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3. (a) The first sentence of Article 6(3) of Directive 92/43 must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects. (b) Pursuant to the first sentence of Article 6(3) of Directive 92/43, where a plan or project not directly connected with or necessary to the management of a site is likely to undermine the site's conservation objectives, it must be considered likely to have a significant effect on that site. The assessment of that risk must be made in the light inter alia of the characteristics and specific environmental conditions of the site concerned by such a plan or project.

4. Under Article 6(3) of Directive 92/43, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all the aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent national authorities, taking account of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in the light of the site's conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects.

5. Where a national court is called on to ascertain the lawfulness of an authorisation for a plan or project within the meaning of Article 6(3) of Directive 92/43, it can determine whether the limits on the discretion of the competent national authorities set by that provision have been complied with, even though it has not been transposed into the legal order of the Member State concerned despite the expiry of the time-limit laid down for that purpose.

It is obvious from our knowledge and experience that the Irish State and the ESB /GWL have at all times throughout this process been singing from the one hymn sheet. They have both dug their heels in and are entrenched in the united position that they complied with laws, regulations and planning permissions at all times. This cosy position has been exposed by the first CJEU Case C-215/06 and the second CJEU Case C-261/18 and the ESB /GWL has been in contempt of court for over 13 years. No ordinary citizen in this state would have been allowed to continue in contempt of court for this length of time.

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In CJEU Case C-215/06 the Judgement states that'

58 A system of regularisation, such as that in force in Ireland, may have the effect of encouraging developers to forgo ascertaining whether intended projects satisfy the criteria of Article 2(1) of Directive 85/337 as amended, and consequently, not to undertake the action required for identification of the effects of those projects on the environment and for their prior assessment. The first recital of the preamble to Directive 85/337 however states that it is necessary for the competent authority to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes, the objective being to prevent the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects.

59 Lastly, Ireland cannot usefully rely on Wells. Paragraphs 64 and 65 of that judgment point out that, under the principle of cooperation in good faith laid down in Article 10 EC, Member States are required to nullify the unlawful consequences of a breach of Community law. The competent authorities are therefore obliged to take the measures necessary to remedy failure to carry out an environmental impact assessment, for example the revocation or suspension of a consent already granted in order to carry out such an assessment, subject to the limits resulting from the procedural autonomy of the Member States.

60 This cannot be taken to mean that a remedial environmental impact assessment, undertaken to remedy the failure to carry out an assessment as provided for and arranged by Directive 85/337 as amended, since the project has already been carried out, is equivalent to an environmental impact assessment preceding issue of the development consent, as required by and governed by that directive.

61 It follows from the foregoing that, by giving to retention permission, which can be issued even where no exceptional circumstances are proved, the same effects as those attached to a planning permission preceding the carrying out of works and development, when, pursuant to Articles 2(1) and 4(1) and (2) of Directive 85/337 as amended, projects for which an environmental impact assessment is required must be identified and then – before the grant of development consent and, therefore, necessarily before they are carried out – must be subject to an application for development consent and to such an assessment, Ireland has failed to comply with the requirements of that directive.

Consequently, the first two pleas in law are well founded.

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As stated previously the central and critical question is would any responsible and independent planning authority grant planning permission in 2021 to this windfarm development on this very site if there was no windfarm in existence?
We would strongly suggest that there would be no possibility whatsoever of planning being granted to 70 windturbines on a European designated Special Protection Area (***Slieve Aughty Mountains SPA Site code: 4168)*** with waterlogged bog up to approximately 6 meters deep, 650 acres of forestry and located in an area that is critical to the careful management for protection against flooding the Gort lowlands and the source of the public water supply for the town of Gort.

(b) Whether the applicant had or could reasonably have had a belief that the development was not unauthorised.

Deforestation of 263 ha without planning permission or EIA

We would submit that the developers were well aware that the deforestation of some 263 ha of forestry was unauthorised. The developers were also aware that the some of the quarries in operation were unauthorised and the locations of turbines were unauthorised, They were also aware that the robust drainage plan implemented following the 2003 landslide was unauthorised.

The Department of Agriculture, Forestry Service, granted in May of 2003 a felling licence for the clear felling of 263 ha of coniferous trees at a blanket bog hill side without planning permission and carrying out an EIA, despite the fact that the EIA Directive had been long before that date amended to include the clear felling of forestry (97/11 EC) of the 3rd March, 1997 and the Irish interpretation of that amendment is that when more than 70 ha of coniferous plantation are intended to be clear felled, an EIA is mandatory! By not carrying out an EIA prior to granting the felling licence, the Forestry Service violated European Law in force, here the EIA Directive as amended.

The European Communities (Environmental Impact Assessment) (Amendment) Regulations 1999 came into force on the 1st May, 1999.
These regulations added the following as subject to an Environmental Impact Assessment:-
1. Agriculture, silviculture and aquaculture.

(b)(iii) deforestation for the purpose of conversion to another type of land use, where the area to be de-forested would be greater than 10 HA of natural woodland or 70 HA of conifer forest.
These regulations came into force on the 1st May, 1999.

In CJEU Case C-215/06 the court ruled that;

107 It is not disputed, first, that the competent authorities gave their approval to the change in the type of wind turbines originally planned without requiring an environmental impact assessment in conformity with Directive 85/337 as amended and, secondly, that the consent given for the third phase of construction was also not accompanied by such an assessment. ***In addition, such an assessment did not precede the deforestation authorised in May 2003, contrary to the requirements of the Irish legislation.***

108 *However, point 3(i) of Annex II to Directive 85/337 as amended refers to installations for the harnessing of wind power for energy production (wind farms) and point 13 of that annex refers to any change or extension of projects listed in Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment.*

109 *In addition, the relevant selection criteria in Annex III to Directive 85/337 as amended, which are applicable to the projects listed in Annex II and are referred to in Article 4(3) of that directive, include the risk of accidents having regard inter alia to the technologies used.* ***Noteworthy among those criteria is the environmental sensitivity of the geographical area, which must be considered having regard, inter alia, to 'the absorption capacity of the natural environment', paying particular attention to mountain and forest areas.***

110 *Since the installation of 25 new turbines, the construction of new service roadways and the change in the type of wind turbines initially authorised, which was intended to increase the production of electricity, are projects which are referred to in Annex II to Directive 85/337 as amended and which were likely, having regard to the specific features of the site noted in paragraph 102 of this judgment and the criteria referred to in the preceding paragraph of this judgment, to have significant effects on the environment, they should, before being authorised, have been subject to a requirement for development consent and to an assessment of their effects on the environment, in conformity with the conditions laid down in Articles 5 to 10 of Directive 85/337 as amended.*

(b)(iii) deforestation for the purpose of conversion to another type of land use, where the area to be de-forested would be greater than 10 HA of natural woodland or 70 HA of conifer forest.

These regulations came into force on the 1st May, 1999.

In CJEU Case C-215/06 the court ruled that:

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111 ***Consequently, by failing to take all measures necessary to ensure that the grant of the amending consents and the consent relating to the third phase of construction of the wind farm was preceded by such an assessment, and by merely attaching to the applications for consent environmental impact statements which did not satisfy those requirements, Ireland has failed to fulfil its obligations under Directive 85/337 as amended.***

112 ***It follows from the foregoing that, by failing to take all measures necessary to ensure that the development consents given for, and the execution of, wind farm developments and associated works at Derrybrien, County Galway, were preceded by an assessment with regard to their environmental effects, in accordance with Articles 5 to 10 of Directive 85/337 either before or after amendment by Directive 97/11, Ireland has failed to fulfil its obligations under Articles 2, 4 and 5 to 10 of that directive.***

In THE SUPREME COURT appeal
(Appeal No 51/2009) Denham C.J. O'Donnell J. McKechnie J. Clarke J. Laffoy J. In the matter of the Planning and Development Act 2000 as amended and in the matter of s. 160 of the Planning and Development Act 2000 Between/ Derrybrien Development Society Limited Applicant/Appellant and Saorgus Energy Limited, Coillte Teoranta, and Gort Windfarms Limited Respondents Judgment of the Court delivered on the 16th day of October, 2015, by Denham C.J. 1. This is an appeal by Derrybrien Development Society Limited, the applicant/appellant, referred to as "the appellant" from the judgment and order of the High Court (Dunne J.) dated the 3rd June, 2005 and the 10th June, 2005, respectively, wherein the learned High Court judge refused to restrain the respondents, their servants and agents, from deforesting lands owned by Coillte Teoranta. Motion 2. The appellant had brought a motion to the High Court seeking an order:- (i) Pursuant to inter alia s. 160(1)(a) of the Planning and Development Act, 2000, restraining the respondents their servants or agents from continuing the aforesaid unauthorised development. (ii) A final order pursuant to s. 160(1)(b) and s. 160(2) of the Planning and Development Act, 2000, directing restoration of the respondent's lands to their condition prior to the commencement of the unauthorised development inclusive of the re-planting of trees in the affected areas and the restoration of the pre-existing drainage channels. The motion was refused by the High Court but stayed for twenty one days in the event of a notice of appeal within that time, and it was stated that if there was an appeal that execution of the costs order be stayed pending the determination of an appeal. 3. The first named respondent is referred to as "Saorgus", the second named respondent is referred to as "Coillte", and the third named respondent is

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referred to as "the wind farm". The three respondents are referred to collectively as "the respondents".

*68. **For clarity, it should be noted that the Court is prepared to approach this appeal on the assumption that the planning permissions did not cover or extend fully to the deforestation.***

69. It also should be noted that, while the papers in this appeal are extensive, they do not provide a clear picture of the situation under appeal.

70. A decision is required on the appellant's appeal, which has been brought by the appellant after the decision of the European Court of Justice in The Commission v. Ireland Case C- 215/06 E.C.R. 1-4911.

71. In the context of this appeal, in all the circumstances of the appeal, the Court is satisfied that it is appropriate to exercise its discretion under s. 160 and to refuse the remedy sought in the motion.

72. Consequently, for the reasons set out in this judgment, in all the circumstances, the Court exercises a discretion under s. 160 and would refuse the motion, and dismiss the appeal.

For some inexplicable reason the Supreme Court in 2015 refused the motion even though they did accept the fact that ***"the planning permission did not cover of extend fully to the deforestation".***
However four years later in 2019 the CJEU imposed a fine of €5 million euro and €15,000 per day until a proper Environmental Impact Assessment was carried out on this very same development. As of the date on this letter the fine stands at circa €15 million which is a colossal waste of public money and which nobody has taken any responsibility for.

The Supreme Court in Appeal No 51/2009 failed to apply either law or justice and instead decided to use its own discretion to dismiss our legitimate appeal. It was and is a shameful derelic violation of the Duties and Obligations and Power and Authority duty and responsibility by the Supreme Court not to uphold Our EU laws Directives and Treaties. (incl. Our CFREU) It is imperative that the polluter pays principle is invoked and that all damage done by the windfarm developers is **OBVIATED** and not MITIGATED. This inter alia must be considered an option in any EIA and particular given Pt. 116 in Our CJEU Judgement Case C- 261/18 of November 2019.

The fact remain that No planning permission and No EIA were produced for deforestation of 263 ha in direct contravention of Irish and EU law.
Therefore An Bord Planala cannot legally grant Substitute Consent to a development that never applied for planning permission and is an unauthorised development.

Application under Section 177B is legally flawed

This planning application was initiated under Section 177B and it refers in particular to the notice been served by the planning authority in relation to developments in its administrative area **" for which permission was granted".**

Application to apply for substitute consent where notice served by planning authority.
177B.—(1) Where a planning authority becomes aware in relation to a development in its administrative area ***for which permission was granted*** *by the planning authority or the Board, and for which—*
(a) an environmental impact assessment,
(b) a determination in relation to whether an environmental impact assessment is required, or
(c) an appropriate assessment, was or is required, that a final judgment of a court of competent jurisdiction in the State or the Court of Justice of the European Union has been made that the permission was in breach of law, invalid or otherwise defective in a material respect because of— (i) any matter contained in or omitted from the application for permission including omission of an environmental impact statement or a Natura impact statement or both of those statements, as the case may be, or inadequacy of an environmental impact statement or a Natura impact statement or both of those statements, as the case may be, or (ii) any error of fact or law or procedural error, it shall give a notice in writing to the person who carried out the development or the owner or occupier of the land as appropriate.

The issue here is that there was no grant of permission for the deforestation therefore it cannot be legally assessed or adjudicated on under Section 177B.

In particular see point 68 of the Supreme Court Judgement (Appeal No 51/2009)

68. **For clarity, it should be noted that the Court is prepared to approach this appeal on the assumption that the planning permissions did not cover or extend fully to the deforestation.**

.The facts are that the Department of Agriculture, Forestry Service, granted in May of 2003 a felling licence for the clear felling of 263 ha of coniferous trees at a blanket bog hill side without planning permission and carrying out an EIA, despite the fact that the EIA Directive had been long before that date amended to include the clear felling of forestry (97/11 EC) of the 3rd March, 1997 and the Irish interpretation of that amendment is that when more than 70 ha of coniferous plantation are intended to be clear felled, an EIA is mandatory! By not carrying out an EIA prior to granting the felling licence, the Forestry Service violated European Law in force, here the EIA Directive as amended.

The Management Committee of the Department of Communications, Marine & Natural Resources, the Attorney General, the Department of Agriculture, the Forest Service, the ESB and Coillte were all involved in this decision making process and did not comply with the European Communities (Environmental Impact Assessment) (Amendment) Regulations 1999 came into force on the 1st May, 1999.

Any assertion that suggests that the applicant had, or could reasonably have had, a belief that the development was not unauthorised based on the actions or inactions of Galway County Council as an enforcement authority is false and misleading. The facts are that Galway County Council were informed by letter which Martin Collins wrote to the County Council on the 29th July 2003 see appendix 3. The letter highlighted a significant number of issues to Galway County Council **before the landslide occurred in October 2003**. The changes scale and extraordinary intensity of the excavations at the windfarm development was most alarming. The ESB engineers on the site appeared to ignore and be oblivious to the environmental disaster that was about to occur in October 2003.

Also Galway County Council have been deeply involved in all stages of the planning and decision making for this development over its 25 years of history. Of significant importance in consideration of this point in that according to the planning application information Galway County Council received almost €393,613 in rates from the windfarm in 2020. From past experience we do not have confidence that Galway County Council will take an independent and unbiased view on decisions in relation to this windfarm development?

In CJEU Case C-215/06 the Judgement states that'

58 A system of regularisation, such as that in force in Ireland, may have the effect of encouraging developers to forgo ascertaining whether intended projects satisfy the criteria of Article 2(1) of Directive 85/337 as amended, and consequently, not to undertake the action required for identification of the effects of those projects on the environment and for their prior assessment. The first recital of the preamble to Directive 85/337 however states that it is necessary for the competent authority to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes, the objective being to prevent the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects.

59 Lastly, Ireland cannot usefully rely on Wells. Paragraphs 64 and 65 of that judgment point out that, under the principle of cooperation in good faith laid down in Article 10 EC, Member States are required to nullify the unlawful consequences of a breach of Community law. The competent authorities are therefore obliged to take the measures necessary to remedy failure to carry out an environmental impact assessment, for example the revocation or suspension of a consent already granted in order to carry out such an assessment, subject to the limits resulting from the procedural autonomy of the Member States.

60 This cannot be taken to mean that a remedial environmental impact assessment, undertaken to remedy the failure to carry out an assessment as provided for and arranged by Directive 85/337 as amended, since the project has already been carried out, is equivalent to an environmental impact assessment preceding issue of the development consent, as required by and governed by that directive.

61 It follows from the foregoing that, by giving to retention permission, which can be issued even where no exceptional circumstances are proved, the same effects as those attached to a planning permission preceding the carrying out of works and development, when, pursuant to Articles 2(1) and 4(1) and (2) of Directive 85/337 as amended, ***projects for which an environmental impact assessment is required must be identified and then – before the grant of development consent and, therefore, necessarily before they are carried out – must be subject to an application for development consent and to such an assessment, Ireland has failed to comply with the requirements of that directive.***

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Consequently, the first two pleas in law are well founded.

In addition and of major significance we know from minutes of reports of Management Committee Meetings of the Department of Communications, Marine & Natural Resources that the Derrybrien Windfarm project & forestry obligations were discussed at meetings on Tuesday 11th March 2003, Tuesday 18th March 2003 and Tuesday 25th March 2003.

On Tuesday 11th March 2003 the minutes states that;
" Martin Brennan spoke on the following issues;
Saorgas correspondence re Derrybrien Windfarm project & forestry obligations.
ESB's involvement & the issue of the disposal of land / State assets by Coillte were raised".

On Tuesday 18th March 2003 the minutes states that;
"Martin Brennan; AG's advice is awaited on Derrybrien windfarm licence".

On Tuesday 25th March 2003 the minutes states that;
"Martin Brennan; the Derrybrien wind farm licence".

On the web page of the Office of The Attorney General the following outline the Functions, powers and duties of the Attorney General.

Functions, powers and duties

The Attorney General is legal adviser to the Government and attends Government meetings. The Attorney General advises the Government on the constitutional and legal issues which arise prior to or at Government meetings, including whether proposed legislation complies with the provisions of the Constitution, acts and treaties of the European Union, the European Convention on Human Rights or other international treaties to which Ireland has acceded. The Attorney General also advises as to whether the State can ratify international treaties and conventions. The Attorney General represents the State in legal proceedings.

The Attorney General is legal adviser to each Government Department and certain public bodies. The Attorney General is the representative of the public in all legal proceedings for the enforcement of law and the assertion or protection of public rights. The Attorney General defends the constitutionality of Bills referred to the

Supreme Court under Article 26 of the Constitution. The Attorney General is an ex officio member of the Council of State which the President of Ireland can consult in relation to his exercise and performance of certain powers and functions under the Constitution.

It is inconceivable that the Management Committee of the Department of Communications, Marine & Natural Resources and the Attorney General did not give full legal consideration to all the legal requirement of the deforestation on the proposed windfarm site. It is also clear that the ESB and Coillte were both deeply involved in promoting and executing the windfarm project at Derrybrien and that the Derrybrien Windfarm project & forestry obligations were discussed at high level management committee meetings on Tuesday 11th March 2003, Tuesday 18th March 2003 and Tuesday 25th March 2003.

(c) Whether the ability to carry out an assessment of the environmental impacts of the development for the purposes of an environmental impact assessment or an appropriate assessment and to provide for public participation in such an assessment has been substantially impaired.

A critical question here is what exactly is being assessed and what is the timeframe? Is the assessment focused on what was the condition of the site in 1998 and 2001? Or is the assessment starting in 2003 after construction commenced? The major difficulty is that there was no proper EIA carried out prior to development consent being granted.
Unfortunatly for our environment and our community this substitute consent application appears to be assessing damage and mitigation measures. No reasonable or independent planning authority could grant permission to this development with scale of destruction and non compliance with EU Law and Directives.

The fact that it is almost 25 years ago since a planning application was first lodged for part of this windfarm development is incontrovertible evidence that any assessment at this point in time is largely an academic exercise and flies in the face of the need and requirement of a proper EIA prior to any works commencing.
In Case C-216/18 delivered on 12 November 2019 European Commission V Ireland point 116 states that; (See appendix 1)
116 "An environmental impact assessment, such as that provided for by Directive 85/337, is one of the fundamental environmental protection

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mechanisms in that it enables, as recalled in paragraph 73 above, the creation of pollution or nuisances to be prevented at source rather than subsequently trying to deal with their effects."

All the reports produced and paid for by the ESB amazingly reach the consensus that some things happened during the construction of the development but that the granting of permission is fully justified.

No consultation with local Derrybrien residents

The ESB / GWL has not consulted the local community in relation to this application. What they have done is notified the community on the eve of the application being lodged with An Bord Pleanala in 2020. There is a considerable difference between notification and consultation. It appears that the ESB / GWL did liaise with An Bord Pleanala, Galway County Council, the Environmental Protection Agency, Inland Fishries Ireland (Shannon Region) and Coillte but not the local community.

As local residents the first and only communication that we received in relation to this application was an information sheet dropped in my letterbox by Door2door a leaflet distribution company on the morning of Thursday 06th August 2020. Also just for the record the fact that the ESB GWL erected 17 site notice signs on Sunday 23rd August 2020 suggests that rather than sitting down around the table in proper consultations with local residents they preferred to engage in a public relations exercise at a distance. All site notice signs were removed in early 2021 and on the 09th August 2021 new site notice signs were erected containing the original notice and a new notice referring to "additional information". No reference whatsoever was made to "Exceptional Circumstances" in the new site notices.

A key part of the Environmental Impact Assessment should be consultation with local residents before finalising the Environmental Impact Statement. This did not take place. Why were the ESB / GWL afraid to involve the local community in this important process, what were they afraid of?

The lack of consultation shows up a fundamental problem with this application in that it exemplifies the issue that the ESB / GWL had no interest in what we had to say and what issues were of real and deep concern to us as local residents.

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Ireland will then have set a precedent that in effect "RETENTION PERMISSION" will be granted and this will send a clear message to all developers, state and private, that you can build anything anywhere and get away with it.

There are just over 5,500 pages in the application documentation submitted by the ESB / GWL and it is impossible for any ordinary person to scrutinize and submit a comprehensive observation on this application to An Bord Pleanala within the timeframe allowed. We are being deliberately "snowed" with documentation and do not have the funding to pay for expert opinion on what has been submitted. In other words there is no "equality of arms" a bureaucratic fortress has been created and we have in effect been blocked out of this process. However again we will have to pay for legal advice to clarify this and as to the extent and implications for us, the apparent emanation of the State applicant, and the State and for Our EU Law. Along with this the P & D 2010 amendment act is practically impossible for any ordinary person to navigate and understand. It consists of 17 subsections governed by procedures and strict timelines which I as an ordinary citizen find it very difficult if not impossible to understand.

In the 16 areas of assessment in the Remedial Environmental Impact Assessment Report attached to the application, areas such as population, biodiversity, hydrology etc the ESB has overwhelmingly concluded that there **are no significant adverse impacts.**

However the 2015 National Survey of Hen Harrier in Ireland by the National Parks and Wildlife Service the Hen Harrier population in the Slieve Aughtie Special Protection Area has shown a dramatic loss of almost 50% since 2005. According to the 2016 census the people population of Derrybrien has fallen from 144 people in 1996 down to 105 in 2016. We now have a community and an environment on the knife edge of survival.

The site notice on the face of it is not factually correct and is misleading.

The site notice states that;
"Item(3)- ancillary works carried out includes :tree felling"
It is factually wrong to describe tree felling in the context of this substitute consent application as "**ancillary**". What took place was **"Deforestation of 263 hectares"** of trees which required a felling licence from the Department of Agriculture and The Forest Service along with planning permission and an Environmental Impact Assessment.

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The fact is that the windfarm could not have been built without first removing the trees on the site.
An Bord Pleanala must declare this substitute consent application as invalid on this point as there is an attempt by the ESB / GWL to circumvent EU law and Directives by minimising the significance and scale of the deforestation.

Also Galway County Council neglected to include any reference to deforestation in their details when instructing the ESB / GWL under Section 177B to apply for substitute consent.

On page 13 of the;
Planning Report to Accompany Application to An Bord Pleanála for Substitute Consent Document No.: QS-000280-01-R460-003-000

It states that;
"The scope of the application pack, the content of the notices and the number and format of the documents submitted has been pre-agreed with An Bord Pleanála in advance of this submission being made – see email confirmation attached to the Application Form".
Also on page 16 it states that;
"Separately – Gort Windfarms Ltd. liaised with officials in An Bord Pleanála in respect of content of notices, drawing schedules and document formats."

On page 21 it states that;
"Tree felling - c.220 Ha of forestry were felled to facilitate the construction of the wind farm. Operational requirements necessitated the licensed felling of an additional c.47 Ha of forestry between 2016 and 2018."

On the site notice it states that;
"The application relates to development which comprises or is for the purpose of an activity requiring a waste licence".
Again the site notice is deficient as it does not explain what exactly the type of waste that is been referred to on the notice.

In the;
Planning Report to Accompany Application to An Bord Pleanála for Substitute Consent Document No.: QS-000280-01-R460-003-000
On page 11it is stated that;

The fact is that the windfarm could not have been built without first removing the trees on the site.
An Bord Pleanala must declare this substitute consent application as invalid on this point as there is an attempt by the ESB / GWL to circumvent EU law and Directives by minimising the significance and scale of the deforestation.

Also Galway County Council neglected to include any reference to deforestation in their details when instructing the ESB / GWL under Section 177B to apply for substitute consent.

On page 13 of the;
Planning Report to Accompany Application to An Bord Pleanala for Substitute Consent Document No.: QS-000280-01-R460-003-000

It states that;
"The scope of the application pack, the content of the notices and the number and format of the documents submitted has been pre-agreed with An Bord Pleanala in advance of this submission being made – see email confirmation attached to the Application Form".
Also on page 16 it states that;
"Separately – Gort Windfarms Ltd. liaised with officials in An Bord Pleanala in respect of content of notices, drawing schedules and document formats. "

On page 21 it states that;
"Tree felling – c.220 Ha of forestry were felled to facilitate the construction of the wind farm. Operational requirements necessitated the licensed felling of an additional c.47 Ha of forestry between 2016 and 2018. "

On the site notice it states that;
"The application relates to development which comprises or is for the purpose of an activity requiring a waste licence".
Again the site notice is deficient as it does not explain what exactly the type of waste that is been referred to on the notice.

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On page 11it is stated that;

"It is the intention of the Applicant to secure, in due course, all other consents to regularise the status of this development, including Waste Licences if and where applicable."

This is totally unacceptable. The ESB are making a substitute consent application and at the same time withholding an application for a Waste Licence and other unknown **"consents".**
What type of "Waste" are they referring to and what are"all other consents".

We are deeply concerned that the ESB / GWL are not been open and transparent in this application and are slipping in other consents without proper and clear information.

This application must be rejected by An Bord Pleanala on the basis of lack of proper and clear information on the face of the site notice or indeed in the application reports themselves.

On an appointment to visit the planning office in Galway County Council on Tuesday the 31st August 2021 Martin Collins requested to see copies of observations that Galway County Council made on the application and a copy of the response that Gort Windfarms Limited made to the 8 submissions. Neither of the two copies were available.
Of equal importance was the fact that the staffs in the planning office were unable to tell him the closing date for receipt of submissions/ observations by An Bord Pleanala in this case. Also a search of the An Bord Pleanala website by the County Council staff was unable to establish the closing date or a copy of the two submissions.

Also as far as we can ascertain it is not possible to access on line on the An Bord Pleanala web site all the information that is on file in the hard copy in the office of An Bord Pleanala. This is in contravention of the EIA Directive and the Aarhus Convention.
The opaqueness, complexity and the inequity of arms in this substitute consent process will without a doubt exclude and silence the majority of the public which is contrary to EU Law on public participation in decision making.

Of high significance in the decision making process is the fact that Ms Amanda Maguire, Site Protection Section, NPWS wrote to the County Secretary, Galway County Council, in a letter dated 22nd December 2003 outlining in detail issues related to dissemination of information following meetings, requesting copies of

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reports, requesting ecological assessments, highlighting concerns regarding future works and in particular drainage. The letter also pointed out that there were major deficiencies in the original EIS and questions the changes made in what was being constructed and what was granted permission. The letter also focuses on the environmental impacts associated with the landslide on the SPA and SAC areas. Finally the letter clearly stated that a new planning application should be submitted to Galway County Council for any changes to the site layout including drainage. Ms Maguire was very detailed and articulate in identifying issues that required attention and should have been addressed.
In a letter dated 27th January 2004, Mr John Morgan, Director of Services, Roads and Transportation Unit of Galway County Council replied to The Secretary General, Department of the Environment, Heritage & Local Government, Custom House, Dublin 1 and copied the letter to Mr Tom O'Mahony, Assistant Secretary, Department of the Environment, Heritage & Local Government, Custom House, Dublin 1.

In a third letter dated 06th February 2004, Ms Amanda Maguire replied to Me Morgan, welcoming the assurances given that habitats would be protected and welcoming that all reports would be made available to the Department of the Environment, Heritage & Local Government. Ms Maguire note that the County Council is satisfied that thus far the development complies with planning permission granted. Ms Maguire states that "the question of whether any future works would require planning permission is, of course a matter for the local authority. The reference in paragraph 8 of our previous letter to submission of new planning application as appropriate, was not intended to suggest otherwise. We also accept , as stated at points 5 and 6 of your letter, that the issues refered to at those points are matters for the developers.
We note your position at point 4 of your letter regarding the EIS. Overall, our letter of the 22nd December was concerned with impacts of the landslide and assessment of future works. The reference to the EIS was mainly in the context of advising on sensitive peatland areas to be avoided in any future works.
The Department does not dispute that Galway County Council is operating to appropriate professional standards in relation to the planning and other key services and notes you affirmation to this effect. See appendix 4.

Ms Maguire initially wrote a very comprehensive letter and articulated faults and failings as she saw them. We would submit that she was a very diligent public servant doing her job. The reply to her letter by Mr Morgan to the Secretary General of the Department of the Environment, Heritage & Local Government and copied to the Assistant Secretary was in my view designed to dismiss and silence

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legitimate concerns. The rebuttal and "put down" tone and content of Mr Morgan's letter achieved its goal and unfortunately Ms Maguire for some reason wrote a letter of reply which acceded to and almost apologized to Galway County Council.
Why did Ms Maguire reply to a hostile letter sent to The Secretary General, Department of the Environment, Heritage & Local Government, Custom House, Dublin 1 and copied the letter to Mr Tom O'Mahony, Assistant Secretary, Department of the Environment, Heritage & Local Government, Custom House, Dublin 1?
In our view the three letters referenced above is a chilling example of why we would submit that if Ms Maguire was listened to we would not be in the shameful position of two CJEU cases against Ireland and a bill of some €15 million.

If the interest and care for the integrity of the planning system and the environment that Ms Maguire evidently displayed in her first letter was allowed to proceed our environment and a society would be a much better place.

The ESBI and the ESB Fisheries attended the same meeting and according to the correspondence were aware of the points raised in the discussions at the ad hock group meetings.

The purpose of including this correspondence is to show to An Bord Pleanala that in spite of the 5500 pages of "glitz and glamour" in the ESB / GWL application for substitute consent a basic three page letter if listened to and acted upon could have done much more to protect our environment and save the Irish State ridicule, embarrassment and a circa €15 million fine.

(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 continuation of the development

The actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out the development is self evident.

Without going into great details some of the headline figures that give you a scale of the project on this Special Protection Area and a blanket bog site of 1,200 acres are;

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- 70 windturbines
- Development built on a European designated Special Protection Area
- 450,000 cubic meters of bog slipped in the landslide
- 50,000 fish killed as a result of the landslide
- 185,000 cubic meters excavated from compound, turbine bases etc
- Deforestation of 263Ha without planning permission or EIA
- 17.5 Km of roadways
- 39Km of drains
- 3 quarries (The main quarry is outside the windfarm site and never assessed during the planning application).
- 7,880 cubic meters of concrete used
- 232,000 cubic meters blasted and excavated from the quarries
- 22.5 Km of underground cable
- 7.8 Km of overhead power lines
- 4 barrages consisting of approximately 3,500 cubic metres of rocks & stone

The scale of this destruction is something that cannot be ignored.

A 75% drop in numbers of Hen Harriers over the last 15 years on the Slieve Aughty SPA.

In the 16 areas of assessment in the Remedial Environmental Impact Assessment Report attached to the application, areas such as population, biodiversity, hydrology etc the ESB / GWL has overwhelmingly concluded that there **are no significant adverse impacts.**
However the 2015 National Survey of Hen Harrier in Ireland by the National Parks and Wildlife Service the Hen Harrier population in the Slieve Aughtie Special Protection Area has shown a dramatic loss of almost 50% since 2005.

Of some significance is the fact that Duchas officials under the National Parks and Wildlife service wrote to Galway County Council in March 1998 and to An Bord Pleanala in September 2001clearly highlighting the fact that the EIS were seriously deficient in its providing information regarding the impacts on flora, fauna, soil and water. Both correspondence referred in particular to the impact on the Hen Harrier and Merlin population in the area. The planning authorities cannot say that they were not aware of their obligations and legal duty to protect the habitat for the Hen Harriers and Merlin. Their legal duty were enshrined in law under the Wildlife Act 1996 and under Annex 5 of the EU Habitats Directive and Annex 1 of

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the Birds Directive (Council Directive 79/409/EEC on the conservation of wild birds).

Also of significance is the fact that Galway County Council refused planning permission for 00/4581 which was overturned in an appeal to An Bord Pleanala. In her report the An Bord Pleanala inspector clearly identified the importance of the Hen Harriers and the fact that the Slieve Aughties were a stronghold at that time. She states that;
"In view of the importance of this general area for the Hen Harrier and the paucity of information available regarding the impact of windfarms on this species,I would concur with Duchas in relation to the value of surveys. However, in I also agreed with the applicant (Saorgus Energy Ltd) who states that surveys undertaken during periods of disturbance may be considered invalid" and ***"The applicant intends to commence development as soon as possible. I am of the opinion that the Board could require that a series of surveys to be undertaken, possibly commencing in Spring / Summer 2002. I would submit that the attachment of such a condition would also be reasonable for the following reasons; (i) the Slieve Aughty Mountains have been identified as a stronghold for the Hen Harriers following a survey undertaken in 1998/1999 (ii) the inter-relationship between Hen Harriers and windfarms is not well understood and it may be that the relationship is not one of conflict (iii) it is desirable that further research be undertaken of operational windfarms in the area where Hen Harriers are known to exist. I consider that such information would add to decision making in future years and that it is not unreasonable that windfarm operators be required to support this research."***

The grant of planning permission for this site by An Bord Pleanala under PL. 07 122803 attaches 13 conditions. Condition no 8 states that;
The developer shall retain the services of a suitably qualified and experienced bird specialist to undertake appropriate surveys of this site for the Hen Harriers. Details of the surveys to be undertaken shall be agreed in writing with the planning authority prior to commencement of the development.
Reason: To ensure that the developer contributes towards knowledge of the local Hen Harrier population and of the impact of the windfarms on the species".

The decision and approach above raises a number of fundamental difficulties. First of all it appears that the grant of permission by An Bord Pleanala and the subsequent surveys of the Hen Harriers were an experiment that has gone horribly wrong.

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Second of all, the inspector "***agreed with the applicant (Saorgus Energy Ltd) who states that surveys undertaken during periods of disturbance may be considered invalid***" and yet recommends granting permission for a development to start and then carry out surveys after saying earlier that "***surveys undertaken during periods of disturbance may be considered invalid***"

What was the point and purpose of conducting surveys after granting permission other than for experimental and novelty value?????

Thirdly of grave concern is the fact that as of July 2003 when construction commenced no survey had been received by Galway County Council regarding Hen Harrier population or habitat.

Fourth is the fact that the 2015 National Survey of Hen Harrier in Ireland by the National Parks and Wildlife Service the population in the Slieve Aughties has shown a dramatic loss of almost 50% since 2005.
Even more alarming is the fact that recently the Hen Harrier Project Annual Report Year 3; May 2019 – April 2020 stated that:

"The Slieve Aughty Mountains straddles the Galway and Clare border and is the 2nd largest SPA in the network. This SPA supported 27 territorial pairs of breeding Hen Harrier in 2005, however since then the population has undergone catastrophic decline. There were just six confirmed territories recorded during surveys in 2019 and one possible territorial pair, which marks a 75% drop in numbers over the last 15 years. Four of the six confirmed pairs were successful in fledging a total of seven young. In spite of the continued decline in the number of breeding pairs the number of young birds fledged shows an increase over previous years."

In their decision An Bord Planala failed to adhere to;
Directive 85/337/EEC before amendment by Directive 97/11
2 Article 2(1),(2) and (3), first subparagraph, of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40) provided:
'1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue inter alia, of their nature, size or location are made subject to an assessment with regard to their effects.

"The Slieve Aughty Mountains straddles the Galway and Clare border and is the 2nd largest SPA in the network. This SPA supported 27 territorial pairs of breeding Hen Harrier in 2005, however since then the population has undergone catastrophic decline. There were just six confirmed territories recorded during surveys in 2019 and one possible territorial pair, which marks a 75% drop in numbers over the last 15 years. Four of the six confirmed pairs were successful in fledging a total of seven young. In spite of the continued decline in the number of breeding pairs the number of young birds fledged shows an increase over previous years."

In 2007, as a requirement under the EU Birds Directive, Ireland designated six sites as SPAs based on their national importance for breeding hen harriers (see www.npws.ie/protected-sites); (i) the Slieve Bloom Mountains SPA (Site code: 4160); (ii) the Stack's to Mullaghareirk Mountains, West Lim erick Hills and Mount Eagle SPA (Site code: 4161); (iii) the Mullaghanish to Musheramore Mountains SPA(Site code: 4162); (iv) the Slievefelim to Silvermines Mountains SPA (Site code: 4165); (v) Slieve Beagh SPA (Site code: 4167); and (vi) the Slieve Aughty Mountains SPA (Site code: 4168). Between 2005 and 2010, the numbers of hen harriers within these SPAs varied regionally, with three SPAs declining and three increasing over this period, although overall numbers declined by 18.1% since the 2005 survey (Ruddock et al., 2012). Ruddock et al., (2012) suggested that limited breeding resources may be impacting hen harrier populations in Ireland. The proximate or distal causes of the regional declines include potentially contributing factors such as over-winter survival rates (O'Donoghue, 2011), habitat suitability/change particularly of afforested areas (Wilson et al., 2012), predation, persecution, reduction in food supply, development (e.g. windfarms, O'Donoghue et al., 2011) and various disturbance factors e.g. peatcutting, burning etc (Ruddock et al., 2012).

Despite continued good coverage, an acute decline was recorded in the Slieve Aughty range, where the population was also observed to decline since 2005. In 2015 the recorded population was less than half of that recorded in 2005, and further substantial declines were observed since 2010. Some squares to the south of the Aughties did however show an increase in 2015 (Figure 10) which may be explained by redistribution.

In terms of population losses, the most significant reduction within the SPA network since 2010 was recorded in the Slieve Aughty SPA with an overall reduction of nine breeding pairs since the 2010 survey.

The Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA complex and the Slieve Aughty Mountains SPA, similar to 2010 surveys (Ruddock et al., 2012), have both declined since 2005. There are also a relatively large number of wind turbines recorded in these two SPA s (n = 153 & 77 respectively; Appendices 4 - 9) and further analysis of any spatial associations and/or avoidance of windfarms by hen harriers would be desirable. The pairs found in both these SPAs largely nest in afforested or scrub sites and the Stack's complex has the lowest proportional usable forest age

structure of all SPAs (Appendices 4 – 9) indicating that forest demographics may be a driver in this area.

Following the ad hoc recording of pressures and directly recorded threats in 2010 (Ruddock et al., 2012), it was desirable to collect data more systematically during the 2015 survey. In particular Ruddock et al., (2012) identified several factors considered as direct 'disturbance' at known hen harrier sites which included turf cutting, windfarms, power-lines, roads, vehicles, burning, human disturbance, agricultural activity, cattle (i.e. trampling), forestry operations, forest maturation, predation, scrub clearance, shooting and recreational activity.

In a National Survey of breeding Hen Harriers Circus cyaneus in Ireland 1998 – 2000 the population of Hen Harriers were stated to be 15 – 23 pairs.
In the 2015 report it is stated that the Hen Harrier population in 2005 as 24 – 27 pairs, population in 2010 as 15 – 23, population in 2015 as 8 – 14 pairs which is a 48.1% decrease from 2005 to 2015.

It has been reported locally that people are employed to travel within the windfarm site accompanied with specially trained dog/s searching for birds that may be killed or injured by the windturbines. If this is true a report should be published by the windfarm owners giving details of who is carrying out the survey and the results of what they found.

This application must be rejected by An Bord Pleanala on the basis of lack of proper and clear information on the face of the site notice or indeed in the application reports themselves.

The ESB are well aware of the absolute importance of the deforestation as it is specifically referred to in the;
Remedial Natura Impact Statement (rNIS)
On page 29 it states that;
4.2.5.2 Construction phase: circa June 2003-March 2006
The following characters of the Project construction phase are noted as part of this assessment:

- *Site clearance and the felling of approximately 222 ha of commercial conifer plantation*

On page 30 it states that;

Construction works on site commenced in June 2003 with tree felling operations which were undertaken by a contractor on behalf of Coillte. Civil engineering works commenced in July 2003 with road construction and excavations at turbine locations. The works were stopped on 16th October 2003 due to a peat slide on site

Page 30 states that;

Turbulence felling
In order to optimise productivity of the wind farm, Coillte agreed to undertake offsite phased tree felling (46.2 ha in total) under felling licence immediately to the west of the wind farm site in 2016, 2017 and 2018. It is noted that these areas had been scheduled for felling in 2015 as part of Coillte's normal tree felling programme and that the felled areas were replanted. Specific requirements relating to hen harrier were set out in the licence. ***Felling was to be spread out over three years and no operations were allowed during the hen harrier breeding season (1st April to 15th August inclusive) without express permission****.*
Operations were to adhere to the Forest Service document - "Procedures regarding disturbance operations and hen harrier SPAs".

Deforestation of 263 ha without planning permission or EIA

The Department of Agriculture, Forestry Service, granted in May of 2003 a felling licence for the clear felling of 263 ha of coniferous trees at a blanket bog hill side without planning permission and carrying out an EIA, despite the fact that the EIA Directive had been long before that date amended to include the clear felling of forestry (97/11 EC) of the 3rd March, 1997 and the Irish interpretation of that amendment is that when more than 70 ha of coniferous plantation are intended to be clear felled, an EIA is mandatory! By not carrying out an EIA prior to granting the felling licence, the Forestry Service violated European Law in force, here the EIA Directive as amended.

The European Communities (Environmental Impact Assessment) (Amendment) Regulations 1999 came into force on the 1st May, 1999.
These regulations added the following as subject to an Environmental Impact Assessment:-
1. Agriculture, silviculture and aquaculture.

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1. Agriculture, silviculture and aquaculture.

(b)(iii) deforestation for the purpose of conversion to another type of land use, where the area to be de-forested would be greater than 10 HA of natural woodland or 70 HA of conifer forest.
These regulations came into force on the 1st May, 1999.

In CJEU Case C-215/06 the court ruled that;
107 It is not disputed, first, that the competent authorities gave their approval to the change in the type of wind turbines originally planned without requiring an environmental impact assessment in conformity with Directive 85/337 as amended and, secondly, that the consent given for the third phase of construction was also not accompanied by such an assessment. ***In addition, such an assessment did not precede the deforestation authorised in May 2003, contrary to the requirements of the Irish legislation.***

108 *However, point 3(i) of Annex II to Directive 85/337 as amended refers to installations for the harnessing of wind power for energy production (wind farms) and point 13 of that annex refers to any change or extension of projects listed in Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment.*

109 *In addition, the relevant selection criteria in Annex III to Directive 85/337 as amended, which are applicable to the projects listed in Annex II and are referred to in Article 4(3) of that directive, include the risk of accidents having regard inter alia to the technologies used.* ***Noteworthy among those criteria is the environmental sensitivity of the geographical area, which must be considered having regard, inter alia, to 'the absorption capacity of the natural environment', paying particular attention to mountain and forest areas.***

110 *Since the installation of 25 new turbines, the construction of new service roadways and the change in the type of wind turbines initially authorised, which was intended to increase the production of electricity, are projects which are referred to in Annex II to Directive 85/337 as amended and which were likely, having regard to the specific features of the site noted in paragraph 102 of this judgment and the criteria referred to in the preceding paragraph of this judgment, to have significant effects on the environment, they should, before being authorised, have been subject to a requirement for development consent and to an assessment of their effects on the environment, in conformity with the conditions laid down in Articles 5 to 10 of Directive 85/337 as amended.*

111 ***Consequently, by failing to take all measures necessary to ensure that the grant of the amending consents and the consent relating to the third phase of***

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111 Consequently, by failing to take all measures necessary to ensure that the grant of the amending consents and the consent relating to the third phase of

construction of the wind farm was preceded by such an assessment, and by merely attaching to the applications for consent environmental impact statements which did not satisfy those requirements, Ireland has failed to fulfil its obligations under Directive 85/337 as amended.

112 ***It follows from the foregoing that, by failing to take all measures necessary to ensure that the development consents given for, and the execution of, wind farm developments and associated works at Derrybrien, County Galway, were preceded by an assessment with regard to their environmental effects, in accordance with Articles 5 to 10 of Directive 85/337 either before or after amendment by Directive 97/11, Ireland has failed to fulfil its obligations under Articles 2, 4 and 5 to 10 of that directive.***

In THE SUPREME COURT appeal
(Appeal No 51/2009) Denham C.J. O'Donnell J. McKechnie J. Clarke J. Laffoy J. In the matter of the Planning and Development Act 2000 as amended and in the matter of s. 160 of the Planning and Development Act 2000 Between/ Derrybrien Development Society Limited Applicant/Appellant and Saorgus Energy Limited, Coillte Teoranta, and Gort Windfarms Limited Respondents Judgment of the Court delivered on the 16th day of October, 2015, by Denham C.J. 1. This is an appeal by Derrybrien Development Society Limited, the applicant/appellant, referred to as "the appellant" from the judgment and order of the High Court (Dunne J.) dated the 3rd June, 2005 and the 10th June, 2005, respectively, wherein the learned High Court judge refused to restrain the respondents, their servants and agents, from deforesting lands owned by Coillte Teoranta. Motion 2. The appellant had brought a motion to the High Court seeking an order:- (i) Pursuant to inter alia s. 160(1)(a) of the Planning and Development Act, 2000, restraining the respondents their servants or agents from continuing the aforesaid unauthorised development. (ii) A final order pursuant to s. 160(1)(b) and s. 160(2) of the Planning and Development Act, 2000, directing restoration of the respondent's lands to their condition prior to the commencement of the unauthorised development inclusive of the re-planting of trees in the affected areas and the restoration of the pre-existing drainage channels. The motion was refused by the High Court but stayed for twenty one days in the event of a notice of appeal within that time, and it was stated that if there was an appeal that execution of the costs order be stayed pending the determination of an appeal. 3. The first named respondent is referred to as "Saorgus", the second named respondent is referred to as "Coillte", and the third named respondent is referred to as "the wind farm". The three respondents are referred to collectively as "the respondents".

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*68. **For clarity, it should be noted that the Court is prepared to approach this appeal on the assumption that the planning permissions did not cover or extend fully to the deforestation.***
69. It also should be noted that, while the papers in this appeal are extensive, they do not provide a clear picture of the situation under appeal.
70. A decision is required on the appellant's appeal, which has been brought by the appellant after the decision of the European Court of Justice in The Commission v. Ireland Case C- 215/06 E.C.R. 1-4911.
71. In the context of this appeal, in all the circumstances of the appeal, the Court is satisfied that it is appropriate to exercise its discretion under s. 160 and to refuse the remedy sought in the motion.
72. Consequently, for the reasons set out in this judgment, in all the circumstances, the Court exercises a discretion under s. 160 and would refuse the motion, and dismiss the appeal.

For some inexplicable reason the Supreme Court in 2015 refused the motion even though they did accept the fact that ***"the planning permission did not cover of extend fully to the deforestation".***
However four years later in 2019 the CJEU imposed a fine of €5 million euro and €15,000 per day until a proper Environmental Impact Assessment was carried out on this very same development. As of the date on this letter the fine stands at circa €15 million which is a colossal waste of public money and which nobody has taken any responsibility for.

The Supreme Court in Appeal No 51/2009 failed to apply either law or justice and instead decided to use its own discretion to dismiss our legitimate appeal. It was and is a shameful derelic violation of the Duties and Obligations and Power and Authority duty and responsibility by the Supreme Court not to uphold Our EU laws Directives and Treaties. (incl. Our CFREU) It is imperative that the polluter pays principle is invoked and that all damage done by the windfarm developers is **OBVIATED** and not MITIGATED. This inter alia must be considered an option in any EIA and particular given Pt. 116 in Our CJEU Judgement Case C- 261/18 of November 2019.

This application for substitute consent is produced by the ESB / GWL who is the developer and who have endless resources at their disposal. The existence of this development is based on the creation of the Power Purchase Agreement PPA which resulted in an Alternative Energy Requirement contract process. The

corporate group think throughout this process has resulted in a project been foisted into a fragile and totally unsuitable location.

The ESB are well aware of the absolute importance of the deforestation as it is specifically referred to in the;
Remedial Natura Impact Statement (rNIS)
On page 29 it states that;
4.2.5.2 Construction phase: circa June 2003-March 2006
The following characters of the Project construction phase are noted as part of this assessment:

- *Site clearance and the felling of approximately 222 ha of commercial conifer plantation*

On page 30 it states that;

Construction works on site commenced in June 2003 with tree felling operations which were undertaken by a contractor on behalf of Coillte. Civil engineering works commenced in July 2003 with road construction and excavations at turbine locations. The works were stopped on 16th October 2003 due to a peat slide on site

Page 30 states that;

Turbulence felling
In order to optimise productivity of the wind farm, Coillte agreed to undertake offsite phased tree felling (46.2 ha in total) under felling licence immediately to the west of the wind farm site in 2016, 2017 and 2018. It is noted that these areas had been scheduled for felling in 2015 as part of Coillte's normal tree felling programme and that the felled areas were replanted. Specific requirements relating to hen harrier were set out in the licence. ***Felling was to be spread out over three years and no operations were allowed during the hen harrier breeding season (1st April to 15th August inclusive) without express permission****.*
Operations were to adhere to the Forest Service document - "Procedures regarding disturbance operations and hen harrier SPAs".

The fact remain that No planning permission and No EIA were produced for deforestation of 263 ha in direct contravention of Irish and EU law.

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Therefore An Bord Planala cannot legally grant Substitute Consent to an unauthorised development.

Annex 1, Special Protection Area Designations

Issues such as flora, fauna, SPA, forestry, water, bog, landslide risk, quarries, drainage and the implications on the flooding in the Gort area must be assessed properly and independently.

In the:
Derrybrien Wind Farm Project Remedial Natura Impact Statement (rNIS)
Electricity Supply Board (ESB)

5.9 Consideration of findings The rNIS has considered the likely significant effects of the Derrybrien Wind Farm Project, if any; that have occurred, that are occurring or can reasonably be expected to occur in the future; that would adversely affect the integrity of any European site(s). Two European sites were identified at screening stage as having the potential to have been or to be significantly affected as a result of the Project. The assessment undertaken in the rNIS has been informed by project-specific field surveys and specialist reporting with reference to the ecological communities and habitats potentially affected by the Project, in order to provide a scientific basis for evaluations. ***The removal of conifer planation as part of the project construction has created approximately 255 ha of suitable open upland foraging habitat for hen harrier in the Slieve Aughty Mountains SPA. As plantation forest maturation has been quoted as being partly responsible for the regional decreases in breeding hen harriers, the alteration of mature forestry to open habitat has the potential to have significant positive effects on the hen harrier population within the Slieve Aughty Mountains SPA. The assessment has shown that there is no evidence that the construction phase of the Project and the operational phase to date, have adversely affected the integrity of the SPA. With the implementation of mitigation measures it is anticipated that the Project will not result in any future direct, indirect or cumulative adverse effects on the Slieve Aughty Mountains SPA during the continued operation and decommissioning of the wind farm and associated infrastructure. The effects of the Project, in particular the peat slide, on Lough Cutra SPA were assessed and the findings were that the Project did not adversely affect the integrity of the site. The continued operation and decommissioning of the Project will also not affect the integrity of the SPA. It is therefore concluded, that the Project with the implementation of the prescribed mitigation measures will not give rise to significant impacts, either individually***

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or in combination with other plans and projects, in a manner which adversely affects the integrity of any European site(s).

The extract above is quite incredible in that we are told by the ESB that there is no significant impact on the SPA. 450,000 cubic meters of bog flowed down the local river killing 50,000 fish and ended up in the Lough Cutra SPA. The Hen Harrier population in the Slieve Aughties is down approximately 75% since 2005. 39km of drains dug into blanket bog. Is this alone not enough evidence that enormous damage has been done to the SPA?

The extract below is from European Commission's website ;
https://ec.europa.eu/environment/nature/legislation/birdsdirective/index_en.htm

In practice

Often migratory, wild bird species can only be protected by cooperating across borders. Urban sprawl and transport networks have fragmented and reduced their habitats, intensive agriculture, forestry, fisheries and the use of pesticides have diminished their food supplies, and hunting needed to be regulated in order not to damage populations. Concerned with their decline, Member States unanimously adopted the Directive 79/409/EEC in April 1979. It is the oldest piece of EU legislation on the environment and one of its cornerstones. Amended in 2009, it became the Directive 2009/147/EC.

Habitat loss and degradation are the most serious threats to the conservation of wild birds. The Directive therefore places great emphasis on the protection of habitats for endangered and migratory species. It establishes a network of Special Protection Areas (SPAs) including all the most suitable territories for these species. Since 1994, all SPAs are included in the Natura 2000 ecological network, set up under the Habitats Directive 92/43/EEC.

As a local resident I am not aware of any instance of persecution or poisoning of Hen Harriers in the Slieve Aughty SPA area. In fact a Hen Harrier Project was launched in 2017. The Project is an EIP (European Innovation Partnership) Locally Led Scheme and is funded by the Department of Agriculture, Food and the Marine as part of Ireland's Rural Development Programme 2014-2020. As far as I am aware the majority of farmers in the area have willingly and enthusiastically joined the scheme. Many see the conservation of the habitat suitable for the Hen Harriers as part and parcel of their farming practices. In fact if the Hen Harrier population in this area were to reduce more or be wiped out it would be an unforgivable indictment on our society. It would be quite obscene that on the one hand local people have joined with the state in conserving the Hen Harriers while other entities are engaged in the destruction of the Hen Harriers habitat.

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

Unfortunatly at this point in time it is impossible put the site and the environment back to its condition that it was in prior to development commencing.

The scale of the project on this Special Protection Area and a blanket bog site of 1,200 acres are;

- 70 windturbines
- Development built on a European designated Special Protection Area
- 450,000 cubic meters of bog slipped in the landslide
- 50,000 fish killed as a result of the landslide
- 185,000 cubic meters excavated from compound, turbine bases etc
- Deforestation of 263Ha without planning permission or EIA
- 17.5 Km of roadways
- 39Km of drains
- 3 quarries (The main quarry is outside the windfarm site and never assessed during the planning application).
- 7,880 cubic meters of concrete used
- 232,000 cubic meters blasted and excavated from the quarries
- 22.5 Km of underground cable
- 7.8 Km of overhead power lines
- 4 barrages consisting of approximately 3,500 cubic metres of rocks & stone

The scale of this destruction is something that cannot be ignored.

A 75% drop in numbers of Hen Harriers over the last 15 years on the Slieve Aughty SPA.

An Bord Pleanala must issue a clear decision stating that the ESB GWL application do not comply with the "Exceptional Circumstances" criteria and in particular point (e) above you are legally obliged to apply the precautionary principle and requires to be applied to this Derrybrien windfarm project. This is what happened in CJEU Case C – 258/11. See extract below.

46 Consequently, if, after an appropriate assessment of a plan or project's implications for a site, carried out on the basis of the first sentence of Article 6(3)

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of the Habitats Directive, the competent national authority concludes that that plan or project will lead to the lasting and irreparable loss of the whole or part of a priority natural habitat type whose conservation was the objective that justified the designation of the site concerned as an SCI, the view should be taken that such a plan or project will adversely affect the integrity of that site.

47 In those circumstances, that plan or project cannot be authorised on the basis of Article 6(3) of the Habitats Directive. Nevertheless, in such a situation, the competent national authority could, where appropriate, grant authorisation under Article 6(4) of the directive, provided that the conditions set out therein are satisfied (see, to this Waddenvereniging and Vogelbeschermingsvereniging, paragraph 60). effect,

48 It follows from the foregoing considerations that the answer to the questions referred is that Article 6(3) of the Habitats Directive must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of a site will adversely affect the integrity of that site if it is liable to prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat whose conservation was the objective justifying the designation of the site in the list of SCIs, in accordance with the directive. The precautionary principle should be applied for the purposes of that appraisal.

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(f) Whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development.

This point raises a number of important issues. In the strict reference to the "applicant" and its identity is Gort Windfarms Limited the only development that I am aware of that this legal identity has been involved in is this windfarm development at Derrybrien as that is the purpose of its existance. Therefore that legal identity only applies to this windfarm development.
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This Windfarm Project subject of two CJEU judgements

Few if any developments has been the subject of two Court of Justice of the European Union cases. This windfarm has the unique distinction of this record. In 2008 the Court of Justice of the European Union delivered a judgement in Case C-215/06 which found that Ireland failed to implement the Environmental Impact Directive 85/337 properly.

'by failing to adopt all measures necessary to ensure that:

- projects which are within the scope of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment either before or after amendment by Council Directive 97/11/EC of 3 March 1997 are, before they are executed in whole or in part, first, considered with regard to the need for an environmental impact assessment and, secondly, where those projects are likely to have significant effects on the environment by virtue of their nature, size or location, that they are made subject to an assessment with regard to their effects in accordance with Articles 5 to 10 of Directive 85/337, and
- the development consents given for, and the execution of, wind farm developments and associated works at Derrybrien, County Galway,were preceded by an assessment with regard to their environmental effects, in accordance with Articles 5 to 10 of Directive 85/337 either before or afteamendment by Directive 97/11, Ireland has failed to fulfil its obligations under Articles 2, 4 and 5 to 10 of that directive'

In the second case which Judgement delivered on 12th November 2019 Case C - 261/18 Ireland was once again before the CJEU in relation to this windfarm with the following declaration;

127 According to settled case-law, the imposition of a penalty payment is, in principle, justified only in so far as the failure to comply with an earlier judgment of the Court continues up to the time of the Court's examination of the facts (judgment of 14 November 2018, Commission v Greece, C-93/17, EU:C:2018:903, paragraph 108 and the case-law cited).

128 In the present case, it is not in dispute that, as noted, in particular in paragraphs 118 and 119 above, Ireland has still not carried out an environmental impact assessment of the wind farm in the context of a procedure for regularising the consents at issue, granted in breach of the obligation to carry out a prior environmental impact assessment laid down in Directive 85/337. As at the date on which the facts were examined by it, the Court does not have any information that would show that there has been any change to that situation.

This Windfarm Project subject of two CJEU judgements

Few if any developments has been the subject of two Court of Justice of the European Union cases. This windfarm has the unique distinction of this record. In 2008 the Court of Justice of the European Union delivered a judgement in Case C-215/06 which found that Ireland failed to implement the Environmental Impact Directive 85/337 properly.

'by failing to adopt all measures necessary to ensure that:

- projects which are within the scope of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment either before or after amendment by Council Directive 97/11/EC of 3 March 1997 are, before they are executed in whole or in part, first, considered with regard to the need for an environmental impact assessment and, secondly, where those projects are likely to have significant effects on the environment by virtue of their nature, size or location, that they are made subject to an assessment with regard to their effects in accordance with Articles 5 to 10 of Directive 85/337, and
- the development consents given for, and the execution of, wind farm developments and associated works at Derrybrien, County Galway, were preceded by an assessment with regard to their environmental effects, in accordance with Articles 5 to 10 of Directive 85/337 either before or afeamendment by Directive 97/11, Ireland has failed to fulfil its obligations under Articles 2, 4 and 5 to 10 of that directive'

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127 According to settled case-law, the imposition of a penalty payment is, in principle, justified only in so far as the failure to comply with an earlier judgment of the Court continues up to the time of the Court's examination of the facts (judgment of 14 November 2018, Commission v Greece, C-93/17, EU:C:2018:903, paragraph 108 and the case-law cited).

128 In the present case, it is not in dispute that, as noted, in particular in paragraphs 118 and 119 above, Ireland has still not carried out an environmental impact assessment of the wind farm in the context of a procedure for regularising the consents at issue, granted in breach of the obligation to carry out a prior environmental impact assessment laid down in Directive 85/337. As at the date on which the facts were examined by it, the Court does not have any information that would show that there has been any change to that situation.

129 In the light of the foregoing, it must be held that the failure to fulfil obligations of which Ireland stands criticised continued up until the Court's examination of the facts in the present case.
130 In those circumstances, the Court considers that an order imposing a penalty payment on Ireland is an appropriate financial means by which to induce it to take the measures necessary to bring to an end the failure to fulfil obligations established and to ensure full compliance with the judgment of 3 July 2008, Commission v Ireland (C-215/06, EU:C:2008:380).
131 As regards the calculation of the amount of the penalty payment, according to settled case-law, the penalty payment must be decided upon according to the degree of persuasion needed in order for the Member State which has failed to comply with a judgment establishing a breach of obligations to alter its conduct and bring to an end the infringement established. In exercising its discretion in the matter, it is for the Court to set the penalty payment so that it is both appropriate to the circumstances and proportionate to the infringement established and the ability to pay of the Member State concerned (judgment of 14 November 2018, Commission v Greece, C-93/17, EU:C:2018:903, paragraphs 117 and 118).
132 The Commission's proposals regarding the amount of the penalty payment cannot bind the Court and are merely a useful point of reference. The Court must remain free to set the penalty payment to be imposed in an amount and in a form t hat itconsiders appropriate for the purposes of inducing the Member State concerned to bring to an end its failure to comply with its obligations arising under EU law(see, to that effect, judgment of 14 November 2018, Commission v Greece, C-93/17, EU:C:2018:903, paragraph 119).
133 For the purposes of determining the amount of a penalty payment, the basic criteria which must be taken into consideration in order to ensure that that payment has coercive effect and that EU law is applied uniformly and effectively are, in principle, the seriousness of the infringement, its duration and the ability to pay of the Member State in question. In applying those criteria, regard must be had, in particular, to the effects on public and private interests of the failure to comply and to how urgent it is for the Member State concerned to be induced to fulfil its obligations (judgment of 14 November 2018, Commission v Greece, C-93/17, EU:C:2018:903, paragraph 120).
134 In the present case, having regard to all the legal and factual circumstances
culminating in the breach of obligations established and the considerations set out in paragraphs 115 to 124 above, the Court considers it appropriate to impose a penalty payment of EUR 15 000 per day.

129 In the light of the foregoing, it must be held that the failure to fulfil obligations of which Ireland stands criticised continued up until the Court's examination of the facts in the present case.

130 In those circumstances, the Court considers that an order imposing a penalty payment on Ireland is an appropriate financial means by which to induce it to take the measures necessary to bring to an end the failure to fulfil obligations established and to ensure full compliance with the judgment of 3 July 2008, Commission v Ireland (C-215/06, EU:C:2008:380).

131 As regards the calculation of the amount of the penalty payment, according to settled case-law, the penalty payment must be decided upon according to the degree of persuasion needed in order for the Member State which has failed to comply with a judgment establishing a breach of obligations to alter its conduct and bring to an end the infringement established. In exercising its discretion in the matter, it is for the Court to set the penalty payment so that it is both appropriate to the circumstances and proportionate to the infringement established and the ability to pay of the Member State concerned (judgment of 14 November 2018, Commission v Greece, C-93/17, EU:C:2018:903, paragraphs 117 and 118).

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135 Ireland must, therefore be ordered to pay the Commission a periodic penalty payment of EUR 15 000 per day of delay of implementing the measures necessary in order to comply with the judgment of 3 July 2008, Commission v Ireland(C-215/06, EU:C:2008:380) from the date of delivery of the present judgment until the date of compliance with that judgment of 3 July 2008.

Costs

136 Under Article 138(1) of the Rules of Procedure of the Court, the unsuccessful

party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and Ireland has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Grand Chamber) hereby:

1. Declares that, by failing to take all measures necessary to comply with the judgment of 3 July 2008, Commission v Ireland (C-215/06, EU:C:2008:380), Ireland has failed to fulfil its obligations under Article 260(1) TFEU;
2. Orders Ireland to pay the European Commission a lump sum in the amount of EUR 5 000 000;
3. Orders Ireland to pay the Commission a periodic penalty payment of EUR 15 000 per day from the date of delivery of the present judgment until the date of compliance with the judgment of 3 July 2008, Commission v Ireland (C-215/06, EU:C:2008:380);

Other Court cases and convictions

On the 14th March 2008 Mr Justice Declan Budd delivered a judgement in relation to this windfarm in which he Derrybrien Development Society took a High Court challenge to the manner in which Galway County Council extended planning permissions for the erection of a wind farm on a mountain in the area.

In a judgment strongly critical of the council's "plethora of mistakes" in handling the planning issues, Mr Justice Declan Budd found the council breached the planning acts and applied the wrong criteria when assessing applications by Gort Windfarms Ltd (GWL) for extensions of the duration of planning permissions.

Consequently, it had acted outside its powers in granting the extensions.

He said the council had failed to apply the crucial test - whether the development had not been completed within the terms of existing permissions due to circumstances - the bogslide of October 28th, 2003 - outside the control of GWL.

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GWL had failed to provide the necessary information on this issue to the council and, had it done so, the council's decision was likely to have been very different, he said. This was because there was "a substantial body of evidence" which "overwhelmingly suggested" that the peat slip and bog slide was caused by the actions and omissions of GWL, its servants or agents for whom it was responsible under the planning code, he said.

There was a strong consensus in expert reports that the operations of GWL disrupted the stability of the blanket bog on the top and side of Mount Cashlaundrumlahan in the Slieve Aughty mountains near Derrybrien, he noted.

The reports also found GWL had ignored the "eminently foreseeable" risk of destabilisation and bog slide and ensuing delay in completing the wind farm development. Galway County Council had acted on the wrong criteria and irrationally in extending the permissions for the development, he ruled.

A "plethora of mistakes" seemed to have occurred "to the point of embarrassment" in this case, including there being no managerial decisions as required by statute and no record of relevant entries in the planning register.

He added that it was "hard to credit" claims by GWL that it could not have anticipated the 2003 bogslide. This claim was contrary to a consensus in expert reports about effects of the deposit of 400 tonnes of material excavated from the wind turbines "on jelly-like blanket bog".

The leaving of material on unstable blanket bog was a "recipe for disaster" as it was a trigger for a bog flow down the mountain, through the fields and into rivers, with ensuing environmental damage.

One "could only wonder" why appropriate technical expertise was not obtained at an earlier stage by the developer and obvious safety measures and proper construction methods instituted.

The judge was giving his reserved judgment on proceedings brought last July by Derrybrien Development Society challenging the manner in which planning extensions were granted by the council in March 2005 relating to two wind farms of 23 wind turbines being developed by GWL.

The construction of the wind farm is complete and the judge yesterday adjourned the making of final orders in the case until next month, to allow the sides to consider his findings.

If he overturns the permissions, or makes declarations in accordance with his findings that the extensions of the permissions were not in accordance with the terms of the planning acts, retention permission may have to be sought.

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(Mary Carolan © 2008 The Irish Times)

See appendix 5 which contain a letter from Martin Collins to the enforcement officer in Galway County Council dated 29/07/3003 and extracts from the Budd Judgement. The letter was sent to Mr Burke about 10 weeks prior to the landslide on the 16th October 2003.

The letter raised legitimate questions in relation to unauthorised development on the windfarm site and lack of compliance to planning permissions.

In October 2004, ESBI Engineering Ltd and Ascon were prosecuted by Galway County Council for allowing polluted materials to enter a river following the landslide in October 2003.

A number of court cases were successfully taken by local land owners against the windfarm developers in relation to damage to property resulting from the landslide.

Non Compliance with planning conditions

Description of how pre-disaster 2003 construction work breached conditions of planning permissions. Note that deforestation started in June 2003 and construction work started in July 2003.

Planning consent 97/3470 and 97/3652 are similar. Planning consent relate to 00/4581 which was later superseded by 02/3560.

The following outline lack of compliance with planning conditions relating to; **97/3470 and 97/3652.**

Please refer to attached letter from Mr Liam Gavin, Senior Engineer, Planning & Economic Development, Galway County Council sent to Ms. Mary Nolan, Hibernian Wind Power, 27 Lower Fitzwilliam Street, Dublin 2, dated 11th September 2003.

- **Condition No 3** Details of disposal of excavated rock and soil to be submitted and agreed with the planning authority prior to commencement of work on the site. **Agreement reached between developer and Galway County Council on 11th September 2003 provided burrow pits are rehabilitated on completion of excavations.**

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- **Condition No 5** Details of facilities to be installed at the developer's expense to ensure that radio or television transmission in the area are not interfered with by the development. **Noted and agreed with on 11th September 2003 provided protocol from RTE is submitted later. Agreement reached on 24th November 2003**

- **Condition No 6** Before development commences details of aeronautical requirements shall be agreed in writing with the planning authority. **Agreed with the planning authority on 11th September 2003.**

- **Condition No 7** Cash deposit or bond or other security to secure the satisfactory reinstatement of the site upon cessation of the project to be lodged with Galway County Council prior to commencement of work. **Agreement reached on 24th November 2003.**

- **Condition No 8** Details of road network to be used by construction and by long term traffic shall be submitted and agreed with the planning authority prior to commencement of development. **Agreement reached on 24th November 2003.**

- **Condition No 9** Before development commences on the site the developer shall submit to the planning authority for written agreement detailed proposals for the control of silt-laden discharges from the site arising from construction activities. **Agreement reached on 24th November 2003.**

- **Condition 10 (b)** Employ a suitably qualified archaeologist who shall monitor all site investigations and other excavation works. **Agreement reached on 11th September 2003.**

- **Condition No 12** Prior to the commencement of the development the developer shall lodge a cash deposit or a bond or other security to secure the reinstatement of public roads which may be damaged by the transport of materials to the site. **Agreement reached on 24th November 2003.**

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- **Condition No 4(b)** Prior to commencement of development, the developer shall submit and have written agreement from the planning authority in respect of the site layout plan to scale 1: 5000 showing the location of structures referred to in (a) above and access roads/tracks **Agreed on 11th September 2003**

- **Condition No 4(c)** Prior to commencement of development, the developer shall submit and have written agreement from the planning authority in respect of, scaled drawings of proposed turbines. **Agreed on 11th September 2003.**

- **Condition No 4(d)** Prior to commencement of development, the developer shall submit and have written agreement from the planning authority in respect of details of site boundary, if any. **Agreed on 24th November 2003.**

- **Condition No 5** Details of disposal of excavated rock and soil to be submitted and agreed with the planning authority prior to commencement of work on the site. **Agreed on 11th September 2003.**

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- **Condition No 9** The developer shall retain the services of a suitably qualified and experienced bird specialist to undertake appropriate surveys of this site for the Hen Harrier. Details of the surveys to be undertaken shall be agreed in writing with the planning authority prior to commencement of development. **Proposals to retain the services of B.E.S. to undertake the**

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Hen Harrier survey is noted and accepted on 11th September 2003. The Planning Authority awaits a copy of the findings.

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Please note that the main quarry in operation was not identified at any time through the planning process.

There is no point in having EU Directive and Treaties if their Law is neither accessible nor enforced, additionally, its EU citizens are unable to participate in implementation of these same Directives and Treaties or worse still as citizen we are been deliberately and systematically locked out even before we go to Court, and where Justice Delayed - over 20 years so far here – is justice denied. We must

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ensure that the integrity of the EU Laws, Directives and Treaties are upheld.
"When the integrity of the system is compromised we have no system".

For the purpose of convenience the various development consents will be identified as follows **Phase 1 (97/3470) ; Phase 2 (97/3652) ; Phase 3 (00/4581)** which was later the subject of a new planning application **(02/3560)** seeking changes of turbines to850kw, 26 m blade length, 47 m hub height.
Power line consent (99/2377)

Saorgus Energy did lodge two planning applications in December 1997. However on inspection by the planning authority they were both deemed to be invalid due to the lack of a proper map not accompanying the application. Saorgus Energy lodged two new planning applications on the 23rd January 1998 which were accompanied by one EIS. These applications were granted planning permission on 12th March 1998
The Environmental Impact Statement provided for Phase 1 and 2 were very similar in layout and content to the Environmental Assessment which accompanied the planning application for Phase 3. A clear similarity can be observed on page 8 of EIS for phase 1 and 2 and page 14 of ES for phase 3.
Both read as follows;
Structure of this Environmental Assessment/Impact Statement
This EA /EIS have been structured according to guidelines published by the Environmental Protection Agency (1995). This document outlines both the subjects to be covered and the approach to be taken in dealing with them. These procedures have been followed in the preparation of this EA / EIS. All likely effects are considered in terms of:

1. *Existing conditions*
2. *Potential or likely effects*
3. *Proposals for mitigation of these effects*

The developers were aware of the necessity for an Environmental Impact Statement for this huge industrial development from the outset. It should be also pointed out that contrary to what the developer's state on pages 13 and 14 of EA (phase 3) an Environmental Assessment was required. This became a legal requirement on 1st May 1999 under S.I. No. 93/1999.

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"land reclamation for purposes of conversion to another type of land use" the "extraction of peat" the "extraction of minerals other than metalliferous and energy-producing minerals, such as marble, sand, gravel, shale, salt, phosphates and potash and "Industrial installations for carrying gas, steam and hot water, transmit ion of electrical energy by overhead cables..

As stated in the EA for phase 1 and 2 under the heading of;

Effects on rocks and soil
The predicted impacts of the proposed project
The only impacts on the soil and bedrock of the site will be in the construction stage. The foundations for each turbine will entail the excavation of approximately 175 cubic metres of material comprising bedrock and overlying peat. For 23 turbines this will total approximately 23,000 cubic metres of material. Rock material will all be used in road construction and peat will be made available to local operators for turf production. Any further material needed for road construction will be extracted from the north east corner of the site by opening a small quarry (Figure 17). It is envisaged that most of the material needed for road making will be sourced from the excavation of turbine bases and that only a small proportion will need to be sourced from the quarry. ***The shale bedrock and peat*** *are abundant rock and soil types and the impacts on the resource are minimal.*

The construction of turbine foundations and access roads is a necessity for this project. The use of the spoil in turf production and road construction will ensure that unsightly heaps of rubble does not have an adverse impact on the appearance of the site.

Please note that the comments above are for phase 1 and 2 a total of 46 turbines. Approximately 10 km of new roads was required to be constructed for phase 1 and 2. Most if not all of this material was quarried from three quarries on the windfarm site. One from the location as identified in figure 17 and another much larger quarry adjacent to Turbine 65 which is on the phase 3 site and which was never identified at and stage throughout the planning process. Absolutely none of the peat excavated was used for turf production. In fact local people and visitors were discouraged from entering the turbary area by Security Guards. Names and registration details of vehicles were recorded at check points. Such actions were in stark contrast to those stated in the EA.

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(g) Such other matters as the Board considers relevant.

The points made by the ESB / Gort Windfarms Ltd in this section are egregious and misleading.
If they had participated in the CJEU cases it would to interesting to see what influence the ESB / Gort Windfarms Ltd could have on the outcome or direction of both cases apart from carrying out a proper EIA and complying with all regulations, laws and EU Directives.

The ESB / Gort Windfarms Ltd had a significant number of opportunities to comply with the law and EU Directives but failed to do so.

In the Opinion of the Advocate General Pitruzzella delivered on the 13th June 2019 in Case C- 261/18 European Commission v Ireland in which he states in point 60 that;

60. Contrary to what that Member State maintains, I do not consider that the length of time that elapsed between 22 December 2016 and 2 October 2017 — the dates on which the concept paper referred to in point 15 of this Opinion was submitted — can be blamed on the Commission. First, as Ireland itself admits, the letter accompanying the first submission of that document does not state that the Irish authorities would await formal approval from the Commission before proceeding to the next stage. ***Second, the version of that document sent in December 2016 was not signed by the operator of the Derrybrien wind farm, which justified doubts as to the seriousness of the undertaking given by the operator.*** *Lastly, without being contradicted by Ireland, the Commission argues that the content of the document sent in December 2016 was substantially the same as that of a previous document on which it had made various observations which would appear not to have been taken into account by the Irish authorities.*

According to correspondence and tender documents which ESBI and Ascon the Civil Works Contractor for the windfarm project discussed and agreed clearly showed that ESB / GWL were fully aware that there were major issues in relation to forestry, quarries and the mountainous bog land which was waterlogged and very difficult to traverse on foot. In fact the boggy and waterlogged nature of the site was referenced a number of times on the tender documents. In fact it was considered so dangerous that the advice on the tender documents was that;
"The site is isolated and the terrain is difficult and exposed and access must not be undertaken by single individuals, but in groups of two or more."

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ESBI state that;
"Wining road making material from borrow pits discovered within the site boundary excluding the turbary area, we confirm that the civil contractor can develop these borrow pits subject to notifying ESBI Engineering's site management and forwarding location details of these in advance."

The ESB / GWL made changes and modifications themselves to the layout and the turbine locations. This seems to be base on some ground investigations after the grant of planning permission. In section 8 of the tender document they state that;
"It should be noted that this site investigation report was undertaken January 2002, the turbine arrangements has since been modified with some turbines being relocated, such that the information contained with in this report may not be reflect the prevailing ground conditions for these specific turbines,

The information provided for on the tender drawings with regard to these modified turbine locations and the associated ground conditions are to take precedence,"

Under General items it is stated that;
"Ascon raised issued of borrow pits outside those shown on existing drawings, ESBI have responded post meeting as per fax 11-06-03."

"Planning permission for Phase I and II (T1-T46) will lapse on 10th October 2003, 50% of Civil Works for Phase I and II must be completed by this date (i.e 24 bases)"

"Ascon had envisaged 30 m wide corridor of trees to be felled, subsequent felling when roads constructed, more detailed site investigation was also envisaged."

"ESBI outlined that bog burst had occurred at nearby Sonnagh Old, Ascon to investigate if this is a potential problem at Derrybrien."

See appendix 6 which contain this revealing and alarming statement above has a fax date of 29/07/03.

We are now aware that ESBI themselves alerted the Civil Contractors, Ascon that a bog burst had occurred on another adjacent windfarm development before construction work started on the Derrybrien windfarm site

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Please see appendix 7 which is a copy of an archaeological report produced by Michael Punch & Partners dated 07th June 2002 as part of planning conditions and copies of letters from Duachas dated 11th March 1998 and 20th September 2001 highlighting the fact that there were serious deficiencies in the EIA submitted for the windfarm development. .

As far as I am aware this is the only reliable evidence providing details of soil excavations prior to construction starting at the windfarm in 2003.
The raw truth and honesty of the report stands out and in particular, the following paragraph sticks in the memory;

"Excavation in the eastern half of the site was discontinued as the jelly-like movement of the ground under the weight of the machine rendered further digging unsafe. Excavation in the western half of the site was attempted but the area was covered in dense ranks of fir trees which made it impossible for the machine to reach the testing sites and work was abandoned altogether."

Also on the 2nd October 2003 a small landslide occurred at the base of turbine 17. As referenced in the Budd Judgement on page 12 ***"Apparently no heed was paid to this warning".***

The assertion in the ESB / GWL submission under point (g) dated 20th May 2021 stating that;
"The current application for substitute consent made under ABP-308019-20, is the first opportunity afforded to Gort Windfarms Limited to address the status of the Derrybrien Wind Farm Project and its compliance with the Environmental Impact Assessment Directive and the Habitats Directive."
Is false and misleading.

First of all in correspondence dated 25th January 2005 from Mr Harry Harbison, Hibernian Wind Power states that;
"it is intended that an application for planning permission in connection with the proposal be lodged with Galway County Council in the near future and that an application for a waste licence be lodged with the Environmental Protection Agency at the same time.

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An Environmental Impact Assessment (EIA) will be undertaken in connection with the proposal and the Environmental Impact Statement (EIS) will accompany the applications."

See a copy of the correspondence and EIA Consultation report at appendix 8.

Hibernian Wind Power Limited the ESB or Gort Windfarms Limited did not proceed with this proposal. Therefore the ESB / GWL did have an opportunity in the past to address the status of the windfarm but failed to do so.

A substitute consent application was lodged on 27th October 2011 for this very same development and was withdrawn on 25th November 2011.

SJ0001: Co. Galway (05316)

Galway County Council

Windfarm Derrybrien West and Boleyneedorrish and Derrybrien North and East

Case reference: PL07 .SJ0001

Case type: Substitute Consent Notice Direction

Decision: Application withdrawn (planning authority)

Date Signed: 25/11/2011

EIS: Yes

Parties

- Hibernian Wind Power Ltd. (Prospective Appl)

History

- 25/11/2011: Application withdrawn (planning authority)
- 27/10/2011: Lodged

See attached a copy of an Access to Information on the Environment (Galway Co Co Ref No AIE, 1402) appendix 9.

By an amazing set of coincidence Galway County Council withdrew the application on 25th November 2011 for "substitute consent" one day after the

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Statutory Instrument allowing them to do so was signed into law by Minister Phil Hogan TD, which was the 24th November 2011.
In addition the assertion in the correspondence from;

Mr Liam Murphy, ESB Wind Developments Limited, ESB Head Office, 27 Lower Fitzwilliam Street, Dublin 2 in letter sent to Mr Kevin Kelly, Director of Planning Services, Planning & Sustainable Development Unit, Galway County Council, Prospect Hill, Galway dated Monday 7th November 2011 stated that;
"In view of the extraordinary powers granted to Galway County Council by Section 177B et seq of the Planning & Development Acts 2000 – 2010, it was incumbent upon the planning authority to serve a valid notice with meaningful content on the proper person. The Notice in question fails in each of these respects. The person to whom it is apparently addressed is a stranger to the permissions and the execution of the works or the occupation/ownership of the lands. It is not possible to discern from the content of the purported Notice what development Galway County Council requires a substitute consent for, and the need for clarity is acute in view of the complexity of the works and structures at Derrybrien, Co Galway. In view of the highly disadvantageous consequences which flow from a failure to comply with the Notice, the planning authority is required to deliver a valid and comprehensive Notice to the proper person. All of this it has failed to do. In this regard, we request that the Council immediately withdraw the notice for the reasons set out above."

See attached in appendix 10 which contain a comprehensive range of documents which proves beyond doubt that Hibernian Wind Power Limited were no strangers to the permissions, the execution of the works, or the occupation/ ownership of the lands. All documents attached are compelling but in particular note letter dated 20th May 2003 in which Mr Pierce J. Kirby, Construction Manager, Aertech Projects, Stephen Court, 18/21 St Stephen's Green, Dublin 2 advises Ms McConnell, Planning Department, Galway County Council, Galway that;

"the Derrybrien Wind Farm is been acquired by ESB's subsidiary company, Hibernian Wind Power Limited, from Saorgus Energy Limited and that ESB International has been appointed as project managers for the Works. Aertec is a division of ESB International and they will undertake the project management function."

Further on in point (g) the ESB / GWL goes on to state that;
"As described in detail in the rEIAR and rNIS, the peat slide was an exceptional event in itself, and the investigation of it and the measures to address it have

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Further on in point (g) the ESB / GWL goes on to state that;
"As described in detail in the rEIAR and rNIS, the peat slide was an exceptional event in itself, and the investigation of it and the measures to address it have

dramatically increased the understanding regarding construction of wind farms on peat and inform best practice guidelines and the assessments contained in the application documentation."

The major difficulty with the statement above is that An Bord Pleanala grant permission for a windfarm development on 25th June 2018 (Planning ref no ABP-300460-17) in Donegal which resulted in a most alarming and disturbing event. A landslide occurred at the site of a windfarm been constructed at Meenbog, Croaghonagh, Cashelnavean Co Donegal on the 12 November 2020. After all that has been said and written about the landslide at Derrybrien it is beyond belief that An Bord Pleanala and the arms and emanations of the Irish state has allowed a landslide to occur in very similar circumstances to that which happened at Derrybrien. It appears that the Irish authorities has learned nothing from Derrybrien.

There is also an element of condescending arrogance in this statement in that there is an insulation that what happened in Derrybrien was good as it expanded the knowledge and understanding of constructing windfarms on peat.

I would submit to the Board that you take into account other important factors of relevance in your decision.

Following the High Court Case between Derrybrien Development Society Ltd and Gort Windfarms Limited in the High Court in Dublin on 18th April 2008 a number of points were agreed among them was that a "liaison mechanism" would be established between both partied, See appendix 11. As you will see a letter was sent to Mr Brian Ryan, Gort Windfarms Limited, Hibernian Wind Power, Clifton Mews, Lower Fitzwilliam Street, Dublin 2 requesting his views on how the "liaison mechanism" would proceed. The reply that came back to that letter from Mr David Finn, Commercial Manager Renewables, Independent Generation, ESB International can only be described as dismissive and hostile.

This was another example of the most prescient comments from the Opinion of the Advocate General Pitruzzella delivered on the 13th June 2019 in Case C-261/18 European Commission v Ireland in which he states in point 63 that;.

63. ..... Ireland announced, prior to the hearing in this case, ***that as in a game of snakes and ladders, it was going 'back to square one',*** informing the Commission that it had once again changed its mind about the possibility of using

the substitute consent procedure. *In those circumstances, and on the basis of all the foregoing considerations, it can only be concluded, in my view, that there was a genuine failure to fulfil obligations by Ireland and that the justifications put forward by it must be rejected.*

The very nature, origin and reason for this substitute consent planning application is based on the fact that unlawful actions were undertaken by the ESB / GWL and this application is an attempt to retrospectively cover-up and nullify the substantial damage to the environment which has already occurred. In the event of a Judicial Review I will be relying on EU Law and in particular EC 430/10 for Lawfully applicable as per Our EU Law.

Once again the ESB has attempted to create the narrative that the drainage of some 1200 acres of blanked bog is insignificant and volume would be imperceptible. The entire catchment area of the Slieve Aughties receive a very high level of rainfall annually and this flows into a unique limestone area with fragile underground systems. It is not logical to put forward the argument that the massive drainage programme in this area had little or no impact. The cumulative effect of this windfarm development and other large scale drainage has most definitely increased the volume and speed of the water flowing from the Slieve Aughties into the Gort lowlands.

We are very suspicious of 2040 as a decommissioning date and that it may be invented to justify the continuation of the windfarm development.
Can the ESB identify any document that previously referred to 2040 as a decommissioning date?
According to the Gort Windfarms Limited Annual Report and Financial Statements for the year ended 31 December 2018
"The company has an operating lease arrangement in respect of land with 10 years remaining".

According to the Gort Windfarms Limited Annual Report and Financial Statements for the year ended 31 December 2008
"The company has land lease commitments of €400,000 per annum, ending in 2028."

If one was to assume that the end date for the lease is 2028, the windfarm is only producing approximately 24% of its capacity, the fact that it is built on a EU designated Special Protection Area, is reputed to be contributing to the flooding in

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the Gort area and with the massive disturbance of bog through the landslide and construction works one could easily come to the logical conclusion that the windfarm should be taken down, removed and the environment repaired in so far as it is possible.

The ESB / GWL has not provided any reference or evidence in any of the 5500 plus pages in their substitute consent application that they carried out "Due Diligence" checks on the windfarm development before purchasing the project in 2003. Surely for an organisation with the enormous resources of the ESB and with employees with the technical and engineering skills along with years of experience a proper and detailed "Due Diligence" check should have been prerequisites. However it appears that this was never done.

The following have taken difficult and correct decisions in questioning this windfarm project; DG Environment and its officials, Ms Amanda Maguire NPWS, the Courts of Justice of the European Union CJEU and one conscientious planner in Galway County Council (Ms Niamh Kennedy). Her foresight in refusing planning for planning application No 00/4581 was based on fact and intuition.

While the windfarm is in existence it will be a monument to bad planning decisions, inappropriate construction, state indifference to EU Law and a complete disregard for environmental protection.

An Bord Pleanala must issue a clear decision stating that the ESB / GWL application do not comply with the "Exceptional Circumstances" criteria and in particular point (e) above you are legally obliged to apply the precautionary principle and requires to be applied to this Derrybrien windfarm project. This is what happened in CJEU Case C – 258/11. See extract below.

46 Consequently, if, after an appropriate assessment of a plan or project's implications for a site, carried out on the basis of the first sentence of Article 6(3) of the Habitats Directive, the competent national authority concludes that that plan or project will lead to the lasting and irreparable loss of the whole or part of a priority natural habitat type whose conservation was the objective that justified the designation of the site concerned as an SCI, the view should be taken that such a plan or project will adversely affect the integrity of that site.

47 In those circumstances, that plan or project cannot be authorised on the basis of Article 6(3) of the Habitats Directive. Nevertheless, in such a situation, the competent national authority could, where appropriate, grant authorisation under

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48 It follows from the foregoing considerations that the answer to the questions referred is that Article 6(3) of the Habitats Directive must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of a site will adversely affect the integrity of that site if it is liable to prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat whose conservation was the objective justifying the designation of the site in the list of SCIs, in accordance with the directive. The precautionary principle should be applied for the purposes of that appraisal.

The precautionary principle should be applied for the purposes of this appraisal.

The local residents / community in Derrybrien reserve the right to use this submission and all attachments as evidence in any future legal proceedings in the event that people or bodies grant permission to this windfarm development and any environmental damage occurs as a result of a grant of permission to the substitute consent application.

In support of my objection please see enclosed (appendix 12) a copy of a recently published ***Technical Assessment of Derrybrien Windfarm and Ancillary Works by Arcadis Design & Consultancy July 2021*** which identify very serious deficiencies with the rEIAR submitted with the substitute consent application. An Bord Pleanala must rule that "Exceptional Circumstances" criteria do not exist in this application and the substitute consent application must be refused a grant of permission.
As part of this submission I am formally requesting an Oral Hearing on this Substitute Consent application

I look forward to a favourable response from you in due course.

Yours sincerely,

Martin Collins
Contact [redacted]
Phone [redacted]