



An
Bord
Pleanála

Inspector's Report ABP-306863-20

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|--------------------------------|--------------------------------------------------------|
| Development | Historic Peat Extraction. |
| Location | Coole & Clonbeale Mor Bog, near Birr, County Offaly |
| Planning Authority/s | Offaly County Council |
| Applicant | Westland Horticulture Ltd. |
| Type of Application | Leave to Apply for Substitute Consent |
| Observer(s) | N/A |
| Date of Site Inspection | N/A |
| Inspector | Karla Mc Bride |

1.0 Introduction

- 1.1. This report refers to an application for Leave to Apply for Substitute Consent under section 177C (2)(b) of the Planning and Development Act, 2000, as amended in respect of an application made by Westland Horticulture Ltd. for peat harvesting on lands at Coole and Clonbeale Mor, near Birr, County Offaly. The group includes 1 individual peatland site at Clonbeale Mor. The application relates to the regularisation of peat harvesting carried out since 20th September 2012 on this site, which is intended to be used in the future for peat harvesting activities.
- 1.2. The spatial extent of this peatland is described in Drawing Nos. 1182-13 (Figures 1-3) and the accompanying report which indicates a production field of 90ha on an overall landholding of 99ha. The red line boundary on Figure 3 designates the peatland site which is taken to represent the works carried out on or after 20th September 2012 on lands which are intended to be harvested in the future. The red line boundary identifies the extent of the adjacent Bord na Mona Killuan bog.

2.0 Site Location and Description

- 2.1. The Clonbeale Mor peatland is located in the low-lying midland county of Offaly. The surrounding area is predominantly rural in character and the site lies to the immediate E of Killuan Bog which forms part of the Bord na Mona Boora Bog Group. These bogs are located to the E of Birr and to the N of the R440 which connects Birr to Kinnity. The subject lands comprise a cutover raised bog that has been industrially extracted by Westland Horticulture Ltd. for horticulture purposes. The site boundaries are mainly defined by hedgerows and laneways, the lands are traversed by a network of drains that also manage the water regime within the peatland. Access is off the R440 to the S and Rath Road to the N, and along narrow laneways. There are several sensitive heritage sites in the surrounding area (including the Middle Shannon Callow SPA, Little River Brosna SPA and Slieve Bloom Mountains SAC & SPA) along with some protected bogs and fens, and there are several features of archaeological and historic interest in the vicinity.
- 2.2. The Clonbeale Mor bog comprises 1 distinct peatland site which forms the basis of this application for Leave to Apply for Substitute Consent.

| Bog | Ownership (ha) | Current Production Field Footprint (ha) |
|----------------------|-----------------------|------------------------------------------------|
| Clonbeale Mor | 99ha | 90ha |
| Total | 99ha | 90ha |

- 2.3. Peat harvesting activities comprise a series of operations which mainly take place between April and September and include milling, harrowing, ridging and harvesting, with between 4 and 12 crop cycles during a season (weather dependent). Stockpiled materials are transported off site for further processing. As part of the development of the bogs for milled peat production, parallel surface water drains have been created, and the strip of bog between the drains forms the peat production fields. The drains generally fall towards the ends of the production field and are directed by open drain or pipe to a sedimentation basins prior to discharge by way of gravity to two local watercourses (Rapemills River to the N and Camor River to the S).

Photographs and maps in Appendix 1 describe the sites in more detail.

3.0 Planning History

3.1. Planning application(s)

Offaly Co. Co.: No relevant planning history, S.5 Referral declarations or current record of enforcement. BnM S5 referral remitted to ABP with no decision as yet.

3.2. Referral case

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

3.3. Other licence application(s)

EPA Licence No. PO500-001: IPC Licence granted to BnM in May 2000 to carry out peat extraction on lands in excess of 50ha, this licence regulates activities over Bord na Mona's Boora Gog Group including the adjacent Killaun Bog and subject site, and it was amended in 2012.

4.0 Legislative Context

4.1. Requirement for planning permission:

Section 4(4) of the Planning and Development Act, 2000 (as amended) requires that development which is exempt by virtue of certain sections of the act or the exempted development regulations, shall not be exempted development if an EIA or AA is required. This section was inserted by S.17 of the Environment (Miscellaneous Provisions) Act 2011, and came into effect on the 20th September 2012.

4.2. **The Peat Regulations:**

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

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

On the 20th September 2019 the High Court found that the Regulations were invalid on the grounds that they were inconsistent with the requirements of the EIA Directive and the Habitats Directive, and the use of secondary legislation to give effect to the new licensing regime was *ultra vires* [2019] IEHC 685.

4.3. **Leave to Apply for Substitute Consent:**

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

These include in S.177D (1) where it is satisfied that:

- (a) environmental impact assessment (EIA), a determination as to whether an EIA was required, or an appropriate assessment (AA), was required in respect of the development, and
- (b) that exceptional circumstances exist, such that the Board considers it appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent.

4.4. In considering whether exceptional circumstances exist, under S.177D(2) of the Act, the Board is required to have regard to:

- a) whether the regularisation of the development would circumvent the purpose and objectives of the EIA Directive or the Habitats Directive;
- b) whether the applicant had or could reasonably have had a belief that the development was not unauthorised;
- c) whether the ability to carry out an assessment of environmental impacts of the development for the purposes of EIA or AA and to provide for public participation in such an assessment has been substantially impaired;
- d) the actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuing of the development;
- e) the extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated;
- f) whether the applicant has complied with previous planning permissions granted or had previously carried out an unauthorised development;
- g) such other matters as the Board considers relevant.

5.0 Policy Context

5.1. Development Plan

County Offaly Development Plan 2014 to 2020: The Plan recognises the contribution that bogs make to the archaeological, cultural, natural history and landscape of the county. Policy EntO-05 seeks to promote the development of the county's peatlands. Policy RD-11 & 16 seek to protect and encourage employment in rural industries including horticulture & peatlands. Policy RDP-17 seeks to support the development of peatlands for appropriate alternative uses. There are no specific provisions for the subject site.

5.2. Natural Heritage Designations

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

arrangements and local watercourses and it is possible that mobile species from further afield European sites visit the peatland site.

6.0 Grounds for Leave to Apply

6.1. Context

6.2. Bord na Mona (the original owner of the subject site) has been engaged in the production of milled and sod peat for energy fuel and horticultural uses for a prolonged period of time that predates the Planning and Development Act, 1963 and the relevant EU Directives, and extraction of the subject site and adjacent Killuan bog which forms part of the Boora Bog Group has operated under an EPA IPC licence since May 2000. Ownership of this peatland was transferred to Erin Horticulture Ltd. in 2000 which was subsequently acquired by Westland Horticulture Ltd. in 2018. Westland now seeks to regularise the planning status of historic peat extraction (and ancillary works) carried on out its lands since 12th September 2012. Details have been provided in relation to the operation (production process, drainage arrangements, and site area & production footprint) and the legal basis for the Leave to Apply for Substitute Consent request. Details of compliance with the consideration of the exceptional circumstances criteria set out under S.177D (2) (a)-(g) of the Planning & Development Act are summarised below.

6.3. Exceptional circumstances

(a) ***Circumvention of the EIA Directive or Habitats Directive:*** as a remedial EIA and remedial AA will be carried out if Leave to Apply for SC is granted, then circumvention will not occur.

(b) ***Reasonable belief that development was not unauthorised:*** considerable uncertainty regarding the planning status of peat extraction and following a series of planning referrals and legal actions the Peat Regulations were published in early 2019 and subsequently quashed in late 2019.

(c) ***Impairment of ability to carry out EIA, AA or provide for Public Participation:*** BnM engaged in peat extraction at this site since the c.1940s &

the various landowners have operated under an EPA licence since 2000. The IPC licence application involved statutory public participation. If Leave to Apply is granted, then a remedial EIAR & NIS will be submitted which will allow for further public consultation.

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

site: if Leave to Apply is granted, then a remedial EIAR & NIS will be submitted with a detailed assessment of significant effects. Given the location of the site relative to watercourses and separation distances from European sites, it is considered reasonable to expect that emissions and discharges can be managed effectively to minimise any adverse impacts.

(e) ***The extent to which such effects can be remediated:*** any remedial EIAR and NIS will provide for a conclusive assessment of impacts; committed to bog remediation and preparation of a Bog Rehabilitation Plan in agreement with the EPA; and will comply with all EPA licence requirements.

(f) *Compliance with previous permissions or any unauthorised*

development: no planning history and therefore compliance is not applicable

(g) ***Other such matters:*** peat harvesting has taken place since the 1940s and more recently by Bord na Mona under IPC Licence (P05000-01) and by Westland; have implemented measures to reduce the use of milled peat by over 70% in recent years; committed to bog rehabilitation; and the commercial horticulture industry provides significant employment in the Midlands.

6.4 Council response

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

7.0 Assessment

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

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

7.1. Preliminary matters (EIA & AA)

- 7.1.1. **EIA:** The subject development comprises the peat harvesting activities at Clonbeale Mor Bog in County Offaly which originally formed part of a larger Bord na Mona bog group. This peatland site comprises a landholding of c.99ha and a production field of c.90ha which the applicant intends to harvest in the future. Under section 172(1) of the Planning and Development Act 2000 (as amended), environmental impact assessment is mandatory for '*Peat extraction which would involve a new or extended area of 30 hectares or more*' (Class 2(a), Part 1, Schedule 5 of the Planning and Development Regulations 2001, as amended), indicating that substantial peat harvesting operations are likely to give rise to significant environmental effects. Under PL.25.RL.2975, the Board decided, that, having regard to the criteria set out in Schedule 7 of the Planning and Development Regulations, 2001 (as amended), continued works to extract peat on a substantial scale since September 2012 required environmental impact assessment.
- 7.1.2. The application refers to a significant site, in excess of the threshold area for EIA in the Regulations that occurs in an area where there is other large scale peat extraction and gives rise to potential pollutants, including the potential for substantial sedimentation and chemical pollution (ammonia) of downstream waterbodies.
- 7.1.3. This peatland site is also located in proximity to a number of European sites and may ultimately discharge into designated sites for bogs, fens and watercourses. There are also several other European sites in the wider area that may have a mobile connection to the peatlands sites within this bog group (see below).

- 7.1.4. Having regard to the foregoing, I am satisfied that development carried out at this site since September 2012 would have required an environmental impact assessment to have been undertaken.
- 7.1.5. **Screening for AA:** The subject site lies within a wider landscape that is host to a number of European sites including the Middle River Shannon Callows SPA and Little Brosna River Callows SPA to the W. From the information on file and based on an examination of NPWS maps it would appear that the peatland site drains into watercourses that are tributaries of these rivers via onsite drainage arrangements and local streams. From a further examination of NPWS maps it would also appear that there is potential for mobile species from SPAs within foraging range of Clonbeale Mor bog to visit this site (including from Dovegrove Callows and All Saints Bog SPAs to the W and the Slieve Bloom Mountains SPA to the E).
- 7.1.6. The applicant has listed all of the European sites located with a 15km radius of the peatland site but states that the site drains N to the Rapemills River and S to the Camcor River. These rivers ultimately discharge to the Middle River Shannon and Little Brosna River to the NW of the site. I am satisfied that there is limited potential for an aquatic connection between the site and several of the SACs identified by the applicant because of the N/S drainage pattern within the site and the direction of flow in the Rapemills River and Camcor River, and/or the substantial separation distance between the peatlands site and several of the European sites. These sites have therefore been ruled out from any further consideration.
- 7.1.7. The Qualifying Interests and Conservation interests for the European sites are:

| European sites with a potential aquatic and/or mobile connection | Qualifying Interests (of relevance) / Special Conservation Interests |
|------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------|
| Middle Shannon Callows SPA (004096) | Whooper Swan, Wigeon & Corncrake Golden Plover, Lapwing & Black-tailed Godwit Black-headed Gull |

| | |
|-------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| | Wetland & Waterbirds |
| River Little Brosna Callows SPA (004086) | Whooper Swan, Wigeon, Teal, Pinhead & Shoveler Golden Plover, Lapwing & Black-tailed Godwit Black-headed Gull Greenland White-fronted Goose Wetland & Waterbirds |
| Dovegrove Callows SPA (004137) | Greenland White-fronted Goose |
| All Saints Bog SPA (004103) | Greenland White-fronted Goose |
| Slieve Bloom Mountains SPA (004160) | Hen harrier |

7.1.8. **Conservation objectives:**

To maintain or restore the favourable conservation condition of the **bird species** listed as Special Conservation Interest (Middle Shannon Callows SPA, River Little Brosna Callows SPA, Dovegrove Callows SPA, All Saints Bog SPA and Slieve Bloom Mountains SPA).

7.1.9. **Likely significant effects:** From the information on file and on the EPA's website, under Bord na Mona's IPC licence (PO500-001), it is evident that peat harvesting requires substantial drainage works and the discharge of water from the site, with the risk of sedimentation and pollution arising in discharge waters, from the subject application, and possibly from other peat harvesting operations in the area. Environmental controls are also in place for noise and dust. Consequently, there was a risk of siltation and chemical contamination (ammonia) in downstream waters with the potential for impacts on water quality and, therefore, water dependent habitats and species (including birds). There was also a risk of disturbance of mobile species. At a high level, therefore, it is evident that there was a risk of significant effects

arising from the development, individually or in-combination with other projects, on European sites.

7.1.10. **Appropriate Assessment Conclusion:** On the basis of the information provided with the application, it is not possible to establish that the development carried out since September 2012, individually, or in combination with other plans or projects would not have been likely to have had a significant effect on European site Nos. 004096, 004086, 004137, 004103 and 004160, or any other European site, in view of the site's Conservation Objectives and a Stage 2 Appropriate Assessment (and submission of NIS) would have been required.

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

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

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

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

7.2.3. Peat harvesting has taken place at the application site over a prolonged period of time which predates the 1963 Planning Act and the EU Directives in relation to EIA and AA. If the Board decide to grant the applicant leave to apply for substitute consent, the application would be accompanied by a remedial EIAR and remedial NIS. Any subsequent decision by the Board to grant or refuse permission for substitute consent for development carried out since September 2012 would be made on the basis of an assessment of the likely effects of the development on the

environment and the likelihood of any significant effects on European sites, as a result of past works.

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

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

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

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

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

7.4. *Whether the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or an appropriate assessment and to provide for public participation in such an assessment has been substantially impaired.*

7.4.1. The application for leave to apply for substitute consent relates to development that commenced on or after the 20th September 2012 when section 4(4) of the Planning and Development Act 2000 (as amended) came into effect. Since May 2000 the applicant has operated under an IPC Licence issued by the EPA (PO500-001) to Bord na Mona who has submitted Annual Environmental Reports. The IPC licence application included an Environmental Impact Statement which is available to the public on the EPA's website. The EIS includes substantial baseline survey work for a range of environmental receptors (including terrestrial & aquatic ecology and European sites). The baseline survey work provides a reasonable basis for any subsequent application for substitute consent to the Board.

- 7.4.2. The IPC Licence and environmental monitoring reports indicate how the development has operated over the period since September 2012 and would contribute to baseline information for any environmental impact assessment and appropriate assessment. It is also noted that Bord na Mona, as the EPA licence holder, has engaged with the Department of Arts, Heritage and the Gaeltacht to develop principles for the protection of archaeology in the applicant's bogs and engages with other public bodies in relation to the work carried out on its peatlands.
- 7.4.3. Having regard to the foregoing, I am satisfied that there is no substantial impairment to the applicant's ability to carry out an assessment of the environmental impacts of the development. Any application for substitute consent would require public consultation which would provide for public participation in the assessment process.
- 7.5. ***The actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development.***
- 7.5.1. The peat harvesting activities carried out since September 2012 have resulted in changes to the immediate and adjacent habitats, and to the drainage and hydrological characteristics of the site, however much of this would have occurred prior to September 2012 as the works have been ongoing for a prolonged period of time. Since 2000 much of the original emissions to air, water, waste, resource consumption, incidents and complaints have been actively managed under EPA licence, with the licence updated from time to time in light of changes in national or European legislation.
- 7.5.2. Having regard to the foregoing, I am satisfied that there is no evidence to indicate actual or likely significant effects on the environment or on any European site resulting from the development. However, if the Board decide to grant leave to apply for substitute consent, the likely effects of the development on the environment and the likelihood of any significant effects on European sites, as a result of development carried out since September 2012, would be addressed in any subsequent application, by way of a rEIAR and rNIS, and assessed accordingly by the Board.

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

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

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

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

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

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

8.0 Recommendation

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

9.0 Reasons and Considerations

Having regard to the size and scale of the peat harvesting area which was carried out subsequent to 20th September 2012 and to the location the Clonbeale Mor peatland site to the Middle Shannon Callows SPA, River Little Brosna Callows SPA, Dovegrove Callows SPA, All Saints Bog SPA and Slieve Bloom Mountains, and to section 177D of the Planning and Development Act, 2000, as inserted by section 57 of the Planning and Development (Amendment) Act, 2010, the Board is satisfied that:

- (a) an environmental impact assessment and an appropriate assessment were required in respect of the development concerned, and
- (b) exceptional circumstances exist such that the Board considers it appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent.

In this regard, the Board considered that –

- the regularisation of the development concerned would not circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive;
- the applicant had or could reasonably have had a belief that the development was authorised;
- the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or an appropriate assessment, and to provide for public participation in such an assessment, has not been substantially impaired;

- the actual or likely significant effects on the environment or adverse effects on the integrity of a European site, if any, resulting from the carrying out of the development, could likely be substantially remediated; and
- applicant has not otherwise carried out any unauthorised development.

Karla Mc Bride

Senior Planning Inspector

23rd June 2020