

THE HIGH COURT

JUDICIAL REVIEW

[2022] IEHC 148; [Record No: 2021/14 JR]

IN THE MATTER OF SECTION 50B OF THE PLANNING AND DEVELOPMENT ACT, 2000

IN THE MATTER OF THE ENVIRONMENTAL PROTECTION AGENCY ACT, 1992 (AS AMENDED)

BETWEEN:

HARTE PEAT LIMITED

APPLICANT

AND

THE ENVIRONMENTAL PROTECTION AGENCY,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Siobhán Phelan delivered on the 16th day of March, 2022

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INTRODUCTION

1. This is a composite judgment in respect of two sets of proceedings between the Environmental Protection Agency on the one part (hereinafter “the Agency”) and Harte Peat (hereinafter “HP”) concerning peat extraction activity carried out by HP on lands at Shrubbywood/Ballinaloe and Derrycrave, County Westmeath and further bog lands in Counties Cavan and Monaghan.

2. The first proceedings in time are Harte Peat’s (hereinafter “HP”) judicial review proceedings (2021 JR 14) as against Agency in which HP seek orders including *certiorari* quashing the Agency’s decision, dated the 24th November 2020, wherein it refused to consider HP’s application for an IPC license having regard to s. 87(1C) of the Environmental Protection Agency Act 1992 (“the EPA Act”) (hereinafter “the judicial review proceedings”).

3. The second proceedings are the Agency’s proceedings (record no. 2021/33MCA) which comprise an application against HP for a perpetual prohibitory injunctive relief (hereinafter “the statutory injunction proceedings”) pursuant to s. 99H of the EPA Act. In the statutory injunction proceedings, the Agency seeks various orders for the cessation and further prohibition of the extraction of peat and associated activity at specified areas. This activity is currently being undertaken without an integrated pollution control license (“an IPC licence”) and planning permission has never been sought in respect of same.

4. HP take the position that as the user is pre-‘64, they are not required to seek planning permission. They further maintain that while they agreed to make an application for an IPC licence in compromise of previous proceedings, this does not mean that the activity sought to be licenced is unlawful in the absence of a licence.

5. The lands the subject of the proceedings span a total area of some 150 hectares composed of bog-lands in Counties Westmeath, Cavan and Monaghan. The lands in Co. Westmeath drain into the Inny River which in turn flows into the nearby Lough Derravaragh, a special protection area(SPA), which has been designated as a site for the protection of wild birds under the Habitat’s Directive.

6. There is a complicated factual and legal history to these current proceedings which is more fully set out below. In short, however, a previous application for interlocutory relief brought by the Agency [Record No. 2013/202 MCA] was unsuccessful and an application for final orders under s. 99H in those same proceedings was compromised on agreed terms which were then ruled by the Court and included terms that HP would apply for an IPC licence, could continue to extract peat at specified locations and would not extract peat at other specified locations.

7. An application for an IPC licence was duly made by HP. Before it was determined two ministerial regulations, namely the EU (Environmental Impact Assessment)(Peat Extraction) Regulations 2019 (S.I. No. 4 of 2019) and the Planning and Development Act, 2000 (Exempted Development) Regulations 2019 S.I. No. 12 of 2019), were found to be invalid. These two regulations would have exempted HP from the requirement to obtain planning permission and would have provided for the Agency as licensor under the EPA Act to be the single competent authority providing development consent where peat extraction required assessment under the EIA and Habitat's Directives. Consequently, the Agency maintained, in short, that it was precluded by s. 87(1C) of the EPA Act from considering HP's application in circumstances where no application for permission within the meaning of Part IV of the EPA Act had been made and where HP could no longer rely on a ministerial exemption. When HP sought to challenge this refusal by way of judicial review, the Agency moved again to seek injunctive relief pursuant to s. 99H of the EPA Act.

8. Inexplicably, in the papers grounding the application for statutory injunctive relief, the Agency made no reference to the fact that its refusal of an IPC licence was the subject of extant judicial review proceedings. Indeed, the application for a statutory injunction does not appear to have been preceded by a warning letter other than the letter of the 27th November, 2020 refusing to consider the licence application where it is asserted that it is a breach of s. 82(2) of the EPA Act, 1992 (as amended) for a person to carry on a prescribed activity under Class 1.4 in the absence of a licence. This is the very decision letter challenged in HP's judicial review proceedings. In any event, the two sets of proceedings as well as an application for a stay brought in the judicial review proceedings in respect of the s. 99H injunction proceedings, have travelled together. Only the judicial review proceedings and statutory injunction proceedings were heard by me and are the subject of this judgment. The application for a stay has been adjourned pending the outcome of the substantive proceedings.

9. HP contend that the stakes are very high in these joined proceedings. Their business consists of the extraction of peat to be used in the production of mushroom casing by mushroom growers. It is contended that the loss of wet peat as excavated for mushroom casing and as supplied by HP would have an immediate and catastrophic effect on the Irish mushroom industry, its domestic and export markets, and thousands of direct and indirect employees and small-scale producers.

10. The issues narrowed somewhat during the course of the hearing. The Agency's fundamental contention in these related proceedings is that HP are carrying out peat extraction activity in the course of business involving an area exceeding 50 hectares, which the Agency contends requires an IPC license, planning permission and an Environmental Impact Assessment ("EIA") pursuant to the EIA Directive.

11. While HP do not accept that they are extracting peat involving an area exceeding 50 hectares, they agreed in the context of the compromise of earlier proceedings to apply for an IPC licence. More importantly for the purposes of the present proceedings, it became clear during the hearing that they do not contest that their extraction of peat is subject to EIA pursuant to the requirements of EU Directives. While they accept the requirement for an EIA as a matter of EU law, it is HP's contention that this is a function of the Agency in the licensing process under the EPA Act. HP are adamant that as they enjoy pre-64 user, there is no requirement for planning permission or a separate EIA through the planning process. It was further clarified during the course of the hearing that HP no longer seek to rely on exemptions for peat extraction nor is it contended that peat extraction is not "*development*".

12. In my view, the proper resolution of both proceedings depends to varying degrees on whether the Agency is correct in its conclusion in dealing with the licensing application under the EPA Act that development consent through the planning process is required for the extraction of peat by HP at sites operated by it within the State, even where those sites concern pre-64 user, consequent upon the scale of the operation and the acknowledged requirement that such extraction is subject to EIA. The second fundamental question which then arises is whether the operation of HP's business without a licence is in breach of the EPA Act such that I have jurisdiction to proceed to make the orders sought under s. 99H of that Act.

13. Before turning to address these two issues in turn, and because an understanding of the background both legal and factual, is necessary to contextualise the problems which require to be resolved in these two separate proceedings, I will first set out a fuller chronology and thereafter to identify the applicable legal framework which is common to the issues which require to be determined in both sets of proceedings. The legal framework is complex and requires a consideration of the intersection of planning and environmental protection control, not just domestically but also in the European context. Thereafter, I will consider the proceedings in order starting with the judicial review proceedings both because they were first in time and as my decision on those proceedings is a consideration which impacts on the making of orders in the statutory injunction proceedings. Finally, I will address the case for a statutory injunction.

CHRONOLOGY PERTAINING TO THE REGULATION OF PEAT EXTRACTION

14. Prior to September, 2012, peat extraction was exempt from planning control. On the 20th September, 2012 peat extraction lost its exemption from the requirement to obtain planning permission following amendments to s.4 of the PDA 2000 [hereinafter “the 2000 Act”]. The amendments had the effect that peat extraction would require planning permission if likely to have significant effects on the environment (irrespective of whether it required, separately, to be the subject of an IPC licence).

15. On the 5th April 2013, An Bord Pleanála (“ABP”) determined certain s. 5 referrals made by Friends of the Irish Environment (“FOIE”) relating to the peat extraction activity of other operators, including Bulrush and Westland. ABP ruled that the peat extraction activity had lost its exempted development status as of 20th September 2012 consequent upon legislative amendment.

16. On the 3rd of May 2013, ABP dismissed a parallel s. 5 referral made by FOIE in respect of a number of different plots of lands, which included some of Harte Peat’s (“HP”) lands, on the basis that in respect of the lands in question the owners/occupiers thereof had not been properly identified. ABP could not therefore properly process referral.

17. On the 30th May 2013 and the 7th June 2013 respectively, the High Court granted leave to Bulrush and Westland to apply for judicial review *viz.* the s.5 determinations. On the 27th June 2013, the High Court granted leave to FOIE to apply for judicial review *viz.* the s.5 determination in respect of diverse plots.

18. On the 13th July 2013 the Agency initiated injunction proceedings (“the original proceedings”) against HP and Lismoher Ltd (a company which EPA believed was related) under s. 99H of the EPA Act (2013/202 MCA). On the 23rd October 2013, HP sought determination of a preliminary issue *viz.* the meaning of the phrase “*extraction of peat in the course of a business which involves an area exceeding 50 hectares*”, to which the Agency consented.

19. On the 19th May 2014, judgment on the preliminary issue was delivered in favour of the Agency (per Barrett J. ([2014] IEHC 308)). On the 8th August 2014, HP appealed the preliminary issue judgment to the Court of Appeal (2014/1350).

20. On the 25th November 2016, following hearing, the Agency agreed to set aside the Order and judgment of Barrett J. on consent, in circumstances where the Court of Appeal raised a procedural point to the effect that the preliminary issue should not have proceeded in the absence of agreement on the underlying facts.

21. On the 22nd February 2018, the Agency’s Notice of Motion dated 27th November 2014 seeking discovery in the original proceedings was heard.

22. On the 28th February 2018, the s.5 determinations in respect of other operators was upheld by the High Court (Meenan J.) in a written judgment in the case of *Bulrush & Westland v. An Bord Pleanála* [2018] IEHC 58. The decision of the High Court rejected the legal argument to the effect that the fact that peat extraction on lands commenced before the coming into effect of the EIA Directive meant that ongoing peat extraction on those lands remained outside the scope of the Directive. Leave to appeal from this decision was subsequently refused.

23. On the 9th March 2018, ABP’s s.5 determination in respect of the diverse plots was upheld; see *Friends of the Irish Environment v. An Board Pleanála* [2018] IEHC 186 (Meenan

J.). This was subsequently further upheld by the Supreme Court on appeal: *Friends of the Irish Environment v. An Bord Pleanála* [2020] IESC 14.

24. On the 13th November 2018, a 3-day hearing of the interlocutory injunction application in the original proceedings commenced before the High Court (Meenan J.). On the 21st November 2018, in an *ex tempore* judgment, Meenan J. refused the interlocutory relief sought in the original proceedings.

25. On the 25th January 2019. S.I. No. 4 of 2019 and S.I. No. 12 of 2019 (“*the 2019 Regulations*”) came into operation. These made legislative amendments, reclassifying some peat extraction as exempt development, consequent upon the judgment of the High Court in *Bulrush & Westland*.

26. On the 21st May 2019, the original s. 99H injunction proceedings taken by the Agency against HP were compromised and terms of settlement were entered into and made an order of Court. By consent Meenan J. struck out the proceedings. It was agreed as part of the compromise of the 2013 proceedings that HP would apply for a license for the specific areas shown in the compromise map annexed to that Order (being areas A, B and G) within six month, with an agreement that it would not extract on any other areas pending the determination of the license application. The settlement agreement included a side bar agreement to apply in the event that the 2019 Regulations were held to be unlawful/invalid and specifically provided that the compromise was not a barrier to fresh proceedings by the Agency.

27. On the 23rd of July 2019, judgment was delivered in *Friends of the Irish Environment v Minister for Communications* [2019] IEHC 555 (per Simons J.) whereby the Court made orders restraining implementation of S.I. 12/2019 and holding that S.I. 4/2019 was unlawful. On the 20th September 2019, a further judgment was delivered in *Friends of the Irish Environment v Minister for Communications* [2019] IEHC 646 (per Simons J.) whereby the Court held the 2019 Regulations to be invalid and inconsistent with the requirements of the EIA Directive and Habitats Directive.

IPC Licence Application

28. On the 7th October 2019, HP lodged an IPC licence application which included an Environmental Impact Assessment Report (“EIAR”) and a Natura Impact Statements (“NIS”), with the Agency further to the terms agreed in compromising the original proceedings. The application referred to a total licence area of 73.33 hectares with a stated extraction area of circa 49 hectares. The maps appended thereto showed areas similar to Areas A, B, F and G as described in the current statutory injunction proceedings.

29. On the 18th October 2019, the Agency wrote to HP’s agent acknowledging receipt of the application. On the 18th October 2019, the prescribed bodies required to be notified of the application were issued with letters. Further, on the 18th October 2019, the High Court (Simons J.) made orders setting aside the 2019 Regulations: *Friends of the Irish Environment v Minister for Communications* [2019] IEHC 685. From the 23rd October 2019 to the 4th February 2020, the Agency received third party submissions from the HSE, the Department of Culture, Heritage and the Gaeltacht, Friends of the Irish Environment and an anonymous individual. On the 7th November 2019, the Agency sought the observations of Westmeath County Council on the EIAR that was submitted.

30. On the 18th December 2019, the Agency wrote to HP seeking permission to extend the period for its determination to the 1st May 2020 and HP responded consenting. On the 1st May 2020, the Agency wrote to HP again seeking permission to extend the period for its determination to the 30th June 2020.

31. By Notice of Motion dated the 10th March, 2020, the Friends of the Irish Environment Limited sought leave to commence judicial review proceedings identifying the Agency as respondent and HP as Notice Parties (Record No. 2019/910 JR). Amongst the reliefs sought were an order of *certiorari* quashing the decision of the respondent to accept HP’s application for an IPC licence and declaratory relief that the respondent had erred in law and acted contrary to s. 87(1C) of the EPA Act in accepting the application when it knew or ought to have known that the development was not exempt from planning permission and that no such planning permission had been sought nor confirmation obtained from a planning authority that such permission was not required

32. On the 25th May 2020, the Agency wrote to HP under reg. 10(2)(b)(ii) requesting details of planning status for the activity pursuant to s. 87(1B) of the EPA Act and noting that failure to comply may result in the application not being considered.

33. On the 29th May 2020, HP wrote to the Agency confirming that no grant of planning permission existed/that no application was under consideration and enclosing memorandum to effect that no permission was required for peat extraction commenced before planning legislation came into force.

34. On the 4th of August 2020, the Agency wrote to HP stating that the application *prima facie* involved development/proposed development for which permission may be required and further referenced the judgment in *Bulrush & Westland v An Bord Pleanála*. On the 10th of August 2020, HP wrote seeking an extension of time within which to reply to the Agency's letter of the 4th August 2020. On the 11th August 2020, HP wrote requesting a further extension of time within which to reply to the 15th October 2020, details of the statutory basis on which Agency was requiring proof of planning status and an explanation as to why the Agency had concluded the requirements of s. 87 had not been met. On the 12th August 2020, the Agency acknowledged both letters.

35. Then on the 21st October 2020, the Agency wrote to HP reiterating its request for information *viz.* the planning status of the activity and outlining the basis for same, including setting out the factors which led to its view that the activity required EIA and therefore could not be exempted development.

36. On the 5th November 2020, HP replied stating no adverse finding had been made regarding the planning status of lands the subject of application. On the 12th November 2020, the Agency's licensing inspectorate prepared a memorandum regarding the application for the EPA Board to consider. This memorandum recommended refusal to consider the application pursuant to s. 87(1C) of the EPA Act.

37. On the 17th November 2020 the Agency's Board met to consider the memorandum and HP application, accepted the recommendation of the licensing inspectorate and decided to refuse to consider the application pursuant to s. 87(1C) of the EPA Act.

38. On the 24th November 2020, the Agency wrote to HP informing it of the decision to refuse to consider its application for a licence pursuant to s. 87(1C), on the basis that the activity involved development for which planning permission was required. Also, on the same day, the Agency communicated its decision to the relevant prescribed bodies and third parties who had made submissions.

39. On the 7th December 2020, FOIE wrote to HP seeking an undertaking that they would cease all extraction activity failing which s. 160 proceedings would be instituted.

40. On the 8th December 2020, HP wrote to the Agency requesting all documentation relating to the decision for the purposes of instituting proceedings. On the 15th December 2020, HP wrote to the Agency reiterating this request.

41. On the 18th December 2020, the Agency replied attaching documentation relating to its decision and noting same was made available on the EPA website.

THE LEGAL FRAMEWORK – DOMESTIC AND EU

Planning Regulation of Peat Extraction

42. The history of planning regulation of peat extraction has featured in a number of written judgments of the High Court in recent years. It was very helpfully summarized in *Friends of the Irish Environment v. Minister for Communications, Climate Action and Environment, Minister for Housing, Planning and local Government, Ireland and the Attorney General* [2019] IEHC 646 (Simons J.) in a case involving a successful challenge to legislative amendments introduced in January, 2019 where regulatory provisions which had the effect of exempting peat extraction that involves an area of greater than 30 hectares from the requirement to obtain planning permission but subjecting it instead to the licensing requirements of the Agency. I have gratefully borrowed from this summary and added to it where relevant for the purpose of these proceedings.

43. As set out in the judgment in *Friends of the Irish Environment v. Minister for Communications, Climate Action and Environment, Minister for Housing, Planning and local Government, Ireland and the Attorney General* [2019] IEHC 646 peat extraction had traditionally been free from control under the planning legislation. Section 4 of the Local Government (Planning & Development) Act 1963 provided that development consisting of the use of any land for the purposes of “*agriculture*” was exempt from the requirement to obtain planning permission. The definition of “*agriculture*” included the use of land for turbary (“*Agriculture*” as defined in s. 5(2) includes, *inter alia*, the use of land for turbary which is for the extraction of peat).

44. Reliance is placed by HP in this case on s. 24(1) of the Local Government (Planning and Development) Act, 1963 which further provided that:

“(1) *subject to the provisions of this Act, permission shall be required under this Part of this Act –*

- (a) *In respect of any development of land being neither exempted development nor development commenced before the appointed day; and*
- (b) *In the case of a structure which existed immediately before the appointed day and is not on the commencement of that day an unauthorised structure for the retention of the structure”.*

45. The appointed day for the purpose of s. 24 of the Local Government (Planning and Development) Act, 1963 was the 1st October 1964 and therefore under domestic legislation, it was provided that in respect of “*any development*” commenced before the appointed day, planning permission shall not be required. While this has become relevant in recent years and is a central plank of HP’s argument in these proceedings, it happens that peat extraction under the 1963 Act, was treated as exempt in any event. Accordingly, even if it had not commenced prior to the operative date, it would not have required planning permission from the inception of planning controls in 1963 because of the agricultural exemption as then defined.

46. From a relatively early stage, requirements of membership of the EEC impacted on planning controls. It was necessary to amend domestic law in order to give effect to the original version of the EIA Directive (Directive 85/337/EC). The deadline for implementation of this version of the EIA Directive had been the 27th June 1988. Consequent upon this, the benefit of “*exempted development*” under s. 4 of the Local Government (Planning & Development) Act 1963 was disapplied in the case of a “*peat extraction which would involve a new or extended area of 50 hectares or more*” (see Local Government (Planning & Development) Regulations, 1990). The carrying out of an environmental impact assessment was mandatory for peat extraction on this scale (see EC (Environmental Impact Assessment) Regulations 1989).

47. The 50 hectares threshold was criticised in Case C-392/96 *Commission v. Ireland*. Following on from the judgment of the Court of Justice of the European Union [hereinafter the “CJEU”] in that case, the thresholds for peat extraction under national law were revised downwards. The Act of 1963 was repealed by the Planning and Development Act, 2000. As in the Act of 1963, the use of land for the purpose of agriculture was an exempted development under its successor. However, under the Act of 2000 the definition of “*agriculture*” was amended so as no longer to include “*the use of land for turbary*”.

48. The Act of 2000 defines “*development*” as:

“*...except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land...*”.

49. “*Work*” is defined under the Act of 2000 as:

“*works includes any act or operation of construction, excavation, ...*”

50. Section 4(4) of the 2000 Act provided:

“The Minister may, in connection with the Council Directive, prescribe development or classes of development which, notwithstanding subsection 1(a), shall not be exempted development”.

51. Negative effects for developers involved in peat extraction by reason of the removal of *“the use of land for turbary”* from the agricultural exemption were mitigated by reason of the provisions of Article 11 of the Planning and Development Regulations, 2001 which provided:

“development commenced prior to the coming into operation of this Part and which was exempt development of the purposes of the Act of 1963 or the 1994 Regulations, shall notwithstanding the repeal of that Act and the revocation of those Regulations continue to be exempted development for the purposes of that Act”.

52. The threshold for exempted development was reduced to 10 hectares and the threshold for a mandatory environmental impact assessment was reduced to 30 hectares under Article 93 of the 2001 Regulations which provides:

“The prescribed classes of development for the purposes of section 176 of the Act are set out in Schedule 5”.

53. Schedule 5 refers to:

“peat extraction which would involve a new or extended area of 30 hectares or more”.

54. Under the new regime it remained open to the planning authority to carry out a case by case examination. Criteria for a *“case by case examination”* were of a more general nature as set out in Schedule 7 of the 2001 Regulations. Article 103 of the 2001 Regulations provided:

“Where a planning application for sub-threshold development is not accompanied by an EIS, and the planning authority considers that the development would be likely to have significant effects on the environment, it shall, by notice in writing, require the applicant to submit an EIS.”

55. The criteria set out in Schedule 7 repeat the criteria in Annex III, referred to in Article 4(3) of the EIA Directive.

56. The exempted development threshold was subsequently qualified by the Planning and Development Regulations 2005, and the Planning and Development (Amendment) (No. 2) Regulations 2011. In *Friends of the Irish Environment v. Minister for Communications, Climate Action and Environment, Minister for Housing, Planning and local Government, Ireland and the Attorney General* [2020] 3 I.R. 162, Simons J. observed as follows (at p. 177):

“One of the curious features of the approach initially taken to peat extraction under domestic legislation is that a distinction had been drawn between existing peat extraction, and peat extraction involving “new or extended” areas. Although not stated in express terms, the assumption underlying the legislation seems to have been that existing peat extraction did not have to comply with the EIA Directive. In order to benefit from this special treatment under domestic law, all that was necessary was that the drainage of the bogland had commenced prior to the coming into force of the relevant parts of the Planning and Development Regulations 2001 on 21 January 2002. (See Planning and Development Regulations 2005). Thus, it was not necessary even that the peat extraction had commenced prior to the implementation date for the EIA Directive on 27 June 1988.”

57. Simons J. goes on to explain how the generous treatment afforded to peat extraction under domestic law has since been rolled back by amendments introduced under the Environment (Miscellaneous Provisions) Act 2011. The 2011 Act disallowed the benefit of exempted development and introduced amendments the effect of which was to provide that there is no time-limit on enforcement proceedings seeking cessation orders.

58. In *Bulrush v. An Bord Pleanála* [2018] IEHC 58, the Court (Meenan J.) found, in reliance on the decision of the Supreme Court in *Kildare County Council v. Goode* [1999] 2 I.R. 495 that the excavation of peat came within the definition of “works” rather than “use” in the 2000 Act. The significance of this was that as the development was a works development, it was not development “*completed not later than twelve months after such commencement*” (having regard to s. 17(2) of the 2011 Act) and did not therefore benefit from the exemption provided under the amended s. 4(4) of the PDA 2000.

59. Referring to the removal of exempted development status effected by s. 17 of the Environment (Miscellaneous Provisions) Act, 2011 (s. 17(a)(i) & (b) and S.I. No. 474 of 2011 substituting a new s. 4(4) of the PDA, 2000), Simons J. sets out that the planning regime now requires that development shall not be exempted development if an environmental impact assessment for the purposes of the EIA Directive or an appropriate assessment for the purposes of the Habitats Directive is required (see s. 4(4) of the PDA 2000 (as amended). He outlined however that under the transitional provisions, the loss of the benefit of exempted development did not apply where the development had been completed not later than twelve months after the date of the commencement of the legislative amendment (see s. 17(2) of the 2011 Act). Accordingly, developers were allowed a further period of grace until the 21st September 2012 during which they could either “*complete*” their development or apply for planning permission. From that date forward, any development—including peat extraction—which required environmental impact assessment or appropriate assessment was subject to a requirement to obtain planning permission.

60. The implications of this change in the law for peat extraction had been considered in detail by the High Court (Meenan J.) in *Bulrush Horticulture Ltd. & Anor. v. An Bord Pleanála (No. 1)* [2018] IEHC 58, referred to above. Those proceedings came before the High Court by way of an application for judicial review of a declaration made by ABP pursuant to s. 5 of the PDA 2000. The Board had ruled that the development involved in continued works to extract peat from a site in County Westmeath required both an environmental impact assessment and an appropriate assessment because it ceased to constitute exempted development after September, 2012. The peat extraction thus lost the benefit of exempted development which it

had previously enjoyed under the Planning and Development Regulations. The Board's declaration was dated April 2013.

61. The developer sought to challenge ABP's declaration. One of the grounds of challenge had been that the Board, in finding that the EIA Directive applied to peat extraction which it was claimed had commenced prior to the coming into force of domestic legislation which gave effect to the EIA Directive, had erred in law. In the case of *Bulrush*, it was argued that it had operated a milled peat production facility since 2003, with extraction of peat beginning in or about 1983. Similarly, Westland claimed that peat had been extracted at all material times since 1993 and 1999 in the case of its lands. It was contended on behalf of the developers that the requirement for an EIA only arose in the context of development which involved a "*new or extended*" area. The developers relied in support of this argument on case law of the CJEU to the effect that where a consent application had been pending before a competent authority prior to the coming into force of the EIA Directive, then the consent application was not subject to the EIA Directive. This argument was rejected as follows by the High Court (at paras 41-43):

"41. Both Bulrush and Westland relied upon a number of decisions of the European Court of Justice in support of their submission that neither an Environmental Impact Assessment nor an appropriate assessment was required. These decisions included Commission v. Germany, Case C-431/92, Burgemeester v. Gedeputeerde Staten Noord Holland, Case C-81/96, the Commission v. Austria Case C-209-04 and Stadt Penburg v. Germany, Case C-2206-08. These cases are generally referred to as the 'Pipeline Cases'. The principles distilled from these decisions are illustrated in Stadt Papenburg v. Bundesrepublik Deutschland, Case C- 226/08. In this case, a local authority (Stadt Papenburg) issued consent to a shipyard to carry out dredging of the River Ems to allow access from a shipyard to the sea in 1994. This decision had the effect of granting permission for future dredging operations. In 2006 the German government indicated that parts of the River Ems situated down river could be accepted as a possible site of community interest within the meaning of the "Habitats Directive". The local authority brought legal proceedings seeking to prevent the defendant giving its agreement to the inclusion of part of the River in a list of sites of community interest. The local authority was concerned that if parts of the river were included in the list, the

dredging operations required for the shipyard would in the future and in every case thereafter have to undergo an Appropriate Assessment as required by the Habitats Directive.

42. The European Court of Justice held that if the dredging works could be considered as constituting a single operation then the works could be considered to be one and the same project for the purposes of Article 6 of the Habitats Directive. In that case, the project had been authorised before the expiry of the time limit for transposition of the Habitats Directive and, as such, was not subject to the requirement for an Appropriate Assessment under the said Directive.

*43. In my opinion, the decision in *Stadt Papenburg* and other 'Pipeline Cases' are of no assistance to *Bulrush* or *Westland*. These cases cover situations where permission or consent for a project had been sought before the expiry of the time limit for transposing the Directive in question. This is not the case here. Neither *Bulrush* nor *Westland* had any planning permission pending during the time allowed for the transposition of either the Environmental Impact Directive or the Habitats Directive. In my view, the submissions made by both *Bulrush* and *Westland* that they are, in effect, 'Pipeline Projects' is an aspect of the more general submission that the relevant legislation offends the principle against legislation being retrospective."*

62. The High Court also confirmed that the amendments introduced under the Environment (Miscellaneous Provisions) Act 2011 did not have an impermissible retrospective effect. The High Court subsequently refused leave to appeal to the Court of Appeal, holding that one of the principal requirements for certifying leave to appeal, i.e. that the law in question stands in a state of uncertainty, had not been met (*Bulrush Horticultural Ltd. v. An Bord Pleanála* (No. 2) [2018] IEHC 808).

63. A point of distinction between the decision in *Bulrush v. An Bord Pleanála* and this case, however, is that the Court in *Bulrush* was concerned with the consequence of the removal of exemptions for peat extraction whereas in this case the planning status of the peat extraction works as being pre'64 development requires to be addressed. I am asked to decide whether the ratio in *Bulrush* as to the requirements for an EIA extends to continued extraction on foot of

pre-64 development for which there was no requirement to obtain planning permission when planning regulation was first introduced.

64. The restrictions on the availability of the benefit of exempted development introduced under the Environment (Miscellaneous Provisions) Act 2011 were complemented by another amendment under that Act (s. 29 inserting a new s. 160(6)(aa) into the PDA, 2000) whereby the time-limits governing the taking of enforcement action in respect of unauthorised peat extraction were amended. The general position under the PDA 2000 is that there is a seven-year time-limit on the taking of enforcement proceedings. In the case of development in respect of which no planning permission has been obtained, the seven-year time-limit generally runs from the date upon which the unauthorised development first commenced. This seven-year time-limit is, however, modified in the case of peat extraction. An application may be made at any time for an order directing the cessation of unauthorised peat extraction, although a seven-year time-limit continues to apply to mandatory orders requiring the reinstatement of lands. A similar time-limit applies to quarrying activities as clear from the decision in *McCoy v. Shillelagh Quarries Ltd.* [2015] IEHC 838, [86]).

IPC Licensing Regime under the EPA Act, 1992

65. With the exception of the interlude in 2019 when the subsequently nullified ministerial regulations applied, the legal position with regard to IPC licensing has been that certain large-scale peat extraction is subject to licensing by the Agency under Part IV of the EPA Act 1992. The licensing regime exists separately from and in parallel with the planning regime.

66. Section 82 of the EPA Act 1992 provides that a person shall not carry out a licensable “activity” unless a license or revised license under Part IV of the Act is in force in relation to the activity by way of an IPC license.

67. The definition of “activity” reads as follows:

“3.—(1) In this Act, except where the context otherwise requires—

‘activity’ means any process, development or operation specified in the First Schedule and carried out in an installation;”

68. The term “*installation*” is defined as follows:

*“*installation*’ means a stationary technical unit or plant where the activity concerned referred to in the First Schedule is or will be carried on, and shall be deemed to include any directly associated activity, whether licensable under this Part or not, which has a technical connection with the first-mentioned activity and is carried out on the site of that activity;”*

69. The term “*plant*” is defined as follows:

*“*plant*’ includes any equipment, appliance, apparatus, machinery, works, building or other structure or any land or any part of any land which is used for the purposes of, or incidental to, any activity specified in the First Schedule;”*

70. The relevant threshold for the purposes of a licence application reads:

“1.4 The extraction of peat in the course of business which involves an area exceeding 50 hectares.”

71. This threshold represents the gateway to the licensing regime and the Agency does not have jurisdiction to entertain a licence application unless this threshold had been exceeded. Once a licence application had been made, the Agency then had—since 2012—jurisdiction to screen the application for the purposes of the EIA Directive and the Habitats Directive.

72. Thus, in the case of an existing peat extraction development which fell below the threshold of 50 hectares, a licence application to the Agency would not have been required even if a screening determination had indicated that the proposed development was likely to have a significant effect on the environment and/or a European site, and, consequently, had triggered a requirement for assessment as a matter of EU law.

73. In the event that an application is made to the Agency for an IPC license in respect of peat extraction, the legislation imposes an express obligation on the Agency to carry out an EIA in certain circumstances. Section 83(2A)(b) states:

“(b) The Agency as part of its consideration of an application for a licence shall ensure before a licence or a revised licence is granted, and where the activity to which such licence or revised licence relates is likely to have significant effects on the environment by virtue, inter alia, of its nature, size or location, that, in accordance with this subsection and section 87(1A), the application is made subject to an environmental impact assessment as respects the matters that come within the functions of the Agency including the functions conferred on the Agency by or under this Act.

[...]

(See also ss. (2A)((ba) to (d)).

74. Accordingly, when it receives an application for an IPC license in respect of peat extraction, the Agency must address its mind to whether the peat extraction the subject of the application is likely to have significant effects on the environment such that as EIA is required.

75. As noted above, the current threshold for mandatory EIA as a matter of planning law is “[p]eat extraction which would involve a new or extended area of 30 hectares or more”. In this regard, peat extraction is defined under the PDR 2001 Act as including “any related drainage of bogland”. The threshold at which an EIA is required under the planning regime is therefore lower than under the EPA licensing regime. However, the Agency must carry out a screening exercise in respect of peat extraction activity even below this threshold, to determine whether the peat extraction concerned would be likely to have significant effects on the environment and, if so, it must carry out an EIA. Emphasis was placed during the hearing before me on the fact that an EIA performed for the purpose of s. 83 of the EPA Act is limited to matters that come within the functions of the Agency.

Directives

76. As apparent from the foregoing, developments in Irish law in relation to the control of peat extraction have been prompted and indeed, propelled, by the requirements of EU law. To the extent that the EPA Act gives effect to the EIA and the Habitats Directives, a proper interpretation of the provisions of the Act requires a full understanding of the requirements of EU law. Indeed, s. 3(2A) of the EPA Act expressly provides:

“Subject to this Act, a word or expression that is used in this Act and that is also used in [the EIA Directive] has, unless the context otherwise requires, the same meaning in this Act as it has in that Directive.”

77. It is therefore impossible to properly address the issues this Court must decide in these proceedings without also engaging with the requirements of EU law in relation to development consent and impact on the environment. What is also apparent, however, is that in the peat extraction context the State discharges its obligations under EU law not alone through the EPA Act but also through the planning process and accordingly, it is necessary in determining the legal issues which arise in this case to have regard not only to the requirements of EU law but also the domestic regime in place to give effect to those requirements and, specifically, how the different elements of that regime interact with each other.

Environmental Impact Assessment – the EIA Directive

78. The EIA Directive of 1985 has been amended three times: in 1997, in 2003 and in 2009. The initial Directive of 1985 and its three amendments have been codified by Directive of 13 December 2011. Directive 2011/92/EU has been amended in 2014 by Directive 2014/52/EU.

79. The EIA Directive obliges Member States to adopt all measures necessary to ensure that prescribed projects are made subject to a requirement to obtain development consent. What is meant by the requirement to obtain “development consent” and whether that requirement can be met in respect of pre-64 peat extraction by an application for a licence is a key question which this Court must determine.

80. The obligation to obtain development consent was implicit in the original version of the EIA Directive (Directive 85/337/EC) and was made express by the amendments introduced in 1997 (Directive 97/11/EC).

81. Article 1.2 of the EIA Directive gives the following definition:

“2. For the purposes of this Directive, the following definitions shall apply:

(c) "development consent" means the decision of the competent authority or authorities which entitles the developer to proceed with the project;”

82. Article 1.2 further provides:

“(f) "competent authority or authorities" means that authority or those authorities which the Member States designate as responsible for performing the duties arising from this Directive.

(g) “environmental impact assessment” means a process consisting of: (i) the preparation of an environmental impact assessment report by the developer, as referred to in Article 5(1) and (2); (ii) the carrying out of consultations as referred to in Article 6 and, where relevant, Article 7; (iii) the examination by the competent authority of the information presented in the environmental impact assessment report and any supplementary information provided, where necessary, by the developer in accordance with Article 5(3), and any relevant information received through the consultations under Articles 6 and 7; (iv) the reasoned conclusion by the competent authority on the significant effects of the project on the environment, taking into account the results of the examination referred to in point (iii) and, where appropriate, its own supplementary examination; and (v) the integration of the competent authority's reasoned conclusion into any of the decisions referred to in Article 8a.”

83. The EIA Directive requires that certain prescribed projects must be (i) subject to a requirement to obtain a development consent, and (ii) subject to an EIA. Article 2 of the EIA Directive in material part provides:

“1. Member States shall adopt all measures necessary to ensure that, before development 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 a requirement for development consent and an assessment with regard to their effects on the environment. Those projects are defined in Article 4.

2. The environmental impact assessment may be integrated into the existing procedures for development consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive.”

84. Peat extraction is a prescribed activity for the purposes of the EIA Directive. It appears in both Annex I and Annex II of the EIA Directive, as follows:

“Annex I

19. Quarries and open-cast mining where the surface of the site exceeds 25 hectares, or peat extraction, where the surface of the site exceeds 150 hectares.

Annex II

2(a). Quarries, open-cast mining and peat extraction (projects not included in Annex I). ”

85. It is not necessary to carry out an EIA in respect of *all* projects within a prescribed class, rather the requirement is triggered where either (i) the project exceeds the threshold prescribed under the EIA Directive itself, namely 150 hectares in the case of peat extraction, or (ii) the project is likely to have a significant effect on the environment, though this does not obviate the need to ensure that subthreshold projects likely to have significant environmental effects are subject to an EIA (See Article 4(2) of the EIA Directive and Case C-392/96 *Commission v Ireland*). The carrying out of an EIA is mandatory in the case of projects listed in Annex I of the EIA Directive. In the case of projects listed in Annex II, the Member State must determine either on a case-by-case basis, or by the use of thresholds or criteria, whether the

project is likely to have a significant effect on the environment. If this screening determination is “*positive*”, then an EIA must be carried out.

86. A Member State has a limited discretion as to the identification of projects under Annex II which are likely to have a significant effect on the environment and, accordingly, to require development consent (Case C-72/95 *Kraaijeveld and others v Gedeputeerde Staten van Zuid-Holland*). The threshold for peat extraction above which the carrying out of an EIA is mandatory had been fixed under national law as follows: “*Peat extraction which would involve a new or extended area of 30 hectares*” (under Planning and Development Regulations 2001, Schedule 5, Part 2).

87. It is recorded in the judgment in *Friends of the Irish Environment v. Minister for Communications, Climate Action and Environment, Minister for Housing, Planning and local Government, Ireland and the Attorney General* [2019] IEHC 646 that the parties were agreed (para. 61 of the judgment) at the hearing before Simons J. that peat above 30 hectares must, as a matter of EU law, be subject to a requirement to obtain development consent. As he pointed out, however, the State respondents could scarcely contend otherwise in circumstances where their justification for relying on secondary—as opposed to primary—legislation to amend primary legislation was predicated upon an argument that the legislative amendments were “*necessitated*” by EU law. As Simons J. observed it is implicit in this argument that the carrying out of an EIA is mandatory in respect of the category of development identified, namely peat extraction involving an area of more than 30 hectares.

88. As a matter of EU law, therefore, an EIA is mandatory in the case of peat extraction where the surface area of the site exceeds 150 hectares. However, even if the project is below this threshold, an EIA will nevertheless still be required if the project is likely to have a significant effect on the environment. In this latter connection, the Irish State has prescribed a threshold of peat extraction involving a new or extended area of 30 hectares or more as requiring EIA (see section 2(a) of Part 2 of Schedule 5 of the Planning and Development Regulations 2011, as amended (“the PDR 2001”)). However, the High Court’s judgment in *Bulrush & Westland* makes clear that activity below the 30 hectares threshold also requires an EIA – and, pursuant to s. 4(4) of the Planning and Development Act 2000., as amended (“the PDA 2000”), planning permission – if it is likely to have a significant effect on the environment.

89. The CJEU have also made it clear that an EIA must be carried out prior to the commencement of development works. In Case C-215/06, *Commission v. Ireland* (“Derrybrien No. 1”) the CJEU stated as follows:

“51. Given that this wording regarding the acquisition of entitlement is entirely unambiguous, Article 2(1) of that directive must necessarily be understood as meaning that, unless the applicant has applied for and obtained the required development consent and has first carried out the environmental impact assessment when it is required, he cannot commence the works relating to the project in question, if the requirements of the directive are not to be disregarded.

52. That analysis is valid for all projects within the scope of Directive 85/337 as amended, whether they fall under Annex I and must therefore systematically be subject to an assessment pursuant to Articles 2(1) and 4(1), or whether they fall under Annex II and, as such, and in accordance with Article 4(2), are subject to an impact assessment only if, in the light of thresholds or criteria set by the Member State and/or on the basis of a case-by-case examination, they are likely to have significant effects on the environment.”

90. Since the 16th May 2017, Member States have been under an express obligation to provide effective, proportionate and dissuasive penalties under Article 10A of the EIA Directive (as inserted by Directive 2014/52/EU) which provides:

“10A. Member States shall lay down rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive. The penalties thus provided for shall be effective, proportionate and dissuasive.”

91. Addressing the question of ex post facto regularization in *Friends of the Irish Environment v. Minister for Communications, Climate Action and Environment, Minister for Housing, Planning and local Government, Ireland and the Attorney General* [2019] IEHC 646, Simons J. stated as follows at para. 64:

“Notwithstanding that the Directives require that the assessment must be carried out prior to commencement of development, it may be possible to regularise the status of a project by carrying out an ex post facto assessment. To be compliant with EU law, however, the regularisation procedure must meet certain minimum criteria. First, it must not offer an opportunity to developers to circumvent EU law and must remain the exception. Secondly, the ex post facto assessment must have regard to both the historic and prospective impacts of the project. Thirdly, the more recent case law indicates that the regularisation procedure must, at the very least, allow for the possibility of the suspension of development works and the activity pending the carrying out of the ex post facto assessment. As discussed presently, the State respondents dispute that this last requirement is a feature of EU law.”

92. As in *Friends of the Irish Environment v. Minister for Communications, Climate Action and Environment, Minister for Housing, Planning and local Government, Ireland and the Attorney General* [2019] IEHC 646, the requirement to conduct an EIA is not disputed in these proceedings either. The issue is whether that requirement gives rise to an obligation to seek planning consent or whether the requirement can be discharged through the IPC licence regime in respect of a pre-64 user. This was not a question which the Court was required to answer in FOIE, however, it is noted that at para. 89 of his judgment, Simons J. observed:

“The rationale for saying that there must be an automatic suspension of activities pending the completion of a regularization process is less compelling in circumstances where a developer already holds a licence, albeit one granted at a time when the EPA did not have statutory power to carry out an environmental impact assessment in the absence of a parallel application for planning permission, (See Case C-50/09, Commission v. Ireland). First, the ongoing peat extraction will be subject to the requirement to comply with the conditions under the existing licence. This is to be contrasted with the position of unlicensed peat extraction.”

93. He continued to observe at para. 91 of his judgment:

“Even in the case of a licenced activity, it cannot be assumed a priori that to allow peat extraction to continue for a period of in excess of thirty-six months will not necessarily have any adverse environmental effects”.

94. At para. 110 of his judgment he noted:

“The point has been made that the licences currently held by Bord na Mona were granted at a time when national law did not empower the EPA to carry out an environment impact assessment in circumstances where the development was not subject to a parallel requirement to obtain planning permission. The legislative gap in this regard had been condemned by the CJEU in Case C-50/09, Commission v. Ireland. The point has also been made that the fact that a developer might hold a licence from the EPA does not per se obviate the necessity to hold planning permission. Again, it is reiterated that no finding is made that this is the case in respect of any of the licensed activities carried out by Bord na Mona”.

95. Accordingly, while not directly the issue before the Court in *Friends of the Irish Environment v. Minister for Communications, Climate Action and Environment, Minister for Housing, Planning and local Government, Ireland and the Attorney General* [2019] IEHC 646, it is clear that the Court did not consider the conduct of an EIA in the context of a licensing application to necessarily discharge the obligation on the State under the EIA when giving a development consent.

Habitat's Directive

96. The Agency is also a competent authority for the purposes of the Habitats Directive. Article 6(3) of the Habitats Directive provides that:

“3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4 , the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and , if appropriate, after having obtained the opinion of the general public.”

97. The transposition of the requirements of article 6 is given effect principally through (i) the EU (Birds and Natural Habitats) Regulations 2011 (S.I. 477 of 2011), and (ii) Part XAB of the PDA 2000. Under the 2011 Regulations, every public authority, including the Agency, that exercises a consent function must ensure that the requirements of the Habitats Directive are fully integrated into the exercise of that function (Regulations 27 and 42). The requirement for Stage 1 screening, and, if necessary, Stage 2 Appropriate Assessment apply to projects which are likely to have a significant effect on a European site, as defined under Irish law.

98. The two regulatory regimes operate in parallel; thus, as with EIA, where a project requires both planning permission and a license, both An Bord Pleanála/local authority and the Agency would have a role in carrying out an appropriate assessment in respect of the effects of the peat extraction project on relevant European sites. Where only a license is required, the Agency is the sole competent authority which will have to satisfy itself as to the absence of adverse effects on the integrity of European sites. In this way the licensing regime is a gateway to this important assessment pursuant to the Habitats Directive.

99. The Habitats Directive is drafted in much less detailed terms than the EIA Directive. Article 6(3) of the Habitats Directive provides that any project which is likely to have a significant effect on a European Site must be subject to an “*appropriate assessment*”. It is implicit in this that projects which are likely to have a significant effect must be subject to a form of a development consent. A Member State may not systematically and generally exempt certain categories of projects from the obligation requiring an appropriate assessment to be undertaken of their implications for European Sites (Case C-538/09, *Commission v. Belgium*). As in the case of the EIA Directive, the application for development consent (the agreement of the project) must be made, and the appropriate assessment, if required, must be carried out, prior to the commencement of development works (Case C411/17 *Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v Conseil des Ministres*).

The Interaction of the Two Regulatory Regimes under the umbrella of EU law

100. In principle, therefore, the carrying out of peat extraction might be subject, under national law to the requirement to obtain both (i) a planning permission under the PDA 2000, and (ii) an IPC license under the EPA Act. It is long established that development consent for the purpose of EU law might consist of the decisions of two or more competent authorities and our domestic regime so provides (*Martin v ABP* [2008] 1 I.R. 336). In such a scenario, both the ABP or local planning authority and the Agency would have a role in carrying out an EIA in respect of the peat extraction project. Thus, notwithstanding that a local planning authority/ABP must carry out an EIA, the Agency is nevertheless required to carry out a complementary assessment as regards matters coming within its functions. The parties join issue, however, on whether the requirement as to planning permission applies irrespective of when peat extraction commenced on the relevant bog concerned.

101. In *Friends of the Irish Environment v. Minister for Communications, Climate Action and Environment, Minister for Housing, Planning and local Government, Ireland and the Attorney General* [2019] IEHC 555, [2020] 3 I.R. 162, Simons J. summarized the regulatory position in January, 2019 as follows (para. 45):

“(i) There was an obligation to obtain planning permission in respect of any peat extraction project which requires assessment under either the EIA Directive or the Habitats Directive. An EIA had been mandatory, under domestic law, where the peat extraction would involve a “new or extended” area of 30 hectares or more. (See Planning and Development Regulations 2001, Schedule 5, Part 2, paragraph 2(a)). In the case of sub-threshold development, a screening determination would have to be made by reference to the detailed criteria set out at Schedule 7 of the Planning and Development Regulations 2001. A screening determination for the purposes of article 6(3) of the Habitats Directive would also have to be undertaken.

(ii). Peat extraction which was being carried out without the benefit of planning permission, where required, was vulnerable to enforcement proceedings. Any person is entitled to apply for orders pursuant to section 160 of the PDA 2000. There is no time-limit on an application seeking an order which requires the cessation of peat extraction. A planning authority is empowered to serve an enforcement notice and/or to apply for orders pursuant to section 160 of the PDA 2000. Where a complaint is made and (i) a planning authority establishes, following an investigation, that unauthorised

development (other than development that is of a trivial or minor nature) is being carried out, and (ii) the person who has carried out or is carrying out the development has not proceeded to remedy the position, then the authority is obliged to issue an enforcement notice and/or to make an application pursuant to section 160 unless there are compelling reasons for not doing so. (See section 153(7) of the PDA 2000 (as inserted by the Environment (Miscellaneous Provisions) Act 2011)).

(iii). Section 5 of the PDA 2000 provides a simple procedure whereby the question of whether a particular development (including peat extraction) requires planning permission can be determined, initially, by the planning authority and, thereafter, on review by An Bord Pleanála. By way of example, the proceedings in Bulrush Horticultural Ltd. v. An Bord Pleanála (discussed at paragraph 33 above) arose out of a section 5 declaration made by An Bord Pleanála in respect of peat extraction. A section 5 declaration, which has not been challenged by way of judicial review, can be relied upon to ground enforcement proceedings. (See Killross Properties Ltd v. Electricity Supply Board [2016] IECA 207; [2016] 1 I.R. 541).

(iv). In the event that a developer carrying out peat extraction wished to regularise the planning status of the activity—for example, in response to the threat of enforcement proceedings—then the substitute consent procedure under Part XA of the PDA 2000 would have to be invoked. Relevantly, there is no automatic entitlement to apply for substitute consent; rather, a developer has to apply first to An Bord Pleanála for leave to make an application for substitute consent. The Board may only grant leave to apply if it is satisfied 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.

(v). In parallel to the planning legislation, certain large-scale peat extraction involving an area in excess of 50 hectares was subject to licensing by the EPA under Part IV of the Environmental Protection Agency Act 1992.”

102. The ministerial regulations introduced in January, 2019 and found unlawful in *Friends of the Irish Environment v. Minister for Communications, Climate Action and Environment, Minister for Housing, Planning and local Government, Ireland and the Attorney General*

[2019] IEHC 555, [2020] 3 I.R. 162 were directed to exempting peat extraction that involved an area of 30 hectares or more from the requirement to obtain planning permission. Those regulations were intended to have the consequence that the enforcement mechanisms under the PDA 2000; the s. 5 reference procedure; and the substitute consent procedure, would not apply. Under the intended regime, peat extraction that involved an area of 30 hectares or more required an IPC licence from the Agency. Under the transitional provisions, however, an unlicensed developer was entitled to continue to carry on peat extraction subject to a requirement to make a licence application not later than eighteen months after the 25th January 2019. Provided a licence application was made within time, the peat extraction could then continue until such time as the licence application was determined. If the licence application were refused, and that refusal was challenged by the developer in judicial review proceedings, then peat extraction could continue until such time as the judicial review was determined by a final judgment (s. 82B(7) of the EPA Act(as inserted by the Ministerial Regulations)).

103. This proposed regime for streamlining EIA assessment in respect of peat extraction were found unlawful in the decision in *Friends of the Irish Environment v. Minister for Communications, Climate Action and Environment, Minister for Housing, Planning and local Government, Ireland and the Attorney General* which means that the intended exemption of peat extraction from the requirement to obtain development consent for planning purposes is no longer effective and the provisions of Part IV of the EPA Act apply, without provision for exemption from the requirement of have planning consent for peat extraction. It is HP's contention that the fact that this statutory exemption does not exist is not relevant in respect of a pre-64 user where there was never a requirement to obtain planning consent.

THE AREA OF PEAT EXTRACTION ACTIVITY - THE LAW

104. While the Agency and HP appear to agree that whereas an EIA is required where extraction over an area of 30 hectares or more occurs, it is not agreed that it follows that because an activity requires an EIA that it will of necessity require an IPC licence or a licence and planning permission. The threshold required to be met for the purposes of licences under the EPA Act is significantly greater than that under the equivalent provisions for an EIA in the planning code. There is a tension in HP's argument in this regard in that there is some

inconsistency in accepting that an EIA is required but that neither planning permission (by reference to pre '64 user) nor a licence is required (by reference to thresholds). It is trite to observe that where it is accepted that an EIA is required as a matter of EU law, the State is required to make provision for same in domestic law. On the logic of HP's arguments, it is not entirely clear how it envisages that the State would discharge this obligation. HP is content for the purposes of these proceedings to rely on the fact that it has made an application for a licence and is subject to EIA within that process.

105. In contending that the threshold of 50 hectares for a mandatory licence is not met, HP point to differences in language between the Planning and Development Regulations and the EPA Act. They note that while the provisions in the Planning and Development Regulations refer to "*peat extraction*", the equivalent provisions in the EPA Act at para. 1.4 refer to the "*extraction of peat*". It is suggested that the change in language is reflective of an intention in drafting to ensure that in calculating areas the concern is only those locations where peat extraction is in fact occurring. HP's position is that it is only those areas that are to be aggregated for the purposes of determining whether an application for a licence is required. They contend that areas of 50 hectares or less are specifically excluded from an obligation to obtain a licence.

106. HP maintain that the extraction of peat is currently limited to one area within which peat extraction is carried out at Area G (in the order of just over 26 hectares) and therefore is not only less than the 50 hectares specified but is less than the 30 hectares specified for the purposes of the EIA. HP contend that none of the areas included within the application exceed the 50 hectares threshold and therefore as a matter of fact and law do not require to be subject to licensing. They contend that this is implicitly accepted by the Agency who rely on an aggregation of the areas notwithstanding that these are located at significant distances from each other. HP contend that as a matter of law where the activities are carried out on land some 10, 15 or 20kms apart or indeed on any land which are not contiguous one to the other, then they are required to be separately aggregated. It is argued that the entire approach of the Agency which seeks to aggregate areas no matter how far apart they are is fundamentally misconceived. HP disputes the legitimacy of the Agency's approach to the calculation of areas which they maintain includes all of the land within the ownership of HP whether or not that land is involved or is ever intended to be involved in peat extraction.

107. I must now determine the correct approach in law to the calculation of the area to be reckoned for the purpose of establishing threshold. As noted above, s. 2A of the EPA Act provides that a word or expression that is used in the Act and that is also used in the EIA Directive has, unless the context otherwise requires, the same meaning in the Act as it has in that Directive. A number of principles emerge from the caselaw of the CJEU in respect of the interpretation of projects and activities under the EIA Directive.

108. Firstly, the Directive has a “*wide scope and a broad purpose*”. The CJEU has thus consistently given the categories of projects a broad interpretation (see Case C-72/95 *Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland*, and Case C-142/07 *Ecologistas en Acción-CODA v Ayuntamiento de Madrid*, where the CJEU held that the “*construction of motorways and express roads*” would include a project for refurbishment of a road which would be equivalent, by its size and the manner in which it is carried out, to construction). The Irish High Court has similarly adopted a broad purposive approach to the interpretation of projects subject to the EIA Directive (*Maher v An Bord Pleanála* [1999] IEHC 155, [1999] 2 ILRM 198 [1999] 2 IR 198 and *Shannon Regional Fisheries Board v An Bord Pleanála* [1994] 3 IR 449).

109. Secondly, the CJEU has held that in determining whether a wind farm should be subject to EIA, it was appropriate to consider ancillary activities. (Case C-216/06 *Commission v Ireland* at paras. 96, 99-103).

110. Thirdly, the use of thresholds must not be allowed to facilitate impermissible project splitting whereby what is an overall project or activity is artificially separated into individual parts, each of which is sub-threshold. In Case C-392/96 *Commission v Ireland* (paras. 75-76 and para. 82) the CJEU ruled:

“75. So, a Member State which established criteria and/or thresholds at a level such that, in practice, all projects of a certain type would be exempted in advance from the requirement of an impact assessment would exceed the limits of its discretion under Articles 2(1) and 4(2) of the Directive unless all the projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment (see, to that effect, *Kraaijeveld*, paragraph 53). ”

76. *That would be the case where a Member State merely set a criterion of project size and did not also ensure that the objective of the legislation would not be circumvented by the splitting of projects. Not taking account of the cumulative effect of projects means in practice that all projects of a certain type may escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the Directive.*

[...]

82. *It follows from all of the foregoing that, by setting thresholds for the classes of projects covered by points 1(d) and 2(a) [Extraction of peat] of Annex II to the Directive without also ensuring that the objective of the legislation will not be circumvented by the splitting of projects, Ireland has exceeded the limits of its discretion under Articles 2(1) and 4(2) of the Directive.”*

111. These principles derived from EU law have a bearing when I come to answer a number of key questions arising as to the proper construction of Class 1.4.

112. The Agency submitted that there are three key issues relating to the proper construction of Class 1.4.

i. *In the Course of Business*

113. First, a question arises from the text as to whether the threshold “*involve[ing] an area exceeding 50 hectares*” refers to the ‘*business*’ or the ‘*extraction of peat*’. In my view, the inclusion of the phrase “*in the course of business*” clearly reflects the intention of the EU legislature to bring commercial peat extraction within the scope of the EIA Directive. As the Advocate General in Case C-392/96 *Commission v Ireland* (para. 55) stated:

“The only relevant point here is the possible impact of peat extraction on the areas in question. It should be borne in mind that, as the Commission points out, peat extraction may provoke irreversible changes in the ecosystem of the bogs. The Commission acknowledges that turf cutting by hand, hallowed in Irish tradition, falls outside the scope of the Directive. It is the commercial exploitation of areas of less than 50

hectares, therefore, which ought to have been taken into consideration and, so far as we can tell, it has not.”

114. Taking a purposive approach, therefore, and based on the structure of the text of Class 1.4 itself, the Agency contended that there is an argument that the whole area involved in the commercial peat extraction business, as opposed to just the area involved in the peat extraction, should be reckoned. The Agency have suggested that the Court does not need to resolve this issue in the present case, because the Agency has not reckoned Area C, HP’s headquarters and central production facility, in its calculations nor is it seeking orders in respect of same. Instead, in this case, the Agency has confined itself to reckoning the peatlands themselves (including access roads, buffer zones, sedimentation ponds, etc.), as this is where the significant environmental effects with which is it concerned—the “*irreversible changes in the ecosystem of the bogs*” referred to by the Advocate General in Case C-392/96 *Commission v Ireland*—are occurring.

ii. “Installation” and “Plant”

115. In order for an activity to be licensable, two criteria must be fulfilled. First, the activity must be specified in the First Schedule of the EPA Act 1992 and, secondly, the activity must be carried out in an installation. The various definitions of installation and plant have been set out above.

116. Peat extraction is an activity which is carried out on land, not in a building or structure. In the case of peat extraction, therefore, the relevant installation consists of (i) any land or any part of any land which is used for the purposes of, or incidental to, any specified activity, and (ii) shall be deemed to include any directly associated activity, whether licensable under Part IV of the EPA Act or not, which has a technical connection with peat extraction and is carried out on the site of that activity.

117. It has been submitted to me that this definition captures not only the footprint of the land from which peat has been cut or harvested, but also includes any land or any part of any land which is used for purposes incidental to peat extraction, for example, access roads, storage

of harvested peat, buffer zones, sedimentation ponds, etc. All of these areas should be included in calculating the threshold. It is contended that this follows irrespective of whether one applies a literal or a purposive approach to interpretation.

118. First, it is contended, applying a literal approach to statutory interpretation, these are all areas '*involved in*' the commercial peat extraction and/or are lands used for purposes incidental to that peat extraction. Secondly, applying a purposive approach to interpretation, it would be artificial to confine the threshold to the footprint of the land from which peat has been cut or harvested. Access roads, buffer zones, sedimentation ponds, areas on which peat are stored are all necessarily ancillary to and integral to the commercial harvesting of peat itself and are themselves capable of having environmental effects. These areas are all part of the commercial peat extraction project.

119. The concept of an installation was considered, albeit in the context of Directive 2003/87 on greenhouse emissions, in Case C-158/15 *EPZ NV v Bestuur van de Nederlandse Emissieautoriteit*. The definition of installation under that Directive is similar to that under the Industrial Emissions Directive, and that under the amended EPA Act. In this instance, the CJEU held that a physical separation of 800m did not prevent a coal store for a power station from being part of the installation (paras. 29-32) ruling:

"29. Consequently, the coal storage site at issue in the main proceedings is part of an installation within the meaning of Article 3(e) of Directive 2003/87 only if the coal storage activity fulfils the criteria laid down by that provision for activities other than those mentioned in Annex I to that directive. Such will be the case if that activity is directly associated with the combustion activity of the power plant, if it has a technical connection with the activities carried out on the site of that power plant and if it could have an effect on emissions and pollution.

30. In that respect, it is necessary to point out, first, that the fact that the coal is essential to the functioning of the power plant is in itself sufficient for the view to be taken that the storage is directly associated with that plant's activity. That direct association is, moreover, evidenced by the existence of a technical connection between the two activities. As the Advocate General proposes in point 30 of her Opinion, such a

connection should be assumed if the relevant activity is integrated into the same technical process as the power plant's combustion activity.

31. Such a connection exists in any event, for a coal storage site such as that at issue in the main proceedings, by reason of the very fact of the practical organisation of that site and the presence of a conveyor belt located between the coal park and the power plant.

32. The other facts mentioned by the referring court, namely that the storage site and the power plant are situated approximately 800 metres from each other and are separated, moreover, by a public road, are of no relevance in that regard.”

120. In its decision the Court appears to have treated something which was not itself licensable (the store) as part of the licensable activity (the station).

121. In *Bulrush & Westland*, the High Court (Meenan J.) held (para. 52):

“it seems to me that peat handling activities and access roads would form part of the peat extraction ‘project’ for the purpose of the said Directive.”

122. Similarly, in *EPA v Deegan* [2019] IEHC 755, the High Court (Barton J.) concluded that both an area used for laying out lines of ‘sod turf’ and an area where drainage was carried out in advance of and for the purposes of peat extraction were reckonable (paras. 68-69).

iii. Contiguity

123. The Agency submitted that it is legitimate to aggregate peatlands under the ownership or control of the commercial operator, especially where, for example, the alleged barrier which is said to separate the lands consists of a road or stream, or is, in reality, land involved in peat extraction such as a buffer zone or sedimentation pond.

124. In this regard, the Agency advances two distinct arguments. The first is based on the literal wording of the legislation and the need to avoid project-splitting. The second argument relies on the technical and hydrological connection between bogs. The Agency advanced its argument in reliance on cases such as *O'Grianna v. An Bord Pleanála* [2014] IEHC 632 and *EPA v. Deegan* [2019] IEHC 755.

THE AREA OF PEAT EXTRACTION ACTIVITY - THE EVIDENCE

125. A full application for a licence together with an EIA was lodged with the Agency on behalf of HP on the 7th October 2019. The licence application related to a licence area of 73.33 hectares incorporating some of Areas A, B, F & G with a stated extraction area within the licence area of circa 49 hectares. The application itself describes the class of activity as peat extraction that involves an area of 30 hectares or more. The licence area at Shrubbywood is given at circa 51.83 hectares and the extraction area as circa 34 hectares and at Finnea is given as a licence area of circa 21.50 and an extraction area of circa 15 hectares.

126. The application was accompanied by a Natura Impact Statement (NIS) which identifies connectivity between the Shrubbywood and Finnea sites and Lough Derravaragh, a designated Special Protection Area. Lough Derravaragh SPA is of major ornithological importance and is designated under the EU Birds Directive and is of special conservation interest to the Whooper Swan, Pochard, Tufted Duck and Coot. Lough Derravaragh is one of the most important midland lakes for wintering waterfowl. In addition to a number of other bird species the lake is occasionally used as a roost site by small numbers of Greenland white fronted goose. It was concluded by the experts retained on behalf of HP that management practices to control the discharge of surface water to the River Inny required an Appropriate Assessment of the Project. The Appropriate Assessment which accompanied the application concluded that:

“with mitigation for each environmental aspect, it is anticipated that the potential cumulative impact of the proposed development in conjunction with the other permitted development will be imperceptible.”

127. As already stated, while HP has submitted an application for an IPC licence on foot of its compromise of earlier proceedings, it has not accepted that a licence is required as a matter

of law. It remains their position that the Agency are incorrect in their approach to calculating the area involved in the business of peat extraction for the purpose of deciding whether the business is above the threshold fixed for a licence (or indeed for planning permission). They contend that since the compromise was entered into, they have reduced the area of land from which peat is extracted of their own volition. They maintain that HP have been extracting within part of Area G only and the land owned by HP within that area equates to 26.53 hectares.

128. The Agency contends that HP's activities meet the threshold for a licence regardless of how the 50 hectares threshold is calculated. The Agency's position is that in calculating the area of land involved one should reckon not only the footprint for which peat has been cut or harvested or is currently being cut or harvested but also all land used for the purposes of or incidental to HP's peat extraction activity. The Agency say that one should reckon all areas under the control of the operator that have a technical or hydrological connection to an area where extraction has occurred or is occurring notwithstanding that these might superficially be viewed as individual or non-contiguous sites. They say that at any given moment in time a commercial peat extractor is likely to be working in one discreet area of peatlands under its ownership and/or control and to focus solely on that area and snapshot in time in reckoning the threshold would defeat the legislative intent for regulation and circumvent the requirements of and purpose of EU environmental law.

129. In grounding the Agency's injunction application the Agency identifies lands involved in the activity of peat extraction operated by HP in the maps exhibited at JG12, the affidavit of John Gibbons sworn on the 25th February 2021. The total area of land within areas A, B, D and E owned by HP comprise 150.39 hectares made up as follows:

- (i) Area A = 50.413 ha (lands at Shrubbywood/Ballinealoe, County Westmeath – it is noted that the folio record (WH21916F) shows 41.08 ha in the ownership of HP, rather than 50.413)
- (ii) Area B = 24.145 ha (lands at Shrubbywood/Ballinealoe, County Westmeath – but the folio record (WH10147F) shows HP as owner of just 3.15 ha)
- (iii) Area D = 6 .03 ha (lands at Murmod and Lisnabantry, County Monaghan - although the folio entry records the area as 6.71 (CN12178F)
- (iv) Area E = 20.05 ha (Clonfad and Leonard's Island, Clones, Co. Monaghan records an area of 5.68 ha (MN 21844F)

- (v) Area F = 90 ha (lands at Derrycrave, County Westmeath – although the folio entry records 40.71 ha (folios WH936F, WH22927F, WH 22672F, WH22512F, WH33500F, WH33780F, WH7876F) and
- (vi) Area G = 37.65 ha (lands at Derrycrave, County Westmeath – although the area demonstrated in the folio entries is in the region of 26 ha WH8516, WH15835F, WH17487F, WH27430F)

130. Lands at areas A & B are contiguous, as are lands at areas F and G. The maps placed in evidence further show that these four areas form part of a larger peat land area which are environmentally, ecologically and hydrologically connected. The drains from all four areas of land flow into the River Inny. The River Inny flows through the peat land which contains all four areas from Lough Sheelin and into Lough Derravaragh. From Lough Derravaragh it flows south to join the Shannon. As previously noted, Lough Derravaragh is a Special Protection Area (SPA) under the Birds Directive, a site designated for the protection of wild birds under the Habitats Directive to which obligations under Article 6(3) of the Habitats Directive apply. It also carries a national designation of Natural Heritage Area (NHA) and is of major ornithological importance. The contamination of Lough Derravaragh and adjoining surface waters with peat and peat-related siltation from upstream peat extraction facilities is a major environmental and ecological concern.

131. Notwithstanding that the evidence presented by the Agency supports a conclusion that HP's peat extraction activities are currently concentrated at the contiguous areas F and G, they seek orders also under s. 99H of the EPA Act regarding areas A, B, D and E. This is in circumstances where HP has previously extracted peat in areas A and B and in the expectation that if ordered to cease peat extraction in one area, HP will simply move to extract from other areas.

132. It is contended that HP's activity has particularly intensified in Area G since 2018 when quarrying of peat (as opposed to milling) became evident. Quarrying entails digging down typically using excavators to extract peat at much greater depth in G, as has already occurred in area F. HP is extracting peat right down to the marl to a depth of circa 5 m. This has the effect that regeneration of the bogs is unlikely to occur. HP had used precisely the same quarrying modus operandi in area F before subsequently moving across the road into area G. The quarried parts of area F where the bog has effectively been removed have filled with water

and become a pond. Quarrying of peat as opposed to milling dramatically increases the operator's yield from a particular area but has the effect that regeneration of the bogs is unlikely to occur such is the depth to which the peat has been extracted.

133. The Agency estimate that circa 561,000 m³ of peat has been extracted from Area F and that between December 2018 and August 2021, 235,634 m³ of peat been extracted from Area G. Periodic aerial orthographic imagery placed in evidence by the Agency together with more recent mapping carried out by drone flights demonstrate the changes which have occurred from peat extraction activity at areas F and G since 2009. Images show milled peat extraction occurring in Area F in 2009 and 2016 but by 2018 it had been fully excavated and the remaining void had filled with water. Since then drainage works have been carried out.

134. A series of site visits the subject of site inspection reports exhibited in the affidavit grounding the injunction application also describe the progressive extraction of peat over the years using mechanical means and the state of the denuded peat lands following excavation. Site inspection since 2019 confirms active and extensive peat extraction in area G. From the evidence it appears that little activity has been observed at areas A and B, although a stockpile at area B (which HP dispute belonged to it), has been removed.

135. The Agency have concluded that the peat extraction being carried out by HP is of such a scale as to require an EIA under EU law and that the activity on its County Westmeath peat lands is being carried out in proximity to a number of European sites protected under the EU Birds and Habitats Directives. The Agency's position is that the carrying out of peat extraction without the environmental effects thereof having first been assessed constitutes a serious and ongoing breach of EU environmental law (Affidavit of John Gibbons).

136. The position set out in the Affidavit of Aidan O'Harte sworn on 8th July 2021 is that there has been a significant de-intensification in peat extraction activity, and all of the activity is being carried out on in a single site where historically peat extraction has occurred, long before the coming into force of the obligations under the First Schedule of the EPA Act.

137. In my view, Mr. O'Harte's position on affidavit as regards de-intensification needs to be considered both in the light of the quantity of peat already extracted and also with due regard

to the proposed quantity of future extraction detailed in the licence application. From the licence application it is apparent that it is proposed to extract peat as follows:

"The proposal is to continue the extraction at both sites [at Shrubbywood near Coole and near to Finnea], with harvesting for the next few years at Shrubbywood only as a maintenance activity. The extraction would proceed on a phased basis with extraction initially occurring primarily at the Finnea site, with Shrubbywood as the secondary site. The Finnea site would be closed within 8-10 years, whereas the Shrubbywood site would be 18-20 years' time at the current rate of harvest and extraction.

[...]

The Finnea site is to be excavated to a maximum of 4m below the existing peat level. Due to the fluctuations in depth of the peat across the site, the average depth of peat removed across the Finnea area will be 2.9m. At Shrubbywood the peat at the will be excavated to a maximum of 3.5m below the existing peat level. Due to the fluctuations in depth of the peat across the site, the average depth of peat removed across the Shrubbywood area will be 2.35m.

138. According to the license application, it is estimated that 80,000 tonnes of peat is to be extracted on average every five years at each of the sites at Shrubbywood and Finnea. The scale of the intended peat extraction is evidently significant.

DECISION ON LAND RECKONABLE FOR THE CALCULATION OF THRESHOLD

139. Bearing in mind the principles expressed by the CJEU in C-392/96 *Commission v. Ireland* (paras 75-76 and para 82 as referred to above), I accept as correct the Agency's submission that it is incumbent on all authorities of the State, such as the Agency and, for matters within their jurisdiction, the Courts, to apply the law in such a way that projects which are likely to have significant environmental effects are made subject to an EIA, and for this purpose to make sure that they are subject to a consent procedure (see *Kraaijeveld*, at para. 55).

Furthermore, this equally applies in respect of the obligation to ensure that projects which are likely to have significant effects on European sites are made subject to an Appropriate Assessment (Case C-127/02 *Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij*, at para. 65).

140. Having regard to the decisions in Case C-158/15 *EPZ NV v. Bestuur van de Nederlandse Emissieautoriteit, Bulrush & Westland, EPA v. Deegan* (above) and the decision of the CJEU in Case C-216/06 *Commission v. Ireland* where the CJEU ruled that environmental impact of ancillary works namely peat extraction and road construction, should have been taken into account in screening a proposed windfarm project, it seems to me that the construction urged by the Agency is correct. I am satisfied that the various definitions of “*installation*” and “*plant*” capture not only the footprint of the land from which peat has been or is being cut or harvested, but also includes any land or any part of any land which is used for purposes incidental to peat extraction, all of which should be included in calculating the threshold. Land which is drained (deliberately or incidentally) for the purposes of peat extraction is undoubtedly involved in the sense of being affected by the extraction in a technical and/or hydrological sense. Accordingly, in calculating the area involved in determining whether the threshold is met it is proper to have regard not only to the footprint of the land from which peat has been cut or harvested, but also any land or any part of any land which is used for purposes incidental to peat extraction, for example, access roads, storage of harvested peat, buffer zones, sedimentation ponds etc. All of these areas should be included in calculating the threshold.

141. There is nothing in the wording of Class 1.4 itself, nor in the definitions of installation or plant, which indicates that the lands must be contiguous. Rather, the statutory definitions are broad and include land or any part of land. This suggests that even where lands are not contiguous, but straddle a stream or road for example, each part of the lands may be reckoned in calculating the threshold. The legal test is whether the specific areas are involved in peat extraction in the course of business. It seems to me that this is a question of fact and degree in each case. If, however, land on one side of a road is being used to store or dry peat which has been cut from the lands on the other side of the road, it is artificial to say that these two areas are not involved in the commercial peat extraction. Similarly, if lands on either side of a road form part of a single bog beneath the road, it is artificial to treat them as separate.

142. This interpretation is consistent with the EU caselaw on project-splitting which indicates that the purpose of the EIA Directive cannot be circumvented by the splitting of projects, and the failure to take account of the cumulative effect of several projects must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment. I am satisfied that treating any interruption to the contiguity of sites, including a stream or a road, as splitting the peat extraction into two or more projects is artificial, and facilitates the mischief of project-splitting which the EU case-law prohibits.

143. This interpretation is also in line with domestic jurisprudence. In *O’Grianna v An Bord Pleanála* [2014] IEHC 632 Peart J. held that the obligations of EIA would be avoided if a windfarm development could undergo EIA without a simultaneous EIA of its connection to the national electricity grid, as follows (para. 27):

“I am satisfied that the second phase of the development in the present case, namely the connection to the national grid, is an integral part of the overall development of which the construction of the turbines is the first part. [...] The wind turbine development on its own serves no function if it cannot be connected to the national grid. In that way, the connection to the national grid is fundamental to the entire project, and in principle at least the cumulative effect of both must be assessed in order to comply with the Directive.”

144. The focus on commercial peat extraction is also relevant here. If contiguity were necessary, a commercial entity engaged in the business of peat extraction could escape the requirements of the EIA Directive altogether by extracting peat on multiple non-contiguous sites, each less than 50 hectares. Such an entity could be extracting peat on 100s or even 1,000s of hectares of bogs, without being required to obtain a licence. This cannot have been a situation intended by the legislature in enacting Class 1.4.

145. I have also found the decision in *EPA v Deegan* [2019] IEHC 755 instructive. There the Court (Barton J.) held that areas used for drainage in the context of peat extraction were directly associated activity and should be reckoned for the purposes of the threshold based on their hydrological connection. Thus, it is submitted that if it can be demonstrated that the

drainage of and/or subsequent extraction of peat affects an overall area of bogland, this overall area should be reckoned for the purposes of the threshold. Again, it seems to me to be clearly established that it is appropriate to have regard to the full extent of the bog in terms of its technical and hydrological connection, rather than to focus on the specific areas from which peat has been harvested.

146. I therefore conclude that it is legitimate to aggregate lands especially where, for example, the alleged barrier which is said to separate the lands consists of a road or stream, or is, in reality, land involved in peat extraction. There is no requirement within the statutory scheme which requires contiguity of land and the application of the threshold should avoid avoidance through project splitting.

147. The evidence establishes that the total area of land within Areas A, B, D, E, F & G owned by Harte Peat comprise 150.39 hectares (excluding Area C where offices and administrative area is located, which adds a further circa 13.3 hectares) as follows:

- a) Map 1 shows the Shrubbywood/Ballinealoe lands in County Westmeath:
 - i. Area A (Shrubbywood) comprises 50.413 hectares and the area owned by Harte Peat comprises 41.08 hectares. Area A1 comprises 3.47 hectares and acts as a buffer between Area A and the River Inny. The River Inny flows south from Lough Sheelin through the bog and into Lough Derravaragh which is a special protection area (“SPA”) and ultimately on into the Shannon. Area A1 contains the siltation ponds for drainage water from Areas A and B.
 - ii. Area B (Ballinealoe) comprises 24.145 hectares and the area owned by Harte Peat comprises 3.15 hectares.

148. Areas A & B are contiguous, as well as being technically and hydrologically connected, forming part of a single peatland with common drainage. Areas A & B combined form 74.56 hectares. These areas have been the subject of peat extraction previously with a large stockpile of peat removed in 2018:

- b) Map 4 shows the Murmod and Lisnabantry lands in County Cavan. Area D outlined in red comprises 6.03 hectares of undeveloped peat lands, within the wider area of 6.71 hectares in the registered ownership of Harte Peat;
- c) Map 5 shows the Clonfad lands in County Monaghan. Area E thereon comprises 20.05 hectares of which Harte Peat are the registered owner of 5.68 hectares. Sub-area E1 (which includes some of the lands of which Harte Peat is the registered owner) depicts an area within Area E from which peat was previously extracted.
- d) Map 6 shows the Derracrave lands near Finnea, namely Areas F & G. Areas F & G comprise 128.04 hectares and Harte Peat are the registered owner of 67.24 hectares of land within these areas. Areas F & G are contiguous and are also technically and hydrologically connected. The River Inny also flows to the west of Area F. Milling and quarrying of peat previously occurred in Area F such that the excavated depth is 5m in some parts thereof.

149. Reckoning the area of land involved in peat extraction having regard not only the footprint from which peat has been cut or harvested or is currently being cut or harvested, but also all land used for the purposes of, or incidental to, the company's peat extraction activity including the full area of the bogs where extraction has occurred or is occurring or the areas which could be extracted in the future, lands used for access roads, storage of peat, buffer zones and sedimentation ponds, it is clear that the 50 hectares threshold is met on sites A & B. A & B are adjoining land parcels involved in peat extraction in the course of business. The threshold is also met on parcels G & F which form part of the same bog complex separated only by a road which is in reality a connected area involved in peat extraction in the course of business.

150. If I am wrong in my conclusion that the adjoining land areas A & B and G & F both separately satisfy the 50 hectares threshold, I consider that the Court should also reckon all areas under the control of the operator that have a technical or hydrological connection to an area where extraction has occurred or is occurring, notwithstanding that these might superficially be viewed as individual or non-contiguous sites and that on this approach it is legitimate to calculate the area comprised in areas A, B, G & F together in determining whether the threshold is met. The evidence establishes that all four areas drain through the River Inny

to Lough Derravaragh and share a hydrological connection to the area where extraction is occurring.

151. Accordingly, I am satisfied that the activity of HP is licensable on the basis that the 50 hectares threshold is met having regard to Areas A and B and/or G and F. To proceed otherwise on the basis of the contrary argument of HP that the Court confine itself to the area where peat extraction is actively occurring is not permissible under EU law as at any given moment in time, a commercial peat extractor is likely to be working in one discreet area of the peat-lands under its ownership and/or control, and to focus solely on that that discreet area and snapshot in time in reckoning the threshold—as HP invite the Court to do—would defeat the legislative intent for regulation and circumvent the requirements of and purpose of EU environmental law. Such an outcome cannot have been what the Oireachtas intended in setting the relevant threshold.

The Agency also argued that areas at D & E were reckonable and are clearly areas which have been involved and may be involved in the future in peat extraction in the course of HP's business. Given the physical separation between the bogland at D & E, the case for reckoning the area of these bogs in calculating threshold for EIA is less compelling in my view. The evidence does not establish any hydrological connection between areas A, B, G, F with areas D and E which are geographically at a remove in separate counties. The only real connection therefore is that the bog land in question is similarly involved in peat extraction in the course of business to the extent that it is owned by a commercial peat extraction company, albeit no active peat extraction is occurring at the said bogs. As there is no active peat extraction occurring at D & E and it is removed geographically from the active extraction business conducted by HP, it seems to me that there is no proper basis for including that land in the reckonable area for the purpose of determining whether thresholds are met. The position might be otherwise were peat extraction in the course of business to resume in a manner which involved these locations.

152. While in no way determinative, I would observe that the approach adopted by me to the calculation of threshold is broadly consistent with HPs own IPC licence application, which was accompanied by both an Environmental Impact Assessment Report (“EIAR”) and a Natura Impact Statement (“NIS”) and was in respect of lands comprising 73.33 hectares incorporating land in Areas A, B, F & G.

REFUSAL TO CONSIDER IPC Licence APPLICATION BY AGENCY

153. This application for an IPC licence was refused by letter dated the 27th November, 2020 in reliance on s. 87(1C) of the EPA Act.

154. Section 87 of the EPA Act in relevant parts, provides for the processing of applications for a licence, specifically where the licence is made in respect of an activity that involves development or proposed development. Notably, the section provides separately for the processing of such applications when they concern development for which a grant of permission is required and development for which planning permission is not required. The proper interpretation of this provision is central to the issues which arise in HP's judicial review proceedings.

155. An “*application for permission*” within the meaning of s. 87 is defined at s. 87(1A) as follows:

“*application for permission*” means —

- (a) *an application for permission for development under Part III of the Act of 2000,*
- (b) *an application for approval for development under section 175, 177AE, 181A, 182A, 182C or 226 of the Act of 2000, or*
- (c) *an application for substitute consent under section 177E of the Act of 2000;”*

156. A “*grant of permission*” is defined as meaning

- “(a) a grant of permission for development under Part III of the Act of 2000,
- (b) an approval for development under section 175, 177AE, 181B, 182B, 182D or 226 of the Act of 2000, or

(c) a grant of substitute consent under section 177K of the Act of 2000.”

157. Section 87(1B) of the EPA Act provides that where an application for a licence is made to the Agency in respect of an activity that involves development or proposed development for which a grant of permission is required, the applicant shall furnish to the Agency —

“(a) confirmation in writing from a planning authority or An Bord Pleanála, as the case may be, that an application for permission comprising or for the purposes of the activity to which the application for a licence relates, is currently under consideration by the planning authority concerned or An Bord Pleanála, and in that case shall also furnish to the Agency either —

(i) a copy of the environmental impact assessment report where one is required by or under the Act of 2000 relating to that application for permission, or

(ii) confirmation in writing from the planning authority or An Bord Pleanála that an environmental impact assessment is not required by or under the Act of 2000,

or

(b) a copy of a grant of permission comprising or for the purposes of the activity to which the application for the licence relates that was issued by the planning authority concerned or An Bord Pleanála and in that case shall also furnish to the Agency either —

(i) where the planning authority or An Bord Pleanála, accepted or required the submission of an environmental impact assessment report in relation to the application for permission, a copy of the environmental impact assessment report, or

(ii) confirmation in writing from the planning authority or An Bord Pleanála that an environmental impact assessment was not required by or under the Act of 2000.”

158. Section 87(1C) of the EPA Act provides that where an application for a licence is made to the Agency in respect of an activity that involves development or proposed development for which a grant of permission is required but the applicant does not comply with *subsection (1B)*, the Agency shall refuse to consider the application and shall inform the applicant accordingly. This was the provision relied upon by the Agency in refusing to consider HP's licence application.

159. Sections 87(1D) and 87(1E) of the EPA Act provide for the further processing of applications where an environmental impact assessment report is required Section 87(1F) for liaison between the planning authority concerned or ABP where an application for permission comprising or for the purposes of an activity requiring a licence under *section 83* or a review on the application of the licensee, under *section 90(1)(b)* arises.

160. Section 87(1G) of the EPA Act provides for a consultation between the Agency and the planning authority concerned or ABP under the PDA2000 where one or other or both require an environmental impact assessment to be carried out.

161. Importantly, s. 87(1H) of the EPA Act provides that where the Agency receives an application for a licence in respect of an activity that involves development or proposed development for which a grant of permission is not required and the Agency, under s. 83(2A) decides that an environmental impact assessment is required in relation to the activity concerned, the Agency shall request the applicant to submit an environmental impact assessment report. Under s. 87(1H)(b) of the EPA Act the application for a licence shall be deemed to be made on the date of receipt by the Agency of the environmental impact assessment report.

162. The Agency contend that HP failed to satisfy the requirements of s. 87(1B) of the EPA Act, to provide either a grant of planning permission or evidence that a planning application had been made thereby triggering a s. 87(1C) refusal to process. HP contend that as the licence application concerned a pre-64 user, then there was no requirement for a planning application and the required environmental impact assessment fell to be carried out by the Agency.

163. Section 87(9) of the EPA Act provides that any decision in respect of a s. 83(1) application shall be reasoned as to the conclusion arrived at. HP contend that the decision under section 87(1C) of the EPA Act was inadequately reasoned.

164. Under s. 87(9)(b) of the EPA Act the Agency has power to attach environmental conditions in relation to features of the project or measures envisaged to avoid, prevent or reduce and, where possible, offset significant adverse effects on the environment and any appropriate monitoring measures. The extent of the powers of the Agency in requiring remedial action is relevant to the question of whether the IPC licensing regime is sufficiently stringent to meet the requirement for development consent under the Directives in the absence of a separate development consent from a planning authority.

165. By letter dated the 25th May 2020, the EPA wrote seeking additional information in relation to whether a planning permission had been granted for the purposes of the activity to which the application for a licence related or whether an application was currently under consideration and if so the details of same. In a reply dated the 29th May 2020, on behalf of HP it was stated:

“the lands the subject matter of this application have been used for peat extraction well before any planning legislation”.

166. An attached memorandum from HP's solicitors added:

“therefore the information sought by you for various reasons including those above, is not, with respect relevant to the consideration and determination of the application”

167. By further letter dated the 4th August 2020, the Agency wrote stating:

*“..it appears to the EPA that your licence application is one in respect of an activity that *prima facie* involves development or proposed development for which grant of planning permission may be required. In particular the Agency has considered the High Court judgement in the cases of Bulrush Horticulture Ltd v. An Bord Pleanála & Ors. and Westland Horticulture Ltd & Ors. v. An Bord Pleanála & Ors.”*

168. The letter continued:

“On the basis of the above the Agency is not currently satisfied that your application is in compliance with section 87(1B) of the Act. In those circumstances, please provide a declaration from An Bord Pleanála or the relevant planning authority, as appropriate, pursuant to section 5 of the Planning and Development Act that the development the subject of your application is exempted development.”

169. In the absence of a substantive response, the Agency wrote again by letter dated the 21st October 2020 and referring to its earlier letter of the 4th August 2020, elaborated as follows:

“In particular, the Agency considers that there are factors set out in the application which indicate the activity is one which will require an environmental impact assessment and therefore cannot benefit from any claim to exempted development that would otherwise apply by virtue of section 4(4) of the Planning and Development Act, 2000 as amended. These factors include:-

- the Harte Peat landholdings which are the subject of this licence application include “Shrubbywood” near Coole, County Westmeath for which an estimated licence area of 51.83 hectares was provided in the licence application and*

“Finnea” near Finnea, Co. Westmeath for which an estimated licence area of 21.5 hectares was provided in the licence application

- *the nature and proximity to conservation sites as detailed in the nature impact statement/environmental impact assessment report submitted as part of the licence application”*

170. The letter concluded:

“therefore, as it appears that planning permission is required for this activity, section 87(1C) of the EPA Act, provides that, in the absence of confirmation from the planning authority that an application has been made for a copy of a grant permission being furnished, the Agency shall refuse to consider such an application.”

171. The letter gave a final period of 14 days to prepare a response to this and previous correspondence. It was indicated that a declaration under s. 5 of the PDA, 2000 would be accepted as conclusive proof that planning permission was not required.

172. On their face both letters indicate that the activity is not exempted development. In the first letter, this is by reference to the decision of the High Court in *Bulrush* (which concerned a reliance on exemptions under Regulations) and in the second letter it is by reference to s. 4(4) of the PDA 2000. Neither letter addresses the point made that this activity does not require planning permission because of pre-64 user. However, the decision might be construed to reference the need for an EIA to explain why planning permission is considered to be required either indirectly by reference to the *Bulrush* decision (where at para. 48 of the judgment – Meenan J asserted:

“In previous paragraphs, I have upheld the decision of the respondent [ABP] that an Environmental Impact Assessment and an Appropriate Assessment is required.... Section 4(4) does not make unlawful that which was lawful at the time it was done. The effect of s. 4(4) is prospective. Bulrush now require planning permission for their activities.”) or by directly asserting “that there

are factors in the application which indicate that the activity is one which will require an environmental impact assessment”.

173. In a response on behalf of HP, it was pointed out that no adverse planning findings had been made in respect of the activity which is the subject of the application.

174. It appears from the record of the Agency’s considerations that a memorandum from an Inspector with the Environment Licencing Programme was prepared in advance of the Agency’s Board meeting on the 17th November 2020. The background to the HP licensing application was set out in the memorandum. In particular, it was set out that the application was submitted to the Agency following an order of the High Court in which a settlement agreement between the Agency and HP was made under the terms of which HP agreed to apply to the Agency for a licence within six months. The memorandum recorded that the licensing regime that they were to make the application under was the European Union (Environmental Impact Assessment)(Peat Extraction) Regulations 2019 (S.I. No. 4/2019), however, these regulations along with the Planning and Development Act 2000 (Exempted Development) Regulations 2019 were set aside by Order of the High Court on the 20th September 2019. This meant that the legislative position pertaining to licence applications for the extraction of peat reverted to that which was in place prior to the enactment of S.I. No. 4/2009 and large-scale extraction of peat reverted to that which was in place prior to the enactment of S.I. No. 4/2019 and large scale peat extraction was no longer an exempted development under the PDA 2000 (as amended).

175. The memorandum advised the Board that it was obliged to assess whether licence applications contain a grant of permission or confirmation of such permission being sought under s. 87(1B) of the EPA, 1992. The memorandum summarized HP’s decision as being:

“Harte Peat Limited responded on 29th of May, 2020 confirming that no grant of planning permission exists, that there is no planning permission under consideration and that they consider that when the licence application was made and receipted, it did not require planning permission and that there is no requirement to obtain planning permission”.

176. This was an incomplete summary of the HP position because it fails to clearly set out HP's reliance on the pre-64 user as distinct to the date of the application.

177. The memorandum advised the Board of the Agency that s. 87(1C) obliged the Agency to refuse to consider an application that does not comply with s. 87(1B) stating further:

"Licence applications which are not accompanied by:

Details of the relevant grant of planning permission or

Confirmation from the planning authority that an application for permission has been made or

A section 5 declaration under the Planning and Development Act, 2000 as amended

Should be refused to be considered by the Agency pursuant to section 87(1C) of the EPA Act, 1992 (as amended)."

178. The minutes of the Board meeting of the Agency held on the 17th November 2020 record in summary terms, consideration of the memorandum and a decision to refuse to consider licence applications pursuant to s. 87(1C) where the application does not comply with section 87(1B).

179. By letter dated the 24th November, 2020, the decision of the Agency is communicated to HP. The contents of earlier correspondence is repeated and the Agency then concludes:

"Therefore, as the Agency considers that the activity for which you seek a licence is one which involves development for which grant of planning permission is required, and you have failed to provide either confirmation from the planning authority that an application has been made or a copy of the grant permission, the Agency refuses to consider your application in accordance with section 87(1C) of the EPA Act 1992 (as amended)."

180. In its letter of the 24th November 2020 the Agency states in contradictory terms that the activity in respect of which the licence is sought is one that “*prima facie involves development in respect of which grant of planning permission may be required*”. The letter then proceeds to indicate in the fifth paragraph of that letter that the activity is “*one for which a grant of permission is required*”. In a closing paragraph, the letter asserts “*please note that it is a breach of section 82(2) of the EPA Act, 1992 (As amended) for a person to carry on a specified activity for Class 1.4 in the absence of a licence.*”

WHETHER THE REFUSAL TO CONSIDER IPC LICENCE IS VITIATED BY ERROR OF LAW

181. There can be little dispute but that on any approach to the reckoning of the thresholds there is an obligation on HP to subject the commercial extraction of peat activity carried out by it to EIA. Even while HP disputed the approach to the reckoning of land for calculating thresholds and noting that the threshold is lower under the PDA, 2000, HP have not sought to contend that an EIA is not required as a matter of EU law to assess the effects of its peat extraction activity on the environment. Indeed, the application submitted for the licence was accompanied by an EIA and NIS. The Agency’s conclusion that the peat extraction being carried out by HP is of such a scale as to require an EIA under EU law where that activity is being carried out in proximity to a number of European sites protected under the EU Birds and Habitats Directives is not challenged in the judicial review proceedings.

182. It was not surprising therefore to have it confirmed during the course of the hearing before me that it was accepted by HP that there is a requirement under EU law to subject the extraction of peat by HP to an EIA and that this is therefore not an issue the Court is required to decide. Nonetheless, two further questions of law are central to the Decision letter of the 27th November 2020 and require to be resolved, namely:

1. whether planning permission is required in respect of the extraction of peat on site where an EIA is required;
2. whether the extraction of peat by HP without a licence contravenes EPA Act, 1992.

183. I now address each in turn.

Is Planning Permission Required in respect of the extraction of peat for which an EIA is required where there is pre-'64 user?

184. In its judicial review proceedings, HP relies on “*agriculture*” as defined in s. 5(2) of the 1963 Act to include, *inter alia*, the use of land for turbary which is for the extraction of peat and the provisions of s. 4(1)(a) which provides that development consisting of the use of any land for the purposes of agriculture “*...a development consisting of the use for any of those purposes of any building occupied with the lands so used*” to contend that there is no obligation to obtain planning permission in respect of a pre’64 user. The position of HP is that by reference to s. 24 of the Local Government (Planning and Development) Act, 1963 the activity having commenced before the appointed day or having regard to the nature of the activity did not require a grant of planning permission. They say this puts them in a different position to *Bulrush & Westland* who enjoyed exempt status under the planning regulations but not a pre-64. Counsel for HP rely on the decision of the Supreme Court in *Waterford County Council v. John A. Wood Ltd.* [1999] 1 IR 556 where the Supreme Court found that s. 24 of the Act of 1963 necessarily permitted the continuation to completion of the particular works commenced before the appointed day and that it was necessary to examine all of the established facts to ascertain what was or might reasonably have been anticipated at the relevant date as having been involved in the works then taking place. As observed in Simons on Planning Law (3rd ed.) at para. 14-383:

“there are some parallels between the reasoning of the Supreme Court in Waterford County Council v. John A. Woods and that of the Court of Justice in Commission v. Germany.”

In *Commission v. Germany* (C-431/92) the Court of Justice ruled that the requirements of the EIA Directive did not apply where the application for consent was formally lodged before the operative date.

185. It is contended by HP that as a matter of law and fact, if the activity the subject matter of the application, was commenced on lands before the appointed day, then the provisions of s. 87(1C) do not apply as planning permission for the activity is not required. It is noted that

in *Bulrush*, Meenan J. found that the *Stadt Papenburg* and other “Pipeline cases” did not assist *Bulrush* or *Westland* because they related to cases where permission or consent for a project had been sought before the expiry of the time limit for transposing the Directive in question whereas *Bulrush* and *Westland* had no pending application. At para. 48 of his judgment in *Bulrush*, Meenan J. stated:

“In previous paragraphs, I have upheld the decision of the respondent that an EIA and an AA is required. Therefore, under section 4(4), the “development” by Bulrush and Wetland is no longer an “exempted development”. The removal of the exemption is not retrospective. Section 4(4) does not make unlawful that which was lawful at the time it was done. The effect of s. 4(4) is prospective. Bulrush now require planning permission for their activities. The wording of section 4(4) which gives rise to this is clear and unambiguous”.

186. The Agency point to legislative changes, clarity achieved through litigation and the requirement to interpret our domestic legislation in conformity with the requirements of EU law to contend that Irish law now requires that HP seek planning permission even in respect of pre’64 user. In particular, they rely on the requirement of EU law that peat extraction which is likely to have significant effects on the environment by virtue of its nature, size or location be subject to a requirement to obtain “*development consent*” within the meaning of the Directives. They maintain that s. 87(1C) of the EPA Act was correctly invoked because the activity the subject of the licence required an EIA and therefore development consent which in Ireland includes both planning permission and a licence where peat extraction at this scale is involved.

187. Section 4 of the PDA 2000, considered in *Bulrush*, is directed to “*exempted development*”. There is no equivalent wording to s. 4(4) with regard to pre-64 development. Insofar as s. 4(4) provides that notwithstanding the provisions of s. 4 and the regulations made thereunder, development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required, it is clear that s. 4(4) operates to remove the exemption. Nothing in the wording suggests that it also operates to require that in respect of a pre-64 user where an EIA or AA is required, there is now a requirement to obtain planning permission.

188. In *Bulrush*, Meenan J. stated that (para. 49):

“For many years, both Bulrush and Westland enjoyed the benefit of their development” being an “exempted development”. Once such a benefit has been given, it does not follow that it can never be limited or removed in its entirety. There are many activities which were once free of regulation but are now subject to regulation. Peat extraction is one such activity which is now subject to regulation arising out of its effect on the environment.”

189. In *Bulrush* Meenan J. relied on the dicta of O’Neill J. in *M & F Quirke v. An Bord Pleanála* [2009] IEHC 426 where he said:

“In all cases the activity restricted by statute would have been unregulated or unrestricted before the enactment of that type of legislation”.

190. The Agency rely on *Bulrush* as authority for the rejection of the proposition that the fact that peat extraction on lands commenced before the coming into effect of the EIA Directive means that ongoing peat extraction on these lands will forever be outside the scope of the Directive. The issue between the parties is as to whether the fact that an EIA is required means that planning consent is required, as the Agency contend or can otherwise be satisfied through the IPC process, as HP contend.

191. It seems to me that his question has not yet been directly determined in any of the authorities opened to the Court in respect of a pre-64 user involving peat extraction. Nonetheless, useful guidance may be gleaned from recent case-law.

192. The Agency placed significant reliance on *JJ Flood & Sons (Manufacturing) Ltd and David Flood v. An Bord Pleanála & Ors* [2020] IEHC 195 which they say is authority for the rejection of the related argument based on alleged pre-1964 user. In that case, the Court of Appeal (Ní Raifeartaigh J.) considered a similar question in the context of a pre-64 quarry user.

It was contended in that case that the quarry was beyond the reach of the EIA Directive and the Habitats Directive because it had remained within the parameters of its pre-1964 user. The Court of Appeal (Ní Raifeartaigh J.) rejected the submission that a quarry which commenced operations prior to 1964, even one which stays within its pre-1964 user, is automatically by virtue of that user rendered immune from the Directives. The Board submitted in that case that it required an application for a substitute consent because it had determined that development had occurred that required relevant assessment. They contended that they had made no determination that the development was unauthorised. In her judgment Ní Raifeartaigh J. accepted the Board's contention that "*if you fall within the Directives, you need development consent*". She stated as follows (para. 78):

"A positive obligation is placed upon Member States, under EU law, to ensure that domestic law complies with the Directives; this is explicitly stated in Article 2 of the EIA Directive as set out earlier in this judgment. One must start the analysis by looking at Irish law while wearing the spectacles of EU law, as it were, rather than the other way around. EU law cares little for domestic concepts (such as whether or not a quarry has a pre-1964 user) and encompasses all development falling within its scope other than those specifically put outside its scope by the Directives themselves".

193. Referring to the decision of Meenan J. in *Bulrush* Ní Raifeartaigh J. continued (paras. 85 and 86):

"The crucial distinction drawn by Meenan J. is between the situation where (i) an activity has had an exemption or exclusion from the domestic planning code, on the one hand, and (ii) an activity which actually had planning permission or had a pending planning application in existence as of the trigger dates on the other. The two categories are not to be equated with each other when considering whether or not the Directives apply.

The conclusion drawn by Meenan J. seems to me to apply with equal force in the present context. The purpose of s. 261A was to comply with Ireland's EU obligations which require Member States to ensure conformity with EU law in this area. If the applicant's argument were correct, then an entire industry with significant effects on the

environment such as quarrying would be outside the scope of the Directives simply because the Member States had, historically decided to exclude the activity from domestic planning law. The applicants' argument is one which seeks to invert the corrected relationship between domestic law and EU law, by seeking to elevate the status of a quarry under domestic planning law prior to the date of transposition of the Directives to a status which trumps EU law requirements concerning quarries. This cannot be correct. The Directives impose an obligation on Member States to ensure that projects which require assessment are made subject to a requirement to apply for and obtain development consent. The only projects which are relieved of this obligation are ones which either already had a development consent or were in the process of obtaining a development consent i.e. a consent application was pending. The rationale for relieving such projects from the Directive does not apply to a project which has never held any form of development consent. It seems to me also that the decision of the CJEU in the more recent "nitrogen deposits" case, relied upon by the Attorney General and described at some length above, continues with an interpretation of the Directives which restricts exclusions from their scope and I also note the emphasis on exceptionality repeated in the Comune di Corridonia Case (Case C-196-16)."

194. HP dispute that the decision in *JJ Flood v An Bord Pleanala* is authority for the proposition that pre-1964 user is not material to the requirement for an EIA. They rely on the fact that the *JJ Flood* case concerned quarrying and the relevant Planning and Development regulation made no requirement that the area of quarrying be a "*new or extended area*" in the way that the regulations provides for new and extended areas when considering peat extraction.

195. There are indeed distinctions to be drawn between this case and the *JJ Flood* case. In particular, there is no equivalent provision to s. 261A of the PDA, 2000 in respect of peat extraction. While that provision provided a gateway to development consent through the planning process where an EIA was required pursuant to EU law, quarries are in a different situation to commercial peat extraction in that a similar provision has not been introduced with regard to commercial peat extraction..

196. From HP’s perspective, therefore, the gateway to obtaining a development consent is not necessarily through the planning process in the case of peat extraction. This is because they contend that another means for assessing environmental impact exists through the IPC licensing process. In this way HP contend that the IPC licence is a “*development consent*” within the meaning of the Directives and provides “*the gateway*” which s. 261A provides in the case of quarries but without the necessity to obtain planning permission in order to regularize peat extraction in accordance with the requirements of EU law. Thus, it might be concluded that as the purpose of s. 261A is to comply with Ireland’s EU obligations which require Member States to ensure conformity with EU law in the case of quarries, this end is achieved insofar as above threshold peat extraction is concerned through the IPC licencing regime which empowers the Agency to require an EIA pursuant to ss. 83(2A) and 87(1H) of the EPA Act.

197. The Agency reject this proposition. They say that the EIA process under the IPC regime does not meet EU law assessment requirements because it is limited to the Agency’s own functions and powers. They say that a “*development consent*” within the meaning of the Directives requires assessment in the context of a planning application. In particular, they say that the Agency does not have power to authorise development it only has the power to condition emissions from an activity.

198. In deciding which argument should prevail, I have found the decision in *Friends of the Irish Environment Ltd v Minister for Communications* [2019] IEHC 555, [2020] 3 I.R. 162, (Simons J.) to be of assistance even though this case did not concern the question of a pre-64 user. There the Court considered EU law insofar as the assessment required under the Directives is concerned. Simons J. relied on the judgment in Case C-196/16 *Commune di Corridonia* as indicating that the assessment must be both retrospective and prospective and cannot be confined to the future effects of the project. This was construed by Simons J. to mean that EU law requires that domestic law must provide for remediation measures as part of the development consent process. Simons J. pointed to the power of ABP to require such measures but the lack of an equivalent provision under the EPA Act, 1992 (as amended) before stating (para. 119):

“119. With respect, the obligation to transpose a directive is to do so in clear and precise terms. This point has previously been made in the specific context of the EIA Directive by the CJEU in Case C-50/09, Commission v. Ireland.

“46. Whilst it is true that, according to settled case-law, the transposition of a directive into domestic law does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific, express provision of national law and a general legal context may be sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner (see, in particular, Case C-427/07 Commission v Ireland [2009] ECR I-6277, paragraph 54 and the case-law cited), the fact remains that, according to equally settled case- law, the provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the need for legal certainty, which requires that, in the case of a directive intended to confer rights on individuals, the persons concerned must be enabled to ascertain the full extent of their rights (see, in particular, Commission v Ireland, paragraph 55 and the case-law cited).”

120. The legislative amendments introduced by the Ministerial Regulations fail to transpose properly the EIA Directive and the Habitats Directive. This is because the new licensing regime for peat extraction has simply been bolted-on to the existing IPC licensing regime, with no amendments made to reflect the requirements prescribed under EU law for the grant of retrospective development consent.”

199. This criticism might equally be directed to the existing IPC licensing regime which is similarly ill equipped to meet the requirements prescribed under EU law for the grant of retrospective development consent.

200. It seems to me therefore that once it is accepted, as it has been, that EU law requires an EIA in respect of peat extraction by HP, as a matter of fact and law, this in turn means that the domestic means by which an EIA which is fit for the purposes of the Directives is conducted is through the requirement to seek planning permission. This is because no other effective means exist in domestic law providing for remediation measures as part of the development

consent process. Enhanced powers exist under the PDA, 2000 (as amended) in relation to remedial and mitigation measures to remedy or mitigate any significant effects on the environment relating to the development for which consent is sought which far surpass the powers of the Agency.

201. It is further clear from the decision of Ní Raifeartaigh J. in the *JJ Flood* case that this does not mean that existing extraction is unauthorised from a domestic planning perspective but rather that it requires an EIA conducted within the ambit of a sufficiently robust development consent in order to satisfy EU law requirements. As the Court of Appeal said at para. 86:

“The applicants’ argument is one which seeks to invert the corrected relationship between domestic law and EU law, by seeking to elevate the status of a quarry under domestic planning law prior to the date of transposition of the Directives to a status which trumps EU law requirements....the Directives impose an obligation on Member States to ensure that projects which require assessment are made subject to a requirement to apply for an obtain development consent. The only projects which are relieved of this obligation are ones which either already had a development consent or were in the process of obtaining a development consent.”

202. The Court continued at para. 99:

“in considering whether or not a direction to apply for substitute consent amounts to a finding that a quarry was “unauthorised”, there is a danger of becoming side-tracked into an argument which is semantic rather than one of substance. The issuing of a direction to apply for substitute consent is not a form of penalty or sanction. Rather, it is in ease of a quarry operator in that it opens a gateway to the regularisation of the planning status of the lands.”

203. In finding that there is a requirement to obtain planning permission, the Agency is in reality making a decision that the extraction of peat by HP requires ‘development consent’ as a matter of EU law because it requires an EIA. Given the limitations on the Agency in terms of

their powers and functions, the conduct of an EIA under ss. 83(2A) and 87(1H) of the EPA Act is not adequate to meet the requirements of EU law as clear when one contrasts the respective powers of the planning authority and the Agency as regards remedial and mitigation measures where environmental impact is concerned.

Accordingly, it is my view that as a matter of law, pre-64 user notwithstanding, planning permission is required for the extraction of peat activity to which the licence application relates once it is accepted that an EIA is required as a matter of EU law. The requirement to obtain development consent in the form of planning permission derives from the requirements of EU law because Irish law does not provide another adequate mechanism which allows for the regularisation of development in accordance with the requirements of EU law. The Agency would require enhanced powers and functions similar to those of a planning authority were the IPC licence to be equated with a development consent process under the Directives. I cannot accept HP's argument that the reference to the requirement for an EIA in the decision letter amounts to an error of law. I am satisfied that as a matter of law the ratio in *Bulrush* as to the requirements for an EIA extends to commercial peat extraction even where it continues further to pre-64 development for which there was no requirement to obtain planning permission when planning regulation was first introduced. It seems to me that *Waterford County Council v. John A Wood* [1999] 1 I.R. 556 remains good authority insofar as it addresses the requirements of planning law *qua* planning but that it now falls to be read through the lens or prism of the requirements of EU environmental law and domestic obligations to meet those requirements. I am satisfied on the authority of *JJ Flood and Friends of the Irish Environment Ltd v. Minister for Communications* together with the decision in *Bulrush* that development consent sufficient to discharge obligations under the Directives in the Irish context necessitates an application to the planning authorities having regard to the relative scope of the powers of planning authorities and the Agency when it comes to regulating for environmental protection,

Does the activity require a licence?

204. The application for an injunction under s. 99H is made on the basis that it is a breach of s. 82(2) of the EPA Act for a person to carry on a specified or prescribed activity for Class 1.4 in the absence of a licence. In its letter of the 24th November 2020 rejecting the licence application the Agency advise that the extraction of peat by HP without a licence is in breach of the EPA Act. As set out above, HP does not accept that the Agency is correct and argue that

the premise for that conclusion and therefore for the s. 99H proceedings is wrong both as a matter of fact and law.

205. Notwithstanding that HP has made an application for a licence in accordance with the terms of its compromise of the earlier proceedings and its acceptance that the activity is subject to EIA requirements because it exceeds a 30 hectares area of extraction activity, it does not accept that it is in breach of a requirement to hold a licence. This is because HP contend that the area of peat extraction concerned does not exceed the licensable threshold of 50 hectares (para. 1.4 of the First Schedule to the EPA Act where it is provides that:

“The extraction of peat in the course of business which involves an area exceeding 50 hectares is subject to Part IV of the Environmental Protection Agency Act, 1992 and as a consequence requires a licence for the purposes of Part IV of the Act”.

206. They further point out that whilst they compromise proceedings on the basis that an application for an IPC licence would be made, there was nothing in that settlement agreement to limit or restrict in any way HP in the event that the application was not successful.

207. I agree with HP's submission (in reliance on *Fingal County Council v. Keeling & Sons Limited* [2005] 2 I.R. 108 where the Supreme Court concluded that no issue of estoppel can arise merely by the making of an application) that the making of an application for an IPC licence pursuant to a compromise of proceedings entered into does not preclude them from maintaining in these proceedings that as a matter of law no licence was required. In my view, the real question is whether they are in fact required to hold an IPC licence because they are involved in the extraction of peat in the course of business which involves an area exceeding 50 hectares.

208. As more fully set out above, I have concluded that all of the business carried on at Shrubbywood, Ballinealoe (Areas A and B) and Derrycrave (Areas F and G), Co. Westmeath (which are all located within the same overall peat land) should be regarded as a single unit for the purposes of the 50 hectares threshold. I reached this conclusion on the basis, *inter alia*, that the peat extraction activity which is occurring at Area G is part of a bigger area of bogland in which commercial peat extraction activity occurs. These areas are in proximity to each other

and and hydrologically connected to the Lough Derravaragh SPA, a European site protected under the Birds and Habitats Directives. I am satisfied that the 50 hectares threshold has been exceeded as Areas F & G alone have a total area of 128.04 hectares and the contiguous lands in Areas A and B have a total area of 74.55 hectares.

209. I am therefore satisfied that an IPC licence is required for HP's extraction activity in County Westmeath involving Areas A, B, F and G. As I have concluded that HP is involved in the extraction of peat in the course of business which involves an area exceeding 50 hectares over these four areas, it follows that HP is required to hold an IPC licence in respect of its peat extraction activity at these areas.

IS THE REFUSAL LETTER OTHERWISE DEFECTIVE CONSEQUENT UPON IRRELEVANT CONSIDERATIONS OR INADEQUATE REASONING?

210. The Agency was not only entitled to refuse to process the application but was obliged to do so where satisfied that the application concerned was one in respect of an activity for which development consent in the form of planning permission was required. As I have found above that the requirement to submit to EIA means that development consent in the form of planning permission was required for this project, I cannot accept HP's contention that the reference to the requirement to submit to an EIA to be an irrelevant consideration as it had argued.

211. While I have concluded that the decision of the Agency communicated by letter dated the 27th November 2020 is not vitiated by error of law and is not amenable to orders in judicial review proceedings on this basis, HP further argued before me that the decision was unsustainable consequent upon inadequate reasoning in the communication of that decision. I now turn to address this issue.

212. I agree with the submission made on behalf of HP that the letter containing the decision reflects an evolving position whereby the Agency moves from considering that planning permission *may* be required to a conclusion, a number of paragraphs later, that such permission *is* required without any basis or explanation as to how the second part of that position has been arrived at. The memorandum to the Board is capable of being read as advising the Board of the Agency that in the absence of the documentation specified under s. 87(1B) of the EPA Act,

the Agency was required to refuse to process the application. This is incorrect. The test under s. 87(1B) of the EPA Act is that the Agency is required to refuse to process the decision where the development concerned is one which requires planning permission. However, it appears from the decision letter itself, that the Agency properly identified that s.87(1C) was triggered by a decision on the part of the Agency that planning permission was required and that the Agency made this decision for the purpose of its reliance on s. 87(1C).

213. There is no reference at all in the record of the decision making process to the fact that HP maintained that the activity involved development for which a grant of permission is not required, essentially because the relevant activity commenced before the 1st October 1964 and being a pre-64 development, the activity, by virtue of s. 24 of the Local Government (Planning and Development) Act 1963, does not require planning permission.

214. Having said that the letter of the Agency of 24th November 2020 refers to a consideration that an EIA is required, where the Agency has a power but a duty in certain circumstances, to carry out an EIA in respect of licensing under the EPA Act, further explanation is required as to why this means that planning permission is required, even in respect of pre-'64 user. The context of this reference is not explained in the decision letter or the record of the decision and the Agency does not set out why its power to conduct an EIA is inadequate to ensure compliance with the requirements of EU law.

215. In circumstances where the Agency has a power to grant a licence under s. 87(1E) and to require the submission of an EIA in support of the application where development consent in the form of planning permission is not required, in my view further explanation was required to enable HP to understand the decision taken.

216. It seems to me that the test properly identified and applied by the Agency in refusing to process the application in reliance on s. 87(1C) was its correct conclusion that development consent in the form of planning permission was required for the development because of the need for an EIA. It is a separate matter as to whether reliance on the requirement is adequately reasoned or whether the basis for the decision is sufficiently clear from the letter. The Agency in their considerations underlying the determination that an EIA is required fail to properly explain how they reach this conclusion in the case of a pre-64 user. Where the Agency could itself carry out an EIA if they so considered one was required, no basis was given for in the

record of its decision for any determination as to why it was considered that because the activity the subject matter of the application required an EIA, the Agency were precluded from considering the application at all. It is my view that the Agency, in coming to such a conclusion, was obliged to explain why as a matter of EU law an EIA was required in respect of the peat extraction the subject of the licence application and why further an EIA under the EPA Act, 1992 was inadequate for the purposes of EU law and why this meant in turn that the requirement for an EIA gave rise to a requirement for development consent in the form of planning permission, even in respect of pre-'64 user.

217. It is not satisfactory that at no stage in the record of the decision-making process or the decision letter does the Agency address HP's claim that planning permission was not required because of a pre-64 user as it would be required to do if deciding that it could not process the application by reason of section 87(1C) of the EPA Act. Suggesting that a declaration under s. 5 that the development was exempt would be accepted by the Agency only addresses a case made that the development was exempt, not that it was not unauthorised because it pre-dated planning regulation. This is because there is no jurisdiction under s. 5 vested in the local authority or the Board to declare a pre-64 user. The provisions relied upon by the Agency to establish whether that s. 87(1) and (1C) has application cannot be addressed by the s. 5 procedure which procedure only involves a consideration of whether an activity is development or exempted development and cannot properly address an issue as to whether planning permission is required.

218. Similarly, the reference in correspondence and in the memorandum to the *Bulrush* case, without addressing the distinction that it was a case involving reliance on exemption regulations as distinct from the HP case where clear reliance was being placed on a pre-'64 user, is not sufficient to address HP's concern that the Agency failed to appreciate the distinction between the two and consequently did not have regard to the fact that different considerations may arise when dealing with an application for a licence where pre-'64 user is claimed, as opposed to an application in reliance on exemptions under regulation where those exemptions have been found to no longer apply.

219. Nothing in the reasoning advanced in the letter or the record of decision making explains why a pre-64 user does not mean that development consent in the form of a planning permission is not required where the Directives require an EIA. In my view, the decision is

inadequately reasoned and fails to provide appropriate reasons of a type that meet with the criteria set out by in *Connolly v. An Bord Pleanála* [2018] IESC 31. In *Connolly* Clarke C.J. at para. 5.4 of the judgment stated as follows:

“In my view it is of the utmost importance, however, to make clear that the requirement to give reasons is not intended to, and cannot be met by, a form of box ticking. One of the matters which administrative law requires of any decision maker is that all relevant factors are taken into account and all irrelevant factors are excluded from the consideration. It is useful, therefore, for the decision to clearly identify the factors taken into account so that an assessment can be made, if necessary, by a court in which the decision is challenged, as to whether those requirements were met. But it will rarely be sufficient simply to indicate the factors taken into account and assert that, as a result of those factors, the decision goes one way or the other.”

220. In *International Fishing Vessels Limited v. The Minister for The Marine* [1989] IR 149, Blayney J. held that in this context reason must provide (at para. 43):

“(1) It is common case that the Minister's decision is reviewable by the Court. Accordingly, the Applicant has the right to have it reviewed. But in refusing to give his reasons for his decision the Minister places a serious obstacle in the way of the exercise of that right. He deprives the Applicant of the material it needs in order to be able to form a view as to whether grounds exist on which the Minister's decision might be quashed. As a result, the Applicant is at a great disadvantage, firstly, in reaching a decision as to whether to challenge the Minister's decision or not, and secondly, if he does decide to challenge it, in actually doing so, since the absence of reasons would make it very much more difficult to succeed.”

221. In *Mallak v. The Minister for Justice, Equality and Law Reform* [2012] 3 I.R. 297, Fennelly J. stated at p. 321 and 322:

“In the present case, the applicant points to the effective invitation to the appellant to 'reapply for the grant of a certificate of naturalisation at any time.' That statement might reasonably be read as implying that whatever reason the Minister had for refusing the

certificate of naturalisation was not of such importance or of such a permanent character as to deprive him of hope that a future application would be successful. While, therefore, the invitation is, to some extent, in ease of the appellant, it is impossible for the appellant to address the Minister's concerns and thus to make an effective application when he is in complete ignorance of the Minister's concerns.

More fundamentally, and for the same reason, it is not possible for the appellant, without knowing the Minister's reason for refusal, to ascertain whether he has a ground for applying for judicial review and, by extension, not possible for the courts effectively to exercise their power of judicial review."

222. Importantly, Fennelly J. continued to state at p. 322 that:-

'In the present state of evolution of our law, it is not easy to conceive of a decision-maker being dispensed from giving an explanation either of the decision or of the decision-making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision-maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded.'

223. Clarke C.J. in the course of the judgment stated:

*"Following the above quoted statement at para. 66 of *Mallak*, Fennelly J. stated that there are:-*

'Several converging legal sources [which] strongly suggest an emerging commonly held view that persons affected by administrative decisions have a right to know the reasons on which they are based, in short to understand them.'

6.9. Therefore, Fennelly J.'s decision in *Mallak* points to at least two purposes served by the provision of reasons by a decision maker being, first, to enable a person affected

by the decision to understand why a particular decision was reached, but secondly, to enable a person to ascertain whether or not they have grounds on which to appeal the decision where possible or seek to have it judicially reviewed.

6.10. *It is possible to cite further recent decisions of this Court in this context to similar effect.*

6.11. *In [Meadows v. Minister for Justice \[2010\] 2 I.R. 701](#), Murray C.J. stated:-*

'An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context.

Unless that is so then the constitutional right of access to the courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective.'

6.12. *In my judgment in [Rawson v. Minister for Defence \[2012\] IESC 26](#), I stated at paragraph 6.8:-*

'As pointed out by Murray C.J. in Meadows a right of judicial review is pointless unless the party has access to sufficient information to enable that party to assess whether the decision sought to be questioned is lawful and unless the courts, in the event of a challenge, have sufficient information to determine that lawfulness. How that general principle may impact on the facts of an individual case can be dependent on a whole range of factors, not least the type of decision under question, but also, in the context of the issues with which this Court is concerned on this appeal, the particular basis of challenge.'

Similarly, in [EMI Records \(Ireland\) Limited & ors v. The Data Protection Commissioner \[2013\] IESC 34](#), I concluded at paragraph 6.5:-

'It follows that a party is entitled to sufficient information to enable it to assess whether the decision is lawful and, if there be a right of appeal, to enable it to assess the chances of success and to adequately present its case on the appeal. The reasons given must be sufficient to meet those ends.'

6.14. In [Oates v. Browne \[2016\] IESC 7](#), Hardiman J. stated at paragraph 47:-

'It is a practical necessity that reasons be stated with sufficient clarity that if the losing party exercises his or her right to have the decision reviewed by the Superior Courts, those Courts have the material before them on which to conduct such a review. Secondly, and perhaps more fundamentally, it is an aspect of the requirement that justice must not only be done but be seen to be done that the reasons stated must "satisfy the persons having recourse to the tribunal, that it has directed its mind adequately to the issue before it'.'

6.15. *Therefore, it seems to me that it is possible to identify two separate but closely related requirements regarding the adequacy of any reasons given by a decision maker. First, any person affected by a decision is at least entitled to know in general terms why the decision was made. This requirement derives from the obligation to be fair to individuals affected by binding decisions and also contributes to transparency. Second, a person is entitled to have enough information to consider whether they can or should seek to avail of any appeal or to bring judicial review of a decision. Closely related to this latter requirement, it also appears from the case law that the reasons provided must be such as to allow a court hearing an appeal from or reviewing a decision to actually engage properly in such an appeal or review".*

224. In the present case the Agency merely states its conclusion without setting out any reasons and without specifically addressing the matters raised by HP namely that the activity the subject matter of the licence was a pre-64 activity and as a consequence planning permission was not required. Nor is it possible to discern the approach taken from the decision documentation in a manner which would allow HP to understand why it had been concluded that planning permission was required notwithstanding its reliance on a pre-64 user and to be advised as to whether the decision was correct in law.

225. From reading the Agency's letter and the record of the decision-making process, I am not satisfied that the Agency gave consideration to HP's contention that s. 87(1C) of the EPA Act does not apply to activities which do not require planning permission on the basis of a pre-'64 user. From the record, the Agency's consideration appears to have been confined to circumstances where reliance was placed on an exemption as excusing from the necessity to obtain planning permission. HP is correct that the type of documentation provided for in s. 87(1B) will not ever be available in respect of a pre-64 user and there is no mechanism to provide conclusive proof by way of any statutory document of a type which is contemplated in s. 87(1B) in relation to that user.

226. Of course, this begs the question as to whose function it is to determine that development consent in the form of planning permission is required for pre-64 peat extraction and what decision-making capacity the Agency have in this regard. It would appear that s. 87(1C) of the EPA Act vests the Agency with a power to make a decision that planning permission is required in refusing to process an IPC licence application. I read this as meaning that the Agency has power to determine that development consent in the form of planning permission is required by reason of the requirement for an EIA. Insofar as it has this function, however, the Agency failed to demonstrate through the record of the decision making process or in its Decision letter that it considered the claim that planning permission was not required on the basis of a pre-'64 user, understood that this was different to a claim to an exemption.

227. While it might be inferred that the Agency decided that development consent in the form of planning permission was required notwithstanding the asserted pre-'64 user having regard to the same requirements of EU law which informed the decision of Meenan J. in the *Bulrush* case cited in the Agency's correspondence, because the decision does not address the pre-'64 claim as distinct from a claim to an exemption and explain why development consent in the form of planning permission is required notwithstanding the asserted pre-'64 user claim, in my view, the Agency does not adequately reason its decision. The record of the Agency's decision making under sections 87(1B) and (1C) of the EPA Act does not provide sufficient explanation to enable HP to understand the basis for the decision. In my view the decision under s. 87(1C) of the EPA Act is defective for want of adequate reasoning.

228. It is recalled, however, that a primary basis for the requirement to give reasons deriving from the tenets of constitutional justice is to ensure access to the Courts to permit an effective

challenge the decision should it be tainted by an error of law. In this case, HP has been hindered by inadequate reasoning in the decision letter or the limitations on such reasoning as may be deduced from the record of the decision. That said, it seems to me that while the position would have been far more straightforward had proper reasoning been advanced in the first instance, HP has in fact had a full opportunity to challenge the decision that planning permission was required over the course of the hearing which spanned four days.

229. In view of my finding that planning permission is required for the activity the subject of the licence application by virtue of the requirement to conduct an EIA and obtain development consent but the decision under s. 87(1C) of the EPA Act was defective for want of reasoning, it is therefore my preliminary view that the appropriate remedy may be declaratory relief rather than certiorari as it is not immediately evident that an order of certiorari would serve a purpose. I will hear the parties should they wish to contend otherwise.

APPLICATION FOR STATUTORY INJUNCTION

230. It is clear from the affidavit adduced by the Agency in these proceedings that HP is carrying out extraction of peat in the course of business, without a licence from the Agency. This is in contravention of the EPA Act where the 50-hectare threshold is met. The carrying out of peat extraction at this level without the environmental effects thereof having first been assessed constitutes a serious and ongoing breach of EU environmental law. In its application for injunctive relief, the Agency relies on s. 99H of the EPA Act, (as inserted by s. 15 of the Protection of the Environment Act 2003). Section 99H(1) provides for an injunction in the following terms:

“99H. — (1) Where, on application by any person to the High Court or the Circuit Court, that Court is satisfied that an activity is being carried on in contravention of the requirements of this Act, it may by order —

(*a*) require the person in charge of the activity to do, refrain from or cease doing any specified act (including to refrain from or cease making any specified emission),

(*b*) make such other provision, including provision in relation to the payment of costs, as the Court considers appropriate.

(2) An application for an order under this section shall be by motion, and the High Court or the Circuit Court when considering the matter may make such interim or interlocutory order as it considers appropriate....”

231. As apparent from the foregoing, s. 99H provides a self-contained statutory procedure whereby the Circuit Court or High Court can make orders for the cessation and prohibition of any specified act where satisfied that an activity is being carried out in contravention of the EPA Act. Failure to comply with an order under section 99H of the EPA Act is an offence (s. 99H(5))

232. I have concluded on the evidence that HP engages in peat extraction in the course of business which involves an area significantly in excess of 50 hectares. Based on its current activity alone, it is intensively extracting peat from its boglands at Derrycrave near Finnea, Areas F & G. HP is the registered owner of 67.24 hectares of land within these two Areas which are contiguous, technically and hydrologically connected and environmentally and ecologically comprise a single bog of 128.04 hectares. This alone means that the threshold is met. In addition, HP has previously carried out peat extraction, including associated activities which must be reckoned in accordance with the case law above, such as drainage of bogs, the creation of a siltation pond and storage of extracted peat, in Areas A and B (which again are contiguous within one another, comprising a single raised bog, and which also form part of an overall raised bog complex which also includes Areas F and G, as confirmed by the evidence of Dr. Crushell). I have concluded above that as the total area of A, B, F & G clearly exceed 50 ha. and these areas of bog are all part of the single bog complex west of Castlepollard which drain to the River Inny and into Lough Derravaragh, the existing activity at G requires that HP obtain a licence. The obligation to obtain a licence is established by reference to the proximity and connection of these areas of bogland.

233. At present HP’s current activity is concentrated at Area G which adjoins Area F which has already been extracted down to the marl, however orders are also sought under s. 99H of the 1992 Act regarding Areas A, B, D & E in circumstances where HP has previously extracted peat in Areas A & B and with extraction also having occurred in Area E1, a sub-area of Area E, and in the expectation that if ordered to cease peat extraction in one area, HP will simply

move to extract from other areas. Peat extraction involving an area exceeding 50 hectares is a specified activity for the purpose of Class 1.4 of the First Schedule to the EPA Act and the requirement for a licence is triggered at this threshold pursuant to s. 82 of the EPA Act. There is no dispute, but that HP continue to operate in the absence of any such licence at present. Having already determined that a licence is required, I am satisfied that an activity is being carried on in contravention of the requirements of this Act.

234. Accordingly, I must now decide whether I should exercise the power vested in the Court under s. 99H of the EPA Act by order to:

- (a) require the person in charge of the activity to do, refrain from or cease doing any specified act (including to refrain from or cease making any specified emission),
- (b) make such other provision, including provision in relation to the payment of costs, as the Court considers appropriate.

The jurisdiction under s. 99H of the EPA Act is broadly analogous to that of the courts under a section 160 application regarding unauthorised development (under the PDA 2000). There is one important distinction which in my view touches on the scope of the power rather than the exercise of the discretion, namely the use of the current tense in s.99H of the EPA Act with reference to an activity which is being carried on which contrasts with the more widely drawn power under the planning act which is referable to past, present and future actions. This difference in the scope of the power notwithstanding, I consider the authorities cited to me in relation to the exercise of the s. 160 discretion to be of persuasive force in guiding the principled exercise of my power under section 99H of the EPA Act. Thus, in *Ampitheatre Ireland Ltd v HSS Developments* [2009] IEHC 464 Hedigan J. held that the test to be met by an applicant in s. 160 proceedings is to satisfy the Court that there has been unauthorised development and thereafter that the Court should exercise its discretion to make an order in the applicant's favour. Similarly, the decision of Clarke J. (then in the High Court) in *Cork County Council v Slattery Precast Concrete Ltd* [2008] IEHC 291 outlines that while the Court retains a discretion as to what the appropriate course of action is where it is established that there has been unauthorised development (para. 12.1):

“...a court should be slow to tacitly accept the unauthorised nature of the development by giving any undue leeway to the party who has been guilty of the unauthorised development in the first place.”

235. The Court therefore found that discretion to do other than grant orders restraining the unauthorised development “should be exercised sparingly” (para. 12.1).

236. In argument, the Agency relied on *McCoy v Shillelagh Quarries Ltd* [2015] IEHC 838 (paras. 84-85), wherein the Court (Baker J.) held that the exercise of its discretion under s. 160 should be informed by reference to EU environmental law:

“I consider myself constrained further by the requirements of European Community law, and especially the EIA Directive and the Habitats Directive as each of these mandates that an Environmental Impact Statement is required in respect of the operation of this quarry.

Accordingly, were I to refuse injunctive relief or grant injunctive relief with respect to some of only of the operation, I consider that my decision would be one which could be characterised as a failure to respect the integrity of the environmental legislation, and allow the development to continue when it is unauthorised under Irish [law] and when Irish law arises as a result of the obligations of Ireland and Community law.”

237. It is now well established that there is an onus on the Court to ensure conformity with EU environmental law in exercising a discretion under section 160 of the PDA 2000, and, by analogy, s. 99H of the EPA Act. This has been recently recognised *Dunne v Guessford Ltd* [2021] IEHC 583 wherein and relying on the dicta of Baker J. in *McCoy*, Simons J. held that it would not be a proper exercise of the Court’s discretion to refuse relief under s. 160 where it was satisfied that unauthorised development had occurred. Moreover, in *Waterford City & County Council v Centz Retail Holdings Ltd* [2020] IEHC 634 Simons J. held that it would be contrary to the public interest in ensuring compliance with planning legislation to allow a commercial entity who had shown a reckless disregard for the statutory requirement to obtain

planning permission prior to the commencement of development to continue to trade and profit in the interim.

238. The discretionary factors applicable in a s. 160 context are, as identified by the Supreme Court in *Meath County Council v Murray* [2018] 1 IR 189 and amplified in *An Taisce v McTigue Quarries* [2018] IESC 54, as follows:

- (i) “*the nature of the breach: ranging from minor, technical, and inconsequential up to material, significant and gross;*
- (ii) *the conduct of the infringer: his attitude to planning control and his engagement or lack thereof with that process:- • acting in good faith, whilst important, will not necessarily excuse him from a s.160 order; • acting mala fides may presumptively subject him to such an order;*
- (iii) *the reason for the infringement: this may range from general mistake, through to indifference, and up to culpable disregard;*
- (iv) *the attitude of planning authority: whilst important, this factor will not necessarily be decisive;*
- (v) *the public interest in upholding the integrity of the planning and development system;*
- (vi) *the public interest, such as: • employment for those beyond the individual transgressors; or • the importance of the underlying structure/activity, for example, infrastructural facilities or services;*
- (vii) *the conduct and, if appropriate, personal circumstances of the applicant;* 25
- (viii) *the issue of delay, even within the statutory period, and of acquiescence;*
- (ix) *the personal circumstances of the respondent; and*
- (x) *the consequences of any such order, including the hardship and financial impact on the respondent and third parties.”*

239. Further, when referencing the above factors in *Meath County Council* (at para. 93), McKechnie J. stated:

“The weight to be attributed to each factor will be determined by the circumstances of a given case. Some, because of their importance, may influence

whether an order is or is not in fact made: others, the scope, nature or effect of that order. This list is not in any way intended to be exhaustive, and it may well be that other matters might require consideration in an appropriate case.”

240. This approach was applied in the context of the grant of a perpetual injunction under s. 160 in *Donegal County Council v P Bonar Plant Hire Ltd* [2021] IEHC 342.

241. Applying the above approach to the facts and circumstances of this case, I am satisfied on the evidence that HP is carrying out an activity in contravention of the EPA Act and therefore my discretion to do other than grant orders restraining the unauthorised development is limited. Further, however, I am required to exercise my discretion in a manner which conforms with the requirements of EU law which includes an obligation to exercise powers in a proportionate manner.

242. There are undoubtedly factors which militate against the making of the orders sought by the Agency. These factors require to be carefully weighed. In considering the weight to attach to these factors, I do so against a background where I am satisfied that, at least latterly, HP has engaged positively with the Agency in seeking to regularize its position and has applied for a licence in good faith. Its application was properly supported by an EIAR and a NIS. In my view it is not HP’s fault that the law in relation to peat regulation in the State has been in a state of flux and has changed even while its application for a licence was pending before the Agency. The responsibility for the State’s failure of effective regulation lies elsewhere. The background to peat regulation or lack thereof in the State is relevant to the more benign view I take to the culpability of HP for exploiting the environment for commercial gain when weighing and balancing the competing factors which inform the exercise of my discretion under section 99H of the EPA Act.

243. The historic lack of proper regulation apart, the main thrust of HP’s case against the exercising of discretion to make orders turns on alleged loss to its commercial interests and alleged financial impact on third parties in terms of the mushroom industry generally. HP contend that the mushroom industry which they supply mushroom casing products to on a year round basis would be unable to continue. The effect of this is an alleged impact on consumer choice, jobs and both domestic and export retail markets. It seems to me, however, that these

alleged effects are not quantified beyond bald averment that “*huge economic loss*” and “*enormous financial loss*” would occur. Nor is it clear that the business would, in fact be unable to continue. In this regard, HP also appear to envisage (para. 44 of Aidan O’Harte’s affidavit sworn on the 11th January 2021) being able to continue its business using imported peat. This does not sit easily with earlier averments suggesting the business would effectively be shut down overnight resulting in the collapse of the Irish mushroom industry. While the affidavit evidence in respect of alleged damage to HP’s business and third parties is vague and somewhat contradictory, I accept that any order made will have a significant impact and will likely result in large commercial losses. I am conscious of other public interest considerations beyond environmental concerns which include on the other side the employment of innocent parties which would be affected by the making of the order and the economic importance of the underlying peat extraction industry, not least for the mushroom industry. Accordingly, I consider it proper to weigh as a countervailing factor in making my decision on the proper or proportionate exercise of my discretion under section 99H in this case the fact that significant adverse economic consequences and financial hardship are likely to result from the making of an order in the terms sought.

244. With regard to the nature of the breach and the clear requirements of EU law, I am satisfied that the breach cannot be considered as other than material and significant even attaching a lower level of culpability to HP arising from historic lack of proper regulation. Given previous lack of legal clarity in this area and the fact that the issue of pre-64 user in the context of peat extraction has not previously been decided, I take the view that the conduct of HP, its attitude to planning control and its level of engagement with that process, while clearly not what it might have been, should not even now be characterised as *mala fides*. As already noted, the approach of HP to regulation of the peat extraction industry falls to be considered having due regard to the complexities arising from a failure on the part of the State to effectively regulate over time and a piecemeal approach which has required this Court to interpret domestic law expansively in order to ensure compliance with EU obligations. In turn, the requirements of EU law have crystallised incrementally through the case-law of the CJEU and domestic courts such that while some latitude is appropriate in weighing HP’s historic breach, this latitude diminishes as the law becomes clearer. Against the historic context regarding the treatment of peat extraction in the State and the piecemeal and ineffective approach of the State to its regulation, in my view historic breaches could not fairly or proportionately be considered gross even though the adverse environmental impact of

extensive unregulated peat extraction may be enormous. However, on foot of an emerging clarity in the law, continuing and ongoing breaches by reason of a failure to comply with regulatory controls lawfully imposed properly attract increasing levels of censure and opprobrium.

245. While there is a public interest in the mushroom industry, including industry employment and choice of product and while the impact is not addressed in very clear or satisfactory terms on affidavit, I agree with the Agency that this cannot outweigh the very serious environmental consequences of allowing HP to continue to carry on an unauthorised and wholly unregulated activity. Accordingly, although the evidence suggests and is accepted by me as establishing that where HP is restricted as to its peat extraction activity, there will likely be considerable downstream consequences and resulting economic hardship for dependent businesses and that businesses may fail with consequential loss of employment, I cannot properly permit these considerations to be determinative when measured against the threat to the environment presented by unregulated peat extraction activity having regard to the nature of the duties on me to ensure effective protection of the environment through the law.

246. As for the question of delay, it seems to me that this weighs on both sides of the scales. The failure of the Agency to act on foot of a breach of the requirements of EU law over a protracted period might suggest that the application is now infected with an artificial urgency which the Court should be slow to tolerate, whereas on the other hand the delay in requiring HP to regularize its position having regard to EU law environmental requirements also means that likely damage to the environment occasioned during the period of delay makes it the more imperative to finally and belatedly act now to bring peat extraction activity into compliance without any further delay. It is a relevant consideration in my view that even during the period it has taken for the licence application to be determined and for these proceedings to come on for hearing, HP have had ample opportunity to be advised, to make informed decisions and to present any application required to regularize its position. If it has not used this time to best advantage this is not a reason for the Court to refrain from making the orders necessary to ensure compliance with environmental law at this juncture.

247. Notwithstanding the factors which militate against the making of stringent orders requiring peat extraction work to cease, I consider the countervailing factors in support of the exercise of the discretion under s. 99H of the EPA Act to be more compelling. In particular,

the public interest safeguarding the environment and the duty on the Court to ensure compliance with the requirements of EU environmental law and guard against a situation which would permit those requirements to be circumvented, requires this Court to intervene to make orders under s. 99H of the EPA Act having regard, in particular, to the intensity of its current activity, including the depth to which HP is extracting, the fact that HP has been aware of the decision in *Bulrush & Westland* but continues to seek to advance arguments to the effect that it is not subject to regulation which are inconsistent with that authority and the evidence that unauthorised peat extraction activity, which is being carried out in the absence of any regulation, is having detrimental and irreversible environmental consequences on the lands in question (as more fully set out in the report of Dr. Patrick Crushell, Chartered Ecologist exhibited in the proceedings). In my view, the public interest in ensuring that peat extraction is carried out in compliance with both domestic and EU environmental law cannot be overstated and is the single most significant factor warranting the grant of the orders sought by the Agency.. It seems to me that were I to decline to make the orders sought, I would have failed to discharge the onus on me to apply the law in a manner which is effective, proportionate and dissuasive.

248. In circumstances where I have decided to make an order under s. 99H of the EPA Act in respect of the HP's peat extraction activity, I must also determine the scope of application of any order and most specifically whether it is appropriate to include the lands at D & E within the scope of any order where these lands have not been included by me in reckoning the area of activity for the purpose of triggering an obligation to hold a licence. In my view, any order the Court makes under s. 99H should be grounded by reference to an activity which is being carried out. In circumstances where no peat extraction activity is occurring at the lands at D & E and where they are not hydrologically or technically linked to the existing activity, it would in my view be an overreach for the Court to make an order in respect of the areas at D and E. The position might be otherwise were HP to shift its centre of attention to these areas following the making of orders under s. 99H contemplated in this judgment.

CONCLUSION

249. The contamination of Lough Derravaragh and adjoining surface waters with peat and peat-related siltation from upstream peat extraction facilities is a major environmental and

ecological concern. Peat extraction has already occurred in some parts of these lands right down to the marl at a depth of circa 5 metres. At this level of extraction, the evidence is that the bog is unlikely to ever regenerate.

250. The site visit reports and photographs exhibited to ground the injunction application graphically evidence the continued exploitation and deterioration of the peat lands. This exploitation has occurred without any regulation, including regulation as to the environmental effects thereof, whatsoever. It is no longer tenable for the State, be it through the Agency or the Court, to permit the extraction of peat without regulatory control as to its environmental impact.

251. I have concluded that in calculating thresholds and in exercising powers under s. 99H of the EPA Act it is necessary to have regard to the full extent of the bog in terms of hydrological connection, rather than focusing on the specific areas from which peat is being harvested at a point in time. For the reasons set out above, I have concluded that this is the proper interpretation of domestic law having regard to the legislative intention and the requirement to give effect to EU environmental law in the State. I propose to make the Orders sought at para. 1 of the Notice of Motion in respect of lands at G and F and at para. 2 in respect of lands at A, B, F and G.

252. Although there was an application for a stay before the Court in the judicial review proceedings, this application was not addressed in oral argument pending a determination of the substantive applications. Whilst I will hear the parties in relation to the question of a stay, my preliminary view subject to hearing from the parties is that any stay should be strictly conditioned as to time and should be for the purpose of permitting an appeal to be taken against my decision. In view of my decision on the s. 99H application and the reasons for it it seems to me that the question of a continuation of a stay beyond an initial short period related to the bringing of an appeal and having it listed before an appellate court should properly be a matter for the appellate court in the event that an appeal is pursued.

253. HP's application by way of judicial review has been partially successful in that whilst I have not found an error of law which would vitiate the decision communicated by letter dated the 27th November 2020, I do not consider that decision to have been properly reasoned.

254. I will hear the parties in relation to the appropriate form of orders and consequential matters relating to both sets of proceedings. The parties will have an opportunity to make short further submissions in writing and orally, should they so elect, before I rule on the question of a stay.