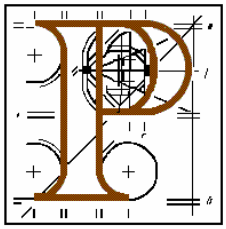
An Bord Pleanála Ref: 25. RL 2975

An Bord Pleanála



Inspector's Report

Question referred:	Whether the drainage of bogland, peat extraction and handling, the creation of accesses from public roads and other associated works are development or are exempted development
Location:	Lower Coole, Mayne, Ballinealoe & Clonsura, Co. Westmeath
Owned by:	1. Westmeath Peat Ltd. 2. Cavan Peat Ltd.
Occupied by:	Westland Horticulture Ltd.
Request by:	Friends of the Irish Environment Ltd.
Referred by:	Westmeath County Council
Date of site inspection:	13th June 2012
Inspector:	Stephen J. O'Sullivan

CONTENTS

1. SITE

The request to the planning authority concerned two pieces of land in the north-west of county Westmeath. The surrounding area is characterised by bog and coniferous forestry interspersed with pastoral land and residential settlement, most notably at the village of Coole. The southern piece of land is referred to as the Coole site in the request. It lies on either side of the Regional Road R395 less than 2km west of the village by the River Inny. Its area is given as between 250ha and 300ha. It extends into the townlands of Lower Coole, Mayne & Ballinealoe. The vegetation has been stripped from the land and peat extraction has occurred across it. The northern land is referred to as the Clonsura site. Its area is given as 150ha to 200ha. The vegetation has been stripped from the land and peat extraction has occurred across it.

2. PLANNING CONTEXT

Reg. Ref. 92/347 – the planning authority granted permission in 1992 for temporary staging areas for the loading of peat at Coole and Mayne Tds.

According to the EPA's website, Westland Horticulture Ltd made an application for an Integrated Pollution Prevention and Control licence to the EPA on 12th March 2010 in respect of the extraction of peat at Lower Coole, Mayne, Ballinealoe & Clonsura Co. Westmeath, reference no. P0914-01 refers.

25C. WW0406 – there is currently before the board an appeal against a decision of the county council to revoke a licence to discharge to surface waters in respect of a peat extraction operation at Shrubbywood on land adjacent to but outside the boundaries of the land which this referral is concerned.

None of the land described in the request is within the boundaries of a Natura 2000 site, but there are several in the vicinity, including the cSACs at Garriskil Bog to the south and Moneybeg & Clareisland Bogs to the north and the SPAs at Lough Sheelin and Derragh Lough to the north. Of most relevance is the SPA at Lough Derravaragh c1.5km to the south of the Coole site into which the land drains via the River Inny.

The conservation objective for the SPA at Lough Derravaragh, site code 004043, is to maintain or restore the favourable conservation status of the bird species that listed as Special Conservation Interests for this SPA, namely Cygnus cygnus [wintering], Aythya ferina [wintering], Aythya fuligula [wintering] and Fulica atra [wintering], and the wetlands that support them.

3. LEGISLATIVE PROVISIONS

PROVISIONS CONCERNING ENVIRONMENTAL IMPACT ASSESSMENT

Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (the EIA directive) was made by the council on 27th June 1985 and addressed to the member states of the community who were obliged to take the necessary measures to ensure its implementation by 3rd July 1988.

Article 2 of the directive requires member states to adopt all measures necessary to ensure that projects likely to have significant effects on the environment are subject to a requirement for development consent and an assessment with regard to their effects is carried out before consent is given (EIA).

Under Article 4(1) and Annex I of the directive, peat extraction with a site surface area that exceeds 150ha must be subject to EIA. Under Article 4(2) and Annex II other peat extraction is a type of project for which the member states may set criteria or determine on a case by case basis whether it should be subject to EIA. Article 4(3) and Annex III establish criteria to be used when thresholds or case by case determinations are being made about whether projects should be subject to EIA. These criteria are similar to those at schedule 7 of the Irish planning regulations, save that the schedule refers to proposed developments rather than projects.

It is relevant to note that the directive was addressed to member states and only has direct effect against those states and its emanations, including the board. It does not apply directly to private persons in the way national laws do. Nevertheless the board and other public bodies must have regard to the state's obligations under the directive in when they interpret the Irish legislation that transposes the directive into national law.

Section 176 of the Planning and Development Act 2000, as amended by section 56 of the Planning and Development (Amendment) Act 2010, states –

(1) The Minister may, for the purpose of giving effect to the Environmental Impact Assessment Directive, make regulations—

(a) identifying development which may have significant effects on the environment, and
(b) specifying the manner in which the likelihood that such development would have significant effects on the environment is to be determined.

(2) Without prejudice to the generality of subsection (1), regulations under that subsection may provide for all or any one or more of the following matters:

(a) the establishment of thresholds or criteria for the purpose of determining which classes of development are likely to have significant effects on the environment;
(b) the establishment of different such thresholds or criteria in respect of different classes of areas;
(c) the determination on a case-by-case basis, in conjunction with the use of thresholds or criteria, of the developments which are likely to have significant effects on the environment;
(d) where thresholds or criteria are not established, the determination on a case-by-case basis of the developments which are likely to have significant effects on the environment;
(e) the identification of selection criteria in relation to—
(i) the establishment of thresholds or criteria for the purpose of determining which classes of development are likely to have significant effects on the environment, or
(ii) the determination on a case-by-case basis of the developments which are likely to have significant effects on the environment.

(3) Any reference in an enactment to development of a class specified under Article 24 of the European Communities (Environmental Impact Assessment) Regulations, 1989 (S.I. No. 349 of 1989), shall be deemed to be a reference to a class of development prescribed under this section.

Article 93 of Part 10 the Planning and Development Regulations 2001 states –
The prescribed classes of development for the purposes of section 176 of the Act are set out in Schedule 5

Part 2 of Schedule 5 of the 2001 Regulations contains the following item –
2. Extractive Industry
(a) Peat extraction which would involve a new or extended area of 30 hectares or more.

Schedule 7 of the Planning and Development Regulations 2001 sets criteria for determining whether development would be likely to have significant effects on the environment. It reads –

1. Characteristics of proposed development

The characteristics of proposed development, in particular:
- *the size of the proposed development,*
- *the cumulation with other proposed development,*
- *the use of natural resources,*
- *the production of waste,*
- *pollution and nuisances,*
- *the risk of accidents, having regard to substances or technologies used.*

2. Location of proposed development

The environmental sensitivity of geographical areas likely to be affected by proposed development, having regard in particular to:

- the existing land use,
- the relative abundance, quality and regenerative capacity of natural resources in the area,
- the absorption capacity of the natural environment, paying particular attention to the following areas:

(a) wetlands,
(b) coastal zones,
(c) mountain and forest areas,
(d) nature reserves and parks,
(e) areas classified or protected under legislation, including special protection areas designated pursuant to Directives 79/409/EEC and 92/43/EEC,
(f) areas in which the environmental quality standards laid down in legislation of the EU have already been exceeded,
(g) densely populated areas,
(h) landscapes of historical, cultural or archaeological significance.

3. Characteristics of potential impacts

The potential significant effects of proposed development in relation to criteria set out under paragraphs 1 and 2 above, and having regard in particular to:

- *the extent of the impact (geographical area and size of the affected population),*
- *the transfrontier nature of the impact,*
- *the magnitude and complexity of the impact,*
- *the probability of the impact,*
- *the duration, frequency and reversibility of the impact.*

PROVISIONS CONCERNING APPROPRIATE ASSESSMENT

Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (the Habitats directive) was made by the council on 21st May 1992. It was addressed to the member states who were obliged to bring into force the laws necessary to comply with the directive within 2 years.

Article 3 requires a coherent network of sites to be set up under the title Natura 2000. The network of sites shall include the Special Areas of Conservation (SACs) designated under this directive and the Special Protection Areas (SPAs) designated under Council Directive 79/409/EEC (the Birds directive).

Article 6(3) of the directive obliges member states to ensure that any plan or project not directly connected with or necessary for the management of a Natura 2000 site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives. 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.

Again this directive has direct effect against the state and the board but not upon private persons. Its transposition into Irish law was mainly through the EC (Natural Habitats) Regulations of 1997. These regulations did not affect the exempted status of any development under the planning acts. Articles 14 to 18 of the regulations established a regime whereby any operations or activities likely to have significant adverse effects on the integrity of Natura 2000 site can be regulated by the relevant Minister and subject to appropriate assessment as needs be.

PROVISIONS CONCERING THE DEFINITION OF DEVELOMENT AND OF EXEMTPED DEVELOPMENT UNDER CURRENT LEGISLATION

Section 2(1) of the Planning and Development Act 2000 states *inter alia* –

"agriculture" includes horticulture, fruit growing, seed growing, dairy farming, the breeding and keeping of livestock (including any creature kept for the production of food, wool, skins or fur, or for the purpose of its use in the farming of land), the training of horses and the rearing of bloodstock, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and "agricultural" shall be construed accordingly;
……..
"unauthorised use" means, in relation to land, use commenced on or after 1 October 1964, being a use which is a material change in use of any structure or other land and being development other than—

(a) exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act), or
(b) development which is the subject of a permission granted under Part IV of the Act of 1963 or under section 34 of this Act, being a permission which has not been revoked, and which is carried out in compliance with that permission or any condition to which that permission is subject;
……..
"works" includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal…..

Section 3(1) of the 2000 Act states –
In this Act, "development" means, 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.

Section 4 of the 2000 Act, as amended by section 17 of the Environment (Miscellaneous Provisions) Act 2011 is as follows –

4.—(1) The following shall be exempted developments for the purposes of this Act—

(a) development consisting of the use of any land for the purpose of agriculture and development consisting of the use for that purpose of any building occupied together with land so used;

(b) development by the council of a county in its functional area, exclusive of any borough or urban district;

(c) development by the corporation of a county or other borough in that borough;

(d) development by the council of an urban district in that district;

(e) development consisting of the carrying out by the corporation of a county or other borough or the council of a county or an urban district of any works required for the construction of a new road or the maintenance or improvement of a road;

(f) development carried out on behalf of, or jointly or in partnership with, a local authority that is a planning authority, pursuant to a contract entered into by the local authority concerned, whether in its capacity as a planning authority or in any other capacity;

(g) development consisting of the carrying out by any local authority or statutory undertaker of any works for the purpose of inspecting, repairing, renewing, altering or removing any sewers, mains, pipes, cables, overhead wires, or other apparatus, including the excavation of any street or other land for that purpose;

(h) development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures;

(i) development consisting of the thinning, felling or replanting of trees, forests or woodlands or works ancillary to that development, but not including the replacement of broadleaf high forest by conifer species;

(ia) development (other than where the development consists of provision of access to a public road) consisting of the construction, maintenance or improvement of a road (other than a public road) or works ancillary to such road development, where the road serves forests and woodlands;

(j) development consisting of the use of any structure or other land within the curtilage of a house for any purpose incidental to the enjoyment of the house as such;

(k) development consisting of the use of land for the purposes of a casual trading area (within the meaning of the Casual Trading Act, 1995);

(l) development consisting of the carrying out of any of the works referred to in the Land Reclamation Act, 1949 , not being works comprised in the fencing or enclosure of land which has been open to or used by the public within the ten years preceding the date on which the works are commenced or works consisting of land reclamation or reclamation of estuarine marsh land and of callows, referred to in section 2 of that Act.

(2) (a) The Minister may by regulations provide for any class of development to be exempted development for the purposes of this Act where he or she is of the opinion that—

> *(i) by reason of the size, nature or limited effect on its surroundings, of development belonging to that class, the carrying out of such development would not offend against principles of proper planning and sustainable development, or*
>
> *(ii) the development is authorised, or is required to be authorised, by or under any enactment (whether the authorisation takes the form of the grant of a licence, consent, approval or any other type of authorisation) where the enactment concerned requires there to be consultation (howsoever described) with members of the public in relation to the proposed development prior to the granting of the authorisation (howsoever described).*

(b) Regulations under paragraph (a) may be subject to conditions and be of general application or apply to such area or place as may be specified in the regulations.

(c) Regulations under this subsection may, in particular and without prejudice to the generality of paragraph (a), provide, in the case of structures or other land used for a purpose of any specified class, for the use thereof for any other purpose being exempted development for the purposes of this Act.

(3) A reference in this Act to exempted development shall be construed as a reference to development which is—

(a) any of the developments specified in subsection (1), or
(b) development which, having regard to any regulations under subsection (2), is exempted development for the purposes of this Act.

(The following sub-sections 4 and 4A were inserted by section 17(1) of the Environment (Miscellaneous Provisions) Act 2011)

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

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

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

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

to be exempted development.

(5) Before making regulations under this section, the Minister shall consult with any other State authority where he or she or that other State authority considers that any such regulation relates to the functions of that State authority.

Section 17(2) of the Envionment (Miscellaneous Provisions) Act 2011 states –

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

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

(b) completed not later than 12 months after such commencement,
unless, immediately before such commencement, the development was being carried on in contravention of the Act of 2000 or regulations under that Act.

Section 17 of the Environment (Miscellaneous Provisions) Act 2011 came into force on 21st September 2011 by operation of Statutory Instrument. No. 474/2011.

Section 5 of the 2000 Act states –

(1) *If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter.*

(2) *(a) Subject to paragraph (b), a planning authority shall issue the declaration on the question that has arisen and the main reasons and considerations on which its decision is based to the person who made the request under subsection (1), and, where appropriate, the owner and occupier of the land in question, within 4 weeks of the receipt of the request.*

(b) A planning authority may require any person who made a request under subsection (1) to submit further information with regard to the request in order to enable the authority to issue the declaration on the question and, where further information is

received under this paragraph, the planning authority shall issue the declaration within 3 weeks of the date of the receipt of the further information.

(c) A planning authority may also request persons in addition to those referred to in paragraph (b) to submit information in order to enable the authority to issue the declaration on the question.

(3) (a) Where a declaration is issued under this section, any person issued with a declaration under subsection (2)(a) may, on payment to the Board of such fee as may be prescribed, refer a declaration for review by the Board within 4 weeks of the date of the issuing of the declaration.

(b) Without prejudice to subsection (2), in the event that no declaration is issued by the planning authority, any person who made a request under subsection (1) may, on payment to the Board of such fee as may be prescribed, refer the question for decision to the Board within 4 weeks of the date that a declaration was due to be issued under subsection (2).

(4) Notwithstanding subsection (1), a planning authority may, on payment to the Board of such fee as may be prescribed, refer any question as to what, in any particular case, is or is not development or is or is not exempted development to be decided by the Board.

…….

Article 6(3) of the Planning and Development Regulations 2001 states –

Subject to article 9, in areas other than a city, a town or an area specified in section 19(1)(b) of the Act or the excluded areas as defined in section 9 of the Local Government (Reorganisation) Act, 1985 (No. 7 of 1985), development of a class specified in column 1 of Part 3 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 3 opposite the mention of that class in the said column 1.

Article 9 of the 2001 Regulations states –

(1) Development to which article 6 relates shall not be exempted development for the purposes of the Act—

……

(c) if it is development to which Part 10 applies, unless the development is required by or under any statutory provision (other than the Act or these Regulations) to comply with procedures for the purpose of giving effect to the Council Directive,……

Article 11 of the 2001 Regulations states –
Development commenced prior to the coming into operation of this Part and which was exempted development for 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 the Act.

Class 17 of Part 3 of Schedule 2 of the 2001 Regulations was as follows –
(a) Peat extraction in a new or extended area of less than 10 hectares.
(b) Peat extraction in a new or extended area of 10 hectares or more, where the drainage of the bogland commenced prior to the coming into force of these Regulations.

The class was amended in 2005 to read as follows –

Column 1	*Column 2*
Description of Development	*Conditions and Limitations*
Peat extraction	
CLASS 17	
(a) Peat extraction in a new or extended area of less than 10 hectares, or	*1. No such peat extraction shall be likely to have significant effects on the environment by reference to the criteria set out in Schedule 7.*
(b) Peat extraction in a new or extended area of 10 hectares or more, where the drainage of the bogland commenced prior to the coming into force of these Regulations.	*2. Paragraph 1 shall not apply to peat extraction -*
	(i) on a European site where such development is regulated by the European Communities (Natural Habitats) Regulations 1997, or any Regulations or enactment amending or replacing those Regulations, or
	(ii) on a site prescribed under article 12 where such development is regulated by the Wildlife (Amendment) Acts 1976 and 2000, or any enactment amending or replacing those Acts.

and then amended back again in 2011

PROVISIONS REGARDING TIME LIMITS ON ENFORCEMENT

Section 157(4) of the 2000 act, as amended by section 28 of the 2010 act and section 47 of the 2011 act states –

(a) No warning letter or enforcement notice shall issue and no proceedings for an offence under this Part shall commence—

(i) in respect of a development where no permission has been granted, after seven years from the date of the commencement of the development;
(ii) in respect of a development for which permission has been granted under Part III, after seven years beginning on the expiration, as respects the permission authorising the development, of the appropriate period within the meaning of section 40 or, as the case may be, of the period as extended under section 42 .

(aa) Notwithstanding paragraph (a) a warning letter or enforcement notice may issue at any time or proceedings for an offence under this Part may commence at any time in respect of unauthorised quarry development or unauthorised peat extraction development in the following circumstances:

(i) where no permission for the development has been granted under Part III and the development commenced not more than 7 years prior to the date on which this paragraph comes into operation;
(ii) where permission for the development has been granted under Part III and, as respects the permission—

(I) the appropriate period (within the meaning of section 40), or

(II) the appropriate period as extended under section 42 or 42A,

expired not more than 7 years prior to the date on which this paragraph comes into operation.

(ab) Notwithstanding paragraph (a) or (aa) a warning letter or enforcement notice may issue at any time to require any unauthorised quarry development or unauthorised peat extraction development to cease and proceedings for an offence under section 154 may issue at any time in relation to an enforcement notice so issued

(b) Notwithstanding paragraph (a), proceedings may be commenced at any time in respect of any condition concerning the use of land to which the permission is subject.

(c) It shall be presumed until the contrary is proved that proceedings were commenced within the appropriate period.

PROVISIONS REGARDING THE DEFINITION OF DEVELOMENT AND OF EXEMPTED DEVELOPMENT UNDER PREVIOUS LEGISLATION

Section 265(1)(a) of the 2000 Act states –

Nothing in this Act shall affect the validity of anything done under the Local Government (Planning and Development) Acts, 1963 to 1999, or under any regulations made under those Acts.

Section 2(1) of the Local Government (Planning and Development) Act 1963 states that, save where the context requires otherwise –

*"*agriculture*" includes horticulture, fruit growing, seed growing, dairy farming, the breeding and keeping of livestock (including any creature kept for the production of food, wool, skins or fur, or for the purpose of its use in the farming of land), the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, the use of land for turbary, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes, and "*agricultural*" shall be construed accordingly*

Section 3(1) of the 1963 Act states that –
*"*Development*" in this Act means, save where the context otherwise requires, the carrying out of any works on, in, or under land or the making of any material change in the use of any structures or other land.*

Section 4(1) of the 1963 Act states that –

The following shall be exempted developments for the purposes of this Act:

(a) development consisting of the use of any land for the purposes of agriculture or forestry (including afforestation), and development consisting of the use for any of those purposes of any building occupied together with land so used;
……
(i) development consisting of the carrying out of any of the works referred to in the Land Reclamation Act, 1949 .

Section 4(4) of the 1963 Act as inserted by the EC (Environmental Impact Assessment) Regulations, 1989 states –

(a) The Minister may, in connection with the Council Directive, prescribe development or classes of development for the purposes of this subsection.

(b) Notwithstanding paragraph (a) of subsection (1) of this section, development which is prescribed for the purposes of this subsection shall not be exempted development.".

Section 1 of the Land Reclamation Act 1949 defines works as follows –

*"*works*" refers to the following or any of them:—*

(a) field drainage;

(b) land reclamation;

(c) the construction and improvement of watercourses;

(d) the removal of unnecessary fences;

(e) the construction of new fences and the improvement of existing ones;

(f) improvement of hill grazing;

(g) reclamation of estuarine marsh land and of callows;

(h) any operations ancillary to the foregoing.

Article 13 of the Local Government (Planning and Development) Regulations 1994 states –

The prescribed development for the purposes of sub-section (4) (inserted by the Environmental Impact Assessment Regulations) of section 4 of the Act of 1963 shall be—

(a) the use of uncultivated land or semi-natural areas for intensive agricultural purposes, where the area involved would be greater than 100 hectares,

(b) initial afforestation, where the area involved would be greater than 200 hectares, or the replacement of broadleaf high forest by conifer species, where the area involved would be greater than 10 hectares,

(c) peat extraction which would involve a new or extended area of 50 hectares or more.

4. THE REQUEST

A request for a declaration under section 5 was made to the planning authority on 16th November 2011. It referred to the drainage of bogland, peat extraction and handling, the creation of accesses from public roads and other associated works at Lower Coole, Mayne, Ballinealoe and Clonsura that are the subject of an application to the EPA for a licence No. P0914-01 made by Westland Horticulture Ltd. The request cites Class 17 of Part 3 of Schedule 2 of the planning regulations, as amended in 2005, that establishes an exemption for peat extraction in certain circumstances but which excludes from that exemption extraction that is likely to have significant effects on the environment by reference to the criteria set out in schedule 7 of the regulations. The requester argues that peat extraction in the said townlands would be likely to have a significant effect on the environment by virtue of: emissions to air of dust and greenhouse gases; emissions to water of nutrients, sediments, dissolved organic carbons and heavy metals; changes in hydrology; downstream effects on habitats include the Special Protection Area (SPA) at Lough Derraverragh. The request argues that peat extraction in the areas described would be likely to have a significant effect on the environment because it would cause emissions to air and water, would alter hydrology and have direct impacts on flora and fauna as well as downstream impacts on the Special Protection Area (SPA) at Lough Derravaragh. Its cumulative impact with the peat extraction and forestry in the area between Lough Derravaragh and Sheelin should be considered. The area is environmentally sensitive due to the very low regeneration capacity of the bog; the designation of Lough Derravaragh as an SPA; and the water quality status of the River Inny. The environmental impact of the peat extraction in question would be large in terms of area, magnitude, complexity, probability, duration, frequency and irreversibility. The significance of the environmental impact of the peat extraction is therefore established. It requires environmental impact assessment (EIA) and appropriate assessment (AA) and it could not be regarded as exempted development. Therefore the activity is unauthorised development, the request alleges. The request was accompanied by two reports prepared by the requester after visits to the sites which conclude that the extraction of peat from particular parts of the sites has intensified since 2005.

Report by the planning authority

A report by the Senior Executive Planner of the planning authority noted the environmental sensitivity of the area due to the proximity to the SPA at Garriskill Bog 4km away, the Special Area of Conservation (SAC) at Lough Lene 8km away, and the SPA at Lough Derraverragh which is 1km away. The existing peat activity and works is subject to appropriate assessment. The subject site extends to 200ha and would be subject to Environmental Impact Statement. Under section 4 of the planning act, as amended in 2011, works requiring appropriate assessment or environmental impact assessment are not exempted development. This provision does not apply to development that commenced before the 21st September 2011 and was completed within 12 months and was in keeping with the previous provisions of planning legislation. Therefore the works appear to constitute

development and not exempted development. However the owners of the site should be given the opportunity to comment on the application.

The planning authority issued a request for further information to Westland Horticulture Ltd. seeking any documentary evidence or observations that it may have on the application. The response from **Westland Horticulture Ltd.** can be summarized as follows –

- The company can only respond regarding activities at Lower Coole, Mayne and Ballinealoe. The land at Shrubbywood it outside is boundaries and operates independently.

- A Senior Planner of Westmeath County Council confirmed in 1992 that the site did not require an EIS as it had been developed prior to EIS legislation in 1990, with affidavit evidence going back as far as the 1940s. Therefore the current section 5 application is not relevant to the company's activity. The activities at the townlands of Lower Coole, Mayne and Ballinealoe predate the 2001 regulations and there has been no further new or extended development of 10ha or more since then. An appropriate assessment of the potential impact on Natura 2000 sites was submitted to the EPA in support of an application for an IPPC licence.

- Drainage of the bog commenced as far back as 1982. Neither the EPA nor the county council has expressed concern or dissatisfaction with environmental issues associated with the activity on the land the company occupies. With regard to schedule 7 of the 2001 regulations, it should be noted that no development is proposed on the company's land. The associated claims of the requester are irrelevant, inaccurate and unfounded. The peat harvesting activity was developed before January 2002. An application was made for an IPPC licence in March 2010 and the company has been co-operating with the EPA since then in providing all the required information. The company is not responsible for other lands and it would be unreasonable to pin it with responsibility for any accumulation of development in the area between Lough Sheelin and Lough Derravarragh, much of which has been carried out by government bodies. No concerns with pollution or nuisances have been raised by the relevant statutory bodies. The company has developed an environmental management plan and has co-operated with county council regarding discharge licences. Appropriate assessments have been submitted to the EPA and the county council. The request did not specify what impacts the operation would have. It is a seasonal activity from May to early September, so it is not of long duration or constant frequency. Proposals for bog rehabilitation have been submitted to the EPA as part of the licence application. Neither the fisheries board nor the National Parks and Wildlife Service have reported any issues regarding the activity that the company is responsible for and the quality of waters. The legal opinion provided to the company is that the requirement for an EIA does not apply because there was no new or extended development of more than 30ha since 2001

and the company has never been formally asked to complete an environmental impact statement. The matter was considered by the planning authorities in 1992. The impact on any Natura 2000 site is the subject of appropriate assessment with which the applicant has co-operated after requests by the environment section of the county council and the EPA. The reports submitted with the request include inaccurate and spurious claims, many of which referred to lands outside the company's control. The environment section of the county council is satisfied that there were no breaches on the company's discharge licence.

5. THE REFERRAL

Upon receipt of the response from the occupier of the land, the planning authority referred the request to the board citing –

- The legal complexity of the matter, including the possible retrospective application of the EIA provisions
- The altered legal framework over the duration of the use
- The implications of the Habitats Directive
- The fact that a request regarding similar activity has been referred to the board previously.

6. OBSERVATIONS

The observation from **Westmeath Peat Ltd.**, the owner of one of the pieces of land , can be summarised as follows –

- The company owns the lands at Lower Coole, Mayne and Ballinaloe. It is a subsidiary of Cavan Peat Ltd. which owns the lands at Clonsura.

- Whether or not planning permission is required must be judged on the basis of the law that applied when the use commenced rather than on provisions that were introduced subsequently.

- The land does not lie within either a Special Protection Area or a Natural Heritage Area. The company occupying the land observes the highest environmental standards and has voluntarily submitted an appropriate assessment to Westmeath County Council. It has a wastewater discharge licence and has applied for an Integrated Pollution Prevention and Control licence. The only outstanding item in the latter application is the planning status of the applicant. Dredging works on the River Inny were carried out by the OPW and not the occupier.

- The activity carried out on the site is exempt from planning because it began before the appointed date of 1st October 1964. A planning permission was granted in 1992 under Reg. Ref. 92/347 for a storage area for peat extracted from these bogs. During the consideration of that application the Senior Executive Planner with the council concluded that planning permission was not required for the continued harvesting of peat at this location, based on affidavits submitted by local people that the bog had been worked before 1963. The activities on the site also pre-date the commencement date of the EIA directive in February 1990. There has been no new or extended area of either 50ha or 30ha since the coming into force of the directive so the requirement for an EIA does not apply. This was also the conclusion of the county council in 1992. There are no unknown impacts of the peat extraction in the area. The submission quotes a letter from the Minister of the Environment dated 19th August 2009 that reports that the National Parks and Wildlife Service have found no evidence of significant or measureable impacts on the SPA at Lough Derravaragh.

- Sections 2 & 4 of the Local Government (Planning and Development) Act 1963 included use of land for turbary within the definition of agriculture and stated that the use of land for agriculture was exempted development. The Planning and Development Act 2000 did not include turbary within the definition for agriculture. The Planning and Development Regulations 2001 can into force on 21st January 2002. They included exemptions for certain peat extraction at Class 17 of Part 3 of Schedule 2. The legislators clearly recognized that there were existing peat extraction operations at the time and the legislation was drafted to protect and

legitimize those existing operations while bringing new or extended peat extraction developments within the ambit of planning legislation. The criteria for exemption in the new legislation is clear and simple and relates to whether: the bog was drained; the drainage of the bog had commenced before 21st January 2002; and there was a new or extended area of 10 hectares or more.

- The submission states as a matter of fact that the bog was drained, that that drainage commenced before 21st January 2002 and that there was no new or extended area of 10ha or more. Aerial photographs from 1995 and 2000 are submitted to demonstrate this. Westmeath Peat Ltd. bought the land in the early 1980's as a working bog. Peat had been actively removed in the preceding years as attested to in affidavits, copies of which are submitted. The planning authority inspected the site in 1992 in connection with the application by Hunt Peat Ltd. under Reg. Ref. 92/347 and concluded that the peat extraction activity was pre-1963 and so exempt development and that an EIA was not required for the activities on Folio 6292F. Copies of the relevant internal reports are submitted. They clearly state that the bog was drained. So the matter before the board had been considered and adjudicated upon 20 years ago by the county council and there has been no change in circumstances that would justify the board overturning that decision 20 years later. Section 265 of the 2000 act and the Environment (Miscellaneous Provisions) Act 2011 provide that peat harvesting still remains exempt even though an appropriate assessment has been carried out because the peat extraction on all of the company's land was carried out before 25th September 2011 and was not in contravention of the Planning and Development Act 2000 or the regulations made thereunder.

- Under section 157(4)(aa) of the planning act, as amended by the 2010 Planning and Development (Amendment) 2010 a warning letter or enforcement notice can only be issued in respect of the operation of a quarry or the extraction of peat where the development was carried out not more than 7 years before this section comes into operation. This further illustrates the intention of the legislature to legitimize existing peat extraction activity such as the activity on the bog in question where the development was certainly carried out more than 7 years before the 2010 act came into operation. The 2005 regulations cited by the requester only apply to new or extended developments and not to the company's lands.

- Copies of several documents were appended to the submission, including a solicitor's letter that states that because peat extraction had commenced on the land on Folio 6292F before the coming into force of the 1963 Local Government (Planning and Development) Act 1963 then the continuance of that use does not require planning permission. Also included were copies of affidavits submitted to the planning authority in 1992 in support of the application for planning permission by Hunt Peat Ltd. under Reg. Ref. 92/347 stating that the bog had been worked for several decades before then. There is also a copy of a memo from the Senior

Executive Planner for the council that states that, on the basis of those memos, the council should not contest the applicant's position that the use of the bog for commercial and domestic peat extraction has occurred for 40 years. There is a copy of letter from the Minister for the Environment, Heritage and Local Government dated 19th August 2009 stating that the National Parks and Wildlife Service has reported that there is no evidence of significant or measureable impact on the SPA at Lough Derraverragh from peat extraction in the vicinity. Other appendices contain aerial photographs and correspondence from the requester, Bord na Mona, the planning authority and former occupiers of the site.

The observation from the occupier of the land, **Westland Horticulture Ltd.**, can be summarised as follows –

- The same covering letter appears on the submissions from the occupier and the owner of the land that states that the lands have been used for turbary/peat extraction since before the 1963 act came into force and that the drainage commenced since before 21st January 2002. An application to the EPA for an IPPC licence awaits confirmation of the planning status of the site. The occupier has carried out an appropriate assessment which is attached to the submission. The carrying out of the assessment does not affect the exempt status of the land because the occupier of the site was carrying out peat extraction activities in a manner that was not in contravention of the 2000 Act or the regulation made thereunder on 17th September 2011 when section 17(2) of the Environment (Miscellaneous Provisions) Act 2011 came into force and was entitled to continue such operations with the benefit of section 265 of the 2000 act. The use of the land for peat extraction is therefore exempt development.

- The occupying company states that it has been proactive in engaging with the IPPC licensing process and are fully committed to operating its peat extraction activity in a regulated manner. The appropriate assessment that the applicant carried out for the EPA indicated that there was no issue with a Natura 2000 site and any reference to the assessment to demonstrate the contrary is incorrect. The Environment Section of the council did not make any negative submission to the appropriate assessment that completed on 10th February 2011 and submitted to the EPA. The assessment concluded that there would no significant impact arising on the Natura 2000 site from our activities either locally or in combination with other impacts. There is no basis to suggest that the occupier has failed to co-operate with the EPA. The question of planning on the site was raised and answered in 1992 when planning was received for the loading area on the site and the entire peat harvesting area and it was accepted by the planning authority as having exempt status and also confirmed that an EIA was not required. A legal opinion from a barrister was submitted to the EPA on 14th February 2011 upon receipt of which the EPA

requested written confirmation of exemption from the planning authority. The planning authority advised the company to seek a declaration under section 5. The company stated that the matter was not relevant and expressed their frustration at the entire process that was stopping its activities from being regulated by the EPA under the IPPC licensing process. The Environment Section of the council was aware of the conclusions of the appropriate assessment but this is not reflected in the internal communications with the planning department. The council were fully aware that the exempted development had commenced on the site before 21st September 2011 and so the amendments in the 2011 act do not apply. The EIA directive came into force in 1985 and it was well after this that the council adjudged the development to be exempt and not requiring and EIA in 1992.

- The submission was accompanied by a copy of the appropriate assessment report that the company submitted to the EPA and a letter from the consultants who prepared that report. The report states that screening for an appropriate assessment concluded that the site operations could pose a risk to the qualifying interests at the SPA at Lough Derravaragh which is 1.6km downstream of the site as a result of a reduction in water quality that might cause a risk to species such as Pochard, Tufted Duck and Coot. Therefore a full Natural Impact Statement was prepared. It concludes that it can be objectively concluded that the proposed project on its own and in combination with other plans and projects will not adversely affect the integrity and conservation status of any Natura 2000 site or annexed species once certain mitigation measures and recommendations are adopted. The covering letter from the consultants points out that no significant environmental effects on Natura 2000 sites were concluded as a result of the Stage 2 Natura Impact Assessment for the occupier.

The observation from Westland Horticulture Ltd. was circulated for comment. The **requester** responded as follows –

- The requester did not allege who carried out dredging of the River Inny.
- A Natura Impact Statement is not itself an appropriate assessment. It is the report provided to a competent authority to make an appropriate assessment.
- Detailed criticisms are made of the NIS submitted by the occupier.
- The submission reiterates the previous statements that intensification in peat extraction appears to have occurred since the requirement for EIA was introduced.

7. WHETHER A SUITABLE CASE IS BEFORE THE BOARD

The section 5 procedure

Apart from the new sub-section 5(8) introduced in 2011, Section 5 of the 2000 act provides a simple mechanism by which a planning authority or the board can be asked to make a declaration in a particular case about what might be development or exempted development. It requires a person requesting a declaration to provide all necessary information. It also provides for time limits, requests for further information, the issuing of declarations to the owners and occupiers of land 'where appropriate', and referrals to the board. It may be noted that the procedures are rather sparse. Neither the act nor any subsequent regulations specify how a case that is the subject of a request might be described, other than the requirement for it to be 'particular'. This would indicate that a generic or speculative case could not form the basis of a declaration. It would also imply that the subject matter of the request should not be matter of fact that is in dispute, which is to say that the case should not be stated as an allegation that something had happened. Rather a request should be able to state definitively what acts were proposed, without the planning authority having to undertake investigations of a person's past behaviour to clarify what the acts concerned actually are before it can determine their status as development or exempted development. There is no procedure for public notice of a request to be made. This is not surprising because there is no provision for persons to make submissions on a request for a declaration or to communicate with the deciding authority unless that authority has asked them to. So there is no procedure to ensure a person who might be effected by a declaration has been afforded the opportunity to state his position to the declaring authority if that authority has not done so of its own volition. This raises the question as to how such person might be effected by a declaration. The act does not explicitly state that a declaration would actually have any effect. It does not provide that such a declaration establishes the planning status of any act or thing, nor that the existence of a declaration either precludes or supports any enforcement action taken under part VIII of the acts. A planning authority might appear foolish if it attempted to take enforcement action against a person who had previously received a declaration from the authority stating that his acts were not development or were exempted development. A court might give be expected to give some weight to a declaration by an expert body such as the board inasmuch as it related to planning matters. But if were the case that a declaration depended on a matter of statutory interpretation or a question of fact, then there would be no reason for a court to defer to it.

Section 5 should therefore be regarded as a simple and relatively inexpensive process that can provide comfort to a prospective developer regarding the status of clearly defined proposals in relation to the requirement to obtain permission under the planning acts. It does not provide an appropriate mechanism to determine allegations of unauthorized development because the board has neither the legal powers nor the expertise to investigate prior acts by persons; or to resolve conflicting accounts of such acts; or to make judgements of such acts that would carry penal or other legal consequences. This is why the courts are given the central role in the enforcement procedures set out in part VIII of the

act, and the board none at all. The board should therefore avoid making any declaration under section 5 of the act that strays outside the narrow confines of that section into the realm of enforcement either because the declaration is based on accounts of fact that are open to reasonable dispute, or because it implies that any person's prior acts were culpable in a legal sense. Similarly, the fact that there may be a bar to taking enforcement action with respect to any alleged unauthorised development relates to a separate legal process. It does not affect that status of any actions or series of actions as development, exempted development or otherwise.

Neither should the section 5 procedure be regarded as a consent process required under the EIA or Habitats Directives. The 2011 amendments to section 4 of the 2000 act brought the exempted development regime under national planning law into compliance with those directives and so made screening for EIA and appropriate assessment an essential component of the section 5 process. However screening is only the initial stage in the control over projects required by the directives. Its integration into the national law on exempted development avoids that law being used to defeat the purposes of the directives. However achieving those purposes requires an ability to seek, distribute, publish and assess technical information about the likely effects of a project and the power by a public authority to control, amend or prevent such projects. The section 5 procedure does not allow for this. Only an application for permission would. Therefore, once the likelihood of significant effects on the environment or on the conservation objectives of a Natura 2000 sites, it would not serve any useful purpose for those effects or measures to mitigate them to be assessed outside an application for permission.

Whether a proper case for a declaration has been stated

So the board has to satisfy itself that the present case is an appropriate one on which to make a declaration – that the case is clearly described and singular enough to be regarded as 'particular' and capable of being declared as development or as exempted development - and that such declaration can be done without the board exceeding its powers and trespassing onto the role assigned to the courts for enforcement by Part VIII of the 2000 act.

The sites to which the request refers are defined with reasonable clarity on the maps submitted by the requester. The location and boundaries of the sites shown on those maps is consistent with what was observed at the time of inspection. The type of operations and acts with which the request is concerned were described in the text of the request and the referral by the planning authority and by reference to the licence application to the EPA. They are comprised of the works to extract peat across on the two sites and ancillary works including the provision of drainage and access to facilitate the extraction of peat, and the handling of peat on the sites. The observed condition of the sites was consistent with such operations having been carried out heretofore on the sites and an intention by their occupiers to continue to carry out such operations. So the description of land and of works is sufficiently precise to form a basis for a declaration.

There is an issue regarding the making of a request that encompasses two separate pieces of land that are not contiguous, and whether this would prevent the case from being sufficiently 'particular' to form the basis for a declaration. Nevertheless it is not considered that this would not justify the board refusing to deal with the referred request. While the sites are not contiguous, there appears to be a connection in their ownership and occupation. Furthermore the environmental impact of the works upon them is closely connected in a manner that has a direct bearing on whether the works on any individual site would be likely to have significant effects on the environment and thus, under the 2011 act, whether those works amount to exempted development. This is due to their proximity to one another, their location in the same drainage basin, the similar habitats and soils upon them, and the fact that the works upon them are similar in character and are exploiting the same finite natural resource. If an individual request had been made for any of the sites, then the planning authority and the board would have had to consider the works upon it in cumulation with the other site, and indeed the other sites on which peat extraction works are being carried out in the area. The connection between them is in no way random or arbitrary, but relates directly to the criteria set out in law to determine whether the described works are exempted development. If there are any grounds to distinguish between the status of the works on each of the sites, then the board could make a declaration that reflected that fact. The board may therefore proceed to consider the request as referred to it by the planning authority. This requires an understanding of the planning law that refers to peat extraction. My advice in this regard is set out below.

8. THE APPLICABLE LAW

Statutory interpretation by the board

In order to fulfil its duties under section 5 of the planning acts as they arise in this case the board will have to interpret the primary and secondary planning legislation that applies to peat extraction. I advise the board to do so in the manner set out below. However it should be noted that the board's powers do not extend beyond planning matters into decisions on matters of law, so no special authority would attach to whatever interpretation of the law it chooses to adopt.

The distinction between works and use in the definition of development

Under sections 2 of both the 1963 and the 2000 acts, the term 'works' includes any act or operation of excavation. Under sections 3 of both 1963 and 2000 acts development means the carrying out of works on, in or under land or the making of any material change in the use of land. These two types of development are not exclusive. The same act or series of acts might be development both because it involves works and also because it involves making a material change of use to land. The submission that any case must be regarded as one or the other for the purposes of planning law is a fallacy, as stated in the judgment of Keane J. given on 18th May 1998 in the decision of the Supreme Court in Kildare County Council and Thomas Peter Goode, Theresa Goode & Goode Concrete, 207/97. That judgment had regard to the provision in section 2 of the 1963 act, that is repeated in the 2000 act, which states that the term 'use' does not include the use of the land by the carrying out of works thereon. However it did not interpret that provision as separating development into exclusive categories of use and works. Rather that provision operated to avoid the carrying out of works by itself and of itself being regarded as a separate use from the end that those works served so that, for example, the works required to build an agricultural shed should not be regarded as using the land for 'building' in a way that was different from the established and intended use for agriculture of the land on which the building took place. The said court case involved quarrying of land, but the concepts it established are also applicable to peat extraction in that both involve works to excavate part of the land and remove the resulting material. The case law on quarrying seems to be far more extensive than that relating to peat extraction. This is probably because for depth of the ground that could comprise organic peat is usually much less than the depth of inorganic material sought in quarrying, so the former activity tends to be less intensive then the latter. The bogs on which it is located also tend to be removed from settled agricultural land. So it is not surprising that peat extraction has given less cause for disputes between persons or complaints to public authorities than quarrying.

Having regard to the foregoing the board is advised that extracting peat is an operation which involves works on, in and under land. As such it constitutes development in and of itself. Starting to extract peat from land where peat was not previously extracted might involve a material change in the use of that land that constituted development. Starting a sustained and heavily mechanized campaign to exploit on a commercial basis the peat

resources of a piece of land that had previously been subject to occasional peat harvesting might involve an intensification of a use that amounted to a material change, and so constitute development. However the development that arose from the material change of use would be in addition to the continuous development that was occurring while works were being carried out on, in and under the land to extract peat. Continuing to extract peat from land is development even when peat had been extracted on a similar basis from the land before.

However in many cases that development would be exempted development. Section 4(1)(a) of the 1963 act stated that development consisting of the use of land for agriculture was exempted development. There is a line of thought that holds that the section 4(1)(a) exemption only applied to changes of use and could never be applied to works. This approach is mistaken, for several reasons. It is not consistent with the Supreme Court decision in Kildare County Council vs. Goode cited above which criticized an undue distinction between development as works and development as use, and which restricted the line of authority that emerged from the previous case of Central Dublin Development Association Ltd. vs. A-G 109 ILTR 69 to matters concerned with financial compensation. I am not aware of any Supreme Court decision since Goode in 1998 that re-established the dichotomy.

Neither is the exclusion of all works from the exemption given by section 4(1)(a) supported by a careful reading of the legislation. The sub-section did not refer to the 'change of use' of land to agriculture as exempted development, it referred to use. If the Oireachtas had meant to restriction the exemption to apply changes of use only, it would have referred to changes of use. It did not. The distinction between using land for something and changing its of use has a fundamental effect on whether development has occurred or not, as section 3 of the act makes clear. So to hold that the phrase 'use' in the act should be taken as meaning 'change of use' would require an assumption that a very poor standard of draftsmanship was achieved in the act's composition. Furthermore, the ordinary meaning of the phrase 'use of land for the purpose of agriculture', as understood by most speakers of English, would include ordinary and recurring farming activities – like ploughing, digging or fertilizing – that constitute acts of excavation or renewal on or in land, and so amount to works under section 2 of the act and therefore development under section 3. While the act and the consequent regulations provide specific exemptions for some large scale occasional works that would be for agricultural purposes, such as building structures or reclaiming land, there is no other specific exemption for more frequent works to land involved in agriculture. It would be an absurd proposition to hold that the Oireachtas intended planning permission to be required before farmers or gardeners carry out such works. However to hold that they did not constitute some kind of development would require the actual definitions of works and development in sections 2 and 3 of the act to be disregarded. It would provide a far more coherent interpretation of the wording and purposes of the legislation to regard such normal and recurrent works on land as part of the development exempted by the use of land for the purposes of agriculture, even if separate

exemptions or grants of permission were required for larger scale or occasional works to alter the character of land or build structures.

This interpretation of section 4(1)(a) might be seen to fall foul of the reference to the term 'use' in section 2 of the 1963 act that is mentioned above. However, again, this objection is not sustained by a close reading of that provision. It does not provide a definition of "use" but a qualification of the term. It states "use" in relation to land does not include the use of the land by the carrying out of any works thereon. Its effect is therefore that the carrying out of any works alone is not a separate use of land. It does not establish the converse exclusion, that the use of land does not include the carrying out of works necessarily involved in that use. If the Oireachtas had meant to insert such an exclusion, then this could have been achieved with a simper wording that stated instead – *"use" in relation to land does not include the carrying out of any works thereon.* It did not do so.

The 1963 act

The definition of agriculture in section 2 of the 1963 explicitly included use as turbary. Use as turbary was therefore exempted development. This exemption would clearly apply to the change of use of any land to a turbary. However using some piece of land as a turbary necessarily implies that works will be carried out there to excavate and remove peat. If those works did not occur then the land would not be in use as a turbary. The exempted status for use as turbary therefore necessarily applied to the development that is comprised of the works on land to extract peat, otherwise the reference to turbary in the act would be redundant. The board is therefore advised that both a material change of use of land to turbary and works carried out to extract peat were exempted development under section 4(1)(a) of the 1963 act. So a grant of planning permission was not required to begin, continue or complete the extraction of peat from a particular piece of bog or to carry out works that were strictly ancillary to that use or those works. This status is consistent with the overall purposes of the 1963 act, which were directed mainly towards the encouragement and positive direction of development and the preservation of particular amenities rather than environmental regulation and the management of established rural activities.

The directive on environmental impact assessment

The EIA directive of 1985 introduced a different imperative. It placed an obligation on the state to control various types of projects that would be likely to have a significant effect on the environment and to ensure that an assessment was made of such effects before consent for them was given. Peat extraction was one such type of project. An assessment was mandatory for such extraction over an area of more than 150ha. For peat extraction on smaller sites, the state was obliged the establish thresholds or criteria to ensure that particular projects likely to have significant effects on the environment was subject to prior assessment.

While the directive itself applied to the state and not to any private person, it formed the basis for a series of changes to the planning law that did govern the subsequent acts of such persons. An enabling provision was inserted into the 1963 act by the EC (Environmental Impact Assessment) Regulations of 1989 that allowed the Minister to change the exemptions granted by section 4(1)(a) of the act in order to give proper effect to the directive. The minister exercised this power under article 13 of the 1994 planning regulations which removed the exempted status for peat extraction that would involve a new or extended area of 50 hectares or more from the 16th May 1994 onwards. The reference to 'new or extended area of 50ha' meant that the exemption for use as turbary still applied to works to continue to extract peat from bog that was already used as turbary, and obviously to any change of use or works to extract peat on less than 50ha of land that had not been so used previously.

The 2000 act and consequent regulations

The introduction of the 2000 act changed the fundamental status of peat extraction under planning law, although the practical effect of the change was limited by consequent regulation. The definition of agriculture in section 2 of the 2000 act omitted the reference to turbary that had been included in section 2 of the 1963 act. Therefore the exemption for use as turbary that applied under section 4(1)(a) of the 1963 act was not repeated under section 4(1)(a) of the 2000 act. Development that consisted of material changes of use and works to land for the extraction of peat therefore lost the benefit of a general statutory exemption when section 4 of the 2000 act came into force on 21st January 2002. However regulations made by the minister under section 4(2) did provide specific exemptions for the development involved in peat extraction in certain circumstances (as opposed to the 1994 regulations which removed a general exemption for development involved in peat extraction in particular circumstances). Article 6 and then Class 17 of part 3 of schedule 2 of the 2001 planning regulations provided an exemption for peat extraction in a new or extended area of less than 10ha, or in an area of more than 10ha where the drainage of bogland had commenced before the regulations came into force. An additional limitation was introduced into this class on 14th July 2005 stating that it did not apply if the peat extraction was likely to have significant effects on the environment by reference to the criteria set out in schedule 7 of the regulations. Article 9(1)(c) had already stated that development to which Part 10 of the regulations applied, which deals with EIA, would not be exempted development under article 6. This would remove the exemption under article 6 for peat extraction on a new or extended area of more than 30ha because this category of development appeared at part 2.2.a of schedule 5 of the regulations but it would not affect an exemption given outside article 6. So a limited exemption from the requirement to obtain planning permission was provided by regulation for development that comprised changes of use and works for peat extraction to new land that had not previously been so used.

With regard to land that had already been used as turbary, anything that had already been done legally when the 1963 act was in force of course remained legal, as section 265 of the

2000 act makes clear. This would apply to any change of use that had occurred and any works that were done before 21st January 2002. However, as stated above, ongoing works to extract peat are themselves development. So further works to land to extract peat on those lands would require either a grant of permission or an exemption from the need for such a grant. Article 11 of the 2001 regulations provides such an exemption. It does not refer to any particular category of development, but provides a general saver by stating that development that was commenced before the coming into force of the regulations and which was exempted development under the 1963 continues to be exempted development. The normal illustration of the operation of such a saving provision is the building of a house that began but was not finished before the planning acts came into force. The building works required to finish the house after the act came into force are development to which the act applies, but it may be considered unreasonable to subject them to a separate requirement for planning permission when they were contemplated and commenced as part of a series of works to a particular end when that end did not require planning permission. Similarly, the fact that new peat extraction works on a particular bog are a continuation of a series of such works that had commenced as exempted development does not imply that the new works are not themselves development. However the minister found it reasonable to give the benefit of an exemption to such works to allow the completion of a series of works that could be reasonably seen as having been contemplated before the general exemption for peat extraction was removed in 2002. However this exemption would only apply to the continuation of the type of peat extraction works that had commenced as exempted development until the exhaustion of the peat resources on that land without abandonment or intensification. An intensification of operations or a resumption of abandoned operations that amounted to a material change in the use of the land would not benefit from the exemption provided in article 11 of the 2001 regulations. There was no limitation on the operation of article 11 with respect to development that would be likely to have significant effects on the environment and so require an EIA.

The 2011 act

However there were further amendments to section 4 of the 2000 act that sought to reconcile the law on exempted development with the state's obligations under the EIA directive to control and carry out a prior assessment of the impact of projects that are likely to have significant effects on the environment. The 2010 act brought in an amendment with a new section 4(4) that stated that no development that required environmental impact assessment or an appropriate assessment was exempted development if it commenced after the said section of the act came into operation. This provision would not have effected any continuing development that had the benefit of exemption under article 11 of the 2001 regulations. It did not come into force. Under the Environment (Miscellaneous Provisions) 2011, a different section 4(4) was inserted into the 2000 act. It states that development is not exempted development if it requires EIA or an appropriate assessment. A different sub-section 17(2) of the 2011 act stated that this new restriction on exemption would not apply to development that commenced before the relevant section of the 2011 act came into operation (that date was 21st September 2011) and was completed

not more than 12 months later. This provision does effect continuing development that has the benefit of the exemption granted under article 11 of the 2001 regulations. It means that if the development is likely to have significant effects on the environment or on a Natura 2000 site, then its exempted status would cease on 21st September 2012. So works to extract peat that would be likely to have such effects and require EIA or AA will not be exempted development after 21st September 2012 even if they are being carried out on the same land and in the same manner as peat extraction works that were exempted development before that date. The 2011 act and the 2010 act also changed to time limits on enforcement action set out in section 154 of the 2000 act that apply to peat extraction. However neither these amendments or the original provisions of section 154 define the status of anything as development or as exempted development and so they are not relevant to the duties of the board under section 5 of the act.

Conclusion
So, to summarize the above –

- Peat extraction was exempted development under section 4(1)(a) of the 1963 act because agriculture was defined to include use of land for turbary.

- The EC (Environmental Impact Assessment) Regulations of 1989 allowed the minister to restrict the statutory exemptions in section 4(1)(a) of the 1963 act. He did so when making the Local Government (Planning and Development) Regulations 1994 and removed the general exemption for peat extraction on land of more than 50ha where such extraction was not previously being carried out.

- The 2000 act brought in a different regime. There was no general exemption for peat extraction. There was a specific exemption in under article 6 and Class 17 of part 3 of schedule 2 of the 2001 regulations for peat extraction on new land up to 10 hectares or where drainage had already commenced. In 2005 this class was amended to make it clear that it did not apply to development that required environmental impact assessment. Peat extraction that continued on land where such extraction was already occurring as exempted development under the 1963 act continued to be exempted development by virtue of article 11 of the 2001 regulations, but this would not exempt any intensification in the manner of peat extraction that amounted to a material change of use of the land.

- The 2000 act was amended by the Environment (Miscellaneous Provisions) Act 2011 so that the definition of exempted development in planning law was made clearly subservient to the state's obligations under the EIA directive. The amended section 4 of the 2000 act states that no development could be exempted if it was likely to have significant effects on the environment and so require an environmental impact assessment. This applies to any new development, but also on any ongoing development that was not completed by 21st September 2011.

Different interpretations of the law on the status of peat extraction as development or exempted development are conceivable. Some have been advanced in the submissions on this case explicitly, others are implied by those submissions. I am advising the board to use the interpretation set out above. It may choose to interpret the law differently for reasons it sees fit. However if it decides to do so I would remind it that it should not adopt an interpretation that would be contrary to the state's duty to ensure that projects that are likely to have significant effects on the environment are subject to a consent process and prior assessment of their impact. That duty lies directly upon the organs of the state, including the board and the courts.

9. WHETHER DEVELOPMENT

The subject matter of the referred request includes the extraction of peat from the two sites and the provision of drainage and access to facilitate such. This involves ongoing acts and operations of excavation and occasional acts of alterations and so constitutes 'works' within the meaning given in section 2 of the 2000 act. The said works occur on, in or under land and so constitute development under section 3 of the 2000 act. The relevant provisions in sections 2 and 3 of the 1963 act were the same as those of the 2000 act, so any peat extraction and ancillary works on the sites constituted development since October 1964.

The request also refers to the handling of peat. The situation with regard to the handling of peat is different. That is an activity that is carried out on the land, but it is not comprised of works that alter the character of the land by excavation, improvement, renewal or otherwise. So it does not necessarily constitute development as ongoing works, although the commencement of such activity on a piece of land might introduce a material change of use that did constitute development. However in this case the peat handling is ancillary to peat extraction. So that activity would not have given rise to a separate change of use from that caused by the commencement or intensification of peat extraction, and so it would not have constituted any distinct development.

It is apparent from an inspection of the sites that they have been subject to peat extraction on an intensive, continuous and organized basis. It appears that the intention of the occupier is that such extraction will continue. The use of the peatland on the sites in such a manner is fundamentally different in its planning character and environmental impact than the occasional peat extraction and extensive grazing that might have been the use of the bogs historically. No assertion to the contrary has been made in the submissions made in connection with the request or referral. It must therefore be concluded that a material change of use of the site occurred when intensive peat extraction began. This material change of use must have occurred since October 1964. If it had commenced before that date and not been abandoned since, then the peat resources the site would probably have been depleted by now and the matter would not be before the board. It is therefore concluded that the commencement of intensive peat extraction on the sites was a development under section 3 of either the 1963 or the 2000 acts as a material change of use, in additional to the development comprised of the actual and ongoing works carried out to extract the peat.

The subject matter of the present case is therefore development.

10. WHETHER EXEMPTED DEVELOPMENT

Much of the content of the submissions made in connection with the request and referral addresses the question of when the present use of the sites for peat extraction in an intensive and sustained manner began. The occupier and owner assert that this occurred before the law required a grant planning permission for such a change of use. The requester made submissions that cited particular facts that would support an argument that such use of the site began more recently than that, so that the it should not be regarded as exempted development having regard to the restrictions on the area of peat extraction that could benefit from exemption that were introduced in the 1994 and 2001 regulations, and further by the limit that refers to significant environmental effects introduced in 2005.

There are grounds to support both positions on this particular topic, although that put forward by the occupier and owner of the sites seems more convincing. The date on which the intensive extraction of peat began on the site is important in determining whether the development involved is exempted either as regards the making of a material change in the use of the lands or the carrying out of works on the lands. As stated in section 7 of this report above, the board has no inherent power to resolve disputes regarding matters of fact or to investigate and make findings as to the previous conduct of any person. The simple wording of section 5 of the act and the sparse procedures set out there could not be taken as implying such powers. They certainly do not allow the board to impugn anyone's good name by making a declaration based on a conclusion that somebody did something unlawful, even unwittingly, based on a finding of fact when another reasonable finding of fact is available that would avoid such an implication. This means that, in this case, the board should proceed on the assumption that the intensive extraction of peat began on the sites before the exempted development status of use as turbary granted by the 1963 act was first restricted by the 1994 regulations. This assumption is consistent with the observable facts on the ground and is necessary to avoid the board exceeding its competence under section 5 and straying into the jurisdiction of the courts under part VIII of the act.

Proceeding on that assumption and the interpretation of statues and regulations outlined in section 8 of this report above, the board is advised that the material change of the use of the sites that was caused by the development that is the subject of this referral was exempted development under section 4(1)(a) of the 1963 act because it involved use as turbary which was included in the definition of agriculture in section 2 of that act. No subsequent change in the nature or intensity of the use of the sites for the extraction of peat has occurred that would constitute development. The continuation of peat handling is not works and is not development. The development consisting of the works to the land on the site to extract peat and facilitate the extraction of peat also comprise use of the land for turbary and so benefit from the exemption granted under section 4(1)(a) of the 1963 act. The exemption provided by section 4(1)(a) of the 2000 act would not apply to these works carried out after 21st January 2002 because use of the land for turbary was omitted from the definition of agriculture in section 2 of the 2000 act. However because these works were

commenced as exempted development under the 1963 act they continued to be exempted development under the 2000 act by virtue of article 11 of the 1994 regulations. Article 11 was not heretofore qualified or limited by reference to the likelihood of any development that it exempted having significant effects on the environment or upon any Natura 2000 site.

Therefore the development that is the subject of this request and referral was and is at the date of this report exempted development, whether or not it would require an environmental impact assessment or an appropriate assessment.

BUT

The amendment to section 4 of the 2000 act brought into effect by section 17 of the Environment (Miscellaneous Provisions) Act 2011 and the commencement order SI 474 of 2011 supersedes article 11 of the regulations with regard to development that requires environmental impact assessment or appropriate assessment. It states categorically that it shall not be exempted development. It also makes clear that this applies to any development that is not completed by 21st September 2012 even if it had commenced previously as exempted development. The change of use of the sites to intensive peat extraction (including the commencement of ancillary peat handling) is a completed development and is not affected by this change. The development consisting of works to extract peat from the sites is also the subject of this referred request. That development is not complete but ongoing. Therefore if the continuation of the works to extract peat and facilitate such extraction from the site requires environmental impact assessment or appropriate assessment then such works will be development and not exempted development from the 21st September 2012 onwards. This matter is considered below.

11. ENVIRONMENTAL IMPACT ASSESSMENT AND APPROPRIATE ASSESSMENT

In order to determine whether the ongoing works described in the referred request are exempted development, the board must determine whether they would require an environmental impact assessment or an appropriate assessment. The first question depends upon a judgment as to whether they would be likely to have significant effects on the environment by reference to the categories set out in schedule 5 and the criteria set out in schedule 7 of the 2001 regulations (as amended). The second depends upon a judgement as to whether it would be likely to have a significant effect on any Natura 2000 site, either individually or in combination with other projects. Screening development to determine whether it requires environmental impact assessment or appropriate assessment is an integral part of the decision making processes set out in the EIA and Habitats Directives respectively for which the board is the competent national authority. These matters are therefore within the particular competence and expertise of the board.

Environmental impact assessment

Schedule 5 only refers to peat extraction in new areas of more than 30 ha and so does not apply in this case where peat extraction is assumed to have been ongoing since before the regulations were made. When judged in relation to the criteria set out in schedule 7, it is clear that the development comprised of the extraction of peat and ancillary works both the sites would be likely to have significant effects on the environment and so require an environmental impact assessment because –

- In relation to the characteristics of the development: the size of each of the areas of peat extraction is large, exceeding the threshold of 30ha established for peat extraction in new areas; the effect of peat extraction there would be cumulative with the other sites cited in the request and several other large peat extraction areas in close proximity in the same drainage basin; it would involve the use by excavation of a natural resource which is not renewable to any significant degree; and it has the potential to give rise to significant pollution arising from emissions to water.

- In relation to location: the geographical area in which the development would occur is of particular environment sensitivity due to the very limited regenerative capacity of the peatland in the area compared to the extent and intensity of its ongoing exploitation; and with respect to the restrictions of the area's absorption capacity paying attention to the wetlands there and the Natura 2000 sites in the vicinity, most importantly the SPA at Lough Derraverragh.

- In relation to the characteristics of the potential impact: it should be noted that the loss of peat resources and bog arising from the development is certain and irreversible; and while the probability of water pollution would be less (but only if proper mitigation measures had been demonstrated in an EIA), the magnitude of such an impact would be great and it would be very difficult to reverse.

A submission from the occupier objected to the screening of works on the sites for the need for EIA that based its conclusions in part of the likely impact of other activities in the area that the occupier does not control. However the actual text of the directive and the national legislation that transposes it makes it clear that consent authorities have a duty to do precisely this when consideration whether a development requires EIA, or for that matter an appropriate assessment.

The continued extraction of peat and other ancillary works on each of the sites raised in the referred request would therefore be likely to have significant effects on the environment and require environmental impact assessment. Indeed, after inspection of the sites I cannot imagine any reasonable basis to conclude otherwise. It might be that a consent authority may, after having regard to an EIS and any mitigation measures described therein, and to the result of consultation with other expert bodies and with the public, decide that the likelihood or magnitude of the residual impact of the development on the environment (compared to whatever public benefit that it might give) would not justify withholding consent for the project. In this case it is perfectly conceivable that the mitigation measures that are concluded to be necessary are similar to those already being implemented by the occupier on the sites. However these are matters to be considered by a consent authority in the course of an environmental impact assessment before any consent is given. They are irrelevant to the question of whether an environment impact assessment is necessary in the first place. Furthermore the relevant consent authority would be the planning authority on application or the board on appeal. The EPA is not a consent authority for EIA.

Appropriate assessment

The continued extraction of peat and other ancillary works on each of the sites cited in the request causes a risk of emissions to surface waters that drain to Lough Derraverragh. The conservation objectives of the SPA at Lough Derravarragh include the maintenance of the conservation status of the wetland habitats there which support species listed in Annex I of the Birds Directive. The said development would therefore be likely to have significant effects on a Natura 2000 site, and such effects are even more significant when considered in combination with the other peat extraction that takes place in the same drainage basin. It would therefore be necessary for an appropriate assessment of the works to be carried out before public authorities considered whether to agree to their continuation in order to comply with the requirement of article 6 of the Habitats Directive. It may be noted that this is also the conclusion of the expert reports submitted by the occupiers of the sites. It is possible that information could be presented to a consent authority that demonstrated that the development would not have an adverse impact on the integrity of that SPA or any other Natura site, possibly using mitigation measures similar to those currently being implemented by the occupier on the site. However this is the issue to be determined in the course of an appropriate assessment by the appropriate deciding authority,. It is not relevant to the question of whether the appropriate assessment is necessary in the first place. Furthermore, while the technical information submitted by applicant and advice

from the NPWS area an important part of the appropriate assessment process, the actual decisions in that are made by the planning authority on application or the board on appeal.

Conclusion

The development comprised of works to extract peat from each of the sites requires environment impact assessment and appropriate assessment. Therefore it will cease to be exempted development from 21st September 2012.

12. SUMMARY OF CONCLUSIONS AND RECOMMENDATION

The peat extraction and ancillary works on the sites that are the subject matter of the request and referral constitute development both by virtue of the material change in the use of the lands that they caused and the ongoing works on land that they involve. Both were exempted development under section 4(1)(a) of the 1963 act because section 2 of that act included use of land for turbary in its definition as agriculture. The change of use of the lands was completed before the exemption granted to use as turbary by section 4(1)(a) of the 1963 was qualified by the 1994 regulations and then omitted from the 2000 act. The works that commenced on the site as exempted development under the 1963 act continued to be exempted development by virtue of the article 11 of the 2001 regulations. However the development comprised of the continuation of the works for peat extraction on each of the sites would be likely to have significant effects on the environment as judged by the criteria set out in schedule 7 of the 2001 regulations. It would also be likely to have a significant effect on the SPA at Lough Derraverragh. Such development would therefore require environmental impact assessment and appropriate assessment. It would therefore cease to be exempted development if carried out after 21st September 2012 due to the restriction of the scope of exempted development arising from the amendment of section 4 of the 2000 act by section 17 of the Environment (Miscellaneous Provisions) Act 2011.

I therefore recommend that the board make a declaration as set out hereunder -

WHEREAS the question has arisen as to whether or not the extraction of peat and associated works on sites shown on maps submitted to Westmeath County Council on 16th day of November 2011 at Lower Coole, Mayne and Ballinealoe and at Clonsura in the county of Westmeath is or is not development or is or is not exempted development,

AND WHEREAS the said question was referred to An Bord Pleanála by on the 9th day of February by Westmeath County Council,

AND WHEREAS An Bord Pleanála, in considering this reference, had regard particularly to:

(a) the nature and extent of the works that were described in the request and referral and in the various other submissions made in connection with them, and the nature and extent of the works that were apparent upon inspection of the sites,

(b) the assertions that the said works had commenced on the sites before the status of use of land for turbary as exempted development under section 4(1)(a) of the 1963 act was subsequently restricted by the 1994 regulations and by the 2000 act and its consequent regulations, and the absence of evidence sufficient to justify any conclusion to the contrary by the board,

(c) sections 2, 3(1) and 4(1)(a) of the Local Government (Planning and Development Act) 1963,

(d) sections 2, 3(1) and 4 of the Planning and Development Acts 2000-2011,

(e) section 17(2) of the Environment (Miscellaneous Provisions) Act 2011 and the commencement of that act on 21st September 2011 by Statutory Instrument 474 of 2011, and

(f) article 11 and schedule 7 of the Planning and Development Regulations 2001-2012.

AND WHEREAS An Bord Pleanála has concluded that:

(a) the extraction of peat and associated works that are the subject matter of this referral, apart from the handling of peat which is an activity that does not constitute works, involve the carrying out of works on land in an intensive and sustained manner and the commencement of such works involved a material change in the use of land even if peat extraction had occurred on such land in an occasional and less intensive manner before then,

(b) both the carrying out of the said works on the sites and the material change of use to which their commencement gave rise constitute development under section 3 of the 1963 act and section 3 of the 2000 act,

(c) both the material change of the use of the sites and the carrying out of works was exempted development by virtue of section 4(1)(a) of the 1963 act because "use of land for turbary" was included in the definition of agriculture in section 2 of the 1963 act and if the term "use of land for turbary" bears any meaning it must include reference to works to extract peat,

(d) the development arising from the material change in the use of the sites was completed by the commencement of works there and subsequent legislation is not relevant to its status as exempted development,

(e) the ongoing development on the sites arising from the continuation of works to extract peat remained exempted development after the coming into force of the 2000 act, despite the omission of the reference to turbary in section 2 of the 2000 act, by virtue of article 11 of the 2001 regulations,

(f) having regard to the criteria set out in schedule 7 of the 2001 regulations regarding the location and characteristics of the development involved in the continued works to extract peat on the sites and its potential impact, it is likely that such development on each of the sites would be likely have significant effects on the environment and so requires an environmental impact assessment,

(g) having regard to the location of the sites upstream of the Special Protection Area at Lough Derraverragh and the potential for peat extraction and drainage works on the site to give rise to emissions to water that could affect the habitats downstream, it is likely that the development involved in continued works to extract peat from each of the sites, either individually or in combination with other projects, would be likely to have a significant effect on the said Natura 2000 site and so requires an appropriate assessment,

(h) Because the development involved in continued works to extract peat from each of the sites requires environmental impact assessment and appropriate assessment

then, notwithstanding article 11 of the 2001 regulations, any such works after 21st September 2011 will not be exempted development by virtue of section 4(4) of the 2000 act as inserted by section 17 of the Environment (Miscellaneous Provisions) Act 2011

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by Section 5 (3) (a) of the Planning and Development Acts, 2000-2010, hereby declares that the peat extraction and associated works on the sites that is the subject of this request and referral is development and is exempted development until 21st September 2011 after which it will be development but not exempted development.

_____

Stephen J. O'Sullivan
30th July 2012