THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 824 J.R.]

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

BETWEEN

PETER SWEETMAN

APPLICANTS

AND

ENVIRONMENTAL PROTECTION AGENCY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

NURENDALE LIMITED (TRADING AS PANDA WASTE SERVICES LIMITED)

NOTICE PARTY

JUDGMENT of Mr. Justice Coffey delivered on the 12th day of March, 2018

1. This is an application for judicial review in which the applicant challenges a decision by the first named respondent ("the Agency") of 8th September, 2016 to grant a revised Industrial Emissions licence ("the licence") to the notice party ("the Developer") for a waste management facility at Rathdrinagh, Co. Meath ("the site").

2. The applicant makes alternative cases as against the Agency and the second and third named respondents ("the State"):

> (1) As against the Agency, it is contended that the decision to grant the licence was made in breach of the Agency's obligations under both domestic and European law. Although other points of objection are raised in the statement of grounds, the principal ground of challenge which was advanced at the hearing of the application is the contention that although the Environmental Impact Assessment ("EIA") Directive requires the carrying out of a full assessment before development consent can be given, the Agency granted the licence in circumstances where it had only carried out a EIA assessment within its own remit and in the knowledge (it is alleged) that no EIA assessment of the relevant project had been or would ever be carried out on the planning side;
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> (2) In the event that the court holds that the Agency was entitled under domestic law to grant a licence in such circumstances, the applicant contends in the alterative that the State has failed to fully and properly transpose the EIA Directive into Irish law.

3. The applicant seeks the following reliefs:

> (1) An order of *certiorari* by way of an application for judicial review quashing the determination of the first named respondent dated 8th September, 2016 to grant an Industrial Emissions licence (W-1040-04) to the notice party, Nurendale Limited, for a waste management facility at Rathdrinagh, Co. Meath;
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> (2) A declaration that the decision of the first named respondent was in breach of and contravenes Directive 92/43/EEC on the protection of wild habitats of flora and fauna ("the Habitats Directive") and Directive 2011/92/EU of 13th December, 2011 on the assessment of the effects of certain public and private projects on the environment ("the Consolidated Environmental Impact Assessment (EIA Directive)), the Birds Directive 2009/147/EU and the jurisprudence of the European Courts of Justice ("EJC"), in particular case C-50/09 and case C-215/06;
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> (3) A declaration that the second named respondent has failed to properly transpose the EIA Directive 2011/92/EU and has failed to address the lacuna identified by the CJEU in case C-50/09, in that the first named respondent has granted a development consent in circumstances where the development as a whole has not been the subject of any EIA;
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> (4) A declaration that the second named respondent has failed to properly transpose the judgment of the ECJU in case C-215/06.

Factual Summary

4. The Developer has operated an integrated waste management installation at the site since 2002 and has done so on foot of planning permissions granted by Meath County Council in 2001, 2004, 2007 and 2009 and licences granted by the Agency in 2002, 2005 and 2009 pursuant to the Waste Management Act 1996.

5. In order to carry out waste disposal and recovery activity at the site, in 2002 the Developer was required under s. 39 of the Waste Management Act 1996 to obtain a waste licence from the Agency. In July 2002 the Developer was granted a waste licence which permitted the recovery of 44,563 tonnes of waste per annum. In April 2005 the Developer was granted a revision licence which increased the waste acceptance threshold to 165,000 tonnes per annum. In March 2009 a further revision licence was granted which increased the relevant threshold to 250,000 tonnes per annum.

6. It is important to note that whereas the relevant planning permissions are incremental and authorise the development and use of the specific infrastructure to which they relate, the relevant licences are unitary in nature and licence the whole of the relevant activity on the site during the period specified for each licence.

7. In 2009 the Developer applied for a further review of its waste licence in order to extend the licenced area by approximately 3.2 hectares to accommodate a biological treatment facility whereby biogas generated by an anaerobic digester would be used to generate electricity and heat in an onsite combined heat and power plant. By letter dated 7th June, 2009 the Developer also applied to the relevant planning authority, Meath County Council, for planning permission to construct a new building to accommodate the biological treatment facility. The Developer stated that the proposed development would not result in any increase in the volume of

waste accepted at the facility but would in fact reduce the volume of waste it sent to landfill and all associated traffic movements by as much as 40%.

8. Whilst the application for review was pending, changes were made to the relevant regulatory code. As a result of these changes, the Developer's application for review of its revised waste licence became an application for the review of an Industrial Emissions licence pursuant to s. 90(1)(b) of the Environmental Protection Agency Act 1992 ("the Act").

9. The application was screened by the Agency who decided that the relevant activity required an EIA under the EIA Directive and an Appropriate Assessment ("AA") under the Habitats Directive. On 27th March, 2014 the Agency, pursuant to s. 87(1l)(b) of the Act, requested the Developer to submit an Environmental Impact Statement ("EIS"). The Agency further sought a Natura Impact Statement for the purpose of carrying out an AA in order to assess whether there would be any adverse impact from the run-off of surface water from the site on four protected European Sites which were in proximity to the facility. The EIS was received by the Agency on 26th May, 2014, which by virtue of s. 87(1l)(e) of the Act was deemed to be the date of application for the licence.

10. Pursuant to s. 87(1l)(f) of the Act, the Agency notified Meath County Council of the fact that it had received the said application for a licence review on 26th May, 2014. The notification set out in summary the relevant details of the application made and indicated that a copy of the application and the EIS submitted by the Developer and the associated correspondence were available for inspection on the Agency's website. Pursuant to s. 87(1l)(f)(i) of the Act, the Agency requested a response from the planning authority within four weeks of receipt of the notice with a further request that it furnish any observations the Authority had in relation to the licence application including the EIS.

11. The planning authority responded on 29th May, 2014 stating that the Agency's correspondence had been forwarded to a Senior Executive Officer in its planning section for his attention. As no response was received within the specified period, the Agency wrote again to the planning authority on 19th January, 2016 and 29th May, 2016, seeking a reply to the letter issued on 27th May, 2014. On 3rd May, 2016 the Senior Executive Officer in the planning section of the Council sent an email to the Agency in response to the notification of 27th May, 2014, in which he stated as follows:-

> "Meath County Council concurs that an Environmental Impact Assessment is required in respect of the development the subject of licence review application W0140-04. Meath County Council has no observations to make on the content of the EIS."

12. Prior to this, by letter dated the 31st March, 2011, Meath County Council wrote to the Developer's planning advisers, O'Callaghan Moran & Associates, to notify them of the grant of planning permission in respect of the proposed biological treatment facility and to confirm that an EIS was not required for the application. The letter further enclosed a copy of the planners' report explaining its decision. The said letter, dated the 31st of March, 2011, together with the enclosed report was forwarded by the Developer to the Agency under cover of letter dated 19th April, 2011.

13. The relevant report is dated 7th September, 2009 and appears to have been prepared by two executive planners in Meath County Council in respect of the Developer's application for planning permission to construct the biological treatment facility, the subject matter of the licence review application. Item 1 in the report addresses the issue of whether an EIS was required by Meath County Council in respect of the development and use of the proposed biological treatment facility.

14. The initial assessment of the planners was that an EIS was required because the annual waste acceptance at the facility "may exceed 25,000 tonnes", thereby requiring an EIS under Class 11(b) of Part 2 of Schedule 5 of the Planning and Development Regulations 2001. This threshold was relevant because the original planning permission for the site in 2001 was granted after Meath County Council had conducted an EIA for a project with a throughput of 30,500 tonnes per annum, initially rising by 10-15%.

15. The Developer's response to the request is recorded in the body of the report which was to the effect that the Regulations did not apply because the requirement for an EIS only arose in respect of the development of a new waste facility or to a change or extension to the existing development which would result in an increase in the amount of waste acceptance at the facility by more than 25%.

16. Without any reference to what they believed the amount of waste acceptance at the facility actually was, the planners accepted the developer's clarification on the basis that the biological treatment facility was not designed or intended to increase the volume of waste accepted at the facility. It would appear from the limited evidence that is before the court that despite being aware from the planning application that the Developer had a Waste Licence which allowed the facility to accept up to 250,000 tonnes of waste annually, Meath County Council nonetheless dealt with the matter on the assumption that the actual throughput of waste at the facility was in or about 25,000 tonnes per annum.

17. The Agency received a large number of submissions made by members of the public in relation to the application, most of which were submitted before the application date of 26th May, 2014. 96 submissions were made between October and December 2011, 142 in 2012, 9 in 2014 (of which 5 were later withdrawn) and 1 in 2015 (which was also later withdrawn).

18. An inspector, Ms. Caroline Murphy, was appointed by the Agency to consider the submissions made by members of the public and to carry out assessments for the purpose of the EIA and Habitats Directives. In her report dated 12th May, 2016, the inspector made a proposed determination to grant the revised licence subject to the conditions set out in the determination.

19. The Agency adopted the inspector's proposed determination and afforded an opportunity to members of the public who had made submissions, Meath County Council and others to object to the granting of the licence and its conditions. The Developer and four members of the public, including the applicant, objected to the proposed determination. As a result, the Agency appointed a technical committee to prepare a report on the objections, which it received on 16th August, 2016.

20. On 23rd August, 2016 the directors of the Agency adopted the inspector's report and the technical committee's report as its EIA. It considered the proposed determination, the objections thereto and the report of the technical committee and determined that if it was managed, operated and controlled in accordance with the licence, the permitted activity would not result in the contravention of any relevant environmental quality standards or cause environmental pollution.

21. It further had regard to the AA carried out by the inspector and determined that no reasonable scientific doubt remained as to the absence of adverse effects of the permitted activity on the integrity of the four relevant protected European Sites, River Boyne and River Blackwater SAC, River Boyne and River Blackwater SPA, Boyne Estuary SPA, Boyne Coast and Estuary and SAC. For the foregoing reasons, the Agency decided to grant a revised Industrial Emissions licence. The licence was signed and sealed on 8th

September, 2016 and the various relevant interested parties were notified.

22. On 3rd November, 2016 the applicant obtained leave from the High Court to apply for judicial review to challenge the decision of the Agency.

EIA Directive
23. The EIA Directive of 1985 and the amendments of 1997, 2003 and 2009 were codified by Directive 2011/92/EU which has since been amended by Directive 2014/52/EU.

24. In summary, the Directive requires that an EIA be carried out before "development consent" may be granted in respect of a wide range of public and private projects which are defined in Annexes I and II. Article 1(1) of the Directive states that the "Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effect on the environment". Article 1(2) of the Directive defines the term 'development consent' as "the decision of the competent authority or authorities which entitles the developer to proceed with a project". Article 1(3) states that the competent authorities are to be that or those which the Member States designate as responsible for performing the duties arising from the Directive.

25. Article 2 (1) is the key provision of the Directive and imposes a general obligation on Member States to adopt all measures necessary:

> "to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects."

26. Article 3 defines environmental impact assessment as follows:

> "The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 12, the direct and indirect effects of a project on the following factors:
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> (a) human beings, fauna and flora;
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> (b) soil, water, air, climate and the landscape;
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> (c) material assets and the cultural heritage;
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> (d) the interaction between the factors referred to in points (a), (b) and (c)."

27. Article 4 defines the projects that are subject to a requirement for development consent and an Environmental Impact Assessment. Article 4(1) provides that the projects listed in Annex I are subject to mandatory assessment. Article 4(2) provides that the projects listed in Annex II are only subject to the requirement of an Environmental Impact Assessment if so determined by the relevant Member State either through a case-by- case examination or by the application of thresholds or criteria set by the Member State.

28. Annex II at Class 11(b) is of relevance to the instant case because it includes "Installations for the disposal of waste" (which do not involve incineration or chemical treatment of waste for which EIA is mandatory under Annex I).

29. Annex II at Class 13(a) is also of relevance because it includes any "change or extension of projects listed in Annex I or this Annex, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment".

30. Articles 5 to 12 are procedural and set out the processes which must be followed by a competent authority or competent authorities when carrying out an EIA. Article 5 of the Directive requires the competent authority, when it is granting consent, to conduct a process under which the licence applicant submits information. Article 6 provides that the public and relevant authorities must then be given an opportunity to consider that information and to comment upon it, following which, as provided for by Art. 8, the information and comments are then taken into consideration in reaching a decision. Article 9 requires that the decision must set out the decision itself, the reasons underlying the decision and must further specify the measures to be adopted to mitigate major adverse effects. The decision and reasons must then be communicated to the public.

31. Article 11 deals with remedies and provides as follows:

> "1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:
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> (a) having a sufficient interest, or alterative;
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> (b) maintaining the impairment of a right, where administrated procedural law of a Member State requires this as a pre condition:
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> have assess to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participant provisions of this Directive.
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> 2 Member States shall determine at what stage the decisions, acts or omissions may be challenged.
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> 3 What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To that end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2) shall be deemed sufficient for the purpose of point (a) of paragraph 1 of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of point (b) of para. 1 of this Article.

4 The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not effect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

5 In order to further the effectiveness of the provisions of this Article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures."

The Dual Consent Process

32. The EIA Directive does not require and Irish law does not provide for a system of integrated development consent with a single integrated consent process under which the environmental and land use aspects of a proposed project are considered and determined simultaneously in a unified and coordinated matter.

33. Whereas the Planning and Development Acts 2000-2011 impose planning controls, primarily through the requirement of planning permission in respect of "development" (i.e. works and land use), the environmental code imposes controls over activities that are potentially harmful to the environment primarily through the requirement of obtaining licences and permits from the Agency. A project that requires dual development consent under the EIA Directive may not commence operation until both consents have been granted and thereafter it must further comply with the conditions attached to both relevant consents.

34. The dual consent process was challenged in *Martin v. An Bord Pleanála* [2008] 1 I.R. 336 in which the Supreme Court upheld the compatibility of the dual consent process with the EIA Directive. Giving the judgment of the Court, Murray C.J. stated that Article 1(2) of the Directive made it "manifestly clear" that the development consent may consist of the decisions of two or more authorities which are competent to carry out the procedures required by the Directive in relation to an Environmental Impact Assessment. He rejected the contention that the Directive required an "integrated assessment" stating as follows, at pp. 361-363:

> "[100] The applicant contends that by virtue of the statutory division of responsibilities between the Board and the Environmental Protection Agency it is not possible for an "integrated assessment" of the effects of the project on the environment to take place as required by the directive. There is a deficiency in the process, he submits, because no one body carries out a global assessment.
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> [101] As previously mentioned article 3 of the directive requires the environmental impact assessment to be carried out so as to take into account the direct and indirect effects of a project on specified environmental factors which are:
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> "- human beings, fauna and flora;
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> - soil, water, air, climate and the landscape;
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> - material assets and cultural heritage;
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> - the interaction between the factors mentioned in the first, second and third indents."
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> The first matter to note is that the term "integrated assessment" does not appear at all in the directive. The term has been used to refer to the fourth indent above, namely, an examination of the interaction between the other factors mentioned. It has not been claimed, and on the contrary it has been established, that the Board carried out a comprehensive environmental impact assessment, including the interaction between the factors referred to as far as the construction of the plant part of the project is concerned, to the exclusion only of the risk of environmental pollution, as defined in the statutory provision cited earlier in this judgment, related to the activity of the proposed installation.
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> [102] It is also clear from the statutory functions of the Environmental Protection Agency, when considering whether to grant a waste license, and from its statutory procedures, that the Environmental Protection Agency is required, at the very least, to carry out an environmental impact assessment which includes taking account of all the relevant factors and the interaction between them, for the purpose of assessing the risk of environmental pollution arising from the activity of the proposed plant.
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> [103] In short, all of the factors referred to in article 3 of the directive, and the interaction between them, are examined as required by the directive and the interaction between them at each stage of the consent process by the relevant competent authority namely the Board and the Environmental Protection Agency respectively. The Board carries out an "integrated assessment" insofar as the construction of the project is concerned and the Environmental Protection Agency carries out an "integrated assessment" insofar as the activity stemming from the operation of the plant is concerned.
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> It is also relevant to note that nowhere in the directive is it in any sense suggested that one competent body must carry out a "global assessment" nor a "single assessment" of the relevant environmental factors and the interaction between them. Those terms simply do not appear in it."

35. The Irish dual consent process came under further challenge from the European Commission in Case *C-50/09*. Whilst upholding the dual consent process in general, the European Court found that there were two specified gaps in the Irish legislation implementing the EIA Directive.

36. The Court upheld the entitlement of a Member State to designate two or more competent authorities for the giving of development consent and in so doing made reference to Article 1(2) of the Directive as follows:

> "71. Article 1(2) of Directive 85/337 defines the term 'development consent' as 'the decision of the competent authority or authorities which entitles the developer to proceed with the project'. Article 1(3) states that the competent authorities are to be that or those which the Member States designate as responsible for performing the duties arising from that Directive".

37. The court went on to state, however, that the freedom allowed to Member States was merely a freedom as to "the choices" that must be made to "ensure full compliance with the aims of the Directive," which meant that:

> "76…the environmental impact assessment must take place 'before the giving of consent'. That entails that the examination of a project's direct and indirect effects on the factors referred to in Article 3 of that directive and on the interaction between though factors be fully carried out before consent is given.
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> 77. In those circumstances, while nothing precluded Ireland's choice to entrust the attainment of that directive's aims to two different authorities, namely planning authority on the one hand and the Agency on the other, that is subject to those authorities' respective powers and the rules governing their implementation ensuring that an environmental impact assessment is carried out fully and in good time, that is to say before the giving of consent, within the meaning of that Directive."

38. Applying the law thus stated to the complaint made by the Commission, the Court found that there were two lacunae in the relevant Irish domestic law implementing the EIA Directive:

> (1) Section 173 of the Planning and Development Act 2000 was found to be deficient insofar as it merely required a planning authority/An Bord Pleanála to "take into consideration" information relevant to an EIA and did not expressly require the planning authority/An Bord Pleanála to carry out an assessment of that information;
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> (2) It further found that the Environmental Protection Act 1992 was deficient in that it failed to provide for an express right on the part of the Agency to require an EIA resulting in the possibility that the Agency might receive an application and decide on question of pollution before an application was made to the planning authority, which alone under the law then existing could require the developer to submit an EIS.

39. The identification of these deficiencies by the European Court in Case C-50/09 led to an amendment of the domestic legislation implementing the Directive by the adoption under s. 3 of the European Communities Act 1972, of the European Union (Environmental Impact Assessment) Integrated Pollution Prevention and Control Regulations 2002 (S. I. 282 of 2012) which inserted a new s. 173A in the Planning and Development Act 2000 and a new s. 83(2A) in the Environmental Protection Agency Act 1992 and the European Union (Environmental Impact Assessment) Integrated Pollution Prevention and Control Regulations 2012 (S. I. 457 of 2012) which inserted a new s. 87(1l) into the Act of 1992.

Relevant Implementing Legislation

40. The Agency's power to review a revised licence is provided for by s. 90(1)(b) of the Act which provides:

> "[The Agency] may review a licence or revised licence at any time with the consent or on the application of the licensee."

41. The Agency's power to grant a revised licence to the holder of such a licence is conferred by s. 90(2)(a)(i) of the Act. Section 90(2)(b)(ii) of the Act provides that where a revised licence is granted to the holder of such a licence, the licence shall have effect "in lieu" of the previous revised licence. It follows, therefore, that when the Agency is asked to review a revised licence, it is required to look at the entirety of the relevant activity which contrasts with the obligation which arises under the EIA Directive, which at Class 13 of Annex II merely requires the competent authority or authorities to look at the relevant increment in activity which triggers the requirement of an EIA.

42. Section 83(5) of the Act prohibits the Agency from granting a licence or revised licence for an activity unless it is satisfied in relation to eleven matters which it specifies. Section 83(3)(3) of the Act sets out seven further matters to which the Agency must have regard when considering an application for a licence or a revised licence. None of the relevant matters so specified relate to planning and development.

43. Section 86(1)(a) of the Act sets out the conditions which the Agency must attach to a licence or a revised licence granted under the Act. Section 86(1)(b) of the Act sets out a list of conditions which the Agency "may" attach to such licences.

44. By virtue of s. 86(11) of the Act, works consisting of or incidental to the carrying out of development which are necessary to give effect to any condition to be attached to a licence or a revised licence, which are not the subject of a planning permission or an application for planning permission under s. 34 of the Act of 2000 "shall be exempted development within the meaning, and for the purposes of the Planning and Development Act 2000."

45. Section 83(2A)(b) of the Act imposes a duty on the Agency to ensure that when an application is made which relates to activity that is likely to have a significant effect on the environment that the application is made "subject to an environmental impact assessment."

46. Accordingly, although it is contended otherwise by the applicant, the assessment obligation is not imposed directly on the Agency who under s. 83(2A)(g) of the Act is allowed to have "regard to, and to adopt in whole or in part, any reports prepared by its officials or by consultants, experts or other advisors."

47. Section 83(2A)(a) of the Act adopts the definition of an environmental impact assessment contained in Article 3 of the Directive and requires that the said assessment be carried out by the Agency both in accordance with the Act and in accordance with Articles 4 to 11 of the EIA Directive.

48. Section 83(2A)(b) of that Act requires the Agency to ensure that before a licence or revised licence is granted that the relevant licence is made subject to an environmental impact assessment but expressly limits that assessment to "matters that come within the functions of the Agency including the functions conferred on the Agency by or under this Act."

49. Section 83(2A)(c) of that Act makes provision as to when an EIA must be carried out and specifies as follows:

> "(c) Subject to paragraph (b) and s. 87(1A) to (1I), an environmental impact assessment shall be carried out by the Agency in respect of an application for a licence relating to an activity, where development comprising or for the purposed of the activity is:
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> (i) development of a class prescribed by regulations under section 176 of the Act of 2000 that exceeds a quantity,

area or other limit prescribed by those regulations, or

(ii) development of a class prescribed by regulations under section 176 of the Act of 2000 that does exceed a quantity, area or other limit prescribed under those regulations but that the Agency determines would be likely to have significant effects on the environment."

50. The thresholds relevant to this case are set out in Class 11(b) and Class 13(a)(ii) of Part 2 of Schedule 5 of the Planning and Development Regulations 2001. Class 11(b) requires an EIA where the installation is "for the disposal of waste with an annual intake greater then 25,000 tonnes..." Class 13(a) requires an EIA where there is "[a]ny change or extension of development which would… result in an increase of size greater than- 25 per cent, or an amount equal to 50 per cent of the appropriate threshold, whichever is the greater."

51. Where an EIA is required, s. 87(1l) of the Act sets out the procedure that must thereafter be followed where (as in this case) the application for a licence was made before 30th September, 2012.

52. Section 87(1l)(b) of that Act provides that where a developer has not submitted an EIS with the application for a licence and the Agency decides that an EIA is required, the Agency shall (as occurred in this case) request an EIS.

53. Section 87(1H)(c) of that Act provides that upon receipt of an EIS, the Agency is obliged to consult with the planning authority in whose functional area the activity is or will be situate as follows:

"Where an environmental impact statement is submitted to the Agency in accordance with a request under paragraph (a) the Agency shall do the following -

(i) "within 2 weeks of the date of receipt of such statement notify the planning authority in whose functional areas the activity is or will be situate that it has received an application to which this subsection applies and request the planning authority concerned to respond to the Agency within 4 weeks of the receipt of the notice and furnish any observations that the planning authority has in relation to the application for a licence including the environmental impact statement;

(ii) consider any observations furnished to the Agency following a request under subparagraph (i) by the planning authority before making its decision under section 87(2) indicating its proposed determination in relation to the application for a licence, and;

(iii) enter into consultations, as the Agency considers appropriate, with the planning authority or any person or body that it considers appropriate in relation to any environmental impacts of the proposed activity to which the application for a licence relates."

54. Section 87(1B) requires the applicant for the licence to furnish confirmation in writing from the planning authority/Board that the relevant infrastructure has planning permission and either a copy of the Environmental Impact Statement where one is required under the Planning and Development Act 2000 or confirmation in writing from the planning authority/Bord that an EIA is not required under the Act of 2000.

55. Section 87(2) of the Act requires that before it makes its decision whether to grant the application, the Agency is obliged to adopt a proposed determination of which it must give notice to prescribed persons including persons who have made a written submission in relation to the application and the planning authority in whose functional area the activity is or will be situate.

56. Section 87(4) of the Act provides that in the event that there is no objection taken against the proposed determination as notified or where such objection is withdrawn, the Agency shall "make its decision in accordance with the proposed determination". It follows, therefore, that an EIA must be complete prior to the notification of the proposed determination pursuant to s. 87(4) of the Act.

57. Section 87(10)(a) of the Act provides that the validity of a decision to grant or refuse a licence or a revised licence, may only be challenged by way of judicial review provided the proceedings are instituted within the period of eight weeks beginning on the date on which the licence or revised licence is granted.

58. The requirement to subject a project to the carrying out an EIA on the planning side is contained in s. 172 of the Planning and Development Act 2000 and the Planning and Development Regulations 2001. Section 173A of the Act of 2000 mirrors the Agency's obligations to liaise with the planning authority.

59. Section 50(2) of the Planning and Development (Amendment) Act 2010 provides that the validity of a decision to grant or refuse planning permission may only be questioned by way of an application for judicial review which s. 50(7) of the Planning and Development (Amendment) Act 2010 of the Act provides must be brought within eight weeks of the date of the relevant decision.

Decision

60. It is common case that the Agency carried out its EIA in such a way as to assess everything that it was required to assess within its own remit. The applicant's case has been so formulated as to make no criticism of the relevant implementing domestic legislation on the planning side and specifically without any suggestion that development consent on the planning side could lawfully be granted by a planning authority/An Bord Pleanála without an EIA, if such was required by the EIA Directive. Accordingly, there appears to be an implicit acceptance by the applicant, and this Court in any event is satisfied, that if an application for permission was made to it by the Developer in respect of the site which required an EIA under the Directive, Meath County Council was required to carry out an EIA under the relevant applicable domestic statutory provisions, namely, s. 172 of the Planning and Development Act 2000 and either Class 11(b) or Class 13(a)(ii) of Part 2 of Schedule 5 of the Planning and Development Regulations 2001.

61. The applicant has neither pleaded nor argued that the judicial remedies provided by the relevant implementing domestic legislation are not in accordance with Article 11 of the EIA Directive. Accordingly, it appears to be accepted, and in any event this Court is satisfied, that if an application for permission was made which required an EIA to be undertaken and Meath County Council had failed to carry out such an EIA, the remedy of judicial review would have been available to the applicant, as is expressly provided for by s. 52 (2) of the Planning and Development Act 2010.

62. It also appears to be accepted, and this Court in any event is satisfied, that if an intensification of use has occurred at the site since the granting of planning permission by Meath County Council in 2001, such as would require a further EIA on the planning side, under Class 13(a)(ii) of Part 2 of Schedule 5 of the Planning and Development Regulations 2001, the Developer is obliged to apply for a further development consent, pursuant to the Planning and Development Acts 2000-2011, without which the development is *prima facie* unlawful and, therefore, amenable to injunctive and other enforcement remedies under the Planning and Development Acts 2000-2011.

63. This is the context in which the applicant advances his case which can be reduced to the following three propositions:

> (1) First, the applicant contends that the granting of the licence by the Agency has resulted in the granting of a development consent for the entire project such as would authorise a waste acceptance threshold of 250,000 tonnes of waste per annum at the site;
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> (2) Secondly, it is contended that notwithstanding Meath County Council's confirmation that an EIA was not required in respect of the granting of planning permission in 2009 for the biological treatment facility at the site, the Agency had a duty whether arising under the Act or under the Directive to interrogate the validity of the permission that was granted and specifically a duty to assess not only whether Meath County Council should have carried out an EIA in respect of the granting of planning permission in 2009 but also to assess the adequacy of any such assessment or assessments previously carried out;
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> (3) Thirdly, it is contended that the Agency has wrongfully failed in its duty to interrogate the validity of the planning permission that was granted by Meath County Council in 2009 and that it has in consequence unlawfully granted the licence to the Developer in the knowledge that Meath County Council has not and will not be carrying out an EIA on the planning side, such as would authorise a waste acceptance threshold of 250,000 tonnes of waste per annum at the site.

Development Consent For Entire Project

64. The applicant's case so stated proceeds from a supposition that the licence granted by the Agency is in effect a development consent for the entire project. This is manifestly not so. The Agency has no function or power to carry out an EIA assessment outside the sphere of its own competence and cannot grant a development consent that authorises land use or any other related activity that falls within the remit of a planning authority/An Bord Pleanála.

65. It is clear from Article 1(2) of the EIA Directive that a developer is not entitled to proceed with a project until it has a development consent from all of the relevant competent authorities that are required to assess the environmental effects of the relevant project. The existence of a valid development consent on the environmental side does not and cannot logically imply the existence of a corresponding valid development consent on the planning side. Assuming, without deciding, that the development consent on the planning side is not sufficient to authorise a waste acceptance threshold of 250,000 tonnes of waste per annum at the site, there is simply no development consent on the planning side for such a project and the foundations for the applicant's complaint fall away.

Alleged Wrongful Failure Of Meath County Council To Carry Out An EIA

66. Implicit in the applicant's case, however, is an assertion that without carrying out a proper EIA, Meath County Council has wrongfully granted a development consent on the planning side which is sufficient to authorise a waste acceptance threshold of 250,000 tonnes of waste per annum at the site. It is on this basis that the applicant contends that the decision of the Agency to grant the licence was made with the knowledge that no EIA has or will be carried out by Meath County Council for the relevant threshold. Determination of this issue requires the court to consider whether Meath County Council has in fact granted a development consent on the planning side sufficient to authorise a waste acceptance threshold of 250,000 tonnes of waste per annum and, if so, whether Meath County Council has wrongfully and irremediably failed to carry out an EIA in the course of granting the relevant permissions for the site having regard to the provisions of the Planning and Developments Acts 2000-2011 and the Planning and Development Regulations 2001.

67. The mere fact that Meath County Council would not appear to have carried out an EIA on the planning side for the relevant threshold of waste does not of itself establish that the failure to do so was wrongful or that it was otherwise than in accordance with the EIA Directive. Moreover, it does not establish that the failure, if it was wrongful, is irremediable.

68. As already noted, whereas a waste licence/industrial emissions licence is unitary in nature and licences the whole of the relevant activity on the site during the period of the licence, planning permissions are in their nature incremental and authorise the development and use of the specific infrastructure to which they relate. Critically, any lawful assessment of these issues by this Court requires the impleading of Meath County Council who the applicant has failed to sue and who, as a matter of fundamental fairness, is entitled to an opportunity to defend its actions whether by reference to the information supplied to it, the nature and extent of the planning permissions it has actually granted, or otherwise. Furthermore, the case so advanced necessarily involves an impermissible collateral attack on the validity of the relevant planning permissions granted by Meath County Council which the applicant had an opportunity to challenge, but is now *prima facie* out of time to do by virtue of s. 50(7) of the Planning and Development Act 2010.

Alleged Duty of the Agency to Oversee Meath County Council

69. Without specifying the source of the duty, the applicant further contends that the Agency was required by Irish law to assess whether Meath County Council has fully and properly discharged its EIA assessment obligations under s. 172 of the Planning and Development Acts 2000-2011 and the Planning and Development Regulations 2001.

70. The Act plainly does not require the Agency to interrogate and oversee the validity of the actions of a planning authority/the Board. On the contrary, s. 83(2A)(b) of the Act expressly limits the Agency's assessment obligation to matters within its own remit. To have provided otherwise would in effect have required the Agency to exercise the function of determining the validity of a decision to grant or refuse planning permission by a planning authority/the Board which by virtue of s. 50(2) of the Planning and Development Act 2010 is a function reserved exclusively to the courts.

Alleged Gap in the Implementing Legislation

71. The applicant further contends, in the alternative, that if such an assessment obligation on the part of the Agency is not required by Irish law, it nonetheless arises under the EIA Directive itself. This logically implies that there is a deficiency in the implementing domestic legislation, a gap which the applicant has failed to specify and which was not identified by the European Court in its review

of the relevant Irish legislation in Case C-50/09. Article 2(1) of the EIA Directive imposes an assessment obligation but only in respect of the matters set out in Article 3. There is nothing in the provisions of Article 2(1) or Article 3 of the EIA Directive to suggest that the assessment obligation of the Agency or of any competent authority extends to the interrogating and oversight of the validity of the actions of other competent authorities. Similarly, there is nothing in Article 11 of the Directive to suggest that the competent authorities are required to be accountable for the validity of their actions, *inter se*, over and above their accountability to the courts and other independent or impartial bodies as specified in the Directive.

Other Issues Raised

72. The applicant challenges the AA carried out by the inspector on the grounds that reasonable scientific doubt remains as to the absence of adverse effects of the permitted activity on the integrity of four relevant protected European sites. The onus of proof is on the applicant who has failed to lay any evidential foundation to advance this contention. It is readily apparent that the inspector has applied the relevant applicable legal test following a careful and systematic analysis of the effects of the emissions on each European site. Accordingly, this point of objection is rejected.

73. It is further argued that the decision to grant the licence was unreasonable because the Agency failed to have due or proper regard to the alleged fact that "over 200 submissions were received, cataloguing years of continuous non-compliance with both the waste permits and the planning code". The applicant has failed to substantiate this allegation and specifically has failed to advance any evidence as to the nature and gravity of the alleged non-compliant acts or omissions of the developer such as would demonstrate that all relevant issues could not be addressed through the attaching of conditions to the licence. Accordingly, this point of objection is rejected.

74. It is further argued that the licence unlawfully purports to grant a retrospective consent for ongoing and unauthorised activity. The EIA Directive at Class 13(a) of Annex II envisages that an EIA may be carried out in respect of changes or extensions to existing projects. Class 13(a) of Annex II is implemented by Class 13(a)(ii) of Part 2 of Schedule 5 of the Planning and Development Regulations 2001. It follows that there is no requirement that an ongoing project must have been the subject of an EIA before a valid EIA can be carried out in relation to a change or extension to the relevant project.

75. The applicant further asserted, but without exhibiting the relevant planning permissions, that the authorisations thereby granted by Meath County Council were in respect of structures only and did not extend to activities on the site. At the direction of this Court, the relevant permissions were exhibited on affidavit in the course of the hearing from which it is readily apparent that they cover both structures and activities

Conclusion

76. For the foregoing reasons, the reliefs sought are refused.