

## **Submission on the Cessation of Turf Cutting Scheme**

The Minister for the Environment, Heritage and Local Government announced on 27 March 2009 that the government was putting in place a “broad consultative process to prepare for the phasing out of domestic turf cutting on raised bog Special Areas of Conservation and Natural Heritage Areas over the coming years.”<sup>1</sup> We welcome the opportunity to contribute to this process.

### **Executive summary**

The so-called “derogations” are unlawful as a matter of EU and Irish law. If they are not withdrawn, we will bring judicial review proceedings.

### **Detailed analysis**

1. In order to decide how best to deal with the current derogations for turf cutting in designated areas, it is important first to understand: A. their history; B. their precise terms; and C. their legality. These are issues of considerable importance, as there is evident confusion regarding the derogations, including at the highest levels of Irish politics.

#### **A. History of the derogations for turf cutting in SACs<sup>2</sup> and NHAs**

2. In a Dáil debate on 25 February 2009, the Taoiseach commented, having been asked about the original derogation for turf cutting on 32 raised bog SACs:

*The then Minister, Síle de Valera, successfully obtained a derogation of ten years when the [habitats] directive was announced.*<sup>3</sup>

There are several factual errors in this statement, the most significant of which is the suggestion that the Minister “obtained” some sort of official derogation from the terms of the Habitats Directive. As set out in detail below, this is simply not the case: the four derogations in question were unilaterally “granted” by the government - and have been sustained by successive governments - in breach of EU law. Indeed, we use the term “derogation” (and the related term “granted”) for ease of reference only, since they are consistently used by others. As set out below, use of the term derogation is in fact a misnomer. The true situation is that the government unilaterally arrogated unto itself the power to impose, selectively, the terms of the Habitats Directive, when it has no such legal right.

3. By way of background, the Habitats Directive was adopted by the Council of the European Union (including the Irish government’s representative, which was not Síle de Valera) on 21 May 1992. The Directive was transposed into Irish law in February 1997,<sup>4</sup> when the European Communities (Natural Habitats) Regulations 1997 were signed by Michael D. Higgins, then Minister for Arts, Culture and the Gaeltacht, with Síle de Valera a prominent critic.<sup>5</sup> Thus, Síle de Valera was neither involved in the adoption of the Habitats Directive nor directly in its initial transposition into Irish law. However, having taken over as Minister for Arts, Culture and the Gaeltacht in June 1997 (on the election of the 28<sup>th</sup> Dáil), she was instrumental in granting the first 10-year derogation for turf cutting in raised bog SACs, which was announced in February 1999 (almost 7 years after the adoption of the Habitats Directive and nearly 2 years after Ireland’s implementing legislation had been made). This was in clear breach of the Habitats Directive, which provides for no such derogations, though the decision was no great surprise given Síle de Valera’s longstanding antipathy towards the Directive, recounted in detail in a recent journal

article by Professor Brigid Laffan of UCD and Dr Jane O'Mahony of the University of Kent:

*By temperament and political location, neither [Síle de Valera nor Eamon Ó Cuiv] was likely to risk alienating their constituencies in order to comply with a European law. They would invest considerable political energy in mediating between Brussels and the farmers [in the context of the habitats directive generally, not specifically in the context of the derogations] and there is no doubt that their sympathies were entirely with the landowners. One of them simply said, 'I was one of them' and that 'the gun was to my head' (Interview Government Minister, 25 June 2003). The gun in this case was the Commission's pressure to speed up the application of the [habitats] directive in Ireland.<sup>6</sup>*

4. The history of the first derogation for turf cutting is particularly significant for the Working Group's purposes, as it set a precedent for the subsequent derogations granted, and provides a benchmark against which the current position can be measured.

5. The first public indications that the government had some sort of derogation in mind for turf cutting came in written answers on 12 November 1997 and 10 February 1998, and in an adjournment debate on 10 February 1998, in which Minister de Valera commented:

*There are some 200,000 ha of blanket bogs proposed for SAC status and the objective is to phase out turf cutting over five to ten years, although on sensitive or ecologically important areas a shorter time frame may apply.<sup>7</sup>*

*Raised bogs are very much rarer both in Ireland and in Europe. Some 8,000 ha are being proposed for inclusion in SACs in Ireland. The imperative to take prompt action is very much more pressing in the case of raised bogs, therefore, and, consequently, it is intended that turf cutting should [now]<sup>8</sup> cease in these particular areas.<sup>9</sup>*

*While it is possible to phase out the cutting of peat in blanket bogs over a period of years, the position on raised bogs is much more critical. While it is difficult to be precise, it is estimated that 40 acres of intact raised bog are lost, effectively forever, each year cutting continues. To meet our obligations under the directive to conserve this habitat, cutting has to stop now.....While I am in favour of achieving the maximum degree of consensus, deferring the cessation of cutting for another year would not solve the problem, even if this was possible.<sup>10</sup>*

In other words, a derogation of 5-10 years was being considered for blanket bog SACs, while immediate cessation was the order of the day for raised bog SACs.

6. By June 1998, the Minister's position had shifted somewhat, though turf cutters and conservationists were assured that the let-off for turf-cutters was to be temporary in nature:

*The original intention was to agree the cessation of cutting [in raised bog SACs] before the 1998 cutting season. However, as the*

*European Commission has not yet agreed to an enhanced REP scheme for protected areas, and as it has not been possible to finalise compensation, relocation and other arrangements before the 1998 cutting season, I decided that cutting would be allowed for the 1998 season.... My Department is examining all aspects of turf cutting and my intention is that the various issues will be resolved long before the 1999 cutting season approaches..... I made a clear statement, not only to turf cutters but to conservationists who are concerned about the matter, that the concession with regard to turf cutters applies only to 1998.<sup>11</sup>*

7. By February 1999, the Minister's position had again shifted, following "a series of consultations.....with representatives of the farm organisations and turf cutters,"<sup>12</sup> and the first of the government's three 10-year derogations was announced (the fourth derogation, in respect of blanket bog SACs and NHAs, is effectively indefinite in duration – see below). In respect of raised bog SACs:

*I am conscious of the social and economic impacts immediate cessation would have on small communities and have decided to make exceptional arrangements in the case of cutters for domestic use. Cutters will be given a period of up to ten years to make new arrangements.<sup>13</sup>*

The outlook for blanket bog SACs was bleaker:

*These arrangements....do not apply to Blanket Bogs. The issues relating to turf cutting in Blanket Bogs are under constant review.<sup>14</sup>*

In other words (and as it has turned out in fact), the issue of cutting in blanket bog SACs was effectively kicked to touch, amounting to a derogation of indefinite duration in such areas.

8. Thus, in the space of a year (February 1998 to February 1999), Minister de Valera had gone from: (a) seeking to phase out cutting in blanket bog SACs over 5–10 years, and banning cutting immediately in raised bog SACs (based on scientific advice, one assumes), to (b) a derogation of up to 10 years for domestic cutting in raised bogs and a derogation of indefinite duration for cutting in blanket bog SACs (based on political pressure from interest groups).

9. The National Parks and Wildlife Service summarizes the background and the current position in respect of raised bogs as follows:

*Following the publication of the list of SAC raised bog sites in 1997, there was prolonged and strenuous objection from turf cutters. The objectors were especially concerned about loss of property rights, loss of future fuel supplies and loss of a way of life in the summer months. The then Minister, Síle de Valera T.D., addressed the objections of bog owners by allowing them cut for domestic use [from 32 raised bog SACs designated in or before 1999]<sup>15</sup> for 10 years, up to and including 2008, at which stage all cutting would have to cease.<sup>16</sup>*

*A similar ten-year derogation period currently applies to any bog candidate SACs or NHAs designated after 1999. Some designations occurred in 2002. Designation of NHAs was undertaken in 2004.<sup>17</sup>*

10. Thus, there are currently four separate derogations in operation, as set out in the following table.<sup>18</sup> A full list of the SACs and NHAs to which these derogations apply can be found in Minister Gormley's written answer to a parliamentary question from Deputy Denis Naughten on 17 April 2008: see pages 397 to 403 of <http://debates.oireachtas.ie/Xml/30/DAL20080417A.PDF>.

	Derogation granted	Applies to cutting for domestic use in	Derogation due to expire
1.	1999	32 raised bog SACs proposed in or pre-1999 (2 of these were later subsumed into one of the SACs proposed in 2002) <sup>19</sup>	2008 (but extended for a year to 2009 – see below)
2.	1999 (SACs) and 2004 (NHAs)	All blanket bog SACs and NHAs	No date specified
3.	2002	23 raised bog SACs proposed in 2002	2011 or 2012? <sup>20</sup>
4.	2004	75 raised bog NHAs designated in 2004	2013 or 2014? <sup>21</sup>

11. Details regarding the 2002 and 2004 derogations are scant. In respect of the designations in 2002, Minister Cullen, then Minister for the Environment, Heritage and Local Government, announced:

*....arrangements announced in 1999 provided that domestic turf cutting in cSACs could be allowed to continue for up to ten years from date of notification of proposed designation, in order to give owners time to make new arrangements for alternative sources of supply, save in exceptionally sensitive parts of the bogs which would be identified by my Department. **Similar arrangements now apply to additional bogs proposed for designation more recently....***<sup>22</sup>

In advance of the 2004 derogation regarding NHAs, the Minister stated:

*A survey is currently being carried out on designated raised bogs, both SAC and NHA, which will identify the most sensitive areas of these bogs, where cutting cannot be allowed to continue. In the less sensitive areas of the NHA bogs, I expect to be in a position to permit domestic cutting to continue for a number of years. I will announce arrangements in this regard following completion of the current survey, which is due for completion by the end of this year.*<sup>23</sup>

As it turned out, a derogation was of course granted in respect of NHAs, as recorded by Deputy Michael P. Kitt, then Minister of State at the Department of the Environment, Heritage and Local Government:

*When arrangements were announced in 1999 for cessation of turf cutting on bogs designated for conservation, a ten-year derogation*

*was granted to domestic turf cutters. This period is now coming to an end on 32 designated raised bogs. A similar ten-year derogation applies to bogs designated after 1999. When NHAs were designated in 2004, **under an agreement with the farming organisations, a similar ten-year derogation was put in place allowing cutting on NHAs until 2014.***<sup>24</sup>

12. Turning now to the current situation regarding raised bogs, according to Minister Gormley, speaking in 2008:

*There is a certain amount of confusion regarding the impact that restrictions on turf-cutting are having or will have. Turf cutting is restricted on a very small number of Ireland's bogs. Of the 1,500 to 1,600 raised bogs in Ireland, only 139 are designated as special areas of conservation, SACs, or natural heritage areas, NHAs, and only 32 of these are subject to the ten-year derogation that comes to an end this year [2008]. While a similar ten-year derogation period will apply to the balance of the 139 designated [raised] bogs, turf cutting may continue as before on the vast majority of bogs.*

*Recent scientific reports on bog monitoring and turf cutting found that continuing damage at a rate of approximately 2% to 4% per annum was occurring because of domestic turf cutting. In the light of this scientific evidence, **it would not be appropriate to extend the ten-year derogation and turf cutting on the 32 raised bogs designated prior to 1999 should therefore cease at the end of the current [2008] season as scheduled.***<sup>25</sup>

13. The government has since changed its mind:

*The Minister for the Environment, Heritage and Local Government, Mr John Gormley, today (27 Mar 09) announced that the Government is putting in place a broad consultative process to prepare for the phasing out of domestic turf cutting on designated raised bog Special Areas of Conservation and Natural Heritage Areas over the coming years.....**Cutting on all bogs during 2009 will be allowed to continue as before.***<sup>26</sup>

So, despite the fact that "In light of...scientific evidence, it would not be appropriate to extend the ten-year derogation" that expired in 2008, the government has done just that.

14. The position in relation to cutting on blanket bog SACs is even worse. As recorded above, having proposed a phasing out of such cutting over 5-10 years from February 1998, one year later the government effectively consigned such bogs to a derogation of indefinite duration, and the government now appears to be actively encouraging turf cutting in such areas:

*The situation with regard to extraction of peat from blanket bogs is different [from that regarding raised bogs], primarily because this habitat can accommodate a certain amount of turf cutting without significant damage and is in a better position to renew itself without active intervention.....**Turf cutting can continue on our blanket bogs and that message needs to be disseminated.***<sup>27</sup>

This statement is particularly surprising given the NPWS's conclusion in an official scientific report to the European Commission in 2007:

*It has been estimated that approximately 45% of [Ireland's] blanket bog habitat has been lost or severely damaged by peat extraction (Foss, 1998). Most of this cutting has been carried out by private individuals for domestic consumption.<sup>28</sup>*

To allow this to continue via the present derogation for blanket bogs would be a clear breach of the Habitats Directive (see below).

## **B. Precise terms of the derogations**

### *Raised bogs*

15. While information on the precise terms of the raised bog derogations is scant, most likely owing to their unlawful nature (see below), the original 1999 derogation appears to have been recorded in most detail, and the subsequent derogations essentially derive from it. The clearest explanation of the intended operation of the first derogation was given by Síle de Valera on 3 February 1999:

*The Minister for Arts, Heritage, Gaeltacht and the Islands, Síle de Valera TD, and the Minister of State at her Department, Eamon Ó Cuiv TD, following a series of consultations over the last year with representatives of the farm organisations and turf cutters, today announced the detailed arrangements for the cessation of turf cutting on raised bogs which are proposed as Special Areas of Conservation (SACs). These arrangements are necessary to implement the E.U. Habitats Directive, which requires the designation of such areas as SACs, and their protection and conservation.*

*The Ministers are conscious of the social and economic impacts immediate cessation would have on small communities and have decided to make exceptional arrangements in the case of cutters for domestic use. Cutters will accordingly be given a period of up to 10 years to make new arrangements.*

*Those who opt to continue cutting will be allowed to do so on the basis of a permit from the department, which will specify the amount of turf to be cut and the method of cutting to be used. Use of so called 'sausage machines' will not be permitted. Use of other sod turf mechanical harvesting machines will generally be permitted.*

*People who have been cutting for their own personal domestic use will be permitted to cut the amount of turf needed for their own use only for up to 10 years in less sensitive areas of the bog.*

*These arrangements relate to Raised Bogs which have been proposed as candidate SACs. They do not apply to Blanket Bogs. The issues relating to turf cutting in Blanket Bogs are under constant review.<sup>29</sup>*

16. From this statement, it is possible to identify the following six elements of the original derogation:

- (i) It was to apply only “in the case of cutters for domestic use”;
- (ii) It was to operate for “*up to 10 years*”;
- (iii) Those who opted to continue cutting would be allowed to do so on the basis of a permit from the department, which would specify the amount of turf to be cut and the method of cutting to be used;
- (iv) Use of so called 'sausage machines' would not be permitted;
- (v) Use of other sod turf mechanical harvesting machines would generally be permitted; and
- (vi) People who had been cutting for their own personal domestic use would be permitted to cut the amount of turf needed for their own use only for up to 10 years in less sensitive areas of the bog.

17. Since the 2002 and 2004 derogations effectively cross-refer to the original 1999 derogation, the elements set out above must be presumed to apply in respect of all three time-limited derogations (the derogation in respect of blanket bogs is a separate matter, and is considered below).

18. Considering the elements from paragraph 16 in turn, point (i) introduces an immediate ambiguity: “cutters for domestic use” would appear to embrace not only those who cut for their own *personal* domestic use *but also* those who cut for sale for domestic use by others. In other words, the contrast is not between those who cut for sale and those who cut for personal use; rather, it is between those who cut for domestic use and those who cut, for example, to supply peat-fired power stations. That this ambiguity was intended by the government seems clear from point (vi): if this were not the case, why set out what seems to be a special rule (in a separate paragraph) for “people who have been cutting for their own *personal* domestic use”?

19. This highlights a key issue to be addressed by the Working Group: defenders of turf cutting often refer to its cultural importance, the fact that it is a way of life and an important source of cheap fuel for those with turbary rights. However, it is inconceivable that we would be losing 2-4% of active raised bog habitat in SACs per annum<sup>30</sup> - and over one third of this protected, priority habitat in a mere ten years<sup>31</sup> - if cutting was genuinely carried out solely for a cutter's own personal use. The reality is that many of those availing of the derogations must be cutting for sale. **So commercial cutting in SACs was to cease according to Minister de Valera's 1999 press release,<sup>32</sup> but commercial cutting in fact continues to this day. In other words, both blanket and raised bog SACs continue to be harvested for commercial purposes, dressed up – and masquerading – as “domestic” harvesting. This issue was fudged in the Minister 1999 press release, and it has been fudged ever since.**

20. Point (ii) is significant as it: (a) goes to the scope of the Working Group's remit, and (b) raises a very basic question regarding the derogations which does not appear to have been given a definitive answer. Regarding (a), since the three time-limited derogations were to apply for “*up to 10 years*”, the Working Group is entitled to recommend the immediate cessation of the derogations that are due to expire in 2012 and 2014, as well as the derogation that was given a one year extension to 2009. We strongly recommend that the Working Group adopts this as one of its recommendations, for the reasons set out under heading C below. This leads on to (b): when are the 10-year derogations granted in 2002 and 2004 due to expire? This very basic issue has never been settled as far as we are aware, which is indicative of the uncertain (and ultimately unlawful) nature of the derogations. The original derogation, granted in 1999, ran for 10 years and expired in 2008 (so 10 cutting seasons including 1999). Thus, one would expect the derogations granted in 2002 and 2004 to expire after the cutting seasons in 2011 and 2013, respectively (again,

10 cutting seasons including the year the derogation was granted). Is this the Working Group's understanding?

21. Turning to point (iii) - the operation of a permitting system regarding the derogations - it is clear that such a system has never in fact been established. In a Joint Committee for European Scrutiny debate on 1 July 2008, Deputy Damien English asked:

*What is the current situation with regard to people cutting turf? Must a person get permission from the Minister to cut turf, notwithstanding the ten-year derogation. I understand people must get permission and if the Minister does not reply, they have permission by default. That has not been mentioned, but is it or is it not the case? Some people are genuinely afraid of the law. There is a lack of clarity and people are not sure if they are doing the wrong thing.<sup>33</sup>*

22. James O'Connell of the NPWS replied:

*Permission is required to cut turf in a designated area. However, in practice, where turf is being cut from existing banks, people are allowed to do that without going through too many formalities. The difficulty is where people wish to start cutting turf in designated areas or from new banks. In such cases, permission must be sought and an assessment undertaken.<sup>34</sup>*

23. In other words, notwithstanding the fact that a permitting system was clearly to operate in respect of those who "opt to continue cutting" (per Minister de Valera's 1999 press release at paragraph 15 above) *as well* as those who propose new cutting, such a system has never been put into operation ("without going through too many formalities" is a euphemism, we suspect, for "without going through *any* formalities"). Thus, even if we assume for the moment that the derogations are legal as a matter of EU and Irish law (they are not), they have never been operated even in accordance with their own basic terms.

24. We urge the Working Group to consider this issue carefully and to include in its report an opinion regarding the scale and legality of unpermitted cutting that has occurred in designated areas since the original derogation was announced in 1999. This would be relatively easy to establish: all turf cutters in raised bog SACs and NHAs should have applied for permits to continue cutting post-designation. How many cutters are estimated to operate in the relevant areas? And how many have been granted permits by the Department/NPWS under the terms of the derogations?

25. A final issue is monitoring and enforcement, which is particularly important in respect of points (iv) and (v); i.e. the prohibition of 'sausage machines' and the fact that "other sod turf mechanical harvesting machines [will] *generally* be permitted." One wonders what sort – and the extent – of monitoring that has been carried out over the years by Dúchas and subsequently NPWS rangers since the derogations were granted. We understand that serious damage can be and is being done by machines other than the sausage machine. Have any steps ever been taken to prohibit the use of other machinery under the terms of the derogations?

*Blanket bogs*

26. The situation in respect of blanket bogs is even vaguer than that in respect of raised bogs. We have Síle de Valera's 1999 statement on the announcement of the first derogation for raised bogs:

*These arrangements [for raised bogs]...do not apply to Blanket Bogs. The issues relating to turf cutting in Blanket Bogs are under constant review.*<sup>35</sup>

And a 2009 statement from Minister Gormley to the following effect:

*...it is envisaged that cutting on Blanket Bog SAC's can continue, except in very sensitive areas, under the current restrictions, which prohibits commercial extraction and the use of "sausage" machines.*<sup>36</sup>

27. Quite when these "current restrictions" were applied to blanket bog SACs (and NHAs?) - and where they are recorded, if anywhere - is unclear. Additionally, the supposed ban on "commercial extraction" is unclear (does it cover all extraction for sale? Sale for domestic use?), and fails to address the fact that, by the NPWS's admission, most of the estimated 45% loss of Ireland's blanket bog habitat through cutting "has been carried out by private individuals for domestic consumption."<sup>37</sup> One wonders whether the few restrictions that are supposedly in place are ever enforced, and whether any form of permitting system is in operation. Given the position regarding raised bogs, we suspect not.

### **C. The legality of the derogations**

28. Now we come to what is effectively the heart of the matter. If the existing derogations are unlawful, the Working Group would be acting *ultra vires* if it were to recommend their continued operation. Similarly, the government would be acting *ultra vires* if it refused to withdraw the derogations, and refused to take steps to bring cutting to an end, having been made aware of the facts. Any such decisions would be challengeable in the High Court by way of an application for leave to bring judicial review proceedings.

#### *The SACs: raised bog and blanket bog*

29. We will state it again here as it cannot be stressed often enough: there is no provision in the Habitats Directive allowing Member States to derogate from the site protection provisions of the Habitats Directive as the government has done. Thus, Ireland's so-called "derogations" are in breach of EU law.

30. The Habitats Directive imposes a very strict protection regime in respect of SACs. The key provisions for present purposes are Articles 6(2) to (4), which we will consider in turn. These provisions have been transposed into Irish law by the European Communities (Natural Habitats) Regulations 1997 (as amended). Of course, the European Court of Justice is the ultimate arbiter of EU law, and its decisions regarding the interpretation of the Habitats Directive have a direct impact on the Irish legal provisions which implement the Directive.

31. Article 6(2), which is effectively a catch-all provision (covering unpermitted activities, for example), provides:

*Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the*

*areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.*

32. By way of its derogations for turf cutting, the government has clearly breached Article 6(2) (and hence Ireland's transposing legislation): as set out in detail above, as a direct result of turf cutting, an estimated 45% of blanket bog habitat has been lost (and an undetermined amount continues to be lost in SACs each year), while 2-4% of active raised bog habitat is believed to be lost in SACs per annum, with some 36% lost in the period 1994 to 2005 alone.<sup>38</sup>

33. Articles 6(3) and (4) should be read together:

**6(3)** *Any plan or project not directly connected with or necessary to the management of the site [i.e. the SAC in question] but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.*

**6(4)** *If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000<sup>39</sup> is protected. It shall inform the Commission of the compensatory measures adopted.*

*Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.*

34. In other words, if a plan or project (which would include any form of peat extraction or turf cutting) cannot proceed via Article 6(3), the only legal route available if the project is to proceed is Article 6(4). And in that regard, it is important to note that active raised bogs and active blanket bogs are "priority" habitats for the purposes of the Habitats Directive, such that the second paragraph of Article 6(4) applies.

35. By virtue of the leading decision on Article 6(3) of the Habitats Directive - the European Court of Justice's decision in Case C-127/02 "*Waddenzee*"<sup>40</sup> (emphasis added):

(a) "The first sentence of Article 6(3) of Directive 92/43 [the Habitats Directive] must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects" [para 3(a), in operative part at end of judgment]; **and**

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

36. If, following an appropriate assessment, the test in paragraph (b) cannot be met, the only legal route open to a project is Article 6(4) of the Habitats Directive. The problem with the government’s position is that it has never operated a permitting regime that complies with Article 6(3) in respect of turf cutting – indeed, its own use of the term “derogation” would seem to signify acceptance of this fact. It is clear, of course, that the turf cutting that goes on in Ireland’s SACs could *never* be allowed to go ahead under Article 6(3), which requires cumulative impacts to be taken into account.

37. So the only legal route open if turf cutting were to be allowed to proceed in SACs is Article 6(4), which requires three tightly-defined conditions to be met:<sup>41</sup>

Condition 1: There must be an “absence of alternative solutions” (and the burden of establishing this is on the government<sup>42</sup>);

Condition 2: There must be “imperative reasons of overriding public interest” for allowing the activity to go ahead. And in respect of priority habitats - such as active raised and blanket bogs - the *only* considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the European Commission, to other imperative reasons of overriding public interest”; **and**

Condition 3: “[A]ll compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected” must be taken (and the relevant Member State must inform the European Commission of the compensatory measures adopted).

38. Clearly turf cutting in Ireland’s peatland SACs could not satisfy Article 6(4) (again, hence the “derogation” terminology used by the government), and the government has indeed made no attempt to comply.

39. The outcome of this is that the so-called “derogations” unilaterally put in place by the government are in clear breach of the Habitats Directive and Ireland’s Habitats Regulations.

**40. If the “derogations” in respect of SACs (raised bog **and** blanket bog) are not withdrawn, and if rigorous enforcement steps are not taken by the government to stop turf cutting in all SACs:**

- (a) **In view of the urgency of the situation, we will take steps before the High Court to judicially review the government’s decision; and**

- (b) **As a fall-back position, we will put together a detailed complaint to the European Commission, arguing that the government's position amounts to a 'general and persistent' breach of the Habitats Directive – a particularly serious category of breach, with which the government has prior experience.**<sup>43</sup>

*The NHAs: raised bog and blanket bog*

41. NHAs are protected under Pt III, Chapter II of the Wildlife (Amendment) Act 2000. Before reaching a definitive view on our next step in respect of NHAs, we will be pursuing answers to a number of questions: e.g. whether turf-cutters on NHA bogs have served notice on the Minister, or have applied in writing to the Minister, under section 19(1) of the 2000 Act; whether the Minister has consented in writing; whether there is a relevant agreement in place under section 11 or 18 of the Wildlife Act 1976. We would urge the Working Group similarly to pursue these issues.

42. Even if turf cutters have served notice or applied to the Minister under section 19 - which seems highly unlikely - we strongly suspect that the Minister has not required EISs to be submitted under section 19A<sup>44</sup> (it is impossible to see how he could conclude, in light of the information set out above, that turf cutting would not have a significant effect on the environment in the relevant NHA).

43. It seems clear, in any event, given the government's use of the term "derogation", that it considers itself to be operating outwith the scope of the protection provisions of the 2000 Act. **Having established the full facts, we will take steps to judicially review any decision on the part of the government to continue to apply a derogation for turf cutting in peatland NHAs.**

**Relocation of turf cutters**

44. We do not support a relocation of turf cutters to nearby non-designated sites on the withdrawal of the derogations. Any such solution would fail to address the significant environmental and other problems resulting from peat extraction.

*Andrew Jackson  
Friends of the Irish Environment  
20 July, 2009*

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<sup>1</sup> *Government approves continuation of turf cutting for 2009*, 27 March 2009:

<http://www.environ.ie/en/Heritage/NationalParksandWildlife/News/MainBody,19872,en.htm>.

<sup>2</sup> Technically the use of the abbreviation SAC to refer to Ireland's bog sites is incorrect, but we have used it throughout our submission for ease of reference, since so many others use the term. The bogs in question are in fact Sites of Community Importance (**SCIs**), having been proposed to the European Commission, and adopted by the Commission as SCIs. However, the sites have yet formally to be designated as SACs by the government (they must be designated as SACs within 6 years of their adoption as SCIs, so the government has until 2010 – see Art. 4 of the Habitats Directive). In terms of protection, by virtue of Article 4(5) of the Habitats Directive, Article 6(2) to (4) of the Directive applies to SCIs.

<sup>3</sup> <http://debates.oireachtas.ie/Xml/30/DAL20090225.PDF>, at page 405.

<sup>4</sup> Almost 3 years late. Under Art. 23(1) of the Habitats Directive, the government had two years from the Directive's notification to transpose the legislation into Irish law. The Directive

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was notified on 5 July 1992. A number of amendments have since been made to Ireland's transposing legislation to meet the terms of judgments of the European Court of Justice.

<sup>5</sup> S.I. No. 94/1997. See Síle de Valera's role in the debate on the publication of this legislation: <http://historical-debates.oireachtas.ie/D/0476/D.0476.199703130006.html>

<sup>6</sup> See Laffan, B. and O'Mahony, J. (2008). 'Bringing Politics Back In'. Domestic Conflict and the Negotiated Implementation of EU Nature Conservation Legislation in Ireland. *Journal of Environmental Policy & Planning* 10(2): 175-197.

<sup>7</sup> Written Answers, *Special Areas of Conservation*, Vol. 482, 12 November 1997: <http://historical-debates.oireachtas.ie/D/0482/D.0482.199711120245.html>

<sup>8</sup> Written Answers, *Turf Cutting*, Vol. 486, 10 February 1998: <http://historical-debates.oireachtas.ie/D/0486/D.0486.199802100158.html>

<sup>9</sup> Written Answers, *Special Areas of Conservation*, Vol. 482, 12 November 1997: <http://historical-debates.oireachtas.ie/D/0482/D.0482.199711120245.html>

<sup>10</sup> Adjournment Debate, *Special Areas of Conservation*, 10 February 1998: <http://historical-debates.oireachtas.ie/D/0486/D.0486.199802100021.html>

<sup>11</sup> Other Questions, *Turf Cutting*, 18 June 1998: <http://historical-debates.oireachtas.ie/D/0492/D.0492.199806180014.html>

<sup>12</sup> Síle de Valera, Written Answers, *Turbary Rights*, 3 February 1999: <http://historical-debates.oireachtas.ie/D/0499/D.0499.199902030069.html>

<sup>13</sup> Síle de Valera, Written Answers, *Turbary Rights*, 3 February 1999: <http://historical-debates.oireachtas.ie/D/0499/D.0499.199902030069.html>

<sup>14</sup> *Síle de Valera announces cessation arrangements for Turf Cutting in raised Bog SACs*, Press Release, 3 February 1999. The original press release does not appear to be available online, though the IPCC's website has a copy: <http://www.ipcc.ie/prturfopw99.html>.

<sup>15</sup> Conor Ó Raghallaigh, Director of the NPWS, *Designation of Bogs: Discussion*, Joint Committee on European Scrutiny, 1 July 2008:

<http://debates.oireachtas.ie/DDebate.aspx?F=SRJ20080701.xml&Node=H4&Page=5>

<sup>16</sup> *Active Raised Bog (7110), Conservation Status Assessment Report*, National Parks and Wildlife Service, at paragraph 6.1: <http://www.npws.ie/en/media/Media,6253,en.pdf>.

<sup>17</sup> Per Conor Ó Raghallaigh: see endnote 15.

<sup>18</sup> That separate derogations are in operation is clear from Minister Gormley's written answer of 5 February 2009: "I will shortly bring a proposal to Government with a view to putting arrangements in place to facilitate the transition to a full cessation of turf cutting on 32 raised bogs by the end of 2009, and to the remaining number of designated bogs in 2012 and 2014." See: <http://debates.oireachtas.ie/Xml/30/DAL20090205A.PDF>.

<sup>19</sup> Hence references in the literature to Ireland's total of 53 raised bog cSACs: see page 397 of <http://debates.oireachtas.ie/Xml/30/DAL20080417A.PDF>.

<sup>20</sup> In a written answer on 4 June 2008, Minister John Gormley commented: "I understand that the Question refers to Nure Bog, Co. Westmeath, which is a Natural Heritage Area designated in 2004 and where, under the normal 10 year derogation, cutting for domestic purposes by turbary owners may continue **until 2013**." This would be consistent with the original derogation, which was granted in 1999 and expired in 2008 (i.e. including the 1999 cutting season, that is a derogation of 10 seasons).

<sup>21</sup> See endnote 20.

<sup>22</sup> Martin Cullen, Written Answers, *Turbary Rights*, 24 June 2004: <http://historical-debates.oireachtas.ie/D/0588/D.0588.200406240133.html>.

<sup>23</sup> Martin Cullen, Written Answers, *Turf Cutting*, 21 October 2003: <http://historical-debates.oireachtas.ie/D/0572/D.0572.200310210234.html>.

<sup>24</sup> Michael P. Kitt, Seanad Debate, *Turbary Rights*, 21 May 2008:

<http://debates.oireachtas.ie/DDebate.aspx?F=SEN20080521.XML&Node=968>.

<sup>25</sup> Other Questions, *Special Areas of Conservation*, 9 July 2008: <http://historical-debates.oireachtas.ie/D/0659/D.0659.200807090023.html>.

<sup>26</sup> *Government approves continuation of turf cutting for 2009*, 27 March 2009: <http://www.environ.ie/en/Heritage/NationalParksandWildlife/News/MainBody,19872,en.htm>.

<sup>27</sup> *Government approves continuation of turf cutting for 2009*, 27 March 2009: <http://www.environ.ie/en/Heritage/NationalParksandWildlife/News/MainBody,19872,en.htm>.

<sup>28</sup> *Blanket Bog (Active \* Blanket Bog) (7130) Conservation Status Assessment Report*, Art. 17 Habitats Directive Report to the European Commission, 2007: <http://www.npws.ie/en/media/Media,6255,en.pdf>.

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<sup>29</sup> Extracts from: Press Release, *Sile de Valera announces cessation arrangements for turf cutting in raised bog SACs*, 3 February 1999: <http://www.ipcc.ie/prturfopw99.html>.

<sup>30</sup> *Government approves continuation of turf cutting for 2009*, 27 March 2009: <http://www.environ.ie/en/Heritage/NationalParksandWildlife/News/MainBody,19872,en.htm>.

<sup>31</sup> John Gormley, Written Answers, Natural Heritage Areas, 5 February 2009: "Even with the restricted cutting that was introduced in 1999, over one third of the best bog habitat on these sites has been lost in ten years": <http://debates.oireachtas.ie/Xml/30/DAL20090205A.PDF>. And see the NPWS's 2007 report to the European Commission: "The extent of Active Raised Bog habitat has decreased by 36% in a ten year reporting period (1994-2005)": <http://www.npws.ie/en/media/Media,6253,en.pdf>.

<sup>32</sup> "Cuttings for industrial and commercial purpose[s] in these bogs must cease before the 1999 cutting season. In exceptional cases to protect employment, the Minister may agree to allow cutting in 1999 where the operator has already entered into a formal agreement with her Department that they will transfer operations to a non-SAC site and will cease operations within the SAC at an early date": <http://www.ipcc.ie/prturfopw99.html>.

<sup>33</sup> Deputy Damien English, *Designation of Bogs: Discussion*, Joint Committee on European Scrutiny, 1 July 2008: <http://debates.oireachtas.ie/DDebate.aspx?F=SRJ20080701.xml&Node=H4&Page=5>.

<sup>34</sup> James O'Connell, *Designation of Bogs: Discussion*, Joint Committee on European Scrutiny, 1 July 2008: <http://debates.oireachtas.ie/DDebate.aspx?F=SRJ20080701.xml&Node=H4&Page=6>.

<sup>35</sup> *Sile de Valera announces cessation arrangements for Turf Cutting in raised Bog SACs*, Press Release, 3 February 1999. The original press release does not appear to be available online, though the IPCC's website has a copy: <http://www.ipcc.ie/prturfopw99.html>.

<sup>36</sup> John Gormley, Written Answers, Natural Heritage Areas, 5 February 2009: <http://debates.oireachtas.ie/Xml/30/DAL20090205A.PDF>.

<sup>37</sup> Blanket Bog (*Active* \* Blanket Bog) (7130) Conservation Status Assessment Report, Art. 17 Habitats Directive Report to the European Commission, 2007: <http://www.npws.ie/en/media/Media,6255,en.pdf>.

<sup>38</sup> NPWS's 2007 report to the European Commission: "The extent of Active Raised Bog habitat has decreased by 36% in a ten year reporting period (1994-2005)": <http://www.npws.ie/en/media/Media,6253,en.pdf>.

<sup>39</sup> Natura 2000 is simply the collective name for the EU's network of protected areas, comprising SACs under the Habitats Directive and Special Protection Areas (SPAs) under the Birds Directive.

<sup>40</sup> See <http://eur-lex.europa.eu/en/index.htm> for the full text of this judgment and the other judgments of the European Court of Justice referred to in this submission.

<sup>41</sup> See the European Commission's 2007 *Guidance document on Article 6(4) of the 'Habitats Directive'*: [http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance\\_art6\\_4\\_en.pdf](http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance_art6_4_en.pdf).

<sup>42</sup> See the European Court of Justice's judgment in C-239/04 *Commission v. Portuguese Republic*.

<sup>43</sup> See the European Court of Justice's judgment in C-494/01 *Commission v Ireland*, which established this category of breach. And see Wenneras, P. (2006). A new dawn for Commission enforcement under Articles 226 and 228 EC: general and persistent (GAP) infringements, lump sums and penalty payments. *C.M.L. Review* 43(1): 31-62.

<sup>44</sup> Inserted by the European Communities (Environmental Impact Assessment) (Amendment) Regulations 2001 (S.I. No. 538/2001).