

## **LAND RECLAMATION AND PLANNING**

We have now had four wet years out of the last six and this is putting increasing pressure on farmers to reclaim peripheral lands for farming. Furthermore, the ending of milk quotas in 2015, along with the government's proposed expansion of the pastoral sector under the Food Harvest 2020 report, means that reclaiming and drainage of lands is set to become a very real issue in the short term future.

Up until 2011 all works associated with land reclamation were regulated by planning legislation. The thresholds that triggered a planning application were so high that in practice the vast majority of reclamation works did not require planning permission and most activity occurred without being subject to any form of assessment. A European Court of Justice ruling however has dramatically changed the situation in terms of assessment of land reclamation activity. This article will examine the changes that have occurred, the new permissions that have to be obtained, penalties for unauthorized reclamation activity and where to find out more information.

### **Background**

The European Court of Justice found in 2008 that Ireland's planning legislation was over-reliant on thresholds and failed to properly take account of environmental impact. Threatened with serious financial penalties the Irish Government reacted in late 2011 by introducing new planning legislation addressing land reclamation focusing on wetlands and moving all other types of land reclamation activities out of planning altogether and under the regulation of the Department of Agriculture, Fisheries and Marine (DAFM).

### **Planning Application**

The planning system will continue to regulate works associated with the land reclamation of wetlands. 'Wetlands' are defined using the following rather complex and wordy definition –

*"natural or artificial areas where biogeochemical functions depend notably on constant or periodic shallow inundation, or saturation, by standing or flowing fresh, brackish or saline water."*

Planning permission is now required for drainage and/or reclamation of all wetlands where the area in question is over 0.1 hectares. To put this in context, the previous threshold for planning permission was over 20 hectares. This requirement for planning permission also means that the works are subject to a potential environmental impact assessment (EIA) depending on their location and the nature of the works involved. Furthermore, a mandatory EIA is now required for any land reclamation exceeding 2 hectares.

## Consent Application

Under the Environmental Impact Assessment (Agriculture) Regulations, 2011 the DAFM has responsibility for assessing all forms of land recreation other than wetlands. This includes 1) restructuring of rural land holdings; 2) commencing to use uncultivated land or 3) semi-natural areas for intensive agriculture; and land drainage works on lands used for agriculture.

1) Restructuring of rural land holdings involves changes to the layout of the farm, with removal of field boundaries being the most obvious example. Restructuring by removal of field boundaries covers the removal of lengths of field boundaries such as hedgerows, hedgerows on clay banks, stone walls, boundaries consisting of clay banks and stone-lined clay banks. Maintenance work or removal of post and rail fencing is not included. 2) Uncultivated land refers to all areas that are not agriculturally managed or subject to limited management. Semi-natural areas refer to areas not covered by hard or artificial surfaces, improved grasslands, tillage or other crops or gardens. Semi natural areas are identified largely by the plants and wildlife they support. 3) Land drainage works on lands (other than wetlands) used for agriculture includes installing open drains; installing field drains using plastic pipes, field drains with drainage stones or mole drains and opening of a short distance of watercourse.

There are different thresholds which relate to each type of activity so it would be too complex to try address each activity in this article. Instead I will focus on one type of land reclamation and give a practical example to demonstrate the requirements in terms of consent.

If a farmer is proposing to carry out reclamation work involving the removal of field boundaries which amount to less than 500 metres he is exempt from having to obtain any consent. If however, the field boundary removal was between 500 metres and 4 kilometres then an application for screening is required. The Minister of Agriculture will then assess the application in respect of the activity having significant effects on the environment, a European site, on a Natural Heritage Areas or nature reserve, or to a recorded monument. If it is concluded that there is no potential adverse impact then the applicant will be informed that the activity may proceed. However, if it is considered that there is potential for adverse impact then an environmental assessment or consultation with other ministerial departments may be required before a decision to proceed (or not) can be made. Finally, if the field boundary removal exceeds 4 kilometres an application with a mandatory EIA is required.

The Environmental Impact Assessment Section in Johnstown Castle, Co. Wexford looks after consent applications. The data they have available shows that between September 2011 and September 2012 a total of 133 applications for consent were made. The vast majority of applications were approved. Only 8 applications were refused permission, with a further 18 found to be exempt from the regulations. The predominant activity applied for (52%) related to the removal of field boundaries.

## **Environmental Assessment**

There are two types of environmental assessment that may be required in relation to land reclamation; EIA and Appropriate Assessment (AA). EIA is required where certain statutory thresholds are exceeded or there is considered to be a likely significant impact on the environment; it is not specific to any particular area. AA however relates specifically to the environmental impact on European designated sites such as Special Areas of Conservation or Special Protection Areas. The individual carrying out the reclamation is not responsible for the actual assessment but they are required to provide the necessary documentation to assist the assessment. This will take the form of an Environmental Impact Statement (EIS) for EIA or a Natura Impact Statement (NIS) for AA. This responsibility is quite onerous as both documents require evidenced based analysis by experts. In the case of an EIS this could involve many different experts (planning consultant, traffic, archaeology, landscape, hydrology, ecology, air, noise etc). As such it can be quite costly to produce an EIS depending on the type of reclamation involved, the size of the area and the sensitivity of the area from an environmental perspective. An NIS tends to be cheaper because the expertise is usually limited to an ecologist and a hydrologist but nonetheless it can still be an expensive document to fund.

## **Sub-Threshold Development**

Efforts to try avoid planning permission in the case of wetlands, or consent in the case of all other types of reclamation, need to be considered very carefully. First of all thresholds for exemption from both planning permission and consents are based on cumulative works undertaken. As such multiple areas of minor land reclamation will require planning or consent if they exceed the relevant threshold. Secondly, if sub-threshold reclamation is likely to have a significant environmental impact an environmental impact assessment may still be required. Thirdly, sub-threshold reclamation in a European designated site or Natural Heritage Area, or in the vicinity of a national monument, may also not be exempt.

## **Penalties for Avoiding Application**

The penalties for carrying out unauthorized development in respect of both planning (wetlands) and agricultural-related land reclamation can be severe. The Planning Act provides for heavy penalties for unauthorised development with a maximum penalty for conviction on indictment of €12.7 million and 2 years imprisonment, or both and for summary conviction of €5,000 or 6 months imprisonment or both. In the case of the EIA Agriculture Regulations the maximum penalty for indictment is a fine of €250,000 and a summary conviction can result in a fine of €5,000. A defense that the farmer did not know his/her lands were in a European site or contained a national monument will not be accepted by the courts; it is the farmer's responsibility to inform him or herself.

## **Where can I find out more?**

This is a quite complex area of legislation, both in terms of what thresholds apply and in terms of what environmental/archaeological assessment is required, if any. This article has only broadly outlined the issues involved and further reading is necessary to be fully informed. Draft planning guidelines for wetlands are available on the Department of Environment, Community and Local Government website, although it is not clear why these remain in draft form nearly two years on from the legislation coming into force. The DAFM has produced a very useful 'Guide for Farmers' which provides advice on the consent procedure.

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