



***An Comhchoiste um Thalmhaíocht, Bia agus Muir***

**Tuarascáil**

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**Priacail Tuile ag Loch Fuinseann**

Nollaig 2022

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***Joint Committee on Agriculture, Food and the Marine***

**Report**

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**Flooding Risks at Lough Funshinagh**

December 2022

## Flooding Risks at Lough Funshinagh

The Joint Committee on Agriculture, Food and the Marine at its meeting on the 26<sup>th</sup> of October 2022<sup>1</sup> agreed to endorse those aspects of motion no. 152/22 (Motion *re* Ongoing Flooding Risks at Lough Funshinagh added to the Dáil Business website on the 28<sup>th</sup> of June 2022 in the name of Deputy Denis Naughten and others) that pertain to its remit (see Appendix 1 for text of the motion).

At its private meeting on the 6<sup>th</sup> of December 2022, the Committee agreed to include correspondence it had received from Deputy Denis Naughten which is a letter from Roscommon County Council addressed to Minister for the Office of Public Works, Mr. Patrick O'Donovan T.D., dated 18 May 2022 (see Appendix 2). This letter lays out the backdrop for motion no. 152/22.

The Joint Committee on Agriculture, Food and the Marine agreed that this report should be debated in Dáil Éireann and Seanad Éireann.



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Jackie Cahill T.D.  
Cathaoirleach  
8 December 2022

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<sup>1</sup> Houses of the Oireachtas, *Joint Committee on Agriculture, Food and the Marine*, Debate, 26 October 2022. [Link](#) to debate.

## Appendix 1 - Motion re Ongoing Flooding Risks at Lough Funshinagh (152/22)

That Dáil Éireann:

recognises:

- the very serious humanitarian crisis faced by eight families in Ballagh and Lisphelim in Co. Roscommon; and
- the significant threat to eight properties, eight businesses, and some 300 hectares of farmland;

as a result of the significant flooding threat due to the lake levels at Lough Funshinagh, Co. Roscommon, calls on the Government to:

- establish, as a matter of urgency, a cross-departmental and cross-agency taskforce to address emergency climate adaptation measures to protect homes throughout the country;
- set as the first item on the agenda of this taskforce the authorisation of flood alleviation works at Lough Funshinagh, Co. Roscommon, as a case study;
- set out a clear procedure for the repeal of European Union (EU) Habitats designations where they are no longer applicable;
- remove the EU Habitats designation on Lough Funshinagh, Co. Roscommon, which is no longer, if ever, a turlough;
- amend the Planning and Development Acts and the Local Government Act, 2001 to make clear what freedom the State considers a local authority should have to deliver an urgent solution to an emergency situation that requires immediate action;
- amend the Local Authority (Works) Act, 1949 to ensure that the legislation is effective for the purpose of EU law on the assessment of the impact on the environment and/or habitats;
- provide formal guidance to all competent authorities on whether adaptation by displacement of homeowners should be considered as a "feasible solution" when contemplating any adverse effect on the integrity of a European site; and
- amend the protection from legal costs to ensure that the State is not more generous than that required under EU law; and

further calls on the Government to ensure that pumps, fuel and personnel are in place to prevent homes from flooding around Lough Funshinagh while the taskforce completes its work.

Sponsor(s)

Denis Naughten, Seán Canney, Michael Fitzmaurice, Marian Harkin, Verona Murphy, Matt Shanahan

## Appendix 2 - Correspondence from Roscommon County Council to Minister for the Office of Public Works, Mr. Patrick O'Donovan T.D.



Comhairle Contae  
Ros Comáin  
Roscommon  
County Council



18<sup>th</sup> May 2022  
Our ref: RCC Vs FIE

Mr. Patrick O'Donovan TD,  
Minister for the Office of Public Works,  
52 St. Stephen's Green,  
Dublin  
D02 DR67

BY EMAIL – [garret.nolan@opw.ie](mailto:garret.nolan@opw.ie)

**Re: Lough Funshinagh Emergency Flood Relief Works**

Dear Minister O'Donovan,

You will be aware that, on two occasions during 2021, Roscommon County Council (the "Council") and the Office of Public Works ("OPW") attempted to carry out emergency flood relief work at Lough Funshinagh.

On both occasions, the validity of the legal basis for the flood relief work was questioned in the High Court by Friends of the Irish Environment CLG ("FIE"): 2021 Nos. 773 and 1097 JR. The court made orders quashing the Council's legal basis for action. By order of the court, the flood relief work has been stopped and must now be remediated.

At a meeting of the elected members of the Council on 28 March 2022, the Council was unanimous that the Cathaoirleach and Chief Executive should bring certain issues to your attention, as Minister of State with responsibility for the OPW and flood relief. Although you are familiar, for context, the relevant chronology is set out in the attached Schedule.

- (1) The principal constraint on flood relief is the designation of Lough Funshinagh as a European site (or Special Area of Conservation, or SAC), with protection under the Habitats Directive (92/43/EC) and the transposing Irish regulations (SI No. 477 of 2011). When delivering judgment granting the stay pending the conclusion of the second case, the High Court described the impact on this protected site as "the principal determinant" of whether or not to prevent the Council and the OPW from carrying out work (see paragraph 25 of [2022] IEHC 666).
- In particular, the court treated the lake as a "turlough" on the basis that "is the precise habitat type for which the SAC has been designated: see European Union Habitats (Lough Funshinagh Special Area of Conservation 000611) Regulations 2019 (SI No. 211 of 2019)".

This is a matter of real controversy.

Lough Funshinagh does not, as a matter of fact, have the characteristics of a turlough. Turlough is a priority habitat type, marked with an asterisk (\*) at Annex I of the Habitats Directive. The European Commission interpretation manual (2013) gives the following elaborate description:

"Temporary lakes principally filled by subterranean waters and particular to karstic limestone areas. Most flood in the autumn and then dry up between April and July. However, some may flood at any time of the year after heavy rainfall and dry out again in a few days; others, close to the sea, may be affected by the tide in summer. These lakes fill and empty at particular places. The soils are quite variable, including limestone bedrock, marls, peat, clay and humus, while aquatic conditions range from ultra-oligotrophic to eutrophic. The vegetation mainly belongs to the alliance *Lolio-Potentillion anserinae* Tx. 1947, but also to the *Caricion davalliana* Klika 1934."

Lough Funshinagh does not empty annually, or even close to annually. It has not disappeared for 26 years. The last two occasions were in 1996 and 1977. Two of the three highest flood levels in the last 100 years were recorded in the last two years, HY 2019 and HY 2020. This suggests that Lough Funshinagh is, in fact, no longer functioning as a disappearing lake at all. The surface level of water in a turlough coincides with the groundwater level in the surrounding area. The turlough fills in winter and recedes or dries out in summer in response to changes in groundwater level. The level is not influenced directly by rainfall. The water level regime in Lough Funshinagh does not follow this pattern.

Lough Funshinagh is, in fact, perched above the level of surrounding groundwater. In 2016, the Geological Survey of Ireland ("GSI") monitored the water levels in local wells and observed that levels in those wells were between 2 and 3 metres lower than the surface level of water in Lough Funshinagh at the same time. Malachy Walsh and Partners interrogated the surface level of water in the lake and cumulative rainfall data from the Lecarrow gauge for the period of time from August 2016 to August 2021. When compared, there is a strong correlation in the overall shape of the two profiles, which confirms that there is no groundwater inflow to the lake.

The Council submits that Lough Funshinagh never deserved, and certainly no longer deserves, protection as a turlough, for these reasons that it does not, in fact, have the relevant characteristics.

**We invite you, and the Government, to repeal of the designation of Lough Funshinagh as a European site that contains turlough habitat type.**

- (2) The second case identified real difficulties regarding the transposition of European law into Irish law.

When delivering judgment granting the stay pending the conclusion of the second case, the High Court made observations about the strength of the FIE challenge. These related to aspects of European law that are not currently expressed in Irish law.

In particular, the court expressed concern about whether the definition of "emergency" under the Planning and Development Act 2000, as amended, (the "Planning Acts") should be limited to reflect the concept of "civil emergency" under European law. Without formally deciding

the point, the court observed there is a “strong argument” that European law requires a different, narrower, definition.

During its submissions to the court on 28 January 2022, the State conceded that to defend section 179 of the Planning Acts from complaint that the section is inconsistent with European law, it would have to argue at hearing that the section must be “read in a conforming manner” with European law. While the State offered no view on whether the emergency identified by the Council did satisfy this much narrower definition, the court quoted from guidance published by the European Commission to the effect that flood relief works should not be considered a civil emergency under European law, “where flooding has occurred in the same place on several occasions” (see paragraph 46 of [2022] IEHC 666).

Both section 179(6)(b) of the Planning Acts and section 138(4) of the Local Government Act 2001 contemplate freedom for local authority action to deliver an urgent solution to an emergency situation calling for immediate action. The judgment in the second case introduces real doubt for that freedom.

**We invite you, and the Government, to amend the Planning Acts and the Local Government Act 2001 to make clear what freedom the State considers a local authority should have to deliver an urgent solution to an emergency situation calling for immediate action.**

- (3) The first case also identified real difficulties regarding the transposition of European law into Irish law.

The case concerned a decision under the Local Authority (Works) Act 1949. Although on the statute book since 1949 and although listed in the Second Schedule to the regulations that transpose the Habitats Directive (92/43/EC) into Irish law (SI No. 477 of 2011), the Council is advised that the powers under that legislation are not effective for the purpose of the European laws on environmental impact assessment.

**We invite you, and the Government, to review the Local Authority (Works) Act 1949 and amend the same to ensure the powers under that legislation are effective for the purpose of the European laws on the assessment of impact on the environment and/or habitats.**

- (4) The second scheme was carefully limited to interim works only. It comprised only urgent relief works that would have provided relief to the communities of Lough Funshinagh, based on the advice received by the Council, without any significant impacts on any protected European site or the environment.

The long-term solutions for the ongoing flood risk require a permanent intake from the lake that, assuming still defined a priority habitat type, would comprise a permanent loss that, by law, is deemed an adverse effect on integrity of the protected site. This compounds the first practical difficulty. It means the long-term solutions would only secure consent where the competent authority, An Bord Pleanála (the “Board”), consider there are no feasible alternative solutions, and there are imperative reasons of overriding public interest (“IROPI”) that justify the work despite the environmental damage it will cause.

Where adaptation, by displacement of home owners, is a possible "solution" to manage the flood risk, the Council is advised that it would be difficult for the Board to conclude that there are no feasible alternative solutions. This makes it impossible for the Council to secure consent for long-term solutions.

We invite you, and the Government, to provide formal guidance to all competent authorities on whether adaptation, by displacement of home owners, should be considered a "feasible solution", when contemplating any adverse effect on the integrity of a European site.

- (5) The Council understands from media reports that the Government is actively considering reform of judicial review and legal costs risk. You will not be surprised that decisions made by the Council about the two cases have been informed by advice about the judicial review process and legal costs, including the protection for FIE from the costs of proceedings in the High Court and on appeal. It does not make sense that applicants to court should have an unrestricted "shot to nothing", particularly where there is no unique or special interest or connection between the applicant and the area. This last point has been a source for particular concern in the local community. The perception, right or wrong, is that outcomes for the health and safety of citizens can be dictated by an unelected, unrepresentative and unregulated body corporate that has no economic risk in court.

We invite you, and the Government, to amend the protection from legal costs to ensure that the Irish State is not more generous than required by European law.

The Council cannot progress the matter further, without resolution to these issues.

Yours sincerely,

  
Cllr Joe Murphy  
Cathaoirleach

  
Eugene Cummins  
Chief Executive



### Schedule

- (A) On 4 April 2021, the 69.026 m OD level at the lake was the maximum recorded, 762 mm higher than the historic anecdotal maximum in 1947.
- (B) On 17 May 2021, the Council concluded that the existing mitigation methods were insufficient and that there was imminent danger to life, livelihood, property and infrastructure, in the absence of immediate emergency works. Accordingly, the OPW commenced works for the Council under the Local Authority (Works) Act 1949.
- (C) 827.5 m of pipeline was laid by the OPW before the validity of the legal basis for those works was questioned in the High Court: *Friends of the Irish Environment CLG v. Roscommon County Council & others*, High Court 2021 773 JR (the "first case").
- (D) Friends of the Irish Environment CLG ("FIE") complained that the works required approvals under Part 8 of the Planning and Development Act 2000 (as amended) (the "Planning Acts"), environmental impact assessment ("EIA"), appropriate assessment ("AA") and/or assessment for the purposes of the Water Framework Directive (2000/60/EC).
- (E) On 13 August 2021, FIE were granted leave to question the validity of the decision to approve the works, a stay on those works and an early return date in court of 25 August. On that return date of 25 August, the Council consented to an order quashing the decision to approve the works (the "first scheme") and an order to remediate the lands in accordance with a plan prepared by Malachy Walsh and Partners ("MWP"), the Lough Funshinagh Flood Management Project Remediation Plan (the "Remediation Plan").
- (F) From 2 September to 18 October 2021, the OPW carried out substantial works under and in accordance with the Remediation Plan.
- (G) During September 2021, the Council took advice from MWP and McCann FitzGerald Solicitors on the regulatory controls that apply to urgent flood relief works. MWP prepared a scheme that would provide relief to the communities of Lough Funshinagh, without any significant impacts on any Natura 2000 Site (or European site) or the environment. Upon confirmation of the applicable controls, revision to the nature and extent of the flood relief works and completion of screening for both EIA and AA (the "second scheme"), the Council revisited whether emergency works were required.
- (H) On 14 October 2021, the Council again concluded that there was a risk that comprises an emergency situation calling for immediate action, for which an urgent solution is required. The OPW commenced work on the second scheme.
- (I) On 27 October 2021, FIE complained to the High Court that the second scheme was in breach of the order made in the first case.
- (J) On 4 November 2021, the High Court dismissed the complaint made by FIE: [2021] IEHC 666.
- (K) 1.6 km (total) of pipeline was laid, before the validity of the legal basis for those works was questioned in the High Court in the second case.



- (L) On 21 December 2021, FIE were granted leave to question the validity of the decision to approve the works: *Friends of the Irish Environment CLG v. the Council*, High Court 2021 1097 JR (the "second case"). The court also granted an interim stay on those works and an early return date in court of 14 January 2022 for argument about whether the stay should continue pending the conclusion of the second case. On 14 January 2022, the court heard argument from FIE and the Council, and adjourned the matter to 28 January 2022 to hear from lawyers representing Ireland and the Attorney General (the "State").
- (M) On 28 January 2022, after hearing argument from FIE, the Council and the State, the court made an order prohibiting the Council from continuing with the current scheme pending the conclusion of the second case. The court described the issue as presenting a very real dilemma. If the court was to refuse the order, but FIE were to ultimately win their case, the court would have allowed works near a protected European site without full compliance with required procedures. If the court was to grant the order, but FIE were to lose their case, the court would have delayed emergency flood relief works to after a point in time when they would not be available to alleviate flood risk during this winter. The court found there was a conflict in the evidence produced by FIE and the Council that it could not resolve. Even so, the court concluded that the evidence produced by FIE was sufficient to establish a real risk to the protected European site that justified the prohibition, for the time being: [2022] IEHC 44.
- (N) On 23 March 2022, the Council consented to an order quashing the decision to approve the second scheme and an order to remediate the lands in accordance with the methodology contained in the Remediation Plan.