

[REDACTED]
[REDACTED]
[REDACTED]

15th October 2021

Re: Submission on the Draft Policy Statement on Mineral Exploration and Mining in Ireland, and associated SEA Environment Report and AA Natura Impact

I am a lecturer in environmental law and policy at [REDACTED] and a [REDACTED] funded PhD researcher as part of the [REDACTED]. My PhD focuses on rural rights to land access, landscape and cultural heritage in Ireland. I have previously worked in a range of climate and environmental law and policy advisory roles from the private legal sector, to the Oireachtas, to advising government, trades union and NGO bodies.

I welcome the opportunity to contribute to the formation of a Policy Statement on Mining in Ireland. I would like to outline a number of issues for consideration, followed by a series of recommendations.

Mining, Climate Action and the Sustainable Development Goals

The Draft Policy Statement states the following: *“Minerals have a critical role to play in realising our national ambitions, including the implementation of the National Planning Framework, the Climate Action Plan, assisting economic recovery and our transition to a circular and resource efficient economy, supporting rural development, and reducing our emissions in every sector to meet our climate commitment to net-zero greenhouse gas emissions by 2050.”*

The Department should be careful to examine industry representations that could be classified as ‘greenwashing’. Mining is not, in non-artisanal cases, an environmentally, or climate-friendly activity and should not be promoted as such. It is energy-intensive with major impacts on biodiversity. It is estimated that greenhouse gas emissions associated with primary metal and mineral production accounted for approximately 10% of total global energy-related emissions in 2018.¹ If historical trends and current patterns of production and consumption are followed - without transformative policy changes - the overall environmental impacts of extraction and processing of key minerals are projected to at least double between 2017 and 2060, as a result of both the increased scale of extraction and production and of declining ore grades.² Government should give real consideration as to how it will deliver those transformative changes considering the flaws in its regulatory regime and its international reputation as a ‘reluctant jurisdiction’ when implementing environmental regulation.³ Particularly if initiatives by much-welcomed international ‘circular economy’ organisations such as the UK-based Ellen MacArthur Foundation, have failed to result in concrete action.

¹ <https://www.nature.com/articles/s41561-020-0531-3?proof=t>

² <https://www.oecd.org/environment/waste/highlights-global-material-resources-outlook-to-2060.pdf>

³ Dillon, S. The Mirage of EC Environmental Federalism in a Reluctant Jurisdiction, 8 N.Y.U. ENVTL. L.J. 1 (1999)

The document also makes reference to mining being beneficial for the SDGs. The role that mining plays in the SDGs is heavily disputed.⁴ The United Nations Environment Programme (UNEP) state that “minerals underpin global development and are critical to the achievement of the United Nations Agenda 2030 and the SDGs”, while the issues laid out in Section 3 speak to the negative impacts,⁵ with critics noting that the term sustainable mining is “an inherent contradiction in terms.”⁶ One way to ensure that mining could contribute is to ensure that the international normative framework for mining is based on human rights. The Danish Institute for Human Rights stress that as more than 90% of the SDG targets are linked to international human rights and labour standards, an important step for companies to help advance the SDGs is to respect human rights in their core operations and supply chains.⁷ In order to prepare Ireland for mining - and to address human rights abuses by Irish mining companies abroad - the Department can develop legislation at Irish level to ensure mining compliance with the UN Guiding Principles on Business and Human Rights (at home and abroad) or a law such as the 2017 French Duty of Vigilance Law, which requires French companies to adopt supply chain due diligence policies focused on human rights- related risks at supplier companies. Irish organisations such as Frontline Defenders⁸ and Trócaire are already working on such legislation and should be engaged with before further development of the industry.

The focus on minerals as required for climate action is predicated on the Climate Action Plan’s focus on developing a major individual take-up of EVs. This policy choice has been criticised by climate experts and by the Departments of Finance and Public Expenditure and Reform as not feasible and a questionable climate policy choice due to the use of tax incentives for high-wealth individuals. The SEA must examine alternatives in circular economy, public transport, walking and cycling rather than mining, motorways and increased consumption. The green transition will require an increase in the production of certain critical raw materials in the short-term, such as lithium, but overall energy demand needs to be reduced drastically. The Irish government and the SEA must implement the ‘Energy Efficiency First Principle’ under the July 2021 Energy Efficiency Directive’s proposal.⁹ Ireland and the EU must also set targets to reduce absolute resource consumption. In particular, a binding material footprint reduction target of 65% (to five tonnes per capita) by 2050 is needed, with mid-term targets and plans.¹⁰ Ireland should push for such a resource-use approach to climate action through the European Green Deal, the UNFCCC and in relations with third countries to push for normative change to mining regulation at home and abroad.

Balancing the Public Interest

⁴ The United Nations Environment Programme (UNEP) state that “minerals underpin global development and are critical to the achievement of the United Nations Agenda 2030 and the SDGs”,

⁵ <https://www.resourcepanel.org/reports/mineral-resource-governance-21st-century>

⁶ <https://www.theguardian.com/sustainable-business/2015/jan/05/sustainable-mining-business-poverty-environment-new-framework>

⁷ <https://www.humanrights.dk/learning-hub/sustainable-development-goals-sdgs>

⁸ <https://www.frontlinedefenders.org/en/news/i-will-never-give-my-land>

⁹ The targets also remain too low to keep rising global temperatures below 1.5°C, or to slow down rapidly growing material demand for renewable energies and infrastructure. They need to be increased to a 45% final energy consumption reduction by 2030, and Member States must set their own targets equal to or above that, and enforce them.

¹⁰ <https://www.europarl.europa.eu/news/en/press-room/20210122IPR96214/meps-call-for-binding-2030-targets-for-materials-use-and-consumption-footprint>

Ireland should weigh up the benefits of increasing minerals production as against the damage it will cause. It is recommended that Ireland develops process that asks the public *what type* of mining they consider acceptable, and *where they do not want* mining to occur. The 1 May 2021 State Mining and Prospecting Areas map is notable in its lack of exclusion zones, apart from narrow city regions (creating a rural-urban divide) and certain state-owned mines. No assessment has made of where mining should not occur, such as where there is a sensitive environment, where there is a vulnerable water table, what is a national park, what is a locally and culturally sensitive landscape, where schools and hospitals are based, where fishing or sensitive agricultural activities occur, where SACs and SPAs are located and what are world-renowned areas of natural beauty or cultural importance. It is surprising to find regions such as Connemara and Glendalough, the former lovingly mapped by Tim Robinson, to be open for prospecting without restriction.

The Department must engage meaningfully with the public and respect “the right to say no.” The Department should prepare meaningful vindication of procedural rights in cases where a community opposes mining and a license is handed back or revoked, that no further licensing rounds should re-occur. Communities have already expressed their unhappiness with the public consultation and licensing regimes where opposition is stated and a licence revoked, only for that licensing round to re-open next year. If a member of the public does not consent to their land being accessed for prospecting, that should be respected - rather than encouraging the developer to continue to access the land for “non-intrusive” prospecting, as the *Draft Policy Statement* does on p.54. Such a facilitative approach to polluting extractive industries from the Department has sparked tensions in the past, such as with the controversial imprisonment of farmers and other members of the public that refused access to Shell for the laying of a pipeline the community considered a threat to public safety during the Corrib gas project.¹¹

Consider a ban on gold mining and other damaging mining activities

The Department should consider a ban on the mining of certain minerals, for example gold mining, due to its particularly harmful impacts and the lack of public necessity. Most gold is not used for useful activities but for speculative investment. Gold mining is also particularly harmful and has been the subject of a number of human rights court cases under the European Convention on Human Rights (ECHR). In the case *Tătar v Romania [2009]* the court found the Turkish state had violated Article 8 of the ECHR¹² as it had not abided by the precautionary principle in regulating the gold mining industry or providing the public with information on the risks associated with gold mining, such as the use of sodium cyanide. No domestic reports indicated the risks to the public at that time and government had not informed the public as to international or other studies on the impacts of gold mining and sodium cyanide. As an example of where the Irish government appears to be following the mistakes of the Turkish authorities, on page 47 the *Draft Policy Statement* answers the ‘frequently asked question’ “*Is cyanide used in mineral exploration*” with “*Cyanide is not used in mineral exploration*”. This is not an adequate provision of information to the public on the risks associated with mining. While sodium cyanide may not be used during exploratory drilling or prospecting, it is widely used to extract minerals at the full project stage, particularly gold.

Gold mining is also a particularly difficult activity to regulate in the context of international investment law. A number of high profile cases are being taken by gold mining companies under Investor State Dispute Settlement cases including in Ecuador (USD\$480 million, Chinese company, gold), Mexico (USD\$3.54 billion, Canadian company, gold) and Sweden (USD\$1.8 billion, Australian

¹¹ See the 2010 Frontline Defenders Report - Breakdown in Trust: A Report On The Corrib Gas Dispute

¹²Article 8 “Everyone has the right to respect for his private and family life, his home and his correspondence”

company, uranium, vanadium and gold). Please see the cases of mining in the Sperrins¹³ and of Peruvian farmer Máxima Acuña both highlighted by Frontline Defenders.¹⁴ Trócaire has also highlighted a number of gold mining cases including that of Flores Mira Lopez.¹⁵

Issues in the Regulatory Environment

The Republic of Ireland (ROI) and NI rank in the top ten by the Fraser Institute in terms of policy perception index, which measures how attractive a country's policy climate is to mining.¹⁶ The fact that Ireland is viewed as an attractive or friendly policy and regulatory environment for international mining investors and companies, should not be confused with the existence of a robust or well-functioning regulatory regime. There are only two mines in operation in Ireland, both of which could be described as having some checkered interactions when complying with environmental regulation and planning law. Ireland's legislation on mining is based around a 1960s-70s era of mining activity. Our regulatory framework is likely to be ill-prepared for the many new, and experimental technologies that will come with new minerals development by experienced international investors and practiced multi-national companies. Ireland already has a number of serious flaws in its regulatory approach to extractive industries, exemplified by the Corrib Gas project. Ireland is known as a "reluctant jurisdiction" at international and EU level due to its repeated failures to adequately transpose and implement EU and international environmental and administrative law in relation to planning and the licensing of extractive activities.

Oncoming issues include:

- **Institutional Independence and Oversight:** It is recommended that the body responsible for oversight of the mining industry and monitoring of pollution be split from the body responsible for the licensing regime. Currently, the Department of Climate, Environment and Natural Resources (DCENR) is characterised by a basic contradiction: the Department responsible for community participation in environmental decision-making and the protection of the environment from extractive activities and associated pollution, is also the body responsible for the promotion of Ireland as an attractive destination for extractive industries, including the management of licensing regimes.¹⁷ The conflicts inherent in such an activity have already played out in terms of offshore oil and gas licensing, leading to the Department rubber-stamping violations of EU environmental and procedural law in order to facilitate illegal company activities such as project-splitting and inadequate AAs during the Corrib gas project.
- **Natura 2000 (Habitats and Birds Directives):** Ireland is currently before the European Court of Justice due to serious delays in designating proposed and official Sites of Community Interest (SCIs) as Natura 2000 sites.¹⁸ Ireland also has to increase the numbers on list of proposed SCIs in

¹³ <https://www.frontlinedefenders.org/en/blog/post/home-turf-when-irish-environmental-defenders-receive-death-threats>

¹⁴ <https://www.frontlinedefenders.org/en/news/i-will-never-give-my-land>

¹⁵ <https://www.trocaire.org/news/where-the-dead-can-finally-rest/>

¹⁶ <https://www.fraserinstitute.org/studies/annual-survey-of-mining-companies-2020>

¹⁷ See evidence given by Dr. Amanda Slevin to the Oireachtas Committee on Communications, Climate Action and Environment:

https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_communications_climate_action_and_environment/submissions/2018/2018-08-03_submission-dr-amanda-slevin-school-of-social-sciences-queen-s-university-belfast_en.pdf [Accessed 27/08/21].

¹⁸ <https://www.irishtimes.com/news/environment/commission-to-refer-ireland-to-court-of-justice-of-the-eu-over-failure-on-conservation-measures-1.4294916>

order to comply with the 2020 EU Biodiversity Strategy. Across the EU 81% of habitats and 63% protected species have 'unfavourable' status, and Ireland is one of the worst performing countries. SCIs have strict protection and the same rules of AA and s.6(3) and 6(4) of the Habitats Directive apply. Granting prospecting and licensing in SCIs will lead to breaches of Habitats and Birds Directives leading to the payment of fines, a requirement to restore that site to its original status and find a like for like habitat. It is recommended that all prospective sites be designated and set aside from mining and other extractive industries.

- **Marine Protected Areas:** Ireland has not included the prospect of deep sea mining within the public consultation on the Marine Planning Framework or Marine Protected Areas. It is not good practice to introduce policy statements and guidance on mining that could conceivably occur in those areas after the fact. As with Natura 2000 sites, MPAs must be designated first and cumulative impacts and alternatives meaningfully assessed - including an outright ban on mining at sea as in other countries. A ban on mining at sea should be considered due to the harmful impacts and inability to give effect to the the precautionary principle due to lack of knowledge on this unconventional activity or the base level of biodiversity.
- **The 2014 EIA Directive:** The mining regime in Ireland has not been updated to include the 2014 Act. Climate impacts of mining should also be considered, as well as cumulative impacts on water stress. Carrying out EIAs for open-pit mining where the surface of the site is less than 25 hectares, or for underground mining, is not mandatory under EU law, but up to Member State discretion. It is recommended that Ireland introduce an EIA in such cases.
- **Water Framework Directive:** Mining requires extensive water supplies. Ireland's minerals are likely of a lower grade ore, or already extracted mines are being re-exploited. Declining ore grades have an inverse exponential relationship with water consumption. Ireland is already in violation of many of the Directives requirements. There are additional stressors on water use in Ireland due to climate change, population growth and data centres. A cumulative assessment is required of all the impacts to water use in Ireland, and the additional damage that mining will contribute. Again, this assessment must be cumulative not case-by-case.
- **Aarhus Convention and procedural rights:** Ireland is currently behind in fully implementing the Aarhus Convention. Best practice internationally would be to install a right for communities to say no to a project, and the right to Free, Prior and Informed Consent. This is a specific right in the case of Indigenous Peoples articulated in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) allowing communities to give or withhold consent to a project that impacts their lands, territories or natural resources. While the UNDRIP is not applicable to the wider Irish public, a similar right should be installed in the Irish context to avoid the current situation of basic (online) consultations with communities in lieu of actually acquiring consent. Such basic consultations and the lack of a meaningful right to oppose or 'say no' has led to communities boycotting current Departmental public consultations.
- **Waste Management:** Ireland's waste management regime leaves much to be desired, with the EPA repeatedly calling for proper monitoring of waste including that released into waterways, household and industrial waste regimes and water pollution. Ireland's mining industry has also been a contributor to pollution. It is unlikely that Ireland's existing piecemeal waste management licensing and monitoring regime is up for the task of dealing with tailing ponds and the management of toxic waste (in some cases, in perpetuity) to prevent pollution to drinking water and agricultural lands and livestock. Such considerations led to a ban on fracking in Ireland and certain mining activities and minerals should be considered similar to fracking in the context of waste management. Mining is the industry that produces the largest amount of waste, globally. The production of one tonne of copper, for example, generates around 110 tonnes of tailings and 200 tonnes of topsoil removal or overburden. In the EU, mineral waste is already the second biggest waste stream, making up around 25-30% of all generated waste. The increase in

tailings has also led to an increase in accidents. Over the past century, the failure rate for tailings dams was more than 100 times higher than that of reservoir and power dams.

- **Human Rights:** The social impacts of mining cannot be understated. Mining is the deadliest industry for those who oppose it. More environmental defenders are killed for opposing mining than opposing any other industry with 50 of the 212 environmental defenders killed worldwide in 2019 campaigning to stop mining projects.¹⁹ The Business and Human Rights Resource Centre has uncovered 167 official global human rights allegations associated with certain metals such as copper and lithium, tied to 86 different mining operations.²⁰ A number of Irish companies are involved in mines in Sri Lanka and South Africa that are currently the subject of longstanding international criticism and court cases on the basis of human rights abuses and environmental degradation. Irish organisations such as Frontline Defenders, Trócaire²¹ and IHREC focus on the impacts of Irish companies abroad including the mining industry. These Irish organisations have highlighted how workers and nearby communities often face intimidation, sexual violence or exploitation, child labour, human trafficking, or are forced into poverty or economic hardships. Large-scale industrial mining also creates more long-term and indirect negative impacts, being a major contributor to global greenhouse gas emissions, regional conflicts, and political corruption. These are not new issues for Ireland, but have already been experienced in the context of the Corrib gas project.
- **Investor State Dispute Settlement (ISDS):** Ireland is ill-prepared for ISDS should such a regime be accepted with the ratification of the Canada-EU trade agreement (otherwise known as CETA). Please see the case *Eco Oro (a Canadian gold mining company) v Columbia (ICSID Case No. ARB/16/41)* where the court stated that Columbia was within its right to regulate in favour of the environment but that it still owed compensation to Eco Oro anyway, to the tune of millions of dollars. Please compare the judgement and financial impact of this case with the reasoning and findings in *Glencar Exploration plc v Mayo County Council*. As of June 2020, there were 42 publicly known pending ISDS mining claims from mining multinationals around the world, totalling at least USD\$45.4 billion.
- **Landscape Protection:** Ireland is also bound by the European Landscape Convention, which led to the National Landscape Strategy being developed for 2014-2024 (DAHG/Heritage Council 2014). The European Landscape Convention recognises the various fields of public interest in the landscape as being “cultural, ecological, environmental and social” (preamble). It obliges each state party to “recognise landscape in law as an essential component of peoples’ surroundings, as an expression of the diversity of their shared cultural and natural heritage, and as a foundation of their identity” (Art. 5 (a)). It also provides for public participation in landscape planning (Art. 6). Any mineral exploration and mining policy needs to be cognisant of the nature and value of landscapes earmarked for exploration, and this is not restricted to a “view” but rather takes into account the current use or amenity value that particular places have for people.

¹⁹ <https://www.globalwitness.org/en/press-releases/global-witness-records-the-highest-number-of-land-and-environmental-activists-murdered-in-one-year-with-the-link-to-accelerating-climate-change-of-increasing-concern/>

²⁰ <https://www.business-humanrights.org/en/from-us/briefings/transition-minerals-tracker-regional-analysis-of-human-rights-policies-and-practices/>

²¹ <https://www.trocaire.org/news/where-the-dead-can-finally-rest/>