



An
Bord
Pleanála

Inspector's Report ABP-302759-18

Development	Monumental stone quarry
Location	Largybrack, Glencolmcille, County Donegal
Planning Authority	Donegal County Council
Planning Authority Reg. Ref.	EUQY174
Applicant(s)	Donal Mac Monagail agus a Mhic Teo, t/a McMonagle Stone
Type of Application	Leave to appeal for substitute consent under Section 177C of the Planning and Development Act 2000, as amended
Type of Appeal	First-Party Direct Application
Date of Site Inspection	10 th April 2019
Inspector	Colm McLoughlin

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1.0 Introduction

- 1.1. This application for leave to apply for substitute consent for a monumental stone quarry is made under section 177C of the Planning and Development Act 2000, as amended (hereinafter referred to as 'the Act').

2.0 Site Location and Description

- 2.1. The monumental stone quarry subject of this application is located in the rural townland of Largybrack, which is in an upland Gaeltacht area of southwest Donegal, approximately 9km to the north of the village of Carrick. The quarry is situated on the steadily rising western slopes of Crockuna (Cnoc Oona), approximately between the 130m and 210m ordnance datum (OD) levels. Crockuna rises to 400m OD and forms part of the Slievetooley uplands. Vehicular access to the quarry is available from an unsurfaced track on the lower slopes, connecting with the L-2883 local road, and the local road network feeds into the R230 regional road serving the settlements of Glencolmcille and Ardara. The unsurfaced access track serving the subject site also serves adjoining commercial forestry plantations.
- 2.2. The area is characterised by agricultural holdings on the lower slopes and valleys, interspersed sparsely with rural housing, alongside commercial forestry, quarried lands and undeveloped blanked bog uplands, predominantly used for sheep grazing. The nearest habitable house to the subject quarry is located approximately 200m to the west.
- 2.3. The quarry appears to be divided into three broad operational areas, including lower areas for the storage of cut stone and other deposits, as well as the manoeuvring of vehicles. Along the middle southern portion of the site, the ground has been levelled to provide for vehicular parking, as well as the placing and operation of grading and other machinery, storage sheds and bays, a silo and office/workshop accommodation. The various working quarry faces are situated on stepped lands rising to the north and east of the central levelled area, cutting into the hillside and serviced by a network of quarry tracks. Within the application documentation the applicant states that blasting or processing activities do not occur in the quarry with stone excavated by machine and selected by hand. The area of the quarry in 2012 was stated to amount to 7.057 hectares according to the planning authority.

2.4. The primary watercourse draining the quarry is the Glen River, which is situated approximately 800m to the north and west of the quarry, flowing along the lower western slopes of Crockuna, with tributaries flowing off the immediate hillside into the river. Two of these tributaries flow along the northern and southern sides of the subject quarry, before merging proximate to the west of the quarry and discharging into the Glen River. The watercourse along the northern boundary generally runs parallel with the forestry track before cutting south under the access track serving the quarry. The drain along the southern side appears to intersect with a settlement pond or constructed lagoon feature to the west of the quarry, before merging with the northern drain and flowing west under a small stone bridge along the local road. The Glen river ultimately discharges into the sea, approximately 9km to the south of the quarry at Teelin Bay.

3.0 Planning History

3.1. Quarry Site

3.1.1. I am not aware of any planning applications under section 34 of the Act relating to the subject quarry site.

Section 261 Registrations/Applications

3.1.2. The following references relate to the subject quarry registrations and a request for a review of the registration under Sections 261 & 261A of the Act:

- Donegal County Council (DCC) Ref. QY13 – in April 2005 McMonagle Stone submitted an application to register an area of 37.5ha containing a flagstone material, while stating that quarrying commenced on the land in 1990 and that the applicant commenced quarrying on the land in 1996;
- DCC Ref. EUQY 174 – in January 2012 McMonagle Stone submitted an observation regarding the legislative requirement to review the quarry registered (Ref. QY13) in 2005 to state that part of the quarry should be considered as forming part of a pre-1963 quarry and that the remaining quarry area should be subject to an application to An Bord Pleanála (ABP) for substitute consent and permission to work untouched areas of the quarry would be subject to an application to the planning authority. In August 2012,

the planning authority determined that the quarry operations commenced after the 1st day of October 1964 and no planning permission exists for the development. As the quarrying activity was carried out after the 1st day of February 1990 and the development area (7.06ha), exceeded the statutory development area threshold for Environmental Impact Assessment (EIA) (5ha) for extractive industries, it was determined that an EIA would be required for the quarry development. As the quarrying activity was carried out after the 26th day of February 1997, it was also determined that an Appropriate Assessment (AA) would be required for the quarry development. The planning authority advised that an enforcement notice would issue with respect to the decision;

- ABP Ref. PL05E.QB.0729 – in September 2012 An Bord Pleanála received notification of the planning authority’s determination under DCC Ref. EUQY 174;
- ABP Ref. PL05E.QV.0240 – in September 2012 McMonagle Stone sought a review of the planning authority’s determination (DCC Ref. EUQY 174) under Section 261A(2)(a) of the Act and the decision under Section 261A(4)(a). The applicant asserted that the planning authority had failed to appropriately initially register the quarry and that the decision for the quarry should have been issued under Section 261A(3)(a) of the Act. In October 2013, the Board subsequently confirmed that EIA and AA was required for the quarry operations having regard to the information, timelines and evidence available.

License to Discharge Trade Effluent to Waters

- 3.1.3. A review of the register of licenses maintained by the planning authority, allowing for the discharge of trade effluent to water under the Local Government (Water Pollution) Act 1977 (as amended 1990), does not refer to the subject quarry.

Planning Enforcement History

- 3.1.4. Copies of the following enforcement files relating to the subject quarry have been forwarded from the planning authority:
- DCC Ref. UDDL03/28 – in November 2003 the planning authority issued a warning letter with respect to an unauthorised quarry on the subject site;

- DCC Ref. UDDL08/07– in January 2008 the planning authority opened another enforcement file with respect to the subject quarry. It does not appear that warning letters or enforcement notices were served in this case;
- DCC Ref. UD 13/206 – in January 2014 the planning authority issued enforcement notice 'A' with respect to the quarrying operations and an enforcement notice 'B' with respect to the structures and containers on site, associated with the quarrying operations. Both of these enforcement notices were subsequently withdrawn in April 2016, while the case remained open pending legal proceedings.

Legal Proceedings

- Legal proceedings were initiated in December 2013 by Donal McMonagail agus a Mhic Teoranta – trading as McMonagle Stone under High Court Record Number 2013/966/JR relating to section 157 and 261A of the Act, the planning authority quarry reference EUQY 174 and An Bord Pleanála reference PL05E.QV.0240, while also seeking a stay and/or an order prohibiting the service of an enforcement notice. I am not aware of a final judgement in this case.

3.2. Other Sites

- 3.2.1. Applications and quarry registrations proximate to the subject quarry include the following:

Planning Applications

- DCC Ref. 11/30027 – permission was granted by the planning authority in March 2011 for the erection of a sheep-wire fence within a Special Area of Conservation (SAC), 1.2km to the east of the quarry;
- DCC Ref. 07/30101 – permission was granted by the planning authority in April 2007 for the erection of an agricultural shed comprising slatted sheep tank and service passage with associated siteworks, on a site located 750m to the northwest of the quarry;

- DCC Ref. 97/615 – permission was granted by the planning authority in May 1997 for the erection of a septic tank and percolation area to a house located approximately 200m to the west of the quarry.

Section 261 Registrations/Applications

- ABP Ref. PL05E.QV.0273 – in September 2012 McMonagle Stone sought a review of the planning authority's determination (DCC Ref. EUQY 12) under Sections 261A(2)(a)(i) and 261A(2)(a)(ii) of the Act regarding a quarry approximately 520m to the south of the subject quarry. In November 2013, the Board confirmed that development was not carried out to the quarry after the 1st day of February, 1990, that would have required an EIA or a determination as to whether an EIA was required, and that development was not carried out after the 26th day of February, 1997, that would have ultimately required an AA;
- ABP Ref. PL05E.QV.0200 – in September 2012 Noel Breslin sought a review of the planning authority's determination (DCC Ref. EUQY 156) under Section 261A(2)(a)(i) and 261A(2)(a)(ii) of the Act regarding a quarry approximately 420m to the south of the subject quarry. In November 2013, the Board confirmed that development was not carried out to the quarry after the 1st day of February, 1990, that would have required an EIA or a determination as to whether an EIA was required, and that development was not carried out after the 26th day of February, 1997, that would have ultimately required an AA.

3.2.2. Copies of the following enforcement files have been submitted by the planning authority:

- DCC Ref. UDDL13/45 – in March 2013 the planning authority opened an enforcement file with respect to a quarry at Maghera, Ardara, registered under DCC Ref. EN QY 61 to the landowner and operator, Dan McMonagle of McMonagle Stone, Mountcharles, County Donegal. It appears that no warning letters or enforcement notices were served in this case;
- DCC Ref. UDDL12/01– in July 2012 the planning authority issued a warning letter to Dan McMonagle of McMonagle Stone, Mountcharles, County Donegal, with respect to the erection of an unauthorised commercial shed at Meenacurrin, Ardara, County Donegal;

- DCC Ref. UDDL09/55 – in July 2009 the planning authority opened an enforcement file with respect to compliance with planning permission granted to Dan McMonagle under DCC Ref. 05/496 relating to the construction of two houses and on-site wastewater treatment systems at Ballysaggart, St. John’s Point, County Donegal. It appears that no warning letters or enforcement notices were served in this case;
- DCC Ref. UDDL06/03 – in January 2006 the planning authority issued a warning letter to Dan McMonagle of McMonagle Stone, Mountcharles, County Donegal and others, with respect to the construction of an access road and the extraction of stone at Drumkeelan, Mountcharles, County Donegal. This quarry was registered under the planning authority quarry reference QY 17.

4.0 Policy & Context

4.1. Legislation

4.1.1. Section 177C(1) of the Act states the following:

A person who has carried out a development referred to in subsection (2), or the owner or occupier of the land as appropriate may apply to the Board for leave to apply for substitute consent in respect of the development.

4.1.2. Section 177D of the Act states the following:

(1) Subject to section 261A(21), the Board shall only grant leave to apply for substitute consent in respect of an application under section 177C where it is satisfied that an environmental impact assessment, a determination as to whether an environmental impact assessment is required, or an appropriate assessment, was or is required in respect of the development concerned and where it is further satisfied —

(a) that a permission granted for development by a planning authority or the Board is in breach of law, invalid or otherwise defective in a material respect whether by reason of a final judgment of a court of competent jurisdiction in the State or the Court of Justice of the European Union, or otherwise, by reason of—

(i) any matter contained in or omitted from the application for the permission including omission of an environmental impact assessment report or a Natura impact statement or both that report and that statement, as the case may be, or inadequacy of an environmental impact assessment report or a Natura impact statement or both that report and that statement, as the case may be, or

(ii) any error of fact or law or procedural error,

or

(b) that exceptional circumstances exist such that the Board considers it appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent.

(2) In considering whether exceptional circumstances exist the Board shall have regard to the following matters:

(a) whether regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive;

(b) whether the applicant had or could reasonably have had a belief that the development was not unauthorised;

(c) whether the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or an appropriate assessment and to provide for public participation in such an assessment has been substantially impaired;

(d) the actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development;

(e) the extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated;

(f) whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development;

(g) such other matters as the Board considers relevant.

4.2. Natural Heritage Designations

4.2.1. The distance and direction to the nearest European sites, including Special Areas of Conservation (SACs) and Special Protection Areas (SPAs), which could potentially be affected by the development, are listed in table 1 below.

Table 1. Natural Heritage Designations

Site Code	Site Name	Distance	Direction
000190	Slieve Tooley/Tormore Island/Loughros Beg Bay SAC	400m	north/west/east
004510	West Donegal Coast SPA	3.9km	west
000197	West of Ardara/Maas Road SAC	7.5km	north
000189	Slieve League SAC	8.7km	southwest
004090	Sheskinmore Lough SPA	9.4km	northwest
000181	Rathlin O’Birne SAC	14km	southwest
004121	Roaninish SPA	15km	north
004115	Inishduff SPA	16km	south
000191	St. John’s Point SAC	20.7km	southeast

5.0 The Application

5.1. Applicant’s Submission

5.1.1. The applicant requests that the Board grant leave to apply for substitute consent in respect of the works already carried out on the site. The case put forward by the applicant can be summarised as follows:

History of the Site

- the site was first worked perhaps over a hundred years ago when it was used for flags, walling and monumental stone;
- the pit has the benefit of being a pre-1963 quarry development;
- the previous owners allowed the applicant to periodically prospect and extract flagstones from the exposed faces of the subject quarry until the mid-1980s;

- from 1976 the applicant had also operated a smaller quarry (QY12) nearby in Largybrack townland, extracting rock suitable for cleaving of thicker slabs used in walling;
- the quarry and the adjoining tract of land was sold in the 1980s after operations had ceased on site. The new owner planted the landholding and used stone from the land for forestry roads, although the planting could easily have been removed to re-commence quarrying;
- in 1996, the applicant's family leased the subject quarry and re-commenced the quarrying of flagstones. The applicant eventually purchased parts of the subject landholding, including the subject quarry area. The planning authority did not raise issue regarding the quarrying activity in 1996;
- in 2001, McMonagle Stone voluntarily assisted the planning authority in upgrading the local road serving the site (L-2883 local road) and statements from previous local authority employees and a local representative are attached in reference to this;
- as part of the road upgrade works, the soft rock on the subject quarry was cleared to a shallow depth and the quarry area further extended to the extent that all operations since then remain substantially that enlarged area;

Section 261 application

- when initially registering the quarry in 2005 under Section 261 of the Act, it was inadvertently stated that the applicant had commenced operation of the quarry in 1996, however, this was in fact the year that the applicant acquired control of the site and recommenced continuous quarrying operations;
- the planning authority determined that an EIA and AA was required when initially registering the quarry, but failed to appropriately follow the prescribed process at the time, as the planning authority allegedly failed to impose conditions or notify the operator of this decision. This ultimately led to the applicant only becoming aware of the error in the registration of the quarry in 2012, including the planning authority's consideration that the quarry did not have pre-1963 status;

- in the period between 2005 and 2012, neither a warning letter nor an enforcement notice was issued in respect of the operation of the quarry, which would have alerted the applicant to address the issue;
- in 2012 when determining that the quarry did not have pre-1963 status, the planning authority did not have fair regard to the submission of the applicant and this ultimately restricted the applicant's scope to address the matter;
- the area of the site expanded after 1997 and the continued operation of the site is affected by the passage of the EIA Directive and the Habitat Directives;

Pre-1963 Status

- evidence of pre-1963 status is more difficult to come by for this quarry as knowledge of the quarry was not recorded or held by the planning authority during the registration process;
- the planning authority should have investigated the status of the quarry further as part their Section 261 determination given that the legislation did not preclude same;
- despite operating a number of pre-1963 quarries, the applicant was not aware in 2005 of the implications of registering a quarry for future planning purposes;
- the applicant did not have sufficient time to prove the pre-1963 status of the quarry prior to seeking a review by An Bord Pleanála of the planning authority determination. Consequently, in reviewing the request, the Inspector of An Bord Pleanála noted that no proof of a pre-63 existence of the quarry was submitted;
- testimony and statements clearly point to the established use of the land as a quarry in 1963, including the extraction of flagstones in a manner substantially identical to the ongoing operations;
- the use of the quarry was not abandoned at any stage since 1963 given the appreciation of the rock deposits and the clear intention to reap reward from same. The aerial image of the site in 1995 does not provide sufficient proof that the quarry was abandoned, as it would only take a year or two to clear the scrub off the quarry and to re-establish the works on open ground;

- the nature and scale of the quarry is broadly similar to that which would have existed pre-1963 and would not amount to an intensification of use given the work methods employed on site and the lack of burden arising for the local authority. The additional area was as a result of the stripping and ripping to a very shallow depth in 2001, as part of the facilitation of the local road upgrade;
- the existing quarry benefits from ‘pipeline authorisation’ provided by the pre-1963 development on site, as coined in the judgement of Charlton J. in McGrath Limestone Works Ltd. v An Bord Pleanála [2014] IEHC 382;
- based on the evidence now provided, An Bord Pleanála is entitled to consider that the quarry does have pre-1963 status;

Current Operations

- the quarry currently employs 8 to 10 persons in labour-intensive roles;
- commercial rates were paid for the quarry since 2002;
- the applicant invested in plant and machinery for the site, including the construction of lagoons to comply with environmental legislation;
- the quarry area remains the same as that of 2012 and while the quarry has continued to operate, no new ground has been disturbed in the interim to facilitate the ongoing operations. Leave to apply for substitute consent is the only potential route to establish and perhaps facilitate regularisation of any offences that may exist;
- blasting or processing activities do not occur, with stone excavated by machine and selected by hand.

5.2. Planning Authority’s Submission

5.2.1. The submission of the planning authority was accompanied by copies of enforcement files relating to the quarry site and the applicant and also raised the following:

- there are no planning applications relating to this site;
- aerial photography dating from 1995 does not show excavations in the current quarry area, but does show a forestry road and planting within this area, while

also showing a quarry (DCC Ref. EUQY 12) owned by the applicant to the south of the subject quarry;

- the subject lands were planted for forestry in late 1992 and early 1993;
- the applicant was aware that the subject quarry was unauthorised following a meeting with the planning authority and the issuing of a warning letter referring to same in November 2003. In December 2003, the applicant advised the planning authority that a planning application would be prepared following this;
- following the planning authority's determination of the Section 261 notice in August 2012 and prior to the applicant's request to An Bord Pleanála for a review of same in September 2012, the planning authority had intended serving an enforcement notice in relation to the quarry;
- following the applicant's request for a review of the planning authority's determination, An Bord Pleanála confirmed the planning authority's determination that the site did not have pre-1963 status;
- the planning authority identified that an industrial shed was constructed on the quarry immediately prior to December 2013.

6.0 Assessment

6.1. Introduction

- 6.1.1. This is an application for leave to apply for substitute consent for a quarry under section 177C of the Act. Section 177D(1) of the Act specifies that the Board can only grant leave to apply for substitute consent in respect of an application under section 177C, firstly, where it is satisfied that an environmental impact assessment, a determination as to whether an environmental impact assessment is required, or an appropriate assessment was or is required in respect of the development concerned and, secondly, where the applicant concludes that a permission that has been granted by a planning authority or the Board is invalid pursuant to a decision in an Irish Court or the Court of Justice of the European Union, or where exceptional circumstances exist such that the Board considers it appropriate to permit the

opportunity for regularisation of the development by permitting an application for substitute consent.

- 6.1.2. A permission has not been granted for the development by the planning authority or the Board and based on the application submitted, it would appear that the applicant is seeking a grant of leave to apply for substitute consent and regularise the development under the 'exceptional circumstances' criteria.
- 6.1.3. The area of the quarry has not been delineated by the applicant within this application or the previous application (ABP Ref. PL05E.QV.0240) dating from September 2012 when requesting a review of the planning authority's determination (DCC Ref. EUQY 174).

6.2. Requirement for EIA

- 6.2.1. The thresholds concerning the requirement for an EIA of a project are set out in the Planning and Development Regulations 2001-2019. With respect to extraction activities, Class 2(b) to Part 2 of Schedule 5 sets out that projects comprising the 'extraction of stone, gravel, sand or clay, where the area of extraction would be greater than 5 hectares' would require EIA.
- 6.2.2. When considering the quarry registration (DCC Ref. EUQY 174) in 2012, the area of the quarry was stated to amount to 7.057 hectares according to the planning authority. The extraction area of the quarry exceeds the 5-hectare threshold set for projects requiring EIA. The quarry development has not been subject of an EIA and I am satisfied that the broad scope and purpose of the EIA Directive has not been met and that any application to regularise the development would have a requirement for EIA.
- 6.2.3. In conclusion, having regard to the scale and nature of the development that has taken place, and for which regularisation would be sought, I am satisfied that there is a requirement for an EIA of this project under Part X of the Act, and that the likelihood of significant effects on the environment cannot be excluded for the purposes of EIA.

6.3. Requirement for AA

- 6.3.1. The second issue to address is whether the quarry development, would have required or requires Appropriate Assessment. The site location, including a high-level overview of drainage serving the site and the quarry facility, is described in section 2 of this report above, and expanded upon below where relevant.

Relevant European Sites

- 6.3.2. Relevant European sites proximate to the quarry site and in the wider area are listed in section 4.2 above. Qualifying interests and conservation objectives for each of the above sites are listed on the National Parks and Wildlife Services (NPWS) website (www.npws.ie).

Is the Project necessary to the Management of European sites?

- 6.3.3. The project is not necessary to the management of a European site.

Direct, Indirect or Secondary Impacts

- 6.3.4. The potential direct, indirect and secondary impacts that could arise as a result of the proposed works and which could have a negative effect on the qualifying interests of European sites, include the following:

- alterations to water quality, for example, through accidental spills or the release of suspended solids to ground and surface water;
- alterations to the hydrological regime;
- loss of habitat and species or disturbance or fragmentation;
- spread of invasive species.

Potential Effected Sites

- 6.3.5. Based on the source-pathway-receptor model, there is a direct connection via the Glen river tributaries running through and along the quarry site to West Donegal Coast SPA (Site Code: 004510) and Slieve League SAC (Site Code: 000189), both of which are located approximately 8.7km downstream of the quarry site. While Slieve Tooley/Tormore Island/Loughros Beg Bay SAC is upstream of the subject quarry, given the proximate linkage via the surface and ground waters from the SAC

to the subject quarry, there is connectivity between the sites. While there is a potential hydrological connection from the quarry site to other European sites listed in Table 1 above, I am satisfied that these other European sites downstream of the quarry site can be ‘screened out’ on the basis that significant impacts on these European sites could be ruled out, given the substantial extent of intervening marine waters and the nature and scale of the subject development.

6.3.6. The following conservation objective in table 2 is set for West Donegal Coast SPA.

Table 2. Conservation Objectives for West Donegal Coast SPA

To maintain or restore the favourable conservation condition of the bird species listed as Special Conservation Interests for this SPA		
Bird Code	Common Name	Scientific Name
A009	Fulmar	Fulmarus glacialis
A017	Cormorant	Phalacrocorax carbo
A018	Shag	Phalacrocorax aristotelis
A103	Peregrine	Falco peregrinus
A184	Herring Gull	Larus argentatus
A188	Kittiwake	Rissa tridactyla
A200	Razorbill	Alca torda
A346	Chough	Pyrrhocorax pyrrhocorax

6.3.7. The following conservation objectives in table 3 are set for Slieve League SAC.

Table 3. Conservation Objectives for Slieve League SAC

To maintain the favourable conservation condition of reefs
To maintain the favourable conservation condition of vegetated sea cliffs of the Atlantic and Baltic coasts
To restore the favourable conservation condition of Northern Atlantic wet heaths with Erica tetralix
To restore the favourable conservation condition of Alpine and Boreal heaths
To restore the favourable conservation condition of Blanket bogs

To maintain the favourable conservation condition of Calcareous rocky slopes with chasmophytic vegetation

To maintain the favourable conservation condition of Siliceous rocky slopes with chasmophytic vegetation
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6.3.8. The following conservation objectives in table 4 are set for Slieve Tooley/Tormore Island/Loughros Beg Bay SAC.

Table 4. Conservation Objectives for Slieve Tooley/Tormore Island/Loughros Beg Bay SAC

To maintain the favourable conservation condition of Vegetated sea cliffs of the Atlantic and Baltic coasts

To maintain the favourable conservation condition of Embryonic shifting dunes

To restore the favourable conservation condition of Shifting dunes along the shoreline with <i>Ammophila arenaria</i> (white dunes)

To maintain the favourable conservation condition of Decalcified fixed dunes with <i>Empetrum nigrum</i>
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To maintain the favourable conservation condition of Atlantic decalcified fixed dunes (<i>Calluno-Ulicetea</i>)

To restore the favourable conservation condition of Alpine and Boreal heaths
--

To restore the favourable conservation condition of Blanket bogs
--

To maintain the favourable conservation condition of Narrow-mouthed Whorl Snail

To maintain the favourable conservation condition of Otter
--

To maintain the favourable conservation condition of Grey Seal
--

Potential Likely & Significant Effects

6.3.9. As the quarry is at a remove from the Slieve Tooley/Tormore Island/Loughros Beg Bay SAC (Site Code: 000190), West Donegal Coast SPA (Site Code: 004510) and Slieve League SAC (Site Code: 000189), no direct effects occur.

6.3.10. In terms of indirect effects, the key elements are the downstream potential for water pollution principally from sediment and pollutant run-off from the extraction works and alterations to the hydrological regime. As such, given the nature of the activity, likely significant effects on the exposed subtidal reef community complex located at Teelin Point, subject of a conservation objective for Slieve League SAC (Site Code: 000189), cannot be excluded. Alterations to the hydrological regime and water quality has potential to significantly impact on habitat, including those relied upon by the bird species listed as being of special conservation interests for the West Donegal Coast SPA (Site Code: 004510). Alterations to the hydrological regime, including via diversion or culverting of watercourses, has potential to significantly impact on the condition of the upstream sensitive blanket bogland habitat listed for restoration to favourable conservation under the conservation objectives for Slieve Tooley/Tormore Island/Loughros Beg Bay SAC (Site Code: 000190).

In-combination Impacts

6.3.11. I am satisfied that likely significant in-combination impacts do not arise when taken in conjunction with other plans or projects.

Stage 1 – Screening Conclusion

6.3.12. On the basis of the information provided with the application, the Board cannot be satisfied that the development individually, or in combination with other plans or projects would not be likely to have a significant effect on the Slieve Tooley/Tormore Island/Loughros Beg Bay SAC (Site Code: 000190), West Donegal Coast SPA (Site Code: 004510) and Slieve League SAC (Site Code: 000189), in view of the sites' conservation objectives. In such circumstances, an appropriate assessment would be required for the subject quarry development.

6.4. Exceptional Circumstances

6.4.1. While EIA and AA is required for the quarry development, in the absence of a grant of permission by the planning authority or the Board, the Board must determine whether or not exceptional circumstances exist such that it would be appropriate to permit the regularisation of the development by permitting leave to make an

application for substitute consent, as provided for under Section 177D(2) of the Act and addressed below.

Would regularisation of the development concerned circumvent the purposes and objectives of the EIA Directive or the Habitats Directive?

6.4.2. The applicant asserts that the quarry area remains the same as the area of the quarry in 2012 and while the quarry has continued to operate in the interim, no new ground has been disturbed for the ongoing extraction activities. There is publicly available evidence via aerial photography dating from 2012 and 2019, which I have appended to this report, to indicate that contrary to the statements of the applicant, the disturbed area of the quarry has actually expanded in recent years, as part of ongoing extraction activities.

6.4.3. The additional extraction area dating from the 2012 to 2019 period is substantial, there is no grant of planning permission for this extension and the applicant has not specifically sought leave to apply for substitute consent for this additional extraction area. A grant of leave to apply for substitute consent for the disturbed quarry area, up to and including 2012, would restrict the proper consideration of the likely significant impacts of the development on the environment and the adverse effects on European sites in a manner that would circumvent the purpose and objectives of both the EIA Directive and the Habitats Directive.

Whether the applicant has or could reasonably have had a belief that the development was not unauthorised.

6.4.4. There are no previous planning permissions granted for this site. The applicant asserts that they considered the quarry to be authorised by virtue of having 'pre-1963 status' and that 'pipeline authorisation' facilitates the ongoing development within the quarry. The planning authority contests this and states that the quarry was used to construct a forestry road in 1991, while excavations within the site are not visible on ordnance survey Ireland (OSi) aerial photography images dating back to 1995.

6.4.5. In November 2003 the planning authority issued a warning letter to the applicant regarding an unauthorised quarry on the subject site. In response to this, representatives of the applicant advised the planning authority that they would be carrying out an inspection of the development. Subsequently, when initially

registering the quarry in April 2005, the applicant asserts that they erroneously stated that quarrying commenced on the land in 1990.

- 6.4.6. To attempt to verify the pre-1963 status of the quarry the applicant has submitted a host of material, including their own statement and photographs, as well as written statements stated to be from a previous site owner, former local authority employees, local representatives, patrons and residents of the wider area. While a sizeable quantum of documentation has been submitted the evidence is not convincing or in any way definitive in substantiating that it is the subject quarry that existed prior to 1963, particularly in light of historical OSi aerial photographs of the area appended to this report, and the fact that there are other quarries (DCC Refs. EUQY 12 & 156) in the same townland, one of which the applicant is stated to own, while there is also a quarry identified in the vicinity of these neighbouring quarries on the OSi first edition maps dating from 1829-1841.
- 6.4.7. The applicant asserts that a material intensification of the site beyond what was envisaged in 1964 has not occurred, including the direction of extraction and the level of modest mechanisation. Having regard to *Patterson - v - Murphy* [1978] IRLM 85, *McGrath Limestone Works Ltd - v - An Bord Pleanála and others* [2014] IEHC 382, and *Hayes and Others - v - An Bord Pleanála* [2018] IEHC 338, the quarrying that has taken place on the site, since at least the year 2000, could not reasonably be considered to be within the scope of any asserted established rights relating to the continuation of quarrying activity that took place prior to the 1st day of October 1964, on the basis of the scale and extent of quarrying, and the intensity and methods of extraction, including levels of mechanisation, utilised prior to that date, when compared with those factors dating from 2000, based on aerial photographs dating from 1995, 2000, 2005 and 2012, and the documentation on file, including both the planning and enforcement history for the site.
- 6.4.8. There is no authorisation for any quarrying on the site that is subject of this application, the applicant was warned by the planning authority of the unauthorised status of the quarry as far back as 2003 and the documentation submitted does not conclusively prove that the subject quarry commenced prior to the 1st day of October 1964. Notwithstanding the documentation submitted, while there is evidence indicating an element of quarrying in the Largybrack townland prior to the 1st day of October 1964, the evidence available does not confirm that this quarrying took place

on the subject site. In conclusion, I am satisfied that given the scale and nature of the quarrying operations that have been undertaken on the subject site since at least the year 2000, the applicant could not reasonably have had a belief that the subject quarry development was not unauthorised.

Whether the ability to carry out EIA or AA and to provide for public participation in such an assessment has been substantially impaired.

- 6.4.9. The restriction of the quarry area to be included in an application for substitute consent, to the area outlined in this application as conforming to the area of the quarry in 2012, would substantially impair the ability to carry out a remedial EIA Report and a remedial Natura Impact Statement (NIS) to assess the environmental impacts of the development that has been carried out on the remainder of the existing quarry and the effects on European sites. Provisions for public participation in the remedial EIA/AA process would not be undermined.

The actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development.

- 6.4.10. The area that would potentially be covered by the substitute consent application, is part of a larger development that this application has not demonstrated is authorised. There are potential likely significant effects arising in particular for ground and surface water quality and the hydrological regime. There is a hydrological connection between the site and the West Donegal Coast SPA (Site Code: 004510) and Slieve League SAC (Site Code: 000189). Alterations to the hydrological regime has potential to effect the Slieve Tooley/Tormore Island/Loughros Beg Bay SAC (Site Code: 000190). I am satisfied that the restriction of an application for substitute consent to the area outlined in this application would not allow for adequate consideration of the actual or likely significant effects on the environment or the adverse effects on the integrity of European sites resulting from the carrying out or continuation of the development.

The extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated.

- 6.4.11. Having regard to restricted part of the overall quarry to which the application for leave applies to, and as the application has not demonstrated that the remainder of

the quarry is authorised, I consider that an application for substitute consent could not demonstrate the extent to which significant effects on the environment or adverse effects on European sites could be remedied.

Whether the applicant has complied with previous permissions granted or has previously carried out unauthorised development.

6.4.12. As referenced above, the applicant was advised that the quarry on site was considered to be unauthorised by the planning authority in 2003. Notwithstanding, the withdrawal of the enforcement notices referring to unauthorised development on the site and the ongoing legal case, I am satisfied that there is no authorisation for any quarrying on the site and the scale and extent of quarrying, and the intensity and methods of extraction utilised could not reasonably be the same as that asserted to be envisaged prior to the 1st day of October 1964.

6.4.13. The planning authority has forwarded copies of enforcement files relating to other developments in the name of the applicant, however, I am not aware of legal confirmation of these cases pertaining to unauthorised development.

Such other matters as the Board considers relevant.

6.4.14. I consider that no further matters need be considered by the Board in this case.

6.5. Conclusion

6.5.1. Notwithstanding that EIA and AA are required for the development, in light of the scale and nature of the quarrying that has been carried out, the applicant has not demonstrated that exceptional circumstances exist in this case, so as to permit the regularisation of the development in question.

7.0 Recommendation

7.1. Having regard to the information furnished by the applicant and the planning authority, I recommend that the Board refuse to grant leave to apply for substitute consent under section 177D of the Act, based on the reasons and considerations set out below.

8.0 Reasons and Considerations

8.1. Having regard to Section 177D of the Planning and Development Act, 2000, as inserted by Section 57, Planning and Development (Amendment) Act, 2010, the Board is satisfied that an environmental impact assessment and an appropriate assessment is required, in the light of the scale and nature of the quarrying that has been carried out. Furthermore, the Board examined whether or not exceptional circumstances exist such that it would be appropriate to allow the opportunity for regularisation of the development by permitting leave to make an application for substitute consent. In this regard, the Board

- considered that regularisation of the development to the open disturbed areas of the quarry as of 2012 and not the current overall quarry complex, would circumvent the purpose and objectives of the Environmental Impact Assessment Directive and the Habitats Directive,
- considered that, notwithstanding the documentation submitted, the applicant could not reasonably have had a belief that the development was not unauthorised, having regard to the scale and nature of the quarrying operations that have been undertaken on the subject site since at least the year 2000, the planning and enforcement history of the site and aerial photography dating from 1995, 2000, 2005 and 2012,
- considered that the ability to carry out an environmental impact assessment and an appropriate assessment of the development would be substantially impaired by the exclusion of newly disturbed areas of the quarry,
- considered that the development would not allow for adequate consideration of the actual or likely significant effects on the environment or the adverse effects on the integrity of European sites resulting from the carrying out or continuation of the development,
- considered that the extent to which significant effects on the environment or adverse effects on European sites could be remedied would be limited by virtue of the additional and ongoing extraction since 2012,
- considered that there is no authorisation for the quarry on site and the scale and extent of quarrying, and the intensity and methods of extraction utilised

could not reasonably be the same as that asserted to be envisaged prior to the 1st day of October 1964.

- 8.2.** Having regard to the foregoing it is considered that exceptional circumstances do not exist such that it would be appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent in relation to the site outlined in this application.

Colm McLoughlin
Planning Inspector

4th March 2020