



An
Bord
Pleanála

Inspector's Report
ABP-303162-18

Development	Waste Facility and Activity.
Location	Labbadish, Manorcunningham, Co. Donegal.
Planning Authority	Donegal County Council
Planning Authority Reg. Ref.	N/A
Applicant(s)	John Caulderbanks
Type of Application	Application for leave to apply for substitute consent under Section 177C(2)(b) of the Planning and Development Act as amended
Date of Site Inspection	5 th June 2019
Inspector	Suzanne Kehely

1.0 Site Description and Waste Facility Operation

- 1.1. The site of .86 hectares is located in a small hamlet in Labbadish, Manorcunningham which is 9km south east of Letterkenny in Donegal. The access road is a quiet local road about 600m south of the N14. The site is adjoined by the River Corkey along its western boundary from which it is separated and screened by a solid fence and concrete kerbing. A row of houses back onto the other side of the river at this location. Agricultural lands adjoin the southern and eastern sides and are separated by a mesh fence. There is a large old stone building complex which includes a large house on the opposite side of the road.
- 1.2. There is a waste and recycling storage facility operating on site. A reception/staff area is located in a small single storey office building along the site frontage. It is set back with provision for parking. There is a large vehicular entrance into the site in addition to a secondary entrance. The site is substantially hard surfaced and includes a number of large sheds inside of which waste collections are sorted and baled, a weighbridge, smaller structures and some open storage/parking areas. There are a number of gullies in the concrete surface which indicates a drainage network.
- 1.3. The site is about 1.6km upstream from the Special Area of Conservation: Lough Swilly SAC site code 002287. It is 3.4km from Special Protection Areas: Lough Swilly SPA site code 004075.
- 1.4. The waste facility is described as providing domestic waste service for collection, storage and transfer of household waste comprising cardboard, plastic metal, mixed dry recyclables, mechanically treated material, mixed municipal, mixed kitchen slops, wood waste, Alum sludge from water treatment plants. Skip hire is also a small part of the activity.
- 1.5. The waste stream is such that the lorries (under permit) collect separated waste from householders and recycled waste is then stored for short periods and paper/cardboard is then baled on site. All waste is stored until built up for transfer to other recycling and disposal facilities.
- 1.6. The facility operates with a Waste Collection Permits Permit no NWCPO-1 1-08038-05 which permits a range of specified waste classes up to specified tonnages, number of trucks and catchment and is subject an extensive list of conditions.

- 1.7. The Permit Application form is appended to the submitted NIS and indicates waste volume limits of 7,500 tonnes annual intake threshold for Class no. 11 and 10,000 tonnes Annual Intake for Class no. 8. The tonnage for waste types is further broken down in D.5 of the form but duration of time on site is not specified. D.10 quantifies the emissions for the facility and containment of same:
- dust deposition levels no greater than 150mg/m²/day at site boundary
 - No odour detected beyond site boundary
 - Use of wheel wash for vehicles passing through
 - Noise level will not exceed 55dBA during day and 45BA at night (6pm- 8am)
 - Activities on site shall not give rise to noise levels off-site at noise sensitive locations.
- 1.8. The site was originally used as an industrial Alcohol Factory which was a seasonal activity based on potato crops and supply and this dates from prior to 1935 and in latter years (1958/9) the site was used for the production of starch. Elements of the original structures remain.
- 1.9. The surface water is managed such that rain water run-off from roof area is piped to stream with no access for contaminated water. All surface water on ground is collected within gullies and piped to interceptor tank before entering watercourse whereas all contaminated water within the sheds is collected in sumps and stored for delivery to an unspecified treatment depot via tanker.
- 1.10. In terms of ownership and operation, the site was purchased from Ceimici Teoranta in 1980 for the purposes of storage and providing a scrap metal facility with the yard area used to store lorries, skips and machinery. DM Waste was then set up as a waste collection and storage facility in 1990 and used council landfill sites as a final destination for disposal. It is stated that all statutory provisions have been complied with in the operation of this use since the 1980s.

2.0 **Background and the Application**

- 2.1. The development is considered to fall within the scope of section 177(C) (2) as permission was previously granted for the development in question. Application for leave to apply is being made under section 177C (2) (b) as exceptional circumstances exist.
- The Board is asked to note the history of the site and the length of time the structures have been in place, the duration of temporary permissions and

ongoing consent for waste recovery as permitted by the planning authority and by the National Waste Collection Permit Office.

- While otherwise meeting the requirements of Waste Regulations and Planning Regulations, it is due to the proximity to a Natura 2000 site that has prevented regularisation.
- What are described as mitigation measures together with proper procedures, are in place to ensure no adverse effect arises.

3.0 Planning Authority Submission

- 3.1. The planning authority responded to the application with a comprehensive planning history and description of context from its perspective.
- 3.2. The circumstances are explained insofar as historic structures existed at the site, temporary planning permission was granted for waste activities at the site together with an extension to the historic structures and these planning permissions expired. The applicant appears to have been unaware that the temporary permission expired and continued to operate at the site. The existing facility now requires regularisation however, based on the findings of the submitted NIS, the Planning Authority is precluded from considering an application for retention permission in accordance with section 34(12)(b) PDA 2000 as amended.

4.0 Planning History

4.1. Planning applications

- ABP ref PL05.096329/PA ref 94/1794 (file attached) refers to an application for a temporary 10-year permission granted on 27th October 1995 on appeal for retention of existing development include the storage of scrap metal, glass, wheelie bins, empty skips, baling scrap metal and cans and truck parking. Temporary permission for portacabins office and block wall to front. This was restricted to a 3-year permission by the Board. (This reduced time limit is not reflected in the submitted documentation including the report in the enforcement file which refers to the planning history.)
- PA ref. 03/6066 refers to a withdrawn application following expiry of time limit on submission of further information.

- PA ref 04/6015 refers to a 10-year temporary permission on 13th April 2004 for retention of activities and associated buildings and completion of new roof over waste transfer station. Activities to include collection of refuse for daily transfer to landfill (not previously permitted) and previously permitted activities including: collection and storage of glass, metals and paper for transfer to recycling companies, collection of scrap vehicles prior to transfer, truck fleet parking storage of skips, administration of business
- PA ref 08/40101 refers to permission for a shed for storage of glass metal and paper for transfers and for reroofing of existing shed. This was restricted by the PA to be within the parameters of the duration of PA 04/6015 which required removal of structures and ceasing of use after 10 years

Extension of duration of permission for this development was permitted on 15th April 2013. The PA in its consideration of this application referred to the fact that neither an EIA or AA were previously required, furthermore it did not refer to the expiry date of the parent permission. In terms of precise duration of permission, the decision of the High Court in relation to times limits provides a basis that this permission effectively expired on 15/7/18 or thereabouts.

- PA ref 14/50396 refers to an invalid application for permission for continuation of a waste storage and recycling transfer station and all associated development. It was deemed invalid as it was necessary to apply for retention of all buildings and to continue use.
- PA ref 14/50442 refers to a subsequent application for continuation of use on 11th April 2014 and was similarly deemed invalid.
- PA ref 15/51037 refers to an application for retention of all buildings and continuation of use but was again deemed invalid by the PA notwithstanding its alleged advice on same.

4.2. **Planning enforcement**

- PA ref UD 1810 refers to enforcement action in the form of a warning letter and two enforcement notices respectively to unauthorised use and buildings.

The applicant engaged consultants to carry out a screening for AA in February 2018 and prepare a NIS in August 2018.

It is my understanding from the history files that permission for the activities expired with the lapsing of permission pursuant to 04/6015. The extension of duration of

permission of a subsequent variation to that development does however confuse the planning status as there is an inherent conflict in permitting the continuance of something that has been specifically time-restricted. The validity is further questioned in that the 2013 consent screened out the need for AA contrary to the subsequent invalidation of an application for the retention of same on the basis of a need for AA. This is reasonably explained by the transposition of the Habitats Directive and increased statutory guidance and principles set in the courts. In any event the section 177 provides for an error in consent on the basis of AA. This is however not relied upon in making the case for substitute consent.

5.0 Legislative Context

- 5.1. The European Court of Justice (ECJ) decision in the case of C-215/06 resulted in the removal of the facility to apply for retention of planning permission for development which require EIA. Thus, under the amended Section 34(12) of the 2000 Act, a retention application cannot be accepted by the Planning Authority for a development which would have required EIA (screening for EIA) or Appropriate Assessment under the Habitats Directive.
- 5.2. The provisions of 177C of the Act permit an application for leave to apply for substitute consent in certain circumstances including exceptional circumstances, the appropriateness of which the applicant must demonstrate in order to permit regularisation.
- 5.3. Section 177D(1)A of the Act specifies that the Board can 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 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.
- 5.4. Section 177D(1B) requires the Board in its decision to grant or refuse leave to apply to include the main reasons and considerations with reference to the relevant criteria listed in Schedule 7 PDR on which the decision is based. Accordingly, a screening determination is required at this stage.

5.5. Section 177D (2) sets out the criteria for determining exceptional circumstances as being:

- Whether the regularisation of the development concerned would circumvent the purpose of objectives of the Environmental Impact Assessment Directive or the Habitats Directive.
- Whether the applicant had or could reasonably have had a belief that the development was not unauthorised.
- Whether the ability to carry out an assessment of the environmental impacts of the development for the purposes of an environmental impact assessment or an appropriate assessment and to provide for public participation in such an assessment has been substantially impaired.
- 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.
- The extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated.
- Whether the applicant has complied with previous planning permissions granted or has previously carried out unauthorised development.
- Such other matters as the Board considers relevant.

5.6. Section 177D (1) (B) requires that the decision to grant or refuse leave for substitute consent must include the main reasons and considerations with reference to schedule 7 PDA on which the decision is based (i.e. Screening determination)

5.7. **Schedule 7** – Criteria for determining whether a development would or would not be likely to have significant effects on the environment, under three headings-

(a) Characteristics of the Proposed Development.

(b) Location of the Proposed Development.

(c) Characteristics of Potential Impacts.

6.0 EIA Screening

6.1. Need for Screening

6.1.1. In the submitted documentation which includes an application form for a waste permit, it is stated that an EIA is not required nor, I note, was one required in previous applications for planning permission. In the granting of the permit valid to 5th April 2022, Donegal County Council states in its reason for the decision to grant the

permit that subject to conditions and information made available the activity will not cause environmental pollution. This does not however preclude the current or future proposal from EIA screening under current regulations and guidance.

6.1.2. Under the EIA Directive, the term 'disposal' is now required to be interpreted to include 'recovery' as they are not differentiated. Hence waste recovery proposals require EIA screening in the same way as waste disposal facilities. The activity in this instance therefore comes primarily within Schedule 5 Part 2, Other projects - Class 11 (b) (d) and (e)

(b) Installations for the disposal of waste with an annual intake greater than 25,000 tonnes not included in Part 1 of this Schedule.

(d) Sludge-deposition sites where the expected annual deposition is 5,000 tonnes of sludge (wet).

(e) Storage of scrap metal, including scrap vehicles where the site area would be greater than 5 hectares.

6.1.3. In this case the development which is currently unauthorised relates to the continued existence and use of previously permitted buildings as a waste facility relating to an overall upper threshold of 17,500 tonnes on a former established agri-industrial site which had become derelict. The potential sensitive receptors are the adjacent stream and housing backing onto the other side of the stream and the wider environment. While the waste facility is of a scale that is within overall permit thresholds by reference to the application form details, there is no breakdown of volumes and duration of various classes of waste stored on site.

6.1.4. The history file, (attached) refers to issues of battery storage, scrap metal and unsurfaced ground and there were also considerable objections to the nature of the activity. The more recent history files have not been submitted as part of the file and while I note that emissions are set within quantifiable limits and contaminated water is collected and tankered off-site for disposal, it is not entirely clear from the initial documentation if issues of soil contamination and possible groundwater seepage have been addressed from historic uses.

6.1. **Schedule 7A Information**

6.1.1. Having regard to the scale and nature of the proposal and a precautionary approach the applicant was requested to submit further details on the characteristics of the development, the location and its likely significant effects on the environment by

reference to Schedule 7A of the PDR 2001. This information was submitted on 11th October 2019.

6.1.2. Description of Physical characteristics of development

It is explained that the customer base of around 11,200 people is in a 25km radius which includes Letterkenny. These people are served by a total of 17 collections during a week for 'waste' and up to 15 collections for 'recycling waste' in a week. A total of 300 tonnes of 'waste' and 55 tonnes of 'recycling waste' is collected every fortnight which amounts to a total of 9,230 tonnes per annum.

All waste excluding glass is moved to other facilities on a weekly basis with the premises being empty of waste (except glass) material every weekend. It takes 6 months to generate a lorry load for transporting off the site.

Of the 300 tonnes of waste, following segregation within the premises (by a trommel) 220 tonnes go to Riveridge Recycling in Ringsend, Dublin, 60 tonnes of organic fines go to Enrich Environmental in Meath, 10 tonnes of scrap metal go to Peak Environmental in Derry and 10 tonnes of Timber and Glass go to Envirogrind in Pettigo in Donegal and Enva in Antrim in Northern Ireland. No waste goes to landfill. Most of the recycling material is plastic accounting for 40 tonnes and this goes to Newry in Northern Ireland. 8 tonnes of metal go to Derry Northern Ireland for processing and the remaining 7 tonnes of cardboard goes to JML in Rooskey, Donegal.

Skips are used to collect waste at a rate of 4 or 5 being received or sent out on a daily basis. It is clarified that this comprises a mix of scrap metal, C and D wood, cardboard and general waste

6.1.3. A description of the location of the development with particular regard to the environmental sensitivity of geographical areas likely to be affected.

This is described by reference to proximity to Natura sites such as Lough Swilly SAC / Lough Swilly SPA which is the nearest at 1.4km/2km, others include, River Finn SAC, Leanan River SAC, Ballyyarr Wood SAC and Lough Fern SPA (10 - 12.5km away).

6.1.4. Aspects of the environment likely to be significantly affected by the development

It is explained that this is an on-going facility with checks taking place on a regular basis and given that the yard is concreted and kerbed with proper mitigation procedures in place and taking account of the fact that all processing and storage

takes places inside the main building, the likelihood of any aspects of the environment being significantly affected is nil.

Description of the likely significant effects, to the extent of information available to such effects of the development on the environmental with specific regard to a) the expected residues and emission and the production of waste where relevant and b) the use of natural resources in particular soil land water and biodiversity.

Water: It is explained that best practice water pollution prevention measures are used such as a clay embankment. Soiled water is collected and transferred by tanker to a fully licensed treatment depot. Waste water from vehicle washing undergoes interceptor treatments.

Rainwater from the roof is channelled via guttering and pipes to the local stream and is not contaminated by ground surfaces.

Air: Emissions to air are identified as being particulate matter associated with the facility practices but are stated not to impact negatively on any of the qualifying interests of the Natura Sites.

It is further stated that the activities are confined to the existing premises /brown field site and subject of anthropogenic disturbance. Noise is stated to not be a significant negative impact due to internal operations within normal business hours.

It is clarified that all materials processed within the site are delivered to other facilities for tertiary treatment and recycling.

It is further clarified that all concerns identified in the case previously before the Board have been removed and disposed of properly. A survey was carried out prior to the construction of the concrete yard and the holding tanks and at this time all contaminated soil was remove.

It is finally stated that the facility is a relatively small waste collection business with no waste remaining on site for more than a week (other than glass) and no waste goes to Landfill. All of the mitigation factors and proper procedures are in place to prevent pollution or contamination of the environment. It is the opinion of the agent that it is a well-run waste transfer station that is fit for purpose.

6.2. Assessment under Criteria as set out in Schedule 7 of the Regulations / Annex III of the EIA Directive.

- 6.2.1. The headings as set out in Schedule 7 of the Planning and Development Regulations, 2001 (as amended) are generally consistent with those given at Annex

III of the 2014 EIA Directive (2014/52/EU). The following sections assess the proposed development against the criteria listed in the Directive and Planning and Development Regulations under the following general headings:

- Characteristics of proposed development
- Location of proposed development, and
- Characteristics of potential impact

6.2.2. Characteristics of the Proposed Development

a) The size and design of the whole of the proposed development:

- (i) The proposed development is a relatively small operation as explained in detail by the applicant. The total volume of waste that is collected and transferred from the site amounts to less than 10,000 tonnes per annum and therefore operates well below the licenced facility. It is operating within a contained environment of sheds and a hard-surfaced area that is segregated from the adjacent stream. In terms of both scale of the operation and the size of the site, the proposed development is not of a particularly large scale and is significantly below the thresholds set down in Part 2 of the Schedule 5 of the Regulations. The development essentially comprises a continuation of waste facility previously permitted on a former established industrial site. While I note the planning history in relation to car batteries and vehicles, this use has since ceased and the site has been modified in terms of hard surfacing and run-off collection. There is no aspect of the proposed design or layout that is considered to be particularly unusual or which would be at significant variance with the established use at this location.
- (ii) While noting the residential development on the opposite side of the stream, it is segregated from the site and activities by boundary treatment and the operation is substantially contained within the structures on the site.

b) Cumulation with Other Existing and/or Approved Projects

- (i) Existing development in the surrounding area predominantly comprises small scale residential and farming uses typically associated with a rural area. Donegal County Council Planning Department website does not indicate any development of significance. There appears to have been only applications for houses and slatted sheds within a 2km radius in recent years.
- (ii) The nature of the development does however rely on the capacity of a range of waste processing facilities throughout Ulster and extending to Meath and

Dublin and there are no details provided on the extent or duration of the respective capacities. There may be cross border issues in a post Brexit scenario. Some cumulative impacts may arise due to the capacity however in view of the highly dispersed nature of the recipients these impacts are considered to be low or negligible and are not considered to justify the need for EIA.

c) Demolition Works

- (i) There are no demolition works proposed.

d) Use of Natural Resources / Production of Waste / Pollution / Nuisances / Accident Risk and Risks on Human Health

- (i) The overall environmental impact on water under these headings is considered to be low. There is a stream adjacent to the site which ultimately connects to Lough Swilly 1.6km downstream. The site layout and design provides for a barrier by way of an embankment, kerbing and fencing between this water body and the site. Soiled water from the external areas is intercepted before discharging to the stream while run-off from within the sheds that may be potentially contaminated is attenuated on site and tankered off-site. There will be no discharges of note and therefore no impact on the stream during the operational phase. By using best practice methods to manage run-off and soiled water, I am satisfied that there will not be a significant adverse impact on the River Corkey or ultimately Lough Swilly such as would require the carrying out of an EIA. The potential impact on Lough Swilly SAC/SPA is however addressed under the Habitats Directive.
- (ii) Due to hard-surfacing and an effectively contained system and removal of waste off-site there is unlikely to be a significant impact on soil or flora and fauna.
- (iii) Soil and water pollution impacts are considered insignificant and will not result in pollution or nuisance. Subject to the implementation of the best practice measures identified as part of the proposed development, it is considered that these impacts would not be significant.
- (iv) Having regard to the nature of the project, no risks of major accidents arise.
- (v) The activities are substantially confined to within existing premises during working hours and noise emissions are not considered to be of a level to warrant an EIA.

- (vi) There are no details of odour levels or monitoring and impact on residents in the area. However, subject to the implementation of the mitigation and best practice measures, it is considered that risks to human health would not be significant to warrant an EIA. This does not preclude the need for a specialist report in this regard.

6.2.3. Location of the Proposed Development

a) Existing and approved land use

- (i) The site is an established agri-industrial site associated with food processing and in more recent decades has been adapted for waste sorting and transfer as set out in the history section of this report. Overall, I do not consider that what is proposed would have a significant adverse impact in terms of land use.

b) Relative abundance, availability, quality and regenerative capacity of natural resources (including soil, land, water and biodiversity) in the area and its underground/ Absorption Capacity of the Natural Environment

- (i) Overall, the development relates to an anthropogenic brownfield site where the nature of the activity is such that the natural resources used in its development are limited. Potential contamination from historic use associated with vehicular/battery waste has been addressed. The nature of the use is such that it is consistent with established land use and the scale and design of development proposed is also considered to be compatible with the existing environs of the site.
- (ii) Although not stated by the applicant there appear to be no features of significance within the site in terms of wetlands, nature reserves, parks or areas protected under national or European legislation, including the Habitats Directive, that could be impacted by the proposed development. The site does not currently appear to have a beneficial biodiversity use, and there is no indication that the site is a habitat for any protected or rare species. I am satisfied that with appropriate conditions and mitigation measures that there will not be a significant adverse effect on the natural environment.
- (iii) There are no densely populated areas in close proximity the site.
- (iv) All materials processed within this facility are delivered to other facilities for tertiary treatment and recycling.

6.3. Type and Characteristics of Potential Impacts

a) Magnitude and Extent of the Impact

- (i) In view of the foregoing assessment, in my judgement the extent of the impact while potentially extending from source and, in terms of waste disposal, to over a wider geographic area, having regard to volumes and fragmented disposal, the magnitude of impact is low. There will be some impacts arising on local populations and environments arising from traffic, noise, odour and dust. These impacts from traffic will be low level. The impacts from machinery and operations will be confined to working hours and within a contained environment operating substantially within sheds in a predominantly rural environmental. Impact can potentially be mitigated by good practices.

b) Nature of the impact

- (i) *Population and Human Health:* Having regard to the limited size of the site, scale and nature of operation and the size of the population in the immediate area, I do not consider that there will be a significant adverse impact on population and human health.
- (ii) *Biodiversity with particular attention to the Habitats Directive:* The site is not the subject of any ecological designations and there is no indication or evidence that the site is a habitat for any protected or rare species. Due to the brownfield nature of the site there is no significant localised impact on ecology due to loss of habitat. Moreover, the ongoing development is not likely to have significant effect on any Natura 2000 sites owing to the separation distances, the lack of discharges and the proposed disposal of contaminated water.
- (iii) *Land, Soil, Water, Air and Climate/Material Assets:* The nature of the site and the modifications to the site surface and operations to contain and control water quality are such that the impact of the development on land and soils is likely to be negligible. The development in these circumstances is considered not likely to give rise to a significant risk to **water quality**. Under the headings of **air and climate**, and **noise and vibration**, there is the potential for impacts on some neighbouring residences during the operational phase, however given the nature and scale of the proposed development, it is considered that subject to

mitigation and the use of good practices, environmental impacts under these headings are unlikely to be significant.

There are no protected structures or national monuments on site however there are a number of listings in the NIAH which relate to the old stone buildings on the opposite side of the road and also the bridge. This would appear to relate to the historic mill related activities in this riverside setting. As the development relates to a developed site and no new works are proposed there are no likely impacts on archaeological heritage within the site.

Given these limited impacts, and the design and layout of the proposed development and relationship to surrounding properties and lands, it is not considered that the proposed development would have a significant negative impact in terms of **material assets**.

The existing visual quality of the site is limited, and it is considered that the proposed development would have an overall limited negative effect on **landscape** quality and visual amenity.

- (iv) *Interactions:* Interactions could arise between traffic, machinery, noise, odours and dust and on population and human health and also between traffic and historic properties along the traffic route and near the entrance. However, having regard to the relatively low volumes of traffic, business hours of operation and scale and nature of operations which are substantially indoors, it is considered that subject to best practice mitigation measures, significant interactions are not considered likely in respect of population and human health. In the case of protecting historic structures such as the bridge, this is a matter that can be addressed through a traffic safety audit and does not by itself warrant an EIAR.

c) Transboundary nature

- (i) The site is not located within what I would describe as a location having a direct transboundary impact. Some of the destination sites for the disposal or transfer of waste are located in Northern Ireland. However due to the low magnitude of impacts arising from the fragmented dispersal and volumes I do not consider that there will be any significant transfrontier impacts.

d) Probability, Intensity and Complexity of Impacts

- (i) Due to the dispersed nature of recipients of waste from the site the complexity of impacts is potentially far reaching. However the nature and degree of impacts is extremely limited.

e) Onset, duration, frequency and reversibility of impacts

- (i) The duration of the activity is subject to licensing and operates Monday to Friday during business hours. Nuisances arising from air pollution by way of dust, noise and odour may be ongoing but contained due to indoor activity and limited duration of storage of waste. The moving of large volumes of glass is twice yearly. The adjustment of times and loads, hours, good housekeeping can moderate the impacts.
- (ii) Pollution of water is not readily reversible however the measures in place make onset of such an occurrence unlikely.
- (iii) The nature of the proposed development, on an existing developed site for continued waste sorting and transfer is that the predicted impacts will be long term, ongoing and but regulated. The cumulative impacts are limited by the volume and nature of disposal. These characteristics have to be seen in the context of the limited scope and extent of environmental impacts predicted.

6.3.1. It is accordingly concluded that the proposed development does not require an Environmental Impact Assessment as it is not likely to have significant effects on the environment by virtue, inter alia, of its nature, size or location.

6.3.2. Having regard to the nature and scale of the proposed development in these circumstances, it is considered that the issues arising from the proximity/ connectivity to European Sites can be adequately dealt with under the Habitats Directive (Appropriate Assessment) as there is no likelihood of other significant effects on the environment. The need for environmental impact assessment is, therefore, not required.

6.4. Appropriate Assessment (AA)

6.4.1. The site is in the order of 1.6km from Lough Swilly SPA/SAC and the river adjacent to the site feeds directly into this body of water. Other sites such as River Finn SAC, Lennan River SAC, Balyarr Wood SAC and Lough Fern SPA between 10 and 13km from the site but there is no direct connection.

6.4.2. The planning authority invalidated the planning application seeking to regularise the situation, due to the perceived need for an appropriate assessment. The applicant

prepared an appropriate assessment screening report in January 2018 which identified the vulnerable species and habitats associated with Lough Swilly, the hydrological pathways and the potential source of impacts by reason of potential pollutants generated. However, taking account of control measures it was concluded that the potential for significant impacts would be unlikely.

- 6.4.3. The appropriate assessment was later revised in August 2018 and focused on the potential for impacts without control measures taken, on the key relationships that define the structure and function of both Lough Swilly SPA and SAC. It concluded in this document that the habitats and species in Lough Swilly could therefore be impacted during the operational phase without what is described as mitigation measures. No significant impacts are envisaged due to the nature of the operations and the distances to the sites. However, without mitigation measures, significant impacts cannot be completely ruled out. Accordingly, it was concluded that it cannot be excluded beyond scientific doubt in view of best scientific knowledge and on the basis of objective information that retention of the facility and the proposed works individually or in combination with other plans and projects would have a significant effect on the Lough Swilly SAC/SPA
- 6.4.4. A Natura Impact statement was then prepared following the revised conclusion of the AA screening report. As the site is in close proximity to the Corkey River there is potential for effects on fishery stocks and this could have an effect on the Otter population and/or on bird species which rely on water quality for feeding such as the Great Crested Grebe, Grey Heron, Whooper Swan, Shelduck and red breasted Merganser.
- 6.4.5. It is pointed out that mitigation and proper procedures are in place within this facility to ensure that it does not have any adverse effect on any Natura Sites.
- 6.4.6. I have reviewed the Site Conservation Objectives for these sites. Having regard to the contents of the NIS, I consider that it is required as it cannot be excluded on the basis of objective information that the development would have had or would have a likely significant effect on the SAC and SPA, having regard to the qualifying criteria of each designated site, the Conservation Objectives for each site and having regard to a potential pathway between the waste facility and the designated sites.
- 6.4.7. In conclusion, a NIS was submitted by the applicant and I concur with the Planning Authority that it is required for the subject site.

7.0 Assessment

7.1. Scope of Application

- 7.1.1. The Board is asked by the applicant to consider that in the circumstances where an offence may have occurred and that section 177(C) does apply to the site, that exceptional circumstances exist so as to allow the applicant to apply for substitute consent for the established and previously permitted waste facility on the subject site.
- 7.1.2. An application for substitute consent can only be made in respect of development that has already been carried out. The application in this instance relates to two elements: Firstly, there are the buildings comprising sheds that were required to be demolished although there was a difference in the interpretation of the permission for the sheds. Secondly the use of the site and premises as a waste recovery facility as described.
- 7.1.3. The development does qualify for consideration for leave to apply for substitute consent being a development in respect of which an appropriate assessment is required.
- 7.1.4. For reasons set out above I do not consider that an environmental impact assessment is required.

7.2. Exceptional Circumstances

- 7.2.1. Pursuant to the criteria set out in the Act in considering whether exceptional circumstances exist, the following matters are central to informing a decision and are appraised accordingly.
- 7.2.2. **Whether regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive.**

The applicant has prepared a remedial NIS in accordance with the Directive and this statement will have the opportunity to be appraised in light of submissions and will be evaluated and determined on its merits in any subsequent substitute consent application. The development is of a scale and nature that does not I consider warrant an EIAR. I do not therefore consider that the regularisation of the

development concerned would circumvent the purpose and objectives of either the EIA Directive or the Habitats Directive.

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

The applicant was undisputedly in receipt of planning permission for waste recovery activities up to 2014. However, permission for construction of a shed structure was then permitted in 2008 within the parameters of the temporary planning permission for 10 years - and while the duration of that (parent) permission effectively expired in 2014, the planning authority granted a 5-year extension in 2013 to the 2008 permission resulting in permission up to 2018 on the site. The applicant sought to then regularise permission for the activities, but, by excluding a specific reference to seeking permission to retain the shed, the validity of the application was questioned. The applicant clearly held the view that the shed was not unauthorised, and I do not consider this to be unreasonable in view of the sequence and timing of permissions. The continuance of use of that shed as a waste facility is not as clear cut although it does seem to run counter to the condition of the parent permission. However, notwithstanding the waste permit for up to 2022, the decision clearly states the ceasing of waste recovery activities on the site. The applicant made immediate efforts to regularise the situation by seeking retention of the shed (despite disagreeing with the need for this aspect) but the changes in the regulatory provisions in relation to AA restricted the planning authority. While there is some potential confusion over the permission up to 2018, the applicant however could not reasonably have been of the belief that management of waste beyond January 2018 was authorised development.

7.2.4. 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.

I note that the waste permit process associated with the subject site provides relevant data and information while also taking account of submissions by third parties and statutory bodies. The applicant engaged in AA screening in 2018. If leave to apply for substitute consent is permitted in this instance, a remedial NIS would be submitted with the benefit of this screening process and with the consequent application and this would allow for further public participation within the process. Having regard to the planning history of the site and the fact that the

applicant has applied for a number of planning permissions open to third party observations, I do not consider that the provision for public participation in such an assessment has been substantially impaired.

7.2.5. 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.

Having regard to the ongoing consents by way of planning permission and waste permits for the subject development and the conclusion on which the permit is based that there is no indication that these previous activities or continuance of say, that would be subject to the substitute consent application, have resulted or would result in any likely significant direct or indirect effects on the environment (or continue to have such effects) or would have affected the Conservation Objectives of the features for which any European Site in the vicinity has been designated.

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

Based on the submitted details, there is no indication that these waste recovery activities have had any significant effects on the environment or adverse effects on a European Site. The application for substitute consent and the Board's determination on such an application, which would include a remedial NIS, would allow for definitive conclusions to be drawn.

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

The applicant has been in receipt of planning permission for waste recovery activities at this location with a condition for it to cease in for the stated reason.... The applicant has carried out unauthorised development by exceeding this time limit of permission and the circumstances of this are set above.

7.2.8. Such other matters as the Board considers relevant.

I consider the planning history and consistent efforts to comply with Planning Acts as evident in the dates of invalidation of applications has had an unfortunate consequence restricting the regularisation in view of the parallel changing regulatory context. Regard should also be had to the well-established waste related operations on an Agri- industrial factory site, the regulatory control already in place in respect of

environmental impacts and on the limited capacity for a significant material change in impacts arising between the authorised and unauthorised development on site.

I consider it reasonable that the applicant had a reasonable expectation that the site was capable of being regularised under a Section 34 retention application,

I consider that these circumstances should be considered by the Board in determining whether to grant leave to apply for substitute consent.

8.0 Recommendation

Having regard to section 177 D(1)(a), which provides that the Board shall only grant leave to apply for substitute consent 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, I am satisfied to conclude that:

- An EIA is not required and that
- Appropriate Assessment is required in this instance.

I consider that exceptional circumstances exist that would permit the making of an application for substitute consent.

9.0 Reasons and Considerations

Having regard to:

- (a) the nature and scale of the proposed development, which is significantly sub threshold in respect of Class 11 (b) Installations for the disposal of waste with an annual intake greater than 25,000 tonnes not included in Part 1 of this Schedule, (d) Sludge-deposition sites where the expected annual deposition is 5,000 tonnes of sludge (wet) and (e) Storage of scrap metal, including scrap vehicles where the site area would be greater than 5 hectares of the *Planning and Development Regulations, 2001* (as amended),
- (b) the location of the site on a brownfield site where there has been established authorised waste storage, sorting and distribution facilities,
- (c) the location of the site in rural area characterised by agricultural use and small-scale residential development and pattern of development in the area,
- (d) the location of the site outside of any sensitive location specified in article 109(4)(a) (v) of *the Planning and Development Regulations, 2001*,

- (e) the drainage proposals for the site,
- (f) the Schedule 7A submission,
- (g) the guidance set out in the '*Environmental Impact Assessment (EIA) Guidance for Consent Authorities regarding Sub-threshold Development*' issued by the Department of the Environment, Heritage and Local Government,
- (h) to the criteria set out in Schedule 7 of the Planning and Development Regulations 2001 (as amended), and
- (i) to the report and recommendation of the person appointed by the Board to make a report and recommendation on the matter,

it is considered that the proposed development would not be likely to have significant effects on the environment and that the preparation and submission of an environmental impact assessment report is not therefore required,

and,

having regard to Section 177D, Planning and Development Act, 2000, as inserted by Section 57, Planning and Development (Amendment) Act, 2010, the Board is satisfied that:

- a) the development is one where an EIA is not required, and an appropriate assessment is required, and
- b) that exceptional circumstances exist by reference, in particular, to the following:
 - the fact that the regularisation of the development would not circumvent the purpose or objectives of the Environmental Impact Assessment or Habitats Directive;
 - that the ability to carry out an AA and provide for public participation has not been substantially impaired;
 - the applicant's reasonable expectation, that the development was capable of being regularised under normal Section 34 application for retention;
 - and the limited nature of the actual/likely significant effects on a European site resulting from the development.

The Notice to the applicants advising of the decision should also direct that:

- a) the application be made within 12 weeks of the giving of the notice or such longer period as the Board may, on request, consider appropriate, and
- b) the application includes a remedial NIS.

Suzanne Kehely
Senior Planning Inspector

31st December 2019