



An
Bord
Pleanála

Inspector's Report ABP-303629-19

Development	Quarry (EUQY30)
Location	Altcor, Inver, Co.Donegal.
Planning Authority	Donegal County Council
Applicant(s)	Kevin Harrold
Type of Application	Leave to Apply for Substitute Consent under Section 177C of the Planning and Development Act 2000 (as amended)
Date of Site Inspection	8 th May 2019
Inspector	Una O'Neill

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1.0 Site Location and Quarry Operation

- 1.1.1. The subject site is a quarry located in a rural area in the southwest of Co. Donegal, approx. 7km north of Inver and 10km south of Ardara. Access to the site is by a local road L-1515-3 that runs north-south connecting into the N56 to the south at Inver and to the north at Ardara. A second access exists to the site from its northern boundary along a local access road which also serves a windfarm. Lough Namanfin (pNHA) is approx. 660m to the west of the site and visible from the site. There are small rivers to the north and south of the site, which are connected to Lough Namanfin. The topography is generally elevated and undulating, comprising a number of peaks in the wider area and a blanket bog type landscape. There are few dwellings in the area, with the closest being 2 bungalows approx. 640m south of the site.

2.0 The Application

- 2.1.1. The quarry is stated to be a family owned rock quarry. The applicant states the quarry currently has a development area of approx. 1.7ha, with 0.3 ha of ground restored from 2000-2005. It is stated that the quarry operated at a low scale with two trucks employed and an estimated output of 15,000 tonnes per annum. Kevin Harrold took over the quarry in 2004 and mechanised it to allow for screening and basic primary crushing of the rock, operating at a relatively small scale, with estimated output of 30-40,000 tonnes per annum with two trucks and an occasional third truck operating from the site. Blasting has occurred a total of six times at the quarry and was subsidiary to the ripping process.
- 2.1.2. The quarry was registered under Section 261 in April 2005 as a pre-63 quarry with all activities listed. 2.9ha were registered. The applicant states Donegal County Council issued Section 261(6)(a)(i) conditions for comment but did not confirm these conditions and did not conclude the registration process on any of the quarries which registered in the county.
- 2.1.3. It is stated that activity continued at the quarry until 2009, when due to the recession new extraction ceased. Stockpiles were relied upon thereafter. All employees were made redundant and almost all processing plant was removed from the site in 2009.

At this time, the extraction area was 1.7ha of the registered 2.9 ha with a further 0.3 ha restored.

- 2.1.4. In February 2012, the submission states that Kevin Harrold's businesses went into receivership, with Kevin Harrold playing no executive role with regard to any of his business interests. The receivership was withdrawn in 2014.
- 2.1.5. In 2016, the quarry recommenced operations. The applicant states operations did not exceed an area of 2ha and all within the intended registered area. It was Kevin Harrold's intentions to recommence operations to support road developments.
- 2.1.6. The applicant states the original s.261 maps were hand-drawn and not accurate and did not accurately reflect the 2.9 ha registered. Based on the development known in 2005, an 'estimate of the reasonably anticipated area has been mapped, reflecting the most likely future expansion beyond the developed area to a maximum 2.9 ha'.
- 2.1.7. Post 2000 aerial images have been submitted, which it is contended shows the limited area developed up until 2009 and this area did not change through the section 261A time frame. A 2018 aerial shows a marginal difference to that area indicated in 2008/9 and was well within the 2.9 ha registered area and well below EIA determination level (2.5 ha), were the site deemed to be unauthorised due to intensification or material change of use.
- 2.1.8. It is argued that the use of the site until 2004 was authorised and not subject to EIA/NIA considerations. It is stated the occasional use of blasting between late 2004/early 2005 and 2009, did not intensify the use or necessitate substantial change in processing that would normally be used. The same basic end use of a fill product was produced and the change in process did not intensify or create a new product. If intensification has not occurred then the original pre-1963 authorisation remains valid within the 2.9 ha registered area, as identified on the new map developed to accurately show the area. It is contended that application of the Lackagh Test and jurisprudence of Justice Charlton suggests no intensification of pre-63 authorisation.
- 2.1.9. It is stated in the applicant's submission that the EIA subthreshold level of 2.5 ha of extraction was never in place and the planning authority erred in that it examined the site on the basis of the registered area and not the extracted area, consequently there is not an EIA offence and the s261A(3) decision is prima facie erroneous.

- 2.1.10. Without prejudice to the ongoing pre-63 authorisation, the development of a windfarm (PL.05.226845) in close proximity to the site suggests that the dry quarry development could have passed Stage 1 Screening for AA, were it done by the planning authority under the s261A. It is not clear from the planning file if such an assessment was undertaken.
- 2.1.11. In February 2018, Kevin Harrold became aware of the 2012 s.261A outturn which has required an application for substitute consent be made on foot of a s.261A(3) notice. The receiver did not engage in the planning process or the s.261A(6) provisions to refer the matter to An Bord Pleanala.
- 2.1.12. Should the Board decide that an EIS/NIA offence exists, it must determine if exceptional circumstances exist in this situation, which the applicant argues is the case.
- 2.1.13. The operator states that the applicant has not yet had an opportunity to express his views and a 'de novo' consideration by the Board is welcomed. It is further stated that the finding by the Board as to whether or not an offence exists will decide whether the application should in fact be dealt with under this section. If an EIA and/or NIA offence exists, then the Board proceeds to decide if exceptional circumstances exist which would allow for a positive decision to allow the applicant to proceed and apply for Substitute Consent under Section 177(E).
- 2.1.14. It is submitted that the Board might arrive at one of two conclusions:
- That no EIA or NIA offences exist on the site and that section 177(C) does not apply to the site; or
 - That an offence may have occurred and that section 177(C) does apply to the site, but that exceptional circumstances exist as to allow the applicant apply for substitute consent on all of the developed area.

3.0 Planning Authority Submission

A submission from the Planning Authority notes the following:

- Under s.261A of the Act, the Council determined that the quarry was a pre-1964 quarry.

- Under s.261A of the Act the Council determined that an assessment of whether or not an EIA was necessary should have been carried out. From the attached planner's report, it appears that proximity to a non-Natura 2000 site, Meenybradden Bog pNHA may at the time have been the principal concern.
- The Council served notice on 20th August 2012 of the determination under s261A(3)(a) on the quarry owner and the quarry operator and directed them to apply for substitute consent.
- No review of the Council's s261A(3)(a) determination was sought and neither was any application for substitute consent lodged with An Bord Pleanála.
- The Council, having made a s261A(3)(a) determination in relation to the subject quarry would not currently be in a position to consider a standard planning application for permission for the retention of the extension of the quarry relative to what was registered as 'the quarry site' under s261 (s. 34(12) refers).

4.0 Planning History

Planning Registration under the Provisions of Section 261

- 4.1.1. **PA ref QY30** - Quarry was registered under s.261 of the Planning and Development Act 2000 (as amended).

Determination of the Planning Authority under the Provisions of Section 261A(3)(a)

- 4.1.2. The Council determined on 20th August 2012 under s.261A(3)(a) that the subject quarry was pre-1964 and that development had been carried out after 1st February 1990 and after 26th February 1997 without the benefit of planning permission, that would have required a determination as to whether EIA was required and Appropriate Assessment was required and should have been carried out.
- 4.1.3. In a letter to the applicant, dated 21st August 2012, the applicant was directed by Donegal County Council to apply to An Bord Pleanála for a review of the decision or for substitute consent with a remedial EIS and remedial NIS within a period of 12 weeks from the date of the decision (i.e. 20th October, 2012).

- 4.1.4. No review under the provisions of section 261A(6) was submitted to the Board and no application for substitute consent accompanied by a remedial EIS or remedial NIS was received by the Board on or before 30th October 2012.
- 4.1.5. There appears to be no other planning history associated with the site.
- 4.1.6. In a letter dated 27th November 2012, An Bord Pleanála informed Donegal County Council that no application for substitute consent was received by An Bord Pleanála.

Enforcement Proceedings

- 4.1.7. Following an inspection of the quarry by Donegal County Council, a notice issued to the owners of the quarry on 21st June 2018 directing them to cease quarrying of the land.
- 4.1.8. A letter dated 8th January 2019 from Donegal County Council to Mary Harrold states that the unauthorised development has been regularised to the satisfaction of the planning authority in that the quarrying of the land has ceased.

5.0 Legislative Provisions

- 5.1.1. Section 177C of the planning act states *inter alia*

(1) A person who has carried out a development referred to in subsection (2) may apply to the Board for leave to apply for substitute consent in respect of the development.

(2) A development in relation to which an applicant may make an application referred to in subsection (1) is a development which has been carried out where an environmental impact assessment, a determination as to whether an environmental impact assessment is required, or an appropriate assessment, was or is required, and in respect of which—

(b) the applicant is of the opinion that exceptional circumstances exist such that it may be appropriate to permit the regularisation of the development by permitting an application for substitute consent.

Section 177D states –

(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—

(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 can be remedied;

(e) Whether the applicant has complied with previous planning permission granted or has previously carried out an unauthorised development;

(f) Such other matters as the Board considers relevant.

6.0 Policy and Context

6.1. County Donegal Development Plan 2018-2024

- **Chapter 8.1** – Extractive Industry and Geology
- **Policy EX-P-2:** It is a policy of the Council not to permit new extractive industry proposals in areas of Especially High Scenic Amenity or in areas of High Scenic

Amenity. Furthermore, such proposals will not normally be permitted where they would adversely impact upon any Natura 2000 site, Natural Heritage Area, Nature Reserve, Groundwater Protection Area (Aquifer), Freshwater Pearl Mussel Catchment or other areas of importance for the protection of flora and fauna, or areas of significant archaeological potential, unless it can be clearly demonstrated that such extractive industries would not have significant adverse impacts on amenities or the environment, and comply with Article 6 of the Habitats Directive.

- **Map 7.1.1 Scenic Amenity Designations** – Site is in an area of Medium Scenic Amenity.

6.2. Natural Heritage Designations

- Lough Nillan Bog SPA (004110) and SAC (000165) is located approx. 1.2km north of the site.
- Meenaguse/Ardbane Bog SAC (000172) is located approx. 7.4km east of the site.
- Donegal Bay SPA and SAC is approx. 10km south of the site.
- St Johns Point SAC and pNHA is located approx. 13km to the southwest.
- Meenybradden Bog pNHA is located 660m west of the site.

7.0 Assessment

7.1. Introduction

7.1.1. The Board is asked by the applicant to arrive at one of two conclusions:

- (i) That no EIA or NIA offences exist on the site and that section 177(C) does not apply to the site, as the pre-63 authorisation enures to the benefit of the land in that intensification has not taken place upon application of established tests.
- (ii) That an offence may have unknowingly occurred and that section 177(C) does apply to the site, but that exceptional circumstances exist as to allow the applicant apply for substitute consent to regularise the site.

7.2. Pre-63 Authorisation

- 7.2.1. The s261 application (27th April 2005) indicates that the site area was 2.9 ha with the extraction area being 2 ha. The planning authority in their s261A Quarry Assessment Report confirmed these measurements for the registered area and extracted area against a 2010 aerial photograph. The material extracted was stated to be suitable fill/quarry face. Processes detailed are rock hammering, crushing, screening, and blasting. It was stated that pumping was not carried out.
- 7.2.2. An amended map has now been submitted by the applicant and it is stated that this map is more accurate than the handdrawn map submitted originally by the applicant as part of the s261A application. The revised map indicates the worked area as being 1.7 ha, 0.3 ha of ground was restored, and the registered area is 2.9 ha. The planning authority has not commented on the revised measurements submitted.
- 7.2.3. While there is some discussion by the applicant around the inaccuracy of the maps and the contended situation that the quarry has not legally intensified its operations, it is clear to me from the information and aerial photographs presented that the operational/extraction area of the quarry has been extended since the 2005 s261 application and therefore development has taken place, which is more than could reasonably have been anticipated in 1963, and which requires permission.

7.3. Requirement for EIA

- 7.3.1. I note that when the Board is making a decision on whether to grant leave to apply for substitute consent, in accordance with section 177D(1), it can only do so, 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.
- 7.3.2. In relation to EIA Class 2(b), Part 2, Schedule 5, Planning and Development Regulations 2001 (as amended) includes the following:
- “Extraction of stone, gravel, sand or clay, where the area of extraction would be greater than 5 hectares”.

The subject quarry has a stated extraction area of 1.7 ha – 2ha. EIA is not a mandatory requirement in this instance.

- 7.3.3. While the development area beyond that registered under s261 appears to be small, I note that the planning authority in their s261A assessment report reviewed the subthreshold implications of the development and stated that the visual impact due to the lack of screening from the road was a concern given the landscape in this area, as was proximity to a number of special landscape designations including Meenybradden Bog pNHA 398m from the site, the potential for impact on a stream 103m to the southwest of the quarry on the western side of the L-1515-3 and resultant impact on the bog of the pNHA, as well as potential impacts from noise and dust. It was noted that there were no obvious storm water drains or other drainage channels from the quarry.
- 7.3.4. I note that the Oily River is located to the west of the site and is connected to the Meenybraddan Bog pNHA. The EPA mapping system indicates the site is over a locally important aquifer which has a high vulnerability. The soils are defined as blanket peat in this area. I am not clear as to how the surface water associated with this quarry operates, including run-off to the adjoining peat landscape. I am not clear as to the impact on the hydrogeology of the area, and I have concerns in relation to potential impacts on the Oily River and the Meenybraddan Bog pNHA.
- 7.3.5. Overall, on the basis of the limited information before me, I do not consider that the likelihood of significant effects on the environment resulting from the quarry development can be excluded. The applicant has not submitted adequate information in relation to the existing quarry characteristics, or of measures, if any, incorporated or envisaged to avoid, prevent or reduce what might otherwise be or have been significant adverse effects on the environment of the development. The Board, therefore, is obliged to make a determination as to whether EIA is/was required. This requirement, in itself, is sufficient to qualify the subject development for consideration for leave to apply for substitute consent.

7.4. Requirement for AA

- 7.4.1. In relation to AA I would draw the Board's attention, to the following:

- The location of the quarry is 1.2km south of Lough Nillan Bog SPA (004110) and SAC (000165); approx. 7.4km from Meenaguse/Ardbane Bog SAC (000172), approx. 9km from Donegal Bay SPA and SAC.

The following table identifies the Conservation Objectives for the sites in question.

Name of Site	Site Code	Conservation Objectives
Lough Nillan Bog SPA	04110	<p>The conservation objectives for Lough Nillan SPA generally relate to the maintenance of the bird species listed as Special Conservation Interests for the SPA:</p> <ul style="list-style-type: none"> Merlin <i>Falco columbarius</i> (breeding) • Golden Plover <i>Pluvialis apricaria</i> (breeding) • White-fronted Geese <i>Anser albifrons flavirostris</i> (wintering) • Dunlin <i>Calidris alpine schinzii</i> (breeding)
Lough Nillan Bog SAC	00165	<p>The conservation objectives for Lough Nillan SAC generally relate to the maintenance of a favourable conservation condition of Annex I habitats:</p> <ul style="list-style-type: none"> • Oligotrophic waters containing very few minerals of sandy plains (<i>Littorelletalia uniflorae</i>) [3110] • Blanket Bog (* if active only) [7130]
Meenaguse / Ardane Bog SAC	00172	<p>The conservation objectives for Meenaguse / Ardane Bog SAC generally relate to the maintenance of a favourable conservation condition of Annex I habitat:</p> <ul style="list-style-type: none"> • Blanket Bog (* if active only) [7130]
Donegal Bay (Murvagh) SAC	00133	<p>The conservation objectives for Donegal Bay SAC relate to the maintenance of a favourable conservation</p>

		<p>condition of the following Annex I habitat and Annex II species. There are detailed targets for each habitat and species.</p> <p>Annex I Habitats:</p> <ul style="list-style-type: none"> • Mudflats and sandflats not covered by seawater at low tide [1140] • Fixed coastal dunes with herbaceous vegetation (“grey dunes”)* [2130] • Humid dune slacks [2190] <p>Annex II Species:</p> <ul style="list-style-type: none"> • Harbour Seal <i>Phoca vitulina</i> [1365]
Donegal Bay (Murvagh) SPA	004151	<p>The conservation objectives for Donegal Bay SPA relate to the maintenance of a favourable conservation condition of Annex I bird species and associated habitats. There are detailed targets for each habitat and species.</p> <ul style="list-style-type: none"> • Great Northern Diver (<i>Gavia immer</i>) (wintering) [A003] • Light-bellied Brent Goose (<i>Branta bernicla hrota</i>) (wintering) [A046] • Common Scoter (wintering) (<i>Melanitta nigra</i>) [A065] • Sanderling (wintering) (<i>Calidris alba</i>) [A144] • Wetland and Waterbirds [A999]

- The development site is not located within or adjacent to a Natura 2000 site/European site.
- The closest European Site is Lough Nillan Bog SAC and SPA, which is 1.2km north of the site.
- The stream proximate to the site, which has the potential to be impacted upon by the development, does not drain to a European site.

- There is no direct source-pathway-receptor between the development and the European sites in the area.
- While the hydrogeological impacts of the quarry are unclear on the immediate environment, the proposed development is not hydrologically connected to a European site and the development is not likely to have a significant effect on a European site, in view of the conservation objectives of the sites in the area.
- With regard to dust, given the limited scale of the quarry development and distance from European sites, I do not consider that dust from the development is likely to have a significant effect on a European site, in view of the conservation objectives of the sites in the area.
- It is reasonable to conclude that on the basis of the information on the file, which I consider adequate in order to issue a screening determination, that the proposed development, individually or in combination with other plans or projects would not be likely to have a significant effect on European Site No. 04110 (Lough Nillan Bog SPA), 00165 (Lough Nillan Bog SAC), or any other European site, in view of the site's Conservation Objectives, and a Stage 2 Appropriate Assessment (and submission of a NIS) is not therefore required.'

7.5. Exceptional Circumstances

Section 177D(2) of the Planning and Development Act provides that, in considering whether exceptional circumstances exist, the Board must have regard to specified issues. My consideration on each of these is set out as follows:

1. Whether the regularisation of the development would circumvent the purposes and objectives of the EIA Directive or the Habitats Directive?

It can reasonably be argued that if leave were granted to apply for substitute consent, any subsequent application would be accompanied by a remedial EIS. Thus the regularisation of the development in this instance would not circumvent the purpose and objectives of the EIA Directive or the Habitats Directive.

2. Whether the Applicant had or could have reasonably had a belief that the development was not authorised?

The application as set out on behalf of the applicant argues that the applicant believed that the quarry registration constituted a valid planning permission and that no further action was required on foot of the quarry registration. It is also stated that the quarry was under the control of a receiver in 2012, when the notice was issued under section 261A(3)(a) of the Planning and Development Acts 2000 (as amended) directing the applicant to apply to An Bord Pleanála for substitute consent, and that the applicant did not see this letter which was in the receipt of the receiver. The applicant regained control of the quarry in 2014 and states he had no knowledge of the letter until an enforcement notice was served. Given the circumstances, it is reasonable in my view that the applicant could have had a view that the development was authorised.

3. 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 the public participation in such an assessment has been substantially impaired?

If the Board consider it appropriate to grant leave to apply for substitute consent, normal avenues would be open to facilitate public participation and third party observations in relation to the application. In this regard it can be reasonably argued that the ability to provide for public participation has not been substantially impaired.

4. 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 the continuation of the development?

The Planner's Report prepared as part of the section 261A determination includes an EIA screening report with regard to potential subthreshold impacts. It assesses the potential impact arising from the works carried out on site having particular regard to the landscape impact, impact on a local stream and potential noise and dust impacts. With these potential impacts in mind it is concluded that an environmental impact assessment should have been carried out. The rEIS that would be submitted with an application for substitute consent would seek to confirm the likely effects and could then be assessed accordingly.

From the details available to date, there is no indication that the previous quarrying activities, that would be subject to the substitute consent application, have resulted in any significant direct or indirect effects (or continue to have such effects) that would have affected the Conservation Objectives of the features for which any European Site in the vicinity had been designated.

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

The rEIS that would be submitted with an application for substitute consent would seek to confirm the likely effects, which could then be assessed accordingly.

The quarried area that would be subject to a substitute consent application is not located within any designated European site. From the details available to date, there is no indication that these previous quarrying activities, that would be subject to the substitute consent application, have resulted in any significant direct or indirect effects (or continue to have such effects) that would have affected the Conservation Objectives of the features for which any European Site in the vicinity had been designated.

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

There are no previous planning permissions on the site. There is currently no enforcement notice on the site.

7. Such other matters as the Board considers relevant.

The applicant denies receiving any notification of the determinations by the planning authority under section 261A given the business was in receivership at the time and the receiver did not act upon the notice received. In my opinion, this is a particularly relevant matter for the Board's consideration. If it is accepted that the applicant was not in receipt of the planning authority's notices under section 261A, then the applicant could not have availed of the opportunity to seek a review of the planning authority's decision. Leave to apply for substitute consent should be allowed in the interest of fairness.

8.0 Recommendation

I consider that it would be appropriate to consider an application for the regularisation of the development by means of an application for substitute consent. I recommend that the Board grant leave to apply for substitute consent for the development under section 177D of the Planning and Development Act 2000, as amended.

9.0 Reasons and Considerations

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 or a determination as to whether EIA 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 EIA and provide for public participation has not been substantially impaired;
 - the applicant could reasonably have had a belief that the development was not unauthorised
 - the applicant's contention that the s261A(3) notice as the business was in receivership at the time;

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 EIS, if determined as necessary. This may include reference to proposed mitigation measures where appropriate.

Una O'Neill
Senior Planning Inspector

20th May 2019