



An
Bord
Pleanála

Inspector's Report

ABP-304086-19

Development	Leave to apply for substitute consent for a quarry.
Location	Devlineagh, Carrickart, Co. Donegal.
Planning Authority	Donegal County Council
Applicant(s)	J &F Doherty Quarries
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	1 st June 2019.
Inspector	Sarah Lynch

1.0 Site Location and Description

- 1.1. The subject site is a quarry located in a rural area in the north of Co. Donegal approximately 4km west of Carrickart and c. 12km north of Milford. Access to the site is via an unnamed local road which links to the R245 Carrickart to Milford road. Mulroy Bay SAC is c. 320m east of the site and there is a small river to the east of the site which drains to the Bay.
- 1.2. The site forms part of a parcel of commonage land which has been widely worked as a rock fill quarry. The subject lands have been extensively quarried and contain settlement lagoons.
- 1.3. Three houses are located along the approach road to the quarry and a mobile home is sited at the entrance to the quarry. The topography of the site is generally elevated and undulating comprising a number of peaks to the south.

2.0 The Application

- 2.1. The quarry is stated to be a family owned rock quarry that was more widely worked by Donegal County Council prior to the 1st October 1964. The site is part of a parcel of 66 acres of commonage that has now been fully acquired by the Doherty family. The Doherty's took over the quarrying operations after the local authority was finished and resulted in an extensive area under development by the mid 1970's. This is evidenced in OSI photography. The nature of that development was ripping and elementary processing in a mechanised fashion. In 1997 John Doherty took over the business and modernised the equipment and commenced blasting in the year 2000.
- 2.2. An application was granted in 2005 for works in the quarry relating to quarry operations and including blasting in an area of 1.13 hectares. Whilst awaiting the decision of planning it was decided by the applicant not to engage in the Section 261 process and the quarry was therefore not registered. A successful appeal of the 2005 application (PL.05.131552) left the operator without any consent or registration of the development.
- 2.3. A subsequent application with EIS was granted by Donegal County Council in November 2006 and again was successfully appealed (ref: PL.05C.221524).

- 2.4. A third application with EIS was granted by Donegal County Council and was refused by at appeal (ref: PL.05C.231114).
- 2.5. In the absence of engagement in the Section 261 process the quarry was precluded from engaging in Section 261A process. Quarrying ceased on site in 2008 and it is stated that only existing extracted material was processed after this date.
- 2.6. The application relates to c. 8 hectares of quarry area which was consistently under development post 1997, it is stated within the supporting information that this is a dry quarry and lagoons were installed to cater for surface water in order to allow sediment to settle prior to the onward passage of water. It is stated that this is not a water process. It is further stated by the applicant that on this basis NIA can be ruled out technically and legally.
- 2.7. The applicant contends that due to the intensification of the use and as a consequence of regular blasting that an EIA offence has occurred and as such leave to apply for substitute consent should be granted.

3.0 Planning Authority Submission

- 3.1. A submission has been received from Donegal County Council and can be summarised as follows:
 - Donegal County Council undertook a full review of all quarries and concluded that a determination under 216a was not applicable to the appeal site.
 - The quarry was originally pre 1963 authorised.
 - Enforcement proceedings were initiated in relation to intensification.
 - Enforcement proceedings were brought before the circuit court and were then appealed to high court.
 - High court order required cessation of all operations over and above pre 1963 development.
 - A restoration plan was also agreed and has been implemented.
 - The order has been complied with and the case is now closed.

4.0 Planning History

PL.05C.231114 Permission was refused for retention and intensification of quarrying activities.

PL.05C.221524 Permission was refused for retention and intensification of quarrying activities.

PL.05.131552 Permission was refused for retention and intensification of quarrying activities.

5.0 Legislative Provisions

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

5.2. (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.

5.3. (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

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.

6.1. Natural Heritage Designations

- Mulroy Bay SAC is located c. 320 metres north east of the site.
- Cloghernagore Bog and Glenveagh National Park SAC is located c. 6.3 km south west of the site.
- Greers Isle SPA is located c. 6km north of the site.
- Derryveagh and Glendowan Mountains SPA is located c. 7.5km south west of the site.
- Sheephaven SAC is located c. 7km west of the site.
- Kindrum Lough SAC is located c. 8.7km north of the site.
- Ballyhoorisky Point to Fanad Head SAC is located c. 9.6km north of the site.
- Fanad Head is located c. 10.3km north east of the site.
- Horn Head to Fanad Head SPA are located c. 8.8km north west of the site.
- Lough Nagreany Dunes SAC is located c. 8km north west of the site.
- Leannan River SAC is located c. 9.3km south of the site.
- Lough Fern SPA is located c. 9.3km south of the site.
- Tranarossan and Melmore Lough SAC is located c. 10.2km northwest of the site.
- Lough Swilly SAC & SPA are located c. 11.5km south east of the site.

7.0 Assessment

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 ensures 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.

7.1. Pre-63 Authorisation

7.2. Requirement for EIA

7.2.1. 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.

7.2.2. 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 c.8 hectares and therefore requires an EIA to be carried out.

7.3. Requirement for AA

7.4. In relation to AA I would draw the Board’s attention to the following:

- The location of the quarry is c. 320 metres south west of the Mulroy Bay SAC, and there is a hydrological pathway from the site to this SAC. This site also overlaps with Greer Isle SPA and adjoins Lough Nagreany Dunes SAC (000164), Tranarossan and Melmore Lough SAC (000194), Sheephaven SAC (001190), Ballyhooriskey Point to Fanad Head SAC (001975) and Horn Head to Fanad Head SPA (004194). The following table identifies the Conservation Objectives for these sites.

Name of site	Qualifying Interests	Conservation Objectives
Mulroy Bay SAC 002159	1160 Large shallow inlets and bays 1170 Reefs 1355 Otter Lutra lutra	The overall aim of the Habitats Directive is to maintain or restore the favourable conservation

		status of habitats and species of community interest. This objective is the same for all of the Natura 2000 site listed within this table.
Greer Isle SPA 004082	Black-headed Gull (<i>Chroicocephalus ridibundus</i>) [A179] Common Gull (<i>Larus canus</i>) [A182] Sandwich Tern (<i>Sterna sandvicensis</i>) [A191]	
Lough Nagreany Dunes SAC 000164	Embryonic shifting dunes [2110] Shifting dunes along the shoreline with <i>Ammophila arenaria</i> (white dunes) [2120] Fixed coastal dunes with herbaceous vegetation (grey dunes) [2130] Decalcified fixed dunes with <i>Empetrum nigrum</i> [2140] Atlantic decalcified fixed dunes (<i>Calluno-Ulicetea</i>) [2150] Dunes with <i>Salix repens</i> ssp. <i>argentea</i> (<i>Salicion arenariae</i>) [2170] Humid dune slacks [2190] Oligotrophic to mesotrophic standing waters with vegetation of the	

	<p>Littorelletea uniflorae and/or Isoeto-Nanojuncetea [3130]</p> <p>Najas flexilis (Slender Naiad) [1833]</p>	
<p>Tranarossan and Melmore Lough SAC</p> <p>000194</p>	<p>Mudflats and sandflats not covered by seawater at low tide [1140]</p> <p>Annual vegetation of drift lines [1210]</p> <p>Perennial vegetation of stony banks [1220]</p> <p>Vegetated sea cliffs of the Atlantic and Baltic coasts [1230]</p> <p>Embryonic shifting dunes [2110]</p> <p>Shifting dunes along the shoreline with <i>Ammophila arenaria</i> (white dunes) [2120]</p> <p>Fixed coastal dunes with herbaceous vegetation (grey dunes) [2130]</p> <p>Decalcified fixed dunes with <i>Empetrum nigrum</i> [2140]</p> <p>Dunes with <i>Salix repens</i> ssp. <i>argentea</i> (<i>Salicion arenariae</i>) [2170]</p> <p>Machairs (* in Ireland) [21A0]</p> <p>Hard oligo-mesotrophic waters with benthic vegetation of <i>Chara</i> spp. [3140]</p>	

	<p>European dry heaths [4030]</p> <p>Alpine and Boreal heaths [4060]</p> <p>Petalophyllum ralfsii (Petalwort) [1395]</p>	
<p>Sheephaven SAC</p> <p>001190</p>	<p>Mudflats and sandflats not covered by seawater at low tide [1140]</p> <p>Salicornia and other annuals colonising mud and sand [1310]</p> <p>Atlantic salt meadows (Glauco-Puccinellietalia maritimae) [1330]</p> <p>Mediterranean salt meadows (Juncetalia maritimi) [1410]</p> <p>Shifting dunes along the shoreline with Ammophila arenaria (white dunes) [2120]</p> <p>Fixed coastal dunes with herbaceous vegetation (grey dunes) [2130]</p> <p>Humid dune slacks [2190]</p> <p>Machairs (* in Ireland) [21A0]</p> <p>Old sessile oak woods with Ilex and Blechnum in the British Isles [91A0]</p> <p>Euphydryas aurinia (Marsh Fritillary) [1065]</p> <p>Petalophyllum ralfsii (Petalwort) [1395]</p>	

<p>Ballyhooriskey Point to Fanad Head SAC</p> <p>001975</p>	<p>Perennial vegetation of stony banks [1220]</p> <p>Vegetated sea cliffs of the Atlantic and Baltic coasts [1230]</p> <p>Oligotrophic to mesotrophic standing waters with vegetation of the Littorelletea uniflorae and/or Isoeto-Nanojuncetea [3130]</p> <p>Hard oligo-mesotrophic waters with benthic vegetation of Chara spp. [3140]</p> <p>Vertigo angustior (Narrow-mouthed Whorl Snail) [1014]</p> <p>Najas flexilis (Slender Naiad) [1833]</p>	
<p>Horn Head to Fanad Head SPA</p>	<p>Fulmar (<i>Fulmarus glacialis</i>) [A009]</p> <p>Cormorant (<i>Phalacrocorax carbo</i>) [A017]</p> <p>Shag (<i>Phalacrocorax aristotelis</i>) [A018]</p> <p>Barnacle Goose (<i>Branta leucopsis</i>) [A045]</p> <p>Peregrine (<i>Falco peregrinus</i>) [A103]</p> <p>Kittiwake (<i>Rissa tridactyla</i>) [A188]</p> <p>Guillemot (<i>Uria aalge</i>) [A199]</p> <p>Razorbill (<i>Alca torda</i>) [A200]</p> <p>Chough (<i>Pyrrhocorax</i></p>	

	pyrrhocorax) [A346] Greenland White-fronted Goose (Anser albifrons flavirostris) [A395]	
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7.58. As mentioned above there is a hydrological pathway in the form of a stream that bounds the site to the north and north east and south. This stream drains directly to the Mulroy Bay SAC which is linked to the Natura 2000 site above. Given the presence of a direct pathway from the site to the Mulroy Bay SAC and having regard to the nature of the quarrying operations taking place on the site and the potential for impacts to the SAC arising from this activity, it is reasonable to conclude based on the information submitted, which is of sufficient detail in order to issue a screening determination, that individual or in combination effects with other plans or projects on European Site no. 002159 (Mulroy Bay SAC) cannot be ruled out. A stage 2 Appropriate Assessment and submission of an NIS is therefore required.

7.59. Exceptional Circumstances

7.60. 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?

7.61. It can reasonably be argued that if leave were granted to apply for substitute consent, any subsequent application would be accompanied by a remedial EIAR and NIS. 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?

7.62. As mentioned above the quarry which was operated by Donegal County Council from the 1950's was taken over by the Doherty family in the 1970's. In 1997 the now owner took over the business and modernised the quarrying processes and commenced blasting on site. In 2001 the owner was required by Donegal County Council to apply for planning permission for the intensification of works, permission was eventually

obtained in 2005. The applicant states that he did not register the quarry under 216 at this time as his planning application was under consideration by Donegal County Council. The planning permission obtained from Donegal County Council in this regard was however, successfully appealed (ref: PL.05.131552). It is stated that the applicant's failure to register the quarry under 216 was misguided but not an attempt to avoid the regularisation of the development.

- 7.63. A subsequent application which contained an EIS was lodged with Donegal County Council and received a grant of permission. This application was successfully appealed (PL.05C.221524).
- 7.64. A third application which contained an EIS was lodged with Donegal County Council and received a grant of permission. This application was also appealed and was under consideration at the time of ECJ C-215/06. As there was a retention element to the development the Board was precluded from confirming the grant of permission. The applicant was notified by the decision of the Board to refuse permission in 2011 (ref: PL.05C.231114).
- 7.65. The applicants were prevented from engaging in the Section 216A process on the basis of historical operation but lack of Section 216 registration.
- 7.66. It is stated by the applicants that the quarry operation on site has not involved any new extraction since spring 2008 and remains within the boundary of the 2008 application with no possible EIA or AA offence since this time.
- 7.67. It is apparent that the operator was aware that the quarry operations were unauthorised, however valid attempts have been made by the applicant to regularise the development over an extensive period of time.

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?

- 7.68. 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?

- 7.69. It is stated within the documents submitted that the operations on site have always been dry in nature and are within a larger historical quarry. Lagoons were installed to collect storm water and allow this to settle before onwards passage. It is submitted by the applicant that NIS can be ruled out technically and legally, the surface area having been initially developed prior to NIA legislation.
- 7.70. It is of note that concerns were raised within the previous appeal ref PL.05C.231114 in relation to surface water run off to the existing stream to the north and north east and the potential impacts arising to the water quality of this stream and the Mulroy Bay into which the stream flows. Concerns were also raised in relation to the assessment of noise impacts. It was concluded within the assessment of this appeal that there was insufficient information in relation to baseline data and the receiving environment within the EIS submitted. The rEIAR that would be submitted with an application for substitute consent would seek to confirm the likely effects and could then be assessed accordingly.

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

- 7.71. The rEIAR that would be submitted with an application for substitute consent would seek to confirm the likely effects, which could then be assessed accordingly.
- 7.72. 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?

- 7.73. After the decision to refuse permission for retention of development by the Board in 2005, Donegal County Council issued an enforcement notice to the applicant. However, it is stated that the applicant continued with the planning process and also
- 7.74. continued to operate the quarry. After a number of applications and failed appeals enforcement proceedings were escalated to the High Court whereby an order to restore the quarry was issued but a stay was put on this order until the ABP decision was made in relation to PL.05C.231114.
- 7.75. As mentioned above the Board was precluded from granting permission at this time as a result of ECJ C-215/06 and therefore determined to refuse retention and permission for the development. Additional reasons for refusal included the inadequacy of the EIS.
- 7.76. As a consequence of this failed appeal, the High Court order was enacted. A letter from Donegal County Council states that the applicant has fully complied with this court order and all enforcement proceedings are now closed in relation to the site.

7. Such other matters as the Board considers relevant.

- 7.77. The applicant's efforts to engage with the planning process have been noted within the most recent decision of the Board i.e PL.05C.231114. It is evident from the information submitted that the applicant has not sought to frustrate the planning process and has made reasonable efforts to engage with the process in order to regularise the quarry operations within the site. Leave to apply for substitute consent should be allowed in the interest of fairness.

8.0 Recommendation

- 8.1. 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 sought to regularise the development consistently since 2005 and did not attempt to circumvent the proper planning process.

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

Sarah Lynch

Planning Inspector

9th October 2019

