



An  
Bord  
Pleanála

## Inspector's Report ABP-306076-19

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<b>Development</b>	Quarry
<b>Location</b>	Dirreendrislough, Sneem, Co. Kerry
<b>Planning Authority</b>	Kerry County Council
<b>Applicant(s)</b>	Gleesk Quarries Ltd.
<b>Type of Application</b>	Leave to Apply for Substitute Consent under Section 177C of the Planning and Development Act 2000 (as amended)
<b>Date of Site Inspection</b>	16 <sup>th</sup> March 2020
<b>Inspector</b>	Mary Kennelly

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## 1.0 Introduction

- 1.1.1. This is an application for **leave to apply for Substitute Consent** for a quarry under **Part XA of the Planning and Development Act 2000** (as amended), and specifically under **Section 177C(2)(b)**. This follows a previous application for leave to apply for Substitute Consent for a quarry at the site under 08.LS0015, which was refused by the Board on the 16<sup>th</sup> September 2014. The Board had concluded that an Environmental Impact Assessment and an Appropriate Assessment were required in respect of that development and had concluded that exceptional circumstances did not exist to enable an application for Substitute Consent to be submitted in order to regularise the development. The Board, therefore, decided to refuse the application for leave to apply for Substitute Consent.
- 1.1.2. The applicant wishes to re-apply for leave under Section 177C(2)(b) for the quarry. He believes that exceptional circumstances exist such that it may be appropriate to permit the regularisation of the development by permitting an application for Substitute Consent. The application for leave is accompanied by a Remedial NIS and a Remedial Environmental Report, together with other supporting documents and plans and sets out the applicant's case for the consideration of exceptional circumstances.
- 1.1.3. The statutory scheme relating to the substitute consent process has recently been amended by provisions set out at sections 6 to 9 of the Planning and Development Residential Tenancies Act 2020. These amending provisions came into force on the 19<sup>th</sup> of December 2020, following the Supreme Court Judgement of the 1<sup>st</sup> July 2020, in respect of the "Ballysax/McQuaid" cases – three joined appeal cases relating to two quarries. Amendments were made to the substitute consent provisions in Part XA of the 2000 Act and Part 19 of the 2001 Regulations. These amendments provide, inter alia, for the right of third-party public participation by way of written submissions where an application for substitute consent is made. However, there is no such provision for the making of submissions from third parties in the statutory scheme relating to applications for leave to apply for substitute consent.
- 1.1.4. Notwithstanding this, due to the uncertainty that arose from the Supreme Court Judgement in respect of the overall substitute consent process, the assessment of the current application for leave to apply for substitute consent was suspended

pending the outcome of the review of the said legislation. This resulted in a delay in the progress of this case.

## **2.0 Site location and description**

- 2.1.1. The subject site is a quarry located in a scenic rural area on the southern coast of the Iveragh Peninsula, Co. Kerry. The closest settlement is Sneem, which is a picturesque village on the Ring of Kerry, approx. halfway between Kenmare and Caherdaniel. The quarry site is situated in the townland of Dirreendrislough, which is approx. 6km to the south west of Sneem. Access to the site is by means of a network of local roads that run south-eastwards from the N70 (Ring of Kerry road). The topography of the area is generally flat to undulating with rocky outcrops. The land use is generally rough grazing pasture. There are c. 8 dwellings in the vicinity, (within 500m), with the closest being a house approx. 90m to the northeast of the site. There are three dwellings close to the entrance to the quarry and several one-off dwellings to the southwest.
- 2.1.2. There is a fork in the road at the entrance to the quarry, with an internal track (northern haul route) leading directly into the site and a further spur travelling south-eastwards towards the sea, and then westwards alongside the coast to enter the quarry from the south. This road also serves two dwellings. The southern entrance leads to a southern haul route which follows the coastline and an internal track which leads back to the northern haul route. The quarry consists of two distinct excavation areas. One is located at the northern end (stated as c.0.86ha) close to the entrance and is sited on the landward side of the northern haul road. No excavation was taking place in this area at the time of my inspection, but there were stockpiles of stone, topsoil and overburden together with bits of scrap metal and an old truck within this area. The other area is located to the south-east of the northern haul road and comprises most of the rest of the excavation area (stated area of 1.2ha). This area was being actively worked at the time of my inspection. It is at a lower level than the smaller inactive section and extends approx. 50-60m towards the sea and approx. 100m to the south-west.
- 2.1.3. Although the quarry was not operating on the day of my inspection, the presence of stockpiles of aggregate, screening and crushing plant, excavators and other

associated machinery indicated that the southern part of the quarry is active. It was also clear that the southern worked-out area had increased in size and that the cliff faces on the western and northern edges of this section of the quarry had been advanced further since the previous site inspection by the Board's Inspector in 2014. There was no evidence of any settlement lagoons but there were areas of water pooling in the centre of the worked-out area. The worked-out area extends to the foreshore apart from an escarpment which consists of a tall, narrow cliff face adjacent to the sea. A pier or breakwater had been constructed on the seaward side of the quarry between the entrance and the escarpment along the foreshore.

- 2.1.4. The south-eastern boundary of the quarry site is with the coastline of Kenmare River, which is a designated European site, Kenmare River SAC (site code 002158), and is also a designated Shellfish Water Habitat. This inlet, which is an expansive drowned river valley, separates the Iveragh and Beara Peninsulas. There are several European sites in the vicinity including the Killarney National Park, Macgillycuddy's Reeks and Caragh River Catchment SAC and a number of SPAs including Iveragh Peninsula SPA. There is a river located to the north of the site and it would appear from the ordnance survey maps of the area that a tributary of this river flows southwards towards Kenmare River, discharging just to the north-east of the quarry site.

## **3.0 Background and planning history**

### **3.1. Planning Registration under S261 of the Planning and Development Acts**

- 3.1.1. The quarry is said to have commenced prior to the appointed day (1<sup>st</sup> October 1964). The quarry owner/operator applied to Kerry County Council in April 2005 to have the quarry registered under S261 of the Planning and Development Act 2000, (as amended). The P.A. registered the quarry on 27/04/07 under the provisions of S261, subject to 55 no. conditions. However, prior this, an Enforcement Notice had been issued on 6/04/06 stating that intensification of operations had taken place.

### **3.2. Determination under Section 261A(3)(a) of the Planning and Development Acts**

- 3.2.1. The P.A. issued a determination in 2012, under Section 261A of the Planning and Development Act 2000, (as amended), stating that development had been carried out after the 1<sup>st</sup> February 1990, which would have required an Environmental Impact Assessment, in accordance with the EIA Directive. It was further determined that development had been carried out after the 26<sup>th</sup> February 1997, which would have required an Appropriate Assessment to have been carried out. However, neither assessment was carried out. This determination (dated 7<sup>th</sup> August 2012), directed the applicant to apply to An Bord Pleanála for Substitute Consent with a remedial EIS and a remedial NIS within a period of 12 weeks (30<sup>th</sup> October 2012). However, no such application was made, and the applicant claims that notification of the determination was never received.

### **3.3. Enforcement proceedings**

- 3.3.1. The Board notified the planning authority in writing on 7<sup>th</sup> November, 2012 that no application for Substitute Consent had been made. Enforcement proceedings were subsequently prepared by the planning authority. In a report dated 11<sup>th</sup> September, 2013, it was recommended that an Enforcement Notice be issued directing the owner/operator to cease quarrying activity with immediate effect and remove all plant and machinery off-site and to carry out reinstatement works on the site. This report was accompanied by an EIA Screening Report, specifically relating to the cessation and reinstatement works identified in the Draft Enforcement Notice. This screening report had concluded that EIA was not required in respect of these specific works. Similarly, an Appropriate Assessment Screening Report was prepared in relation to the cessation and reinstatement works set out in the Draft Enforcement Notice, in which it was concluded that the works required to comply with the notice would not require the undertaking of an AA.
- 3.3.2. An Enforcement Notice was issued on 10<sup>th</sup> April, 2014 directing the applicant to cease all works and requiring the operator to carry out the reinstatement works set out in Enforcement Notice, in its entirety, by the 9<sup>th</sup> May, 2014.

### 3.4. Application for Leave to Apply for Substitute Consent May 2014 (LS0015)

3.4.1. The applicant appealed to the Board for leave to apply for Substitute Consent on the 9<sup>th</sup> May 2014. The applicant believed that exceptional circumstances existed such that it may be appropriate to permit regularisation of development by permitting an application for substitute consent for the quarry. The application was based on the following grounds :-

- The P.A. determination under S261A had been sent directly to the operator, whereas up to that point, all correspondence had been sent to the agent. It is claimed that had the notice been issued to the agent, an application for substitute consent would have been made within the required timeframe.
- The operator had complied with all but two of the conditions of the S261 Registration and apart from a Warning Letter issued in 2008, no further correspondence had been issued by the P.A.
- The requirements under the S261 registration had largely been fulfilled. It was claimed that the applicant's understanding was that the S261A(3)(a) Notices had merely acknowledged this and that it was concerned solely with the on-going environmental monitoring at the quarry.
- The operator believed that the quarry had obtained permission for 25 years because condition 2 of the S261 Registration had specified a life of 25 years for the quarry.
- The applicant had no recollection of any media advertisements regarding the necessity to apply for substitute consent.

3.4.2. The Board acknowledged that an Environmental Impact Assessment and an Appropriate Assessment would have been required in respect of the development concerned, but did not accept that there were exceptional circumstances that would warrant an application for substitute consent to regularise the activity. Specifically, the Board concluded that exceptional circumstances did not exist for the following reasons:

- The regularisation of the development would circumvent the purpose and objectives of the EIA Directive and the Habitats Directive.



- The applicant could not have reasonably had the belief that the development was not unauthorised.
- The ability to carry out an Environmental Impact Assessment and Appropriate Assessment for the public to participate in had been impaired.
- The development has had, and is having, actual significant effects on the environment and adverse effects on the integrity of a European site resulting from the carrying out of development, in particular, the significant adverse landscape and visual impact of the quarry.
- The significant effects on the environment and adverse effects on the integrity of a European site cannot be remediated to any great extent.
- The failure of the owner/operator to engage in the process for the control of quarries introduced by S261A of the Planning and Development Act (as amended) was noted.

Thus, the application (LS0015) for leave to apply for substitute consent was refused on 16<sup>th</sup> September 2014. The Board decided not to invoke powers available to it under Section 177L of the Act, having regard to the enforcement action being undertaken by the planning authority.

### 3.5. Enforcement action subsequent to Board's refusal for leave to apply for Substitute Consent

3.5.1. Following the Board's decision to refuse LS0015, the planning authority instigated enforcement proceedings. The submitted documentation indicates the following:

- **Enforcement Update dated 7<sup>th</sup> April 2016** – following the Board's decision to refuse leave, a further site inspection was carried out by the Enforcement Officer on 10<sup>th</sup> March 2016. It was noted that "significant quarrying works had taken place since the Enforcement Notice was served and that quarrying was ongoing". It was further noted that the Enforcement Notice had recommended that proceedings under Section 160 be initiated to seek cessation of all quarrying and the closure of the site, but that the P.A. "was not looking for restoration measures as quarrying had commenced before 15/11/2004".

- **Section 160 Proceedings** – were initiated against Timothy O’Sullivan on 23<sup>rd</sup> May 2016 (Chief Executive’s Order No. M/2016/333) seeking the cessation of quarrying activity and the closure of the site.
- **Letter from P.A. dated 14<sup>th</sup> January 2020** – it was pointed out that all documentation relating to the case up until 13<sup>th</sup> June 2014 had previously been forwarded to the Board under LS0015. Since the Board’s decision on that case (Sept. 2014), the Council’s Enforcement proceedings have advanced, and the matter is currently before the Killarney Circuit Court. It was adjourned by the Court on 12/12/19 on foot of the confirmation that a further application for leave to apply for Substitute Consent had been made to the Board. Confirmation provided that no planning applications have been made in relation to the site and that detailed observations will be forwarded to the Board in due course. A further planning report was submitted on 20<sup>th</sup> January 2020, which will be summarised below (Section 5.0).

#### **4.0 Grounds under which leave to apply for Substitute Consent is sought**

- 4.1.1. The quarry is stated to be a family owned sandstone quarry which has been in existence and has been supplying sandstone to the local community for four generations. The quarry operation is the operator’s livelihood and it operates to a strict set of conditions imposed as part of the S261 Registration.
- 4.1.2. The current footprint of the quarry is under 5ha (2.06ha). The topography of the area hides the quarry from view from the Ring of Kerry route and from surrounding roads and houses.
- 4.1.3. The previous application process (LS0015) was flawed and deficient for the following reasons
  - The site was erroneously placed on the foreshore and on the Beara Peninsula instead of the Iveragh Peninsula. The Inspector (LS0015) relied on the EIA/AA Screening reports carried out by the P.A. However, the actual or significant effects were never assessed scientifically, and the Board may have come to a different view had the impacts been known. It was assumed that the quarry

operation had negative impacts on the Kenmare River SAC without the benefit of an rNIS. There was an over-reliance by the Board on the Enforcement file, which was only necessitated by the change in legislation.

- While the quarry is close to Kenmare Bay, it is not on the foreshore and is 50m back from the high-water mark and is 2 metres over the high-water mark.
- Notification of the owner under the Section 261A process was inadequate. He claims that he never received the notification. It is further claimed that the planning authority has never been able to provide evidence of proof of postage and that no such record exists.
- The current application for leave to apply for substitute consent is accompanied by an Environmental Report and a remedial NIS which conclude that there are no major impacts on the Kenmare River SAC nor on the receiving environment generally. It is difficult to see how the Board could have come to a conclusion on this matter without having regard to these documents.

4.1.4. Without prejudice to the previous point, in the alternative, the owner/operator now seeks leave to apply to the Board under S177C(2)(b) for Substitute Consent as it is submitted that exceptional circumstances exist which mean that it may be appropriate to permit regularisation of the development.

4.1.5. The grounds for **Exceptional Circumstances** are set out as follows:

- a) **Whether regularisation would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive** – it is submitted that on the contrary, the development is in accordance with these objectives. The submission of the Environment Report and the Remedial NIS represent new information which constitutes an exceptional circumstance. Firstly, it is pointed out that the Remedial NIS has concluded that the development has had no measurable effects on any European sites and is unlikely to have any effects through any continuation of quarrying operations or any development not carried out to affect the integrity of these relevant Natura 2000 sites or any of their qualifying interests in light of their conservation objectives. Secondly, the Environmental Report demonstrates that there are no measurable effects on the environment and the ongoing activities will not give rise to significant negative impacts on the

environment. It is stated that should leave to apply for Substitute Consent be granted, such an application will be accompanied by a remedial NIS and a remedial EIAR, which will ensure that regularisation will not circumvent the objectives of the EIA Directive or the Habitats Directive.

- b) **Whether the applicant had or could reasonably have had a belief that the development was not unauthorised** – it is claimed that the owner/operator did not know that the quarry legislation had changed, (following the challenge in the European courts), as it was a pre-63 operation and because he did not receive the notification to apply for Substitute Consent. There is no record of registered post on the file. He had believed that it was authorised following the registration in 2005, and only found out that it was unauthorised in 2014, when he received the Enforcement Notice telling him to cease all operations, which was outside of the time limits. The local authority were his main customers until 2014, and it was plausible that he believed he was in compliance with the permission. However, the applicant has demonstrated his willingness and anxiety to comply with the legislative framework. This has been clearly demonstrated by his engagement with the S261 process and by the current application which further shows his commitment to operate the quarry in a manner which is fully compliant with the highest standards.
- c) **Whether the ability to carry out an assessment of the environmental impacts of development for the purposes of EIA or AA and to provide for public participation in such assessments has been substantially impaired** – it is stated that should leave to apply be granted, a remedial NIS and a remedial EIAR will be submitted which will involve consultation with prescribed bodies and public participation. The assessment will include the environmental impacts to date and measures to remediate any impacts. The public notices can invite comments on any environmental concerns in the remedial EIAR. This means that the ability to carry out these assessments and to provide for public participation in the assessment process has not been impaired.
- d) **The actual or likely significant effects on the environment or the adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development** – the Remedial NIS and Environmental

Report submitted with the current application have been produced by environmental consultants. They have concluded that there are no significant environmental impacts either on the immediate vicinity of the development nor on the Kenmare River SAC. It has been demonstrated that the operation has had no measurable effect on a European site and has not caused any disturbance or deterioration of a European site. This is mainly due to the unique features of the site, its location, the prevailing winds from the south-west etc. The rNIS has considered the potential effects associated with the quarrying operations on the relevant European sites and has concluded that the integrity of these sites and their qualifying interests have not and would not be affected, having regard to the conservation objectives for these sites.

- e) **The extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated** – no measurable effects have been identified in the rNIS. There have been no effects to date nor are any such effects likely to occur on the qualifying interests having regard to the conservation objectives. No mitigation or specific avoidance measures are proposed in respect of the quarrying activities at Gleesk over and above those routinely applied measures, which have already been specified in the conditions of the quarry registration (EUQY117), including continuation of noise and dust monitoring. The Environmental Report concluded that the ongoing activity would not give rise to significant negative impacts on the environment. The visual impact on the Kenmare River is the most significant visual impact and this has already been mitigated by the 5m berm inside the high-water mark. All quarrying activities will continue to be undertaken in accordance with best practice and appropriate guidelines.
- f) **Unauthorised development or whether complied with previous planning permissions** – there have been no planning applications or permissions on this site. The applicant has carried out all activity either in accordance with the law or in the reasonable belief that planning permission was not required following the registration under S261. The applicant has complied with all of the conditions of EUQY117 issued by Kerry County Council. The quarry has always been compliant, and it is only since the failure to apply for SC that it

has fallen into non-compliance. However, the planning authority has continued to purchase stone from the quarry. There is no evidence of postage or delivery regarding the Notice under S261A(3)(a). The Court has not heard any evidence regarding any adverse impact on a European site. The sole purpose of the application pursuant to the S160 is to address the lack of compliance with the planning acts, and not as a result of any environmental effects.

g) **Other matters to be considered** – the applicant has asked the Board to take the following additional matters into account –

- (i) **Suitability of the site** – there has been no impact on any European site. Where an operation at a particular location can be demonstrated as being suitable, such an operation should be permitted to be regularised as this reduces the possibility of less suitable sites commencing operations in areas which are vulnerable to adverse environmental effects.
- (ii) **Paucity of alternative sites within a reasonable geographical distance** – Kerry has a large tourist industry with large swathes of land designated as being worthy of preservation (environmental and landscape). This restricts the number of sites available for such activities. The lack of authorised quarries also means that materials are being imported into the county over long distances with far greater economic and environmental impacts. The quarry is a sustainable development and is supported by development plan policies.
- (iii) **The Established Nature of the Quarrying Activity** – the operation of the said quarry represents four generations of the family. It involves the use of modern equipment. It is a locally important economic activity in a rural area which meets the natural resources requirements of the local community.
- (iv) **Commercial viability** – the quarry provides employment within a remote coastal community where there are few indigenous sources of employment. The quarry provides direct employment as well as indirect employment in terms of the provision of goods and services. The stone

is of a very high quality and of great versatility. It is suitable for many different uses including road building, rock armour used in coastal defences etc. the only other source of equivalent stone is on the Beara peninsula, which is over 60 km away.

- (v) **Deficiencies in the previous P.A. and Board decisions –** inaccuracies such as the siting of the quarry on the Beara peninsula and on the foreshore are inaccuracies that may have influenced the Board's decision and in the interests of fairness should be corrected. The PA Planning and Enforcement Reports states that the site is within the 'foreshore'. This statement prejudiced the application and the misinformation was never corrected. This may have undermined the application. Furthermore, there are inconsistencies between the EIA and AA screening carried out prior to the issuing of the S261A notice and afterwards, in respect of the remedial works deemed necessary to comply with the Enforcement Notice. It is argued that the remedial works would have necessitated winning or heaping topsoil and its transportation within the site, which could potentially affect the European site by means of consequential runoff. Similarly, the requirement to form a lagoon would have interfered with the natural filtration of surface and quarry water runoff. The Board's Inspector inadvertently referred to the quarry as being located on the Beara Peninsula. There is some concern that the mix-up could have resulted in a misinterpretation of the likely environmental effects on the European site, as the prevailing winds are from the southwest. Thus, the dust from a similar quarry located on the Beara peninsula would be likely to blow onto the Natura site whereas the dust from the application site would blow onto the applicant's own property to the north/north-east. This may have unduly influenced the Board.

- 4.1.6. The quarry has always operated in accordance with the planning legislation. However, there have been two major changes to the legislation during this time in respect of Registration under S261 and need to apply for substitute consent under S261A. The quarry was regularised under the S261 process and S261(A) made it unauthorised again. Whether he received the notification to apply for Substitute

Consent is immaterial as the test is “whether the applicant had or could reasonably have had the belief that the development was not unauthorised”. Given that he had operated for so long as a registered quarry and that the planning authority was his main customer, it is entirely plausible that he had assumed that the quarry was authorised. It is submitted that there are historic, social, economic, sustainability, strategic and environmental reasons for allowing the application.

## 5.0 Planning Authority Submission

5.1. A submission (15<sup>th</sup> January 2020) from the Planning Authority notes the following:

- The quarry was the subject of a previous request for leave to apply for Substitute Consent (LS0015). In respect of that case, the planning authority had forwarded to the Board its documentation relating to the Section 261 file for QY117 (up to 13<sup>th</sup> June 2014); the Section 261A file for EUQY117 (up to 13<sup>th</sup> June 2014); and the Enforcement file U362/08 (up to 13<sup>th</sup> June 2014). It was confirmed that nothing has been added to the S261 file and documentation relating to the S261(A) file has been forwarded with this submission.
- The P.A.’s Enforcement Proceedings have advanced in the meantime. The matter is currently before the courts, whereby it was adjourned by Killarney District Court on 12/12/19, on foot of the confirmation of receipt of the current application for leave to apply for substitute consent (under S177C(2)(b)).
- The background to taking enforcement action was outlined from the serving of a Notice on 7<sup>th</sup> December 2012 under S261(A)(3)(a) requiring the applicant to apply for SC through to the decision by the board to refuse consent (LS0015) in September 2014. Subsequent to the Board’s refusal, the P.A. initiated S160 proceedings against the applicant on 23<sup>rd</sup> May 2016.
- It is confirmed that no planning applications have been made in respect of the subject site. An extract from the GIS is enclosed.
- It was stated in an internal memo dated 7<sup>th</sup> April 2016 that a site inspection on 10<sup>th</sup> March 2016 had established that significant quarrying activity had taken place since the Enforcement Notice had been issued (10<sup>th</sup> April 2014).



- A Postage Receipt has been provided which is addressed to the applicant and dated 7<sup>th</sup> August 2012, and which related to EUQY117.

5.2. A second submission was made on 21<sup>st</sup> January 2020 which included a set of photographs from 10<sup>th</sup> March 2016 and from 22<sup>nd</sup> May 2019. This submission (from the Senior Planner) set out the site location and description, the planning history and an assessment of the current situation, which may be summarised as follows:

- The sandstone quarry consists of two zones, one of which is located on the foreshore and there are 8 no. receptors within 500m, one of which is within 90m of the site.
- Aggregate is crushed and graded on site. Rock breakers and blasting is used to extract rock. There is no wheelwash or weigh bridge serving the quarry, not are there any sediment/silt ponds. Extraction has remained above the water table. The quarry was surveyed on 10<sup>th</sup> August 2011 and at that time it had an extraction area of approx. 1.8ha.
- A S261A Notice was served on the owner to apply for substitute consent on 7<sup>th</sup> August 2012. A record of postage is enclosed which shows that it was received by the applicant on 8<sup>th</sup> August 2012.
- It is clear from the evidence on file that the quarry had been substantially developed during the years 1995 to 2007 and that extraction had taken place outside the boundary established under the S261 Registration. The evidence referred to includes OSI Aerial Photography available dated 1995, 2000, 2006, Kerry County Council's own aerial photography dated 4<sup>th</sup> January 2007, and the survey carried out on the 10<sup>th</sup> August 2011.
- Inspections on 10<sup>th</sup> March 2016 and on 22<sup>nd</sup> May 2019 have established that extraction has continued at the site and photos are enclosed to demonstrate this point.

## 6.0 Legislative Provisions

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

- (1) A person who has carried out a development referred to in subsection (2), or the owner or occupier of the land as appropriate, to whom no notice has been

given under section 177B, 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.

## 7.0 Policy and Context

### 7.1. Kerry County Development Plan 2015-2021

#### Chapter 8 Natural Resources

This chapter contains policies that seek to achieve a balanced approach between the sustainable growth and development of natural resources, while ensuring that adverse impacts on the environment are kept to a minimum. Section 8.2 relates to the Extractive Industry.

**NR4 – Supply of aggregates** – facilitate the sustainable development of the extractive industry and seek to ensure the on-going availability of an adequate supply of aggregates for the construction industry.

**NR5 – Environmental impacts** – Minimise the adverse effects on the environment and the local community associated with aggregate extraction, processing, delivery and associated concrete production.

**NR6 – Location** – Ensure that quarrying and mining does not occur in areas where the visual or other impacts of such works would adversely injure the amenities of the area or create significant effects on the road network in the area.

**Scenic Amenity Designations** – Section 3.3.2 relates to development in Amenity Areas. The site is located within a **Secondary Special Amenity Area**, which is described as constituting a sensitive landscape which can accommodate a limited level of development, which will depend on the degree to which it can be integrated into the landscape. Development in such area must be designed to minimise the effect on the landscape and take account of topography, vegetation and existing boundaries. Permission will not be granted for development which does not integrate

into the landscape. Development must not be unduly obtrusive and existing features such as trees and hedgerows should be retained.

**Objective ZL-1** Protect the landscape of the County as a major economic asset and an invaluable amenity which contributes to people's lives.

## 7.2. Natural Heritage Designations

**Kenmare River SAC (002158)** is located directly adjacent to the site to the south.

**Killarney National Park, Macgillicuddy Reeks and Caragh Lake Catchment cSAC (000365)** is located approx. 3km to the north-west.

**Old Domestic Building Askive cSAC (002098)** is located approx. 7km to the east.

**Iveragh Peninsula SPA (Site code 004154)** is located c.11km to the west/southwest.

**Ballinskelligs Bay and Inny Estuary SAC (Site Code 000335)** is located c.15km to the west.

## 8.0 Assessment

### 8.1. Introduction

- 8.1.1. It has been established that a quarry has been in existence at this location for many decades and that the current owner and his family have been quarrying here since 1957. The applicant had engaged with the Section 261 Registration process but claims not to have been aware of the requirement to engage with the Section 261A process and/or did not receive the notification from the P.A. in August 2012 directing him to apply to the Board for Substitute Consent. However, an application for leave to apply for Substitute Consent (LS0015) was submitted to the Board under S261A on the basis that the applicant believed that exceptional circumstances existed to enable the Board to regularise the development. The Board decided that the development is one where Environmental Impact Assessment and Appropriate Assessment is/would have been required and that no exceptional circumstances existed such that it would have been appropriate to regularise the development by permitting an application for substitute consent.

8.1.2. The applicant considers that the Board's decision was flawed for several reasons. These include

- the erroneous placement of the site on the Beara Peninsula and on the foreshore in the Inspector's report.
- the over-reliance of the Board on the P.A.'s Enforcement reports relating to EIA and AA Screening and the associated absence of any technical evidence upon which to base the conclusions of adverse effects on the local environment and on the integrity of a European site; and
- the absence of any evidence that the planning authority had served the notice under S261A(3)(a) meant that the applicant had not received adequate notification.

The current application for Leave to apply for Substitute Consent before the Board encloses a red line boundary map and a Survey Drawing which shows the site set back from the HWM, and an Environmental Report as well as a Remedial NIS which, it is submitted, clearly indicate that there are no measurable effects on the local environment and/or the integrity of any European site. It is submitted, therefore, that these factors entitle the applicant to re-apply for leave to apply for substitute consent.

8.1.3. In respect of the alleged lack of knowledge and absence of evidence that the P. A. had notified the applicant of the need to apply to the Board for Substitute Consent, (i.e. Determination under S261A(3)(a)), the Board should note that the P.A. has now provided a copy of the registered postage receipt in respect of this notification. It is, therefore, clear that the applicant had been "served with a notice" as required by S177B. The matters which remain to be determined, therefore, are whether or not exceptional circumstances exist to justify grant of leave to apply for substitute consent in accordance with the criteria set out in Section 177D (2). However, in respect of S177C(1), the applicant would still qualify as a "person who has carried out a development referred to in subsection (2)", which is a development where an EIA or a determination as to whether an EIA is required, or an appropriate assessment, was or is required.

8.1.4. In regard to this qualification, it should be noted that firstly, the P.A. had determined under S261A(3)(a) that this was the case; secondly, that the Board had also decided under LS0015 that this was the case; and thirdly, the applicant has accepted that this

is the case in the current application (cover letter dated 3<sup>rd</sup> December 2019). However, as the applicant has submitted technical documents (E.R. and rNIS) with the current application, in support of his contention that the development has had, and is having, no measurable effects on the environment/integrity of a European site, it is considered appropriate to revisit the question of whether or not EIA, a determination regarding the need for EIA and an AA are required. The matter of the revised red line boundary also needs to be addressed.

## **8.2. Pre-63 Authorisation and S261 Registration**

- 8.2.1. The S261 application (27<sup>th</sup> April 2007) indicates that the site area was 4.718ha with the extraction area being 3.982ha. The planning authority in their S261 Quarry Registration attached 55 no. conditions, one of which (condition 3) restricted the area of the quarry excavations and related activity to the red line boundary shown on the plan submitted to the P.A. on 27<sup>th</sup> April 2005, with the exception that no quarrying may take place within 25 metres of the mean high water line. It should be noted that the S261 red line boundary along the southern perimeter of the site generally followed the line of the HWM. The quarry was shown as being operated in two phases, the first at the northern end and the second adjacent to the coast.
- 8.2.2. An amended red line boundary has now been submitted, which is set back from the HWM and seems to exclude areas of sea cliffs that had been included in the registration area. The new red line boundary has also advanced westwards and northwards taking in a greater area than that registered. The P.A. has not commented on the revised red line boundary. However, it has stated, both in respect of LS0015 and of the current application, (letter 20/01/20), that extraction had taken place outside the boundary registered under S261 and that substantial extraction has continued in recent years. Reference is made, in corroboration, to OSI Aerial Photography (1995, 2000, 2006), the P.A.'s own aerial photography (4/01/07), the survey carried out in 2011 and photos of the site from 10/03/16 and 22/05/19.
- 8.2.3. While there is some discussion by the applicant around the inaccuracy of the maps and the contended situation that the quarry activities did not extend to the foreshore, 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 grant of

registration under S261 in 2005, and therefore development has taken place, which is more than could reasonably have been anticipated in 1963.

- 8.2.4. The applicant places much emphasis on the assertions that quarrying had taken place on the foreshore, which are strongly refuted, and also claims (in the E.R.) that the only activity adjacent to the HWM was 'a long-established track' and that no quarrying had taken place there. I would accept that the 'foreshore' is defined as 'the land and seabed between the High-Water Mark on ordinary and medium tides (shown as HWM on OSI maps) and the 12-mile limit'. However, the evidence on the current file and history files clearly contradicts the applicant's contention that quarrying did not take place in close proximity to the HWM. It would appear that sections of the sea cliffs may have been altered or removed, that stockpiles of aggregate were stored directly adjacent to the HWM and that a pier has recently been constructed on the southern boundary which extends beyond the HWM.
- 8.2.5. The submissions in respect of the previous application (LS0015) had indicated that all but one or two of the conditions of the S261 registration had been complied with. However, in the intervening period, the P.A. has issued an Enforcement Notice requiring certain matters to be addressed, which include several items that had been required by means of various conditions of the S261 Registration, such as the construction of a drainage system with a settlement pond, erection of warning signs, etc. I can confirm that there was no settlement lagoon present at the time of my inspection and the technical documents submitted in support of the application also confirm that there is no formal drainage system on the site.

### **8.3. Requirement for EIA**

- 8.3.1. The Board, when making a decision on whether to grant leave to apply for Substitute Consent, in accordance with section 177D(1), 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. As stated above, although this matter had previously been determined, it will now be reviewed in light of the applicant's "Environmental Report on Existing Quarrying Operations" (produced by OES Consulting, dated Nov. 2019).

8.3.2. It is stated in the covering letter that the overall findings of the ER were that the ongoing activity will not give rise to significant negative impacts on the environment. A remedial NIS was also submitted, which concluded that the quarrying activities have not had, and is unlikely to have, any measurable effects on the Kenmare River SAC or any other European sites in the vicinity. The previous determinations by the P.A. and the Board on whether an EIA was required had taken into account, inter alia, the P.A.'s EIA Screening Report, (dated Aug. 2012), which had had regard to the criteria set out in Schedule 7 to the Planning and Development Regulations 2001 (as amended) and other matters. In reviewing the need for EIA, this screening report will be taken into account as well as the findings of the Environmental Report and any other relevant matters.

8.3.3. In relation to the need for EIA, it is noted that 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 1.8ha – 2.06ha. EIA is not a mandatory requirement in this instance. However, it should be noted that the Registered Area boundary was stated in the application at the time as being 4.718ha with the extraction area being 3.982ha. and a subsequent drawing (on file LS0015) shows the registered boundary area as 5.02ha. Furthermore, the current application is accompanied by a new red line boundary which differs from the registered boundary in that it excludes the southern extremity of the site adjoining the foreshore and a further area to the south west, and it also expands the area of the site to the northwest. It is further noted that the area of extraction that was evident in historical aerial photographs from the time of registration (2007) and in 2012 has since been significantly expanded to the west, to the north-west and to the north of the main extraction area.

8.3.4. The planning authority's EIA Screening Report reviewed the subthreshold implications of the development and identified the characteristics of the proposed development, the characteristics of the potential impacts and the likely significant environmental effects. It is noted that the '*Characteristics of the Proposed Development*' was based on an area of extraction of 1.8ha, which has since



increased in size. It is further noted that the '*Location of the Proposed Development*' had identified the nearest residents as being within 90m, with 8 dwellings within 500m of the site. Although the ER draws attention to the fact that the ownership of most of the nearest dwellings are within the applicant's family group, it is noted from the Enforcement file details (on the LS0015 file) that there had been several complaints from neighbouring residents over the years regarding noise, dust and traffic matters. It is further noted that the identification of a sensitive site in the vicinity, namely the designated Shellfish Habitat at Bunnow Harbour was not included in the ER assessment in respect of the impacts from runoff from the quarry.

#### 8.4. Planning Authority's EIA Screening Report

8.4.1. The P.A.'s Screening Report had identified four '**Profound**' potential impacts on the landscape.

- (1) Topography/landscape - Excavation of 1.8ha of sandstone, rock and overburden has resulted in a permanent change to the topography and effect on the landscape of the locality. The area of extraction at the northern end was not included in this figure and the southern area of extraction has expanded considerably in the intervening 8 years.
- (2) Secondary Special Area of Amenity – location within this landscape designation and likely profound effect on the view setting.
- (3) High visibility of site – from the west, the southwest and the coast, and as it is located on/adjacent to the foreshore.
- (4) High quality/scarce resources such as tourism and the shellfish habitat. The site is located just off the Ring of Kerry route and is visible from the sea, the coast and from the west and southwest, with the potential for a profound impact on tourism. The shellfish habitat adjoining the southern boundary provides local employment and a food source and further analysis is required of the discharge points to this habitat.

8.4.2. The Screening Report had identified nine further potential impacts which were considered '**Sensitive**' and one '**Moderate**' Impact. These included significant impacts from -

- Land and water contamination from pollutants to ground, surface waters, coastal waters and the sea, including protected areas and marine coastal waters. This is due mainly to the absence of silt ponds or any formal drainage system within the quarry and the ultimate discharge of waters to the cSAC, the Shellfish Habitat and the NHA (1.2km to east) and to the presence of groundwater wells within 90m of the site. Further analysis was considered necessary of the discharge points to the cSAC and to the shellfish habitat. It was considered that impacts had occurred to date and that the potential for further impacts must be ascertained.
- Dust and air emissions in terms of harm to human health and release of pollutants to the air due to rock breaking and operation of machinery as well as transport of material. Sensitive receptors include nearest dwelling at 90m and 8 no. dwellings within 500m.
- Noise and vibration from rock breaking and operation of machinery due to rock breaking and processing of rock. Sensitive receptors include nearest dwelling at 90m and 8 no. dwellings within 500m.
- Generation of waste material in the form of silt, overburden and waste from rock processing, which is stored in and around the site.
- Public access routes to facilities – the adjacent public road is considered narrow and incapable of catering for numerous heavy vehicular movements into/out of the quarry. Development has resulted in damage to local roads which affects local transportation and damages vehicles.
- Existing land uses (e.g., private property, homes, agriculture and tourism) – impact on nearby residents and shellfish habitat on southern boundary which is a source of shellfish for human consumption and source of local employment and economic activity. Impacts to date and need to ascertain if potential impacts.
- Use of Natural Resources – Excavation of 1.8ha (2012) of sandstone rock and a significant amount of ground water for processing rock. This was considered to be a moderate impact. However, the extent of the sandstone removed in the intervening 8 years may have increased this impact.

## 8.5. Environmental Report

### 8.5.1. Landscape and Visual Impact

The Environmental Report (current application) addressed the issue of Landscape and Visual Impact. The assessment was based on a review of aerial photographs, various publications and reports and visits to the site and surrounds. It was established that the site is not visible from the north or from the Ring of Kerry (Wild Atlantic Way), due mainly to the ridge of higher ground to the north of the extraction area. Most properties in the vicinity were stated not to have views of the quarry and it was noted that many are owned by the operator and his family. It was acknowledged that the wider landscape setting and backdrop is of High Significance and High Sensitivity, but the immediate setting was of medium/low sensitivity and significance. Thus, whilst the removal of the landcover and sandstone involves a direct impact, which is likely to be significantly negative and permanent, it would be a localised effect. The impact on the wider landscape setting was found to be slight or imperceptible due to the extent of such land cover, the absence of any specific landscape designation on the site and to the lack of visibility from the Ring of Kerry.

It is noted, however, that this analysis was not based on a full LVIA with zones of theoretical visibility, photomontages from critical viewpoints etc. The sensitivity of views from the coast and the sea, which form part of a cSAC and includes several islands, were also downplayed, as were views from proximate residential properties on the basis of relationships with the operator. However, these views were not spatially identified or evaluated in any depth. No analysis was included of the likely impact on views from the Beara peninsula. It is further noted that the landscape and visual assessment did not assess the impact that the extraction would have had historically on the landscape and on the visual amenity of the area, as it incrementally expanded in size. It is considered that the lack of visibility of the quarry from the north and the N70 at present is primarily due to the current placement of overburden stockpiles at the southern end of the northern extraction area, just above the cliff face and a small woodland to the northwest of the cliff. I do not consider that the likelihood of significant landscape and visual effects on the environment resulting from the quarry development can be excluded.

### 8.5.2. Land and Water Contamination

The ER addressed these issues under several topic headings. It was concluded, on the basis of a site visit in March 2019, that there were no observed indications of fuel spillage or leaks such as staining/dark colouration of the aggregate etc. However, no data relating to any historical contamination of soils or groundwater was provided nor any details of remedial measures that were undertaken in the past. It was stated that as the quarry lands have been stripped, the groundwater vulnerability is assumed to be Extreme. However, the extraction area will remain one metre above the water table. Potential future impacts were identified in respect of soil contamination, accidental spillage of fuels/oils and sedimentation run-off affecting both soil and underlying ground water from activities such as stockpiling, refuelling etc. and from the exposure of the aggregate floor. However, it was stated that such impacts would be addressed by means of mitigation in the form of dedicated procedure and regular maintenance of machinery.

No bulk fuel storage is permitted, and refuelling occurs once a week by road tanker, which takes place in a supervised manner in a designated area away from the shoreline. It was also stated that no contamination had ever occurred during the long history of the quarry and that as the ground water table is below the level of extraction, there is no direct impact on the water table and that this will be managed with mitigation and good practice. Monitoring of ground water was recommended with a minimum of 3 no. wells at the up hydraulic gradient and down hydraulic gradient locations and that water levels are recorded quarterly to enable determination of appropriate extraction levels.

The ER established that no surface water courses enter the extraction area and that there is no formal drainage system on the site. It is claimed that the standing water at the low point in the centre of the extraction area functions as a settlement lagoon. However, it should be noted that it has not been constructed as such and it is assumed that water trickles down through the fissures in the ground and eventually discharges to the sea. An assimilative capacity assessment of the Kenmare River was carried out. A sample of foreshore discharge was collected on 13<sup>th</sup> September 2019 and the analysis showed that the water quality was well below the ELV. It was also noted that as the sandstone has a High Polished Stone Value, the generation of fines is very low, which in turn, means that the level of suspended solids in the

discharge water is also very low. It was concluded that as the quality of the run-off is high and the dilution factor of the Kenmare River is great, the assimilative capacity of the receiving waters is considerable. As such it was concluded that the impacts on the coastal and marine waters was not significant.

Although the quarry was registered in 2007 subject to 55 conditions, (EUQY117) several of which required regular monitoring to be carried out, there does not appear to be any reference to or reliance on the results of such monitoring to demonstrate the absence of the occurrence of any significant environmental effects. For example, conditions included a requirement to monitor and record the quality of groundwater and/or any water body or water course beneath or adjacent to the quarry (Cond. 18), yet no such records have been provided. It should be noted that no data relating to monitoring results of water quality, which it would be expected would have been available for the years since the quarry was registered in 2007, have been referenced in the Environmental Report. The findings appear to be based on limited, recent survey material, on observations from site inspections carried out during the compilation of the ER and on desk top studies.

The southern perimeter of the site adjoins (and slightly overlaps) the designated site, the Kenmare River cSAC and the designated Shellfish Waters at Bunnaw Bay. No assessment of the impacts of the quarry on the ecology or biodiversity of the habitats along the foreshore has been undertaken. As stated previously, I also remain concerned that quarrying activity has taken place in the past alongside the foreshore. A comparison of aerial photographs and site photographs at various points during the past two decades seems to indicate that the quarry had extended to, or at least immediately adjacent to, the foreshore in the past. It would also appear that a sandstone pier has been constructed on the foreshore at some time in the past few years. Although it is unclear whether this has any relationship with the quarrying activities, the cumulative impacts of these works with the quarrying activities should have been assessed. On the basis of the information provided, it is not possible, therefore, to rule out the need for environmental assessment on the habitats, flora and fauna in this sensitive coastal environment, that have or may have occurred in the past, and what the potential impacts are likely to be in the future.

### 8.5.3. Noise and Vibration

The ER addressed these impacts and included a recent study which was based on a field survey carried out on 5<sup>th</sup> September 2019. Two Noise Sensitive Locations were chosen, one at 275m from the eastern boundary of the quarry and one at 510m from the northern boundary. The Noise Impact Assessment Report states that although there were several other NSLs near the quarry, some of which were closer, these were not included as they were either owned by the operator or by members of his family. It was concluded that there is no adverse impact on the existing sound environment, or significant effects on the nearest NSLs, as a result of the quarrying operation. It is stated that the quarry is well recessed, and that the equipment is relatively new, which results in lower source noise levels. It is stated that these factors, together with the use of blasting as opposed to rock breaking, serve to mitigate noise effects. It was further stated (5.4) that reports on blasting are unavailable, but it was understood that the vibration and over pressure levels are within the recommended limits. The report concluded that the existing quarry does not impact on the ambient sound environment at the nearest NSLs and that the effect is non-adverse to negligible and insignificant. It was further stated that no blasting effects have been recorded historically but standard measures have been specified and will be continued.

It is noted that the Noise Impact Assessment is based on a description of current activities which seem to be less intense than those in place previously, as is evident from the documentation on file. For example, the current activities are described as involving blasting once every 18-24 months, crushing and screening once a month and output transported by 2-3 HGVs every day, with an annual output of 15,000 tonnes p.a. However, it is clear from the documentation on the LS0015 file that there were at least 8 truck movements per day, (letter from B & J Rochford Ltd. to P.A. dated 19/07/06, paragraphs 4 and 6), and that the Quarry Registration (EUQY117) had restricted truck movements to 35 movements per day (Cond 8) and the amount of material to be excavated to 100,000 tonnes per calendar year (Cond 7). It is further noted that blasting is an activity which is normally carefully monitored and controlled, with records kept on site, (as required by Conditions 45-47 of the Registration), yet no historical records have been made available to substantiate the claims made. It is further noted that the documentation on file indicates that there

were complaints from the public regarding noise from the quarrying activity and from the transport of materials along the local roads, as well as the damage to the local road network. Conditions attached to the Registration included noise limits and a requirement to monitor and record sound levels, yet no such records have been provided.

On the basis of the information provided, it is not possible, therefore, to rule out the need for environmental assessment of the impact of the quarrying activity on the local environment in terms of noise and vibration, particularly in respect of significant effects that have occurred or may have occurred in the past, and what the potential impacts are likely to be in the future.

#### **8.5.4. Dust and Air Quality**

The ER addressed these impacts. It was noted that EPA Guidance recommends a limit for dust emissions of 350mg/m<sup>2</sup>/day at the site boundary. Reference was made to dust monitoring carried out at three locations over three sampling periods, and to the conclusions that all cases were well below the 350mg/ m<sup>2</sup>/day. The overall findings of the analysis were that dust emissions would have an insignificant impact on ambient air quality. However, the dates for these sampling periods were June-July 2009, July-Aug 2009 and Aug-Sept 2009. There is no reference to any sampling or monitoring records carried out prior to 2009 or since 2009. The potential impacts were identified as being from the removal of overburden, excavation, transportation and processing of aggregate. It was also noted that traffic on public roads can lead to mud and fine particulate matter being deposited and re-suspended during dry weather conditions. However, it was considered that traffic flows are insignificant in the context of potential ambient air quality. This seems to be at odds with the information on the enforcement file (contained within LS0015), whereby local residents had been complaining of up to 60 truck movements per day, or one every 8 minutes, at one point in 2006.

On the basis of the information provided, it is not possible, therefore, to rule out the need for environmental assessment of the impact of the quarrying activity on the local environment in terms of dust and air quality, particularly in respect of significant effects that have occurred, or may have occurred, in the past, and what the potential impacts are likely to be in the future.

## 8.6. Conclusion on requirement for EIA

- 8.6.1. In light of the concerns set out above, it is considered that there is insufficient information before the Board to be confident that the likelihood of significant effects on the environment resulting from the quarry development can be excluded. Notwithstanding the additional information and analysis provide in the ER, I remain concerned that there is insufficient evidence-based information to be able to rule out whether any significant environmental effects have occurred or are likely to have occurred in the past. Furthermore, inadequate information has been provided of any measures which have been incorporated or envisaged to avoid, prevent or reduce what might otherwise be/have been significant adverse effects on the environment. Thus, it is considered that the Board's previous determination that EIA is/was required still stands.

## 8.7. Requirement for AA

- 8.7.1. As stated previously, notwithstanding the previous determinations by the P.A. and the Board that the subject quarry was one where an appropriate assessment was required, the matter will now be reviewed in light of the applicant's Remedial Natura Impact Statement (produced by OES Consulting, dated Nov. 2019).
- 8.7.2. It is stated in the covering letter that the overall findings of remedial NIS were that the quarrying activities have not had, and are unlikely to have, any measurable effects on the Kenmare River SAC or any other European sites in the vicinity. The previous determinations by the P.A. and the Board on whether an AA was required had taken into account, inter alia, the P.A.'s Appropriate Assessment Screening Report, (dated May 2012). In reviewing the need for AA, regard will be had to that Screening Report as well as to the remedial NIS and other relevant matters.
- 8.7.3. In relation to Appropriate Assessment, I would draw the Board's attention to the following:
- The quarry adjoins the Kenmare River SAC (site code 002158) and the southern perimeter of the site follows the boundary of the SAC directly and overlaps in one small area. It is further noted that the boundary of the SAC extends inland by c.400m just to the west of the site (less than 100m distant).



The Quarry site is also located within 15km of several other European Sites. These include Old Domestic Building Askive Wood SAC (002098), containing a nursery of Lesser Horseshoe Bats, approx. 6.5km to the east, and Killarney National Park, Macgillycuddy Reeks & Caragh River Catchment SAC (000365), which is approx. 3km to the north.

- The submitted rNIS screened out all European sites at Stage I, except for Kenmare River SAC and Killarney National Park, Macgillycuddy Reeks & Caragh River Catchment SAC. This was on the basis of the distance (5km) from the quarry and the absence of any “obvious environmental pathways or linkages connecting the quarry to these European sites.”
- The assessment contained in the rNIS is based on baseline information which was gathered mainly through desk-based study (2.4). Reference is made to the assessment undertaken by an OES Scientist as part of the ER relating to direct and indirect effects of quarrying on surface water and groundwater arising from the quarry operations. However, no surveys of habitats or species was carried out as part of the rNIS.
- The description of quarrying activities upon which the assessment was based in the rNIS is similar to that used in the Environmental Report outlined above. As previously stated in relation to the need for EIA, this description of development seems to be significantly less intense than the quarrying activities that were underway in and around 2006-2007, when the Quarry was being considered for Registration, and is also at a much smaller scale than envisaged by the conditions attached to that Registration.

8.7.4. The following table identifies the **Conservation Objectives** for the relevant qualifying interests for the sites in question.

Name of Site	Site Code	Conservation Objectives
Kenmare River SAC	002158	The conservation objectives for Kenmare River SAC generally relate to the maintenance of a favourable conservation condition of <u>Annex I Habitats</u> : <ul style="list-style-type: none"> <li>• Large Shallow Inlets and Bays [1160]</li> <li>• Reefs [1170]</li> </ul>

		<p><u>Annex II Species:</u></p> <ul style="list-style-type: none"> <li>• Otter <i>Lutra lutra</i> [1355]</li> <li>• Harbour Seal <i>Phoca vitulina</i> [1365]</li> </ul>
Killarney National Park, Macgillicuddy's Reeks and Caragh River Catchment SAC	00365	<p>The conservation objectives for Killarney National Park, Macgillicuddy's Reeks and Caragh River Catchment SAC generally relate to the maintenance of a favourable conservation condition of <u>Annex I and Annex II habitats:</u></p> <ul style="list-style-type: none"> <li>- Oligotrophic waters containing very few minerals of sandy plains [3110]</li> <li>- Oligotrophic to Mesotrophic Standing Waters [3130]</li> <li>- Floating River Vegetation [3260]</li> <li>- Wet Heath [4010]</li> <li>- Dry Heath [4030]</li> <li>- Alpine and Sub- Alpine Heaths [4060]</li> <li>- Juniper Scrub [5130]</li> <li>- Calaminarian Grassland [6130]</li> <li>- Molinia Meadows [6410]</li> <li>- Blanket Bog (active) [7130]</li> <li>- Rhynchosporion Vegetation [7150]</li> <li>- Old Oak Woodlands [91A0]</li> <li>- Alluvial Forests [91E0]</li> <li>- Yew woodlands [91J0]</li> </ul> <p><u>Annex I /II species</u></p> <ul style="list-style-type: none"> <li>- Kerry Slug (<i>Geomalacus Maculosus</i>) [1024]</li> <li>- Freshwater Pearl Mussel (<i>Magaritefera Magaritefera</i>) [1029]</li> <li>- Marsh Fritillary (<i>Euphydryas aurinia</i>) [1065]</li> <li>- Sea Lamprey (<i>Petromyzon marinus</i>) [1095]</li> <li>- Brook Lamprey (<i>Lampetra planeri</i>) [1096]</li> <li>- River Lamprey (<i>Lampetra Fluviatilis</i>) [1099]</li> </ul>

		<ul style="list-style-type: none"> <li>- Twaite shad (<i>Alosa fallax</i>) [1103]</li> <li>- Atlantic Salmon (<i>Salmo Salar</i>) [1106]</li> <li>- Lesser Horseshoe Bat (<i>Rhynolophus hipposideros</i>) [1303]</li> <li>- Otter (<i>Lutra lutra</i>) [1355]</li> <li>- Killarney Fern (<i>Trichomanes speciosum</i>) [1421]</li> <li>- Slender Naiad (<i>Najas flexilis</i>) [1833]</li> </ul>
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8.7.5. The **potential impacts** on these two European sites from the quarrying activities identified in the rNIS were confined to the following:

1. Reduction in water quality via alteration in water chemistry discharged from the site and increase in the amount of suspended and total solids released from the site.
2. Reduction in air quality owing to dust emissions.
3. Disturbance from quarrying machinery.

8.7.6. The **Assessment of Impacts** is set out in Chapter 8 of the rNIS. The potential for impacts on the Killarney National Park, Macgilllicuddy Reeks and Caragh River Catchment SAC was ruled out based on a review of topography, information on rivers and streams and expected groundwater flows, which established that there is no hydrological link between the quarry and this site.

8.7.7. Water quality impact assessment on the Kenmare River SAC was based on results of the analysis of a sample of discharge water collected on the foreshore on 13<sup>th</sup> Sept. 2019. The results of the analysis indicated that the quality of the run-off was high and would comply fully with the ELVs recommended for the sector and that there was no evidence of hydrocarbon in the sample. The assessment of potential water quality impacts on the Kenmare River SAC from suspended solids was based partly on a desk top study comprising a review of topography, data relating to rivers and streams of the catchment area, information from a dust monitoring exercise carried out in the summer of 2009 for the quarry, observations at the site with regard to run-off, evaporation of rainfall etc. and to an assimilative capacity assessment of Kenmare Bay. It was concluded that the potential for adverse impact on water quality

due to suspended solids can be regarded as insignificant. This was based mainly on the low value for suspended solids in the sample, the dilution factor of Kenmare Bay resulting in a low potential for run-off from the quarry to influence water quality in the bay, and to the ubiquitous nature of the sandstone.

- 8.7.8. It should be noted, however, that the assessment as outlined above was based on the analysis of a single sample taken at a particular point in time, which was relatively recently, and an assimilative capacity assessment of the waterbody, together with site observations on one site visit and desk-top information. The assessment was also based on a very narrow description of the quarry development which is occurring at present, and which seems to deviate substantially from the intensity of operations in the past. It is considered that the assessment is not, therefore, comprehensive over time and is not based on the best available scientific information upon which to base a finding of no significant effects.
- 8.7.9. The potential impact on otters and seals was identified given that Kenmare Bay, (and inland for a distance of 10m in the case of otters), is mapped as suitable habitat for these species, and it was recognised that they may transit along the coastline and be affected by pollution incidents and noise disturbance. However, it was considered that the quarry operations would not interfere with otter or seal habitat or foraging areas as a result of any noise, loss of habitat, disturbance or pollution. These conclusions were based on the limited scale and intensity of operations which, for example result in one blast every 18-24 months and crushing of rock once a month. In addition, it was assumed that a buffer of 50 metres exists between the quarrying activity and the shoreline with no quarrying activities taking place along the foreshore or below the HWM. Furthermore, it was stated that all mobile equipment is appropriately maintained and that no fuel is stored on site.
- 8.7.10. It should be noted, however, that there is no reference to any surveys of habitats or species along the foreshore or within/adjoining the site, either of recent or historical origin. As stated above, the description of the operations is considerably smaller in scale and intensity than that contained in descriptions on file relating to operations in 2006/7 and as suggested by the conditions attached to the registration application. The noise and dust data relates to dust monitoring carried out during one summer in 2009 and the noise assessment carried out as part of the current report. The 50m buffer clearly did not exist until recent times, as the cliff face has been pushed back

over time from the shoreline. There are photographs on the enforcement file (contained within LS0015) that indicate that fuel may have been stored on the site in the past. Similarly, the assessment in relation to noise disturbance and air quality are based on insufficient evidence which was undertaken in order to assess the impacts on residential properties in the vicinity, which were several hundred metres away from the site. It is not possible, therefore, on the basis of the information contained in the rNIS to be confident that the likely significant effects that have occurred, are occurring and are likely to occur, have been adequately identified, described and assessed.

8.7.11. The rNIS notes that a small part of the quarry overlaps with the SAC designated area, (0.082ha), which is dismissed as being just 0.0002% of the total area of the SAC. The assessment in relation to habitat loss/disturbance is also considered to be very limited and seems to be based on a false assumption that

“the overlap area was only ever occupied by a pre-existing access road and no actual quarrying took place in this very confined area.....[and] based on site observations and aerial photography, the area in question does not appear to have resulted in any direct loss, damage and/or disturbance of any Annex I habitats for which the SAC was designated.”

It is further noted that the current application red line boundary “is very definitely inside the highwater mark ..... thus, creating a separation between the SAC and the application boundaries.” However, the red line boundary that formed the basis of the Registered Area cannot now be altered retrospectively.

## 8.8. **Conclusion on need for Appropriate Assessment**

8.8.1. It is considered that the analysis outlined above fails to acknowledge that the quarry activities did extend very close to, if not as far as, the foreshore, as is clearly evident from a comparison of the historical and current the aerial photographs and P.A. site photographs on file. It is unclear whether any parts of the sea cliff were removed/excavated, but there is clear evidence that stockpiles of stone have been stored directly adjacent to the HWM, and it would also appear the an earth berm has been placed adjacent to the remaining part of the sea cliff separating the current operations from the foreshore. As mentioned previously, there is also evidence of

coastal defence works and the construction of a pier which are directly adjacent to and accessible from the quarry site. These works appear to have been constructed below the HWM in the vicinity of the reefs, which is a qualifying interest of the SAC. These matters were not included in the assessment of in-combination effects.

- 8.8.2. It is difficult to be confident, therefore, that the potential impacts arising from any reduction, degradation or fragmentation of the water-dependent habitats that may occur/have occurred along the foreshore within and adjoining the SAC, and/or the potential impacts on water-dependent species which frequent the shoreline, have been adequately identified, described and assessed in the rNIS. Based on the limited and conflicting information before the Board, therefore, it is not possible to rule out that the quarry operations, individually or in combination with other plans or projects, have not had, or are unlikely to have an adverse effect on the integrity of the Kenmare River SAC, (site code 002158) in view of the site's Conservation Objectives. Thus, it is considered that the Board's previous determination that Appropriate Assessment is/was required still stands.

## 8.9. **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 criteria. These matters were considered previously by the Board under LS0015 and will be re-considered as follows:

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

- 8.9.1. The Inspector in his report (LS0015) had stated that on the one hand, it could 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. However, on the other hand, it was pointed out that there had been a "considerable lapse of time" between the section 261A(3)(a) notice (7<sup>th</sup> August 2012) and the date of writing his report (15<sup>th</sup> August 2014), during which time the quarry had continued to operate without ascertaining or evaluating the environmental impact as required by the EIA and

Habitats Directives. In these circumstances, it was considered that the regularisation of the development would circumvent the purpose and objective of these Directives, on the basis that it would be very difficult to retrospectively ascertain the environmental impact of works already carried out. The Board agreed that the regularisation of the development would circumvent the purpose and objectives of these Directives.

8.9.2. The lapse of time since the S261A(3)(a) determination notice was issued (7/08/12) is now almost eight years, as opposed to two years, and it is clear that excavation and quarrying works have continued on site in the intervening period. Article 2(1) of the EIA Directive 85/337/EEC (as amended) requires Member States to adopt all measures necessary to ensure that before development consent is given, projects likely to have significant effects on the environment are made subject to a requirement for development consent and an assessment with respect to their effects on the environment. The preamble to the Directive also states (Point 2) that effects on the environment should be taken into account at the earliest possible stage in all the technical planning and decision-making processes. It is further stated that development consent for projects which are likely to have significant effects on the environment should be granted only after an assessment of the likely significant effects of those projects has been carried out. (Point 7). Thus, it is clear that the continuation of quarrying works for several years without first having evaluated the effects of the project on the environment, militates against the objectives of the EIA Directive.

8.9.3. Similarly, Article 6(3) of the Habitats Directive requires that any plan or project not directly connected with or necessary for the management of a European site, but likely to have significant effects thereon, (either individually or in combination with other plans or projects), shall be subject to Appropriate Assessment of its implications for the site in view of the site's conservation objectives and the Competent Authority shall agree to the plan/project only after having ascertained that it will not adversely affect the integrity of the site, and if appropriate, after having obtained the opinion of the general public. It is equally clear, therefore, that the continuation of quarrying works for several years without first having ascertained that the integrity of the Kenmare River SAC has not been, and will not be adversely affected by such works, is contrary to the purpose of this Directive.

8.9.4. The applicant has submitted an Environmental Report and a Remedial NIS, the conclusions of which are stated to demonstrate that there is no measurable effect on the local environment and that the integrity of the European site is not adversely affected. However, as discussed in Sections 8.3 to 8.8 above, I do not agree that either the Environmental Report or the Remedial NIS adequately demonstrate that significant effects on the environment can be excluded and/or that the integrity of the European site has not been, or will not be, adversely affected, in view of the site's Conservation Objectives.

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

8.9.5. The application as set out by the applicant's agent 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. However, a Notice was issued by the P.A. under Section 261A(3)(a) of the Planning and Development Act 2000 (as amended), which clearly directed the applicant to apply to the Board for Substitute Consent. This notice is dated 7<sup>th</sup> August 2012 and required the applicant to make an application for Substitute Consent no later than 12 weeks after the date of the notice, and that the application should be accompanied by a remedial EIS and a remedial NIS. The applicant had claimed, (in the application for leave to apply for SC dated 9<sup>th</sup> May 2014, LS0015), that as the notice had been sent directly to him instead of to his agent, (as all previous correspondence had been prior to this), he was not aware of the implications of the notice. The Inspector pointed out that it was clear that the operator had received the notice and had specifically referred to certain parts of the notice and associated documentation in the application for leave to apply for Substitute Consent. The Inspector did not, therefore, accept that the operator had a genuine belief that the development was not unauthorised, and the Board agreed.

8.9.6. However, in the current application for leave, it is stated that there is no evidence that the notice was ever issued. Notwithstanding this, the planning authority has now provided a hard copy of the receipt of postage which clearly demonstrates that it was posted to the applicant on the 7<sup>th</sup> August 2012. There is nothing in the current application for leave to apply for Substitute Consent that would alter the Board's previous conclusions on this matter.



**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?**

8.9.7. The Board had considered, in September 2014 (LS0015,) that the ability to carry out an environmental impact assessment and an appropriate assessment for the public to participate in such assessments had been impaired. Given that works have continued on site in the meantime, without establishing whether significant effects on the environment have occurred or are likely to occur, and/or that the integrity of the European site has not been, or will not be, adversely affected, in view of the site's Conservation Objectives, it is difficult to see how the situation has improved.

8.9.8. It is acknowledged that if the Board now considers it appropriate to grant leave to apply for substitute consent, normal avenues would then be open to facilitate public participation and third-party observations in relation to the substantive application. In this regard it could be argued that the ability to provide for public participation may not have been substantially impaired. However, it could also be argued that the legislative provisions governing the substitute consent process, as currently construed, exclude public participation at the application for leave stage, and thus the ability to carry out a full and comprehensive assessment of the effects on the environment, having regard to all of the information that might be available and provided through public participation, is not possible at this stage. For example, no information has been provided by the public on noise and dust emissions in the past and the information provided by the applicant and the planning authority does not address the full timeframe involved.

**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?**

8.9.9. The Planner's Report prepared as part of the section 261A determination includes an EIA screening report with regard to potential subthreshold impacts. It assessed the potential impact arising from the works carried out on site having particular regard to ecology, surface water, groundwater, subsoil, bedrock geology, air quality, archaeology, noise, dust and landscape impacts. The impacts ranged from negative

to profound and included impacts on eight residences within 500m, noise impacts within 1km of the site, untreated water discharging into the SAC and shellfish habitat associated with the Kenmare River, and a significant visual impact. The Planner's Report had also included an AA Screening Report with regard to the likely significant effects on a European site, having regard to the Conservation Objectives for that site. This report had concluded that the quarry had the potential to have adverse impacts on the Kenmare River SAC and its qualifying interests by way of habitat loss and degradation of air and water quality.

8.9.10. With these potential impacts in mind the Inspector (LS0015) had concluded that an environmental impact assessment and an appropriate assessment should have been carried out. The Board agreed that the development has had, and is having, significant effects on the environment, and is having adverse effects on the integrity of a European Site. As stated previously, it is considered that the Environmental Report and remedial NIS which were submitted with the current application for leave to apply for SC do not alter the previous decision by the Board in this respect.

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

8.9.11. The site has been extensively quarried for several decades and it has not been ascertained to date, to what extent the operations have had significant effects on the environment and/or adverse effects on the integrity of the adjoining SAC. Although the current application for leave to apply for substitute consent was accompanied by an ER and a rNIS, it is considered that the information contained in these documents is quite limited and does not rule out the need for EIA and/or for AA. In the absence of such remedial assessments, it is not possible to come to any firm conclusions regarding the ability to remediate such significant effects.

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

8.9.12. There are no previous planning permissions on the site. However, there is currently an enforcement notice on the site and previous enforcement notices have been issued in respect of the cessation of quarrying operations at the site. It is also clear that the development has extended beyond the registration boundary and that several of the conditions attached to that registration have not been complied with to

date. For example, a settlement lagoon has not been constructed. It is further noted that works have continued for many years in the absence of a full evaluation of the likely significant effects on the environment and/or of adverse effects on the integrity of the adjoining European site, notwithstanding the enforcement notices issued by the P.A. directing the operator to cease all quarrying activity. The enforcement proceedings are currently in abeyance in the Circuit Court pending the outcome of this application for leave to apply for Substitute Consent.

8.9.13. It is noted that the Inspector in the previous application (LS0015) had concluded that the operator was knowingly carrying out operations in contravention of the enforcement notice that was current at that time, which had required cessation of all operations by 9<sup>th</sup> May 2014. It would appear that the operator is challenging the current enforcement notice, but has not ceased operations, and as such, the current enforcement notice is not being complied with either.

**7. Such other matters as the Board considers relevant.**

- (a) The applicant denies receiving any notification of the determination by the planning authority under section 261A, which is why he did not act on the notice within the appropriate timeframe. If this were the case, then the applicant could not have availed of the opportunity to seek a review of the planning authority's decision and leave to apply for substitute consent should be allowed in the interest of fairness. However, as stated above, the P.A. has provided proof of postage by Registered Post and it is not accepted that the applicant was unaware of this opportunity.
- (b) The applicant has sought to re-draw the red-line boundary from that shown in the registration application. However, it is clear from historical aerial photography that the quarrying activities had previously extended close to the HWM and included the coastal strip that is now being excluded from the quarry site. It is not possible, therefore, to retrospectively alter the red line boundary of the site.

## 9.0 Recommendation

I consider that it would be inappropriate to consider an application for the regularisation of the development by means of an application for substitute consent. I

recommend that the Board refuse leave to apply for substitute consent for the development under section 177D of the Planning and Development Act 2000, as amended.

## 10.0 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 the development is one where an Environmental Impact Assessment and an Appropriate Assessment are required. Furthermore, the Board examined whether or not exceptional circumstances exist such that it would be appropriate to allow the opportunity for regularisation of the development by permitting leave to make an application for substitute consent.

In this regard the Board -

- Considered that the regularisation of the development would circumvent the purpose and objectives of the EIA Directive and the Habitats Directive,
- Did not consider that the applicant could reasonably have had a belief that the development was not unauthorised,
- Considered that the ability to carry out an Environmental Impact Assessment for the public to participate in has been substantially impaired,
- Considered that the development has had and is having actual significant effects on the environment and adverse effects on the integrity of a European site resulting from the carrying out of the development,
- Considered that the significant effects on the environment and adverse effects on the integrity of a European site cannot be remediated to any great extent,
- Noted the failure of the owner operator to engage in the process for the control of quarries introduced by S261A of the Planning and Development Act 2000 as amended.

It is concluded, therefore, that exceptional circumstances do not exist such that it would be appropriate to permit the regularisation of the development by permitting

leave to apply for substitute consent and that leave to make an application for substitute should be refused accordingly.

Notwithstanding the provisions of section 177L of the Act, the Bord considered that it would be inappropriate to invoke the powers available to it under this section having regard to the enforcement action being taken by the planning authority, which is currently before the courts.

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Mary Kennelly  
Senior Planning Inspector

22<sup>nd</sup> July 2021