



An  
Bord  
Pleanála

## Inspector's Report ABP 307472-20

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<b>Development</b>	Continue Quarrying Activity.
<b>Location</b>	Ballynabarney, Redcross, County Wicklow.
<b>Planning Authority</b>	Wicklow County Council
<b>Planning Authority Reg. Ref.</b>	N/A
<b>Applicant(s)</b>	ECT Sand and Gravel Limited.
<b>Type of Application</b>	Application for Leave to apply for Substitute Consent
<b>Planning Authority Decision</b>	N/A
<b>Appellant(s)</b>	ECT Sand and Gravel Limited
<b>Date of Site Inspection</b>	18 <sup>th</sup> June 2021
<b>Inspector</b>	Hugh Mannion

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## 1.0 Site Location and Description

- 1.1. The site is located in the townland of Ballynabarney North and Bolagh Lower, County Wicklow in a rural area between Rathdrum village to the west and the M11 to the east. The site is part of a larger landholding and is accessed from the local county road network over a cul de sac which ends in the quarry. Agriculture is the dominant land use in the area. The landscape is of low hills dropping to the west into the Avonmore river valley about 3kms distant. The quarry is about 20ha and is screened by the surrounding topography and hedges but the extraction area is visible from the county road to the east of the site.
- 1.2. The site is within the catchment of the Avonmore River which is about 3kms to the west of the site, the Avonmore flows north to south and enters the Irish Sea at Arklow southeast of the site.

## 2.0 Proposed Development

- 2.1. The continued extraction of sand and gravel at a quarry at Ballynabarney, Redcross, County Wicklow.

## 3.0 Planning History

- 3.1. Under **Planning Reg. Ref. 06/4577** permission was granted for a new entrance and driveway to an existing sand and gravel pit and farm.
- 3.2. Under **QY39** an application was lodged on 27<sup>th</sup> July 2005 for registration of the quarry. There was some confusion in relation to the submission of information by the applicant and the quarry was not properly registered.
- 3.3. Under **PL27.233638** (planning Reg. Ref. 08/1153) permission was granted at application stage but refused on appeal for the retention and continuation of use processing and stockpiling of aggregate and various buildings and plant on 25.9617 hectares and permission was sought for the retention and continuation of use of sand and gravel extraction at 21.07 hectares in 4no. phases. Processing of 150,000 tonnes per annum was proposed. The application was accompanied by an EIS.

- 3.4. The Board's reason for refusal referred to the planning history of the site, the failure to register the quarry in accordance with section 261, the judgement C-215/06, that the development for which permission was sought was of a class that required EIA and included a significant element of retention and that therefore the Board was precluded from granting permission.
- 3.5. Under **Planning Reg. Ref. 12/6015** permission was granted for a waste recycling facility to include recovery and recycling of construction and demolition wastes at a maximum rate of 25,000 tonnes per annum within the same landholding.
- 3.6. Under **QV0251** the Board determined on 28<sup>th</sup> March 2014 that development was carried out after the 1<sup>st</sup> day of February 1990, which development would have required an environmental impact assessment. The Inspector's report notes that the available aerial photographs indicates site extraction areas of 2.9 hectares (1995), 7.4 hectares (2000) 16 hectares (2005).
- 3.7. The applicant was advised by a note on the Board Direction that the remedial EIS to be submitted in support of the application for substitute consent would need to be comprehensive and up to date and that the re-submission of the 2008 EIS would not be acceptable.
- 3.8. Under **SU0121** the Board refused an application for substitute consent because the Environmental Impact Statement was deficient in its failure to consider cumulative effects and alternatives and to provide sufficient information in relation to key impacts including the effects on water resources, hydrology and aquatic environment of the area. The Board is not satisfied that the development, which has taken place has not resulted in significant and adverse effects on the environment. The development would, therefore, be contrary to the proper planning and sustainable development of the area.

## 4.0 **Policy Context**

### 4.1. **Development Plan**

4.2. The area is un-zoned in the Wicklow County Development Plan 2016 – 2022.

4.3. **County Development Plan** includes the following objectives.

#### 4.4. Extractive industry

EX1 To facilitate and encourage the exploration and exploitation of minerals in the County in a manner, which is consistent with the principle of sustainability and protection of residential, environmental and tourism amenities.

EX2 To encourage the use, development and diversification of the County's indigenous natural dimensional rock industry, particularly where it can be shown to benefit processing, craft or other related industries.

EX3 To support and facilitate the development of related and spin-off industries of the extractive industry such as craft and monumental stone industries and the development of the mining and industrial tourism heritage. Consideration will be given to the development of such related industries within or in association with existing operations of worked out mines or quarries, at locations such as the disused granite quarries at Ballyknockan, where this does not conflict with other objectives and objectives of the plan.

EX4 To have regard to the following guidance documents (as may be amended, replaced or supplemented) in the assessment of planning applications for quarries and ancillary facilities:

- Quarries and Ancillary Activities: Guidelines for Planning Authorities (2004, DoEHLG);
- Environmental Management Guidelines – Environmental Management in the Extractive Industry (Non-Scheduled Minerals), EPA 2006;
- Archaeological Code of Practice between the DoEHLG and the Irish Concrete Federation 2009;
- Geological Heritage Guidelines for the Extractive Industry, 2008; and
- Wildlife, Habitats and the Extractive Industry – Guidelines for the protection of biodiversity within the extractive industry, NPWS 2009.

#### 4.5. In relation to biodiversity.

##### NH1

To ensure that the impact of new developments on biodiversity is minimised and to require measures for the protection and enhancement of biodiversity in all proposals for large developments.

##### NH2

No projects giving rise to significant cumulative, direct, indirect or secondary impacts on Natura 2000 sites arising from their size or scale, land take, proximity, resource requirements, emissions (disposal to land, water or air), transportation requirements, duration of construction, operation, decommissioning or from any other effects shall be permitted on the basis of this plan (either individually or in combination with other plans or projects).

##### NH3

To contribute, as appropriate, towards the protection of designated ecological sites including candidate Special Areas of Conservation (cSACs) and Special Protection Areas (SPAs); Wildlife Sites (including proposed Natural Heritage Areas); Salmonid Waters; Flora Protection Order sites; Wildfowl Sanctuaries (see S.I. 192 of 1979); Freshwater Pearl Mussel catchments; and Tree Preservation Orders (TPOs). To contribute towards compliance with relevant EU Environmental Directives and applicable National Legislation, Policies, Plans and Guidelines, including the following and any updated/superseding documents:

- EU Directives, including the Habitats Directive (92/43/EEC, as amended)<sup>7</sup>, the Birds Directive (2009/147/EC)<sup>8</sup>, the Environmental Liability Directive (2004/35/EC), the Environmental Impact Assessment Directive (85/337/EEC, as amended), the Water Framework Directive (2000/60/EC) and the Strategic Environmental Assessment Directive (2001/42/EC).
- National legislation, including the Wildlife Act 1976<sup>10</sup>, the European Communities (Environmental Impact Assessment) Regulations 1989 (SI No. 349 of 1989) (as amended), the Wildlife (Amendment) Act 2000, the European Union (Water Policy) Regulations 2003 (as amended), the Planning and Development Act 2000 (as amended), the European Communities (Birds and Natural Habitats) Regulations

2011 (SI No. 477 of 2011) and the European Communities (Environmental Liability) Regulations 2008/11.

- National policy guidelines (including any clarifying Circulars or superseding versions of same), including the Landscape and Landscape Assessment Draft Guidelines 2000, the Environmental Impact Assessment Sub-Threshold Development Guidelines 2003, Strategic Environmental Assessment Guidelines 2004 and the Appropriate Assessment Guidance 2010.
- Catchment and water resource management Plans, including Eastern and South Eastern River Basin Management Plan 2009-2015 (including any superseding versions of same)
- Biodiversity Plans and guidelines, including Actions for Biodiversity 2011-2016: Ireland's 2nd National Biodiversity Plan (including any superseding version of same).
- Ireland's Environment 2014 (EPA, 2014, including any superseding versions of same), and to make provision where appropriate to address the report's goals and challenges.

#### **4.6. Natural Heritage Designations**

Not relevant.

### **5.0 The Appeal**

#### **5.1. Grounds of Appeal**

- The Board previously determined that the applicant was entitled to make an application for substitute consent under Board's reference QV0299 because development was carried out which would have required EIA.
- The subsequent application for substitute consent (SU0121) was refused because the certain information was not submitted rather than for fundamental planning or environmental grounds.

- This application meets the criteria set out in section 177E in relation to exceptional circumstances. The regularisation of the quarry would not circumvent the purposes or objectives of the EIA Directive.
- The present applicant bought the quarry as a working quarry on 1999 and reasonably took the view that it was a pre-'63 use. Aerial photographs from 1995 and 2000 demonstrate that the quarry was several hectares in area at those dates.
- The applicant complied with the requirement to register the quarry under section 261 and 261A. An application for retention under reference 08/1153/PL27.233638 was granted by the planning authority but refused on appeal in part because the Board at that time was precluded from granting a permission subsequent to the ECJ judgement in C-216/06 on retention permissions where EIA was required.

## 5.2. Planning Authority Response

- The application relates solely to leave to apply for substitute consent and the planning authority expresses no view on any future application for substitute consent.
- An application to register the quarry under S261 in 2005 was unsuccessful because a request for further information was not responded to within the time limit. After this event the planning authority reviewed its records and concluded that the applicant had in fact met the requirements for this registration.
- Retention permission was refused under reference 08/1153/PL27.233638 because the Board was precluded for granting permission after ECJ case C-216/06 on retention permissions where EIA was required.
- The applicant attempted to register the quarry under section 261A, but this registration was unsuccessful. However, the planning authority accepted that there was confusion on the applicant's behalf in relation to the process of registration.



- An application for substitute consent under PL27.SU.0121 was refused because of an inadequate EIS.
- In relation to the applicant's perception of the status of the quarry when he purchased it in 1999 there was some confusion in relation to the legal framework for quarry authorisations at that time.
- The site is not located within or adjoining any European site. The planning authority expressed the opinion in relation to PL27.SU.0121 that the quarry would not impact on a European site.
- The planning authority is not pursuing any enforcement action in relation to the quarry at present.
- The planning authority considers that an application for substitute consent would not circumvent the Habitats or EIA Directives.

## 6.0 Assessment

- 6.1. Section 177C of the Planning and Development Act 2000, as amended, provides, *inter alia*, that an application for leave to apply for substitute consent may be made where development required an EIA, screening for EIA and/or submission of an NIS and where 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.
- 6.2. Section 177D provides that the Board, *inter alia*, may grant leave to make an application for substitute consent where it is satisfied that the application refers to development has been carried out and that EIA screening, EIA or AA is required and where exceptional circumstances apply.
- 6.3. This section was amended by EU Planning and Development (Environmental Impact Assessment) Regulations, 2018. The amendment provides that in making a determination on the matter of the requirement for EIA the Board shall have regard to Schedule 7 of the Planning and Development Regulations, the information submitted pursuant to schedule 7A, any further information received by the Board, the available results of preliminary verifications or assessments of the effects on the environment carried out pursuant to EU legislation other than the EIA Directive, the

likely significant effects on any European site or other protected site. The Board has determined previously that the development referred to in PL27.QV0229 which is substantially the same as the development the subject of this application, came within the scope of Schedule 5 of the Planning and Development Regulations 2001, as amended, and required submission of an rEIS. I conclude on that basis that the development the subject of this application for leave is one which should be the subject of an EIS and carrying out of an EIA and that therefore the tests set out in Section 177D are met in this case.

6.4. In addition to the foregoing Section 177D(1)(b) provides that the Board may grant leave to apply for substitute consent where exceptional circumstances apply. These exceptional circumstances are set out in Section 177D (2) and I consider the provisions of Section 177D (2) as follows (the criteria set out in the section is in bold while my assessment is bullet pointed).

6.5. **“Whether the regularisation of the development would circumvent the purposes and objectives of the EIA Directive or the Habitats Directive”**

- This application for leave applies to an area outlined in red on the submitted site layout drawing. This application site is the same site to which the application under PL27.SU0121 referred. Essentially the Board refused permission in that case because the submitted EIS was inadequate. I consider that the regularisation of the development on site, following submission of a remedial EIAR and carrying out of an EIA would not circumvent the purpose and objectives of the EIA and Habitats Directive.

6.6. **“Whether the applicant had or could reasonably have had a belief that the development was not unauthorised”**

- The applicant states that he was unaware of the unauthorised nature of the quarry prior to purchasing the lands in 1999. The planning authority makes the point that there was some confusion as to the planning status of quarrying activity in that period. I consider that at least some element of the quarry had existed for some years prior to the purchase of the site by the current

applicant and that some uncertainty did exist within the development management process in relation to quarries where a mix of pre '63 use, subsequent expansion and potential to require EIA and/or AA applied. Therefore, I conclude that the applicant could reasonably have had the belief that the quarry was authorised.

**6.7. “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.”**

- The process of EIA and AA involves the research and provision of information to the public and consenting authorities in relation to likely significant environmental impacts of a proposed development. In the present case the ability to provide such information has not been substantially impaired and the provision of information would facilitate public participation in the assessment/consent process. I conclude that the ability to carry out an rEIS and rNIS to assess the environmental impacts of the development has not been substantially impaired nor has the capacity for public participation in the process been substantially impaired.

**6.8. “The actual or likely significant effects on the environment or adverse effects on the integrity of a European Site resulting from the carrying out or continuation of the development”**

- It is likely that there will be significant effects on the environment arising from this development but only the submission of an rEIA and carrying out of a rEIA will fully examine these impacts. I conclude therefore that granting leave to make such an application to apply for substitute consent would facilitate that assessment process.
- The finding of adverse effects can only be made following an appropriate assessment on foot of submission of an rNIS. I conclude therefore that

granting leave to make an application for substitute would facilitate that assessment process.

**6.9. “The extent to which significant effects on the environment or adverse effects on the European site can be remedied”**

- I have had regard to the information available on the current file, in file reference PL27.SU.0121 and I carried out a walkover site inspection. Having regard to the material available it appears that there may have been an impact on the groundwater regime in the wider area where the quarry is located through dewatering within the extraction area and that this may have impacted on the Balleese stream which flows southeast towards a confluence with the Avonmore just south of Rathdrum, County Wicklow. Additionally, it appears that the wash water used within the site is confined within a closed system which may mitigate the direct flow of contaminants to the wider water environment. I conclude that an application for substitute consent, accompanied by an rEIAR and NIS could provide information which could address significant effects on the environment or adverse effects on the European site.

**6.10. “Whether the applicant has complied with previous planning permissions or previously carried out an unauthorised development”**

- The planning authority states that the failure to register the quarry under section 261 was inadvertent on the applicant’s behalf, the applicant has attempted to regularise the use on site previously and a permission granted at application stage was overturned on appeal (PL27.233638) and a further application (SU0121) was refused essentially for lack of an adequate EIS. Additionally, the planning authority states that there are no enforcement proceedings against the quarry at present. I conclude that the applicant has made reasonable efforts to regularise the sand/gravel extraction on site.

**6.11. “Such other matters as the Board consider relevant”**

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

## 6.12. Recommendation

I recommend that leave to apply for substitute consent should be granted.

## 7.0 Reasons and Considerations

7.1. Having regard to Section 177D of the Planning and Development Act, 2000, as amended, the Board is satisfied that an environmental impact assessment and an appropriate assessment is required in this case, in the light of the scale and nature of the quarrying that has been carried out.

Furthermore, the Board examined whether or not exceptional circumstances exist such that it would be appropriate to allow the opportunity for regularisation of the development by granting leave to make an application for substitute consent.

In this regard the Board;

- considered that this application for leave to apply for substitute consent has demonstrated that the regularisation of the quarry would not circumvent the purposes and objectives of the EIA Directive or the Habitats Directive because it would allow for the provision of information and an analysis of the likely significant environmental effects of the development.
- considered that the applicant could reasonably have had a belief that the quarrying development that took place prior to 1999 when he acquired the site was authorised.
- considered that this application for leave to apply for substitute consent has demonstrated that the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment and to carry out an appropriate assessment, and that public participation in such assessments has not been substantially impaired.
- considered the submission of an rEIS and rNIS would facilitate an assessment of the potential for the remediation of any significant effects on the environment or on a European site,

- considered that the applicant had made reasonable efforts to regularise the planning status of the quarry and noted that the planning authority is not currently pursuing enforcement proceedings against the applicant in this case,

7.2. Having regard to the foregoing it is considered that exceptional circumstances do exist such that it would be appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent in relation to the site outlined in this application.

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Hugh Mannion  
Senior Planning Inspector

30<sup>th</sup> June 2021