



An
Bord
Pleanála

Inspector's Report ABP311622-21

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| Development | Aggregate extraction, plant, and welfare facilities. |
| Location | Redbog and Philipstown, County Kildare. |
| Planning Authority | Wicklow County Council |
| Planning Authority Reg. Ref. | N/A |
| Applicant(s) | Hudson Brothers Ltd. |
| Type of Application | Application for Leave to Apply for Substitute Consent |
| Planning Authority Decision | N/A |
| Observer(s) | None |
| Date of Site Inspection | 15 th December 2021 |
| Inspector | Hugh Mannion |

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1.0 Site Location and Description

- 1.1. The site comprises an existing sand and gravel quarry at Redbog and Philipstown, County Kildare.

2.0 Proposed Development

- 2.1. The proposed development consists of:

Planning permission is sought for

(A) the continuation of aggregate extraction and processing as permitted under Reg. Ref. 07/267 that arose following S.261 registration of the extraction operation under reference no. QR42.

(B) The lateral extension of the permitted extraction activities in westerly and northerly directions. Over a combined area of approximately 13.8 hectares to match existing extraction depth that is above water table The proposed western extension is for the extraction of sand and gravel and rock over an area of approximately 10.7 hectares. The proposed northern extension is primarily for the extraction of sand and gravel over an area of approximately 3.1 hectares. The extension areas are proposed to be extracted on a phased basis that incorporate into the existing extraction and restoration plans. The proposed lateral extension areas of sand and gravel and rock will be processed using existing site processing facilities and are intended to maintain the extraction and aggregate production capabilities of the existing construction aggregate production operation. The proposed extension areas will include ancillary development in the form of landscape screening bunds.

(C) The replacement of existing wastewater holding system for the existing canteen/office with proprietary wastewater treatment system.

(D) Ancillary site works. The application site area under Reg. Ref. 07/267 was 57.9 hectares. The proposed lateral extraction extension areas will increase the overall extraction area to approximately 54.3 hectares. The total application area is approximately 75.0 hectares and includes the ancillary processing plant and welfare facilities. The application site excludes an area of 0.23 hectares that is the subject of a current planning application for retention of a maintenance shed under Reg. Ref. 19/1230. An Environmental Impact Assessment Report (EIAR) and Natura Impact

Statement (NIS) have been prepared to accompany the planning application that include the existence of this maintenance shed in the assessment study areas. The planning application is accompanied by an Environmental Impact Assessment Report (EIAR) and Natura Impact Statement (NIS) for development at Athgarrett, Philipstown, and Red Bod, Blessington, County Kildare – Hudson Brothers Limited – 20/532.

3.0 Planning History

- 3.1. ABP307870-20 Permission was refused for retention of development comprising a single storey truck and plant maintenance shed, staff welfare facilities, underbody truck wash located on the concrete apron surrounding the shed, proprietary wastewater treatment system and soakaway, and all ancillary works at Redbog, County Kildare as amended by the revised public notice received by the planning authority on the 24th day of March, 2020 providing for significant further information consisting of a new water purification system to welfare facilities.
- 3.2. Reg. Ref. ABP-307456-20 the Board granted an application for Leave to Appeal to Paul Woods against the decision of Kildare County Council to grant permission to Hudson Brothers Ltd. The application was based on the wording of Condition 3 of P.A. Reg. Ref. 19/1230 and whether the development was applicable solely to the development permitted under P.A. Reg. Ref. 07/267, which according to the application, expired on the date P.A. Reg. Ref. 19/1230 was granted, or whether it would also apply to the permission sought under P.A. Reg. Ref. 20/532.

The Board decided that,

- (i) 'The development, in respect of which a decision to grant permission has been made, will differ materially from the development as set out in the application for permission by reason of condition numbered 3 imposed by the planning authority to which the grant is subject, and
- (ii) The imposition of condition numbered 3 will materially affect the applicant's enjoyment of the land adjoining the land in respect of which it has been decided to grant permission or reduce the value of the land.'

Condition No. 3 of Kildare County Council's decision is: 3. The shed shall only be used for the maintenance of HGVs and plant associated with operation of the quarry permitted under reg. ref. 07/267 and shall not be used for the maintenance of any other vehicles or plant.

Reason: In the interest of clarity and proper planning and sustainable development.

ABP Reg. Ref. PL 09.235502 (Reg. Ref. 07/267) – Permission was granted in 2010 for the continuation of aggregate extraction and processing by mechanical means, blasting, aggregate processing, washing, screening, crushing, power-house, control rooms, office building, portacabin/canteen, water recycling plant, lagoons, landscaping berms and all associated works on an approx. 57.9 hectares site, The applicant appealed against financial contribution conditions which the No9ard removed from the grant of permission. Condition 5 restricted the permission to a 10-year period.

P.A. Reg. Ref. 20/532 – A planning application was made in 2020 for:

- Continuation of aggregate extraction and processing as permitted under P.A. Reg. Ref. 07/267,
- Extension of the extraction activity to the west (10.7 hectares) and north (3.1 hectares) to match existing extraction depth,
- Replacement of existing wastewater system with a proprietary effluent treatment system,
- An area of 0.23 hectares, subject of P.A. Reg. Ref. 19/1230 is excluded,
- An EIAR and NIS accompany the planning application.

This application was not determined.

4.0 Statutory Provisions

4.1. Section 177A provides for applications for substitute consent.

4.2. Section 177B provides that where a planning authority becomes aware that a development would have required an EIA, determination as to whether an EIA was required or an AA and a court within the state of the ECJ had invalidated a grant of

permission in relation to that development the planning authority must inform the developer that an application for substitute consent should be made to the Board.

4.3. Section 177C provides that in the absence of a notice under 177B the owner or occupier of land where development has been carried out where that development would have required an EIA, determination as to whether an EIA was required or an AA may apply to the Board for substitute consent if;

- There is a material defect in a permission as determined by a court within the state, the ECJ because of the absence or inadequacy of an EIA or AA, any error of fact or law or,
- where the applicant is of the opinion that exceptional circumstances exist, which would make it appropriate to permit the regularisation of the development by way of an application for substitute consent.

5.0 The Grounds for the Application.

- The application refers to a quarry pit, processing plant, offices and staff welfare facilities at Philipstown and Redbog County Kildare. The site is 57.9ha and outlined in red and illustrated on drawing number 1 prepared by Golder Consultants and submitted to the Board on the 8th October 2021. The application site and other lands in the ownership of the applicant (outlined in blue) are accessed from the N81 about 1km north of Blessington. There are other quarry uses in the area adjacent to but not associated with the applicant's lands.
- Aggregate extraction has been carried out in the area since the 19th century and the quarry was correctly registered under Section 261 of the Acts as QY43 in Wicklow and QR42 in Kildare. In 09.QV.0208 the Board found that the planning authority decision that the quarry required AA was wrong because there was no hydrogeological connection to any European site.
- This application for leave to apply for substitute consent aims to regularise development which was previously permitted but undertaken after the expiry of a previous permission and separately for a maintenance shed. Exceptional circumstances apply in this case.

- It is necessary to regularise the situation within the existing site where there is permission for extraction of considerable remaining reserves of sand and gravel were it not for running out of time as per the permission granted under reference 07267. Thereafter additional expansion can be contemplated.
- An application for substitute consent would not undermine the objectives of the EIA or Habitats Directive.
- The applicant pursued all reasonable routes to get planning permission for the sand/gravel extraction.
- A grant of leave to apply for substitute consent will not impair public participation in the planning process and will, in fact, facilitate public participation in the process by making provision for submissions.
- The planning authority is not currently pursuing any enforcement proceedings in relation to extraction within the site. The extraction is permitted but for being outside the time limit set in 07/267. The applicant held a genuine belief that the removal of aggregate stockpiles was not unauthorised.

6.0 Planning Authority Response

6.1. The planning authority commented as follows.

- Under PL07/267 permission was granted for aggregate extraction with an expiry date of 18th September 2021 which included additional time accounting for the covid-19 event.
- 19/1230 (ABP307870-20) was an application for permission granted by the planning authority but **refused** on appeal for a maintenance shed, staff facilities and other works because it was associated with then unauthorised development.
- Under 20/532 application was made to continue extraction under a permission from 2007 (07/267) but because of potential impacts on Red Bog SAC could not be ruled out the planning authority decided it could not determine the case (which involved an element of retention). There is stayed JR proceedings by the applicant against the PA in relation to this case.

- The 2007 case (07/267) arose from the requirement for registration of the quarry under Section 261 of the Act. That permission had a 10-year lifetime. As quarrying activity continued after the expiry of that permission an enforcement notice was issued.
- Under ABP ref 09.QV.011 the Board set aside a decision by the planning authority and decided that the development would not have an effect on a European site.
- 20/532 was a permission for continuation and extension of the works within the original area covered by 07/267 but the planning authority decided that it could not consider the application because it involved un-authorised development which may require EIA, screening for EIA or AA.
- In so far as the applicant has stated his willingness to submit a full rEIAR and rNIS the planning authority is satisfied that the objectives of the EIA Directive and/or the Habitats Directive would not be compromised by granting leave to apply for substitute consent.
- The planning authority notes that the applicant had suspended extraction works during the covid-19 outbreak but, under financial pressure had restarted aggregate extraction. It is up to the Board to take a view as to if the applicant could have reasonably believed that continued extraction was authorised.
- Granting leave to make an application for substitute consent will allow for public participation in the planning/environmental assessment process.
- The effects on the closest European site (Red Bog SAC) are unclear and may arise from more than one sand/gravel extraction operation in the wider area. Granting leave to make an application for substitute consent would allow for further assessment of this issue.
- A through rNIS with appropriate mitigation measures could prove without scientific doubt that the proposed development will not affect the Red Bog SAC.
- The planning authority supports the applicant's efforts to regularise the situation in the quarry.

6.2. Further Responses

None.

7.0 Assessment

- 7.1. This is an application under section 177C of the Planning and Development Act 2000, as amended, whereby the owner or occupier of land to whom no notice has been issued by a planning authority in relation to unauthorised development may make an application for leave to apply for substitute consent. This application is not an application for consent to development.
- 7.2. There are two potential sets of circumstances which would justify the granting of leave to apply for substitute consent – (a) where a permission has been granted which was in breach of the law, invalid or otherwise defective, where an EIA or NIS was required but not submitted or (b) where **exceptional circumstances** exist which allow the Board to conclude that it would be appropriate to allow for an application for permission for the regularisation of the development.
- 7.3. The **exceptional circumstances** are set out in Section 177D and I consider the provisions of Section 177D (2) as follows (the criteria set out in the section is in bold bullet points while my assessment is in numbered paragraphs).
- **“Whether the regularisation of the development would circumvent the purposes and objectives of the EIA Directive or the Habitats Directive”**
- 7.4. The applicant states that they propose to prepare an rEIAR and rNIS as part of the new application. The planning authority agrees that an application for substitute consent would not undermine the objectives of the EIA Directive or the Habitats Directive. I conclude on that basis that an EIA and Appropriate Assessment can be carried out and that the purposes and objectives of the EIA Directive or Habitats Directive will not be circumvented by making an application for substitute consent.

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

7.5. The applicant states that in 2020 while a decision was pending under planning register reference 20/532 he continued removing material that had been stockpiled and this removal facilitated restoration of lands under a previous permission and that furthermore after April 2021 some extraction was carried out when covid related restrictions on the construction industry were being lifted. The applicant states he believed that at least some of this work was authorised and only became aware that it was not following an approach from the planning authority.

7.6. I accept that the applicant considered that the work carried out including removal of stockpiled aggregate was within the terms of a previous permission. On the basis of the material on file, the various delays in processing applications for permission, the intervention on the covid pandemic and the complexity of distinction between quarrying aggregate and processing it thereafter I conclude that the applicant could reasonably have had a belief that the development, at least in part, was not unauthorised and, notwithstanding that this assumption appears to have been mistaken, that it does not require refusal of leave to make an application for substitute consent.

- **“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.”**

7.7. The provision of an rEIAR will allow for an assessment of the environmental impacts of the development as it has been carried out/will be carried out in accordance with any future permission. Additionally, the effects on any European site will be examined in a rNIS, if submitted with an application for substitute consent. Where an application is made to the Board significant amounts of environmental information

will be made available through the application process because provision will be made for giving the public notice of the making of the application and inviting submissions in relation to the application. I conclude therefore that public participation in the assessment process will not be substantially impaired.

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

7.8. There are a number of sand and gravel extraction sites in different ownerships in this area along the border between County Kildare and County Wicklow. As pointed out in the planning authority’s submission in this case there is some doubt as to the hydrogeological relationship between the nearest European site (Redbog SAC) and these sand and gravel pits. The planning authority refers to a submission from the DAU in the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media dated December 2020¹ in relation to an application 19/1438 which was not appealed to the Board and referred to a nearby sand/gravel/stone quarry. The significant point in this letter is the reasonable possibility that the aquifer underlying the Redbog SAC may be isolated from the surrounding area and therefore not subject to loss arising from quarrying operations in the area.

7.9. On this basis I conclude that it is not reasonable to ascribe actual or likely significant environmental impacts or adverse effects on the integrity of a European site arising from a grant of leave to make an application for substitute consent in this case.

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

7.10. Grants of permission for sand/gravel/rock extraction are generally accompanied by conditions requiring the mitigation of environmental impacts and restoration plans.

¹ I have printed out this letter and attached it in the pouch below this report.

Such mitigation measures generally include the protection of ground and surface water quality during the sand/gravel extraction period. Restoration plans generally include landscaping/contouring the works which mitigate the visual impact on the worked-out areas and enhancement of overburden to protect groundwater quality. I conclude on this point that it would not be reasonable, outside of a full application for substitute consent, to conclude that environmental impacts or adverse effects on a European site would occur or could not be remediated.

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

7.11. The planning authority is the competent authority in determining if unauthorised development has taken place on the site, has not referred to any enforcement actions currently being taken in relation to this development. Additionally, the planning authority recognises that difficulties have arisen in the timing of applications, in determining applications, delays in site inspections and that the problems associated with covid-19 have delayed assessments of planning applications.

7.12. I am satisfied on the basis of the planning authority’s submission that the applicant has substantially complied with previous planning permissions and not carried out an unauthorised development in a manner as to require the refusal of this application to for leave to apply for substitute consent.

- **“Such other matters as the Board consider relevant”**

7.13. I do not consider that there are other relevant matters for the Board to consider.

7.14. Recommendation

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

8.0 Reasons and Considerations

8.1. 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 development and its relationship with European sites.

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 development would not circumvent the purposes and objectives of the Environmental Impact Assessment Directive or the Habitats Directive because it would allow for the provision of information and an analysis of the likely significant effects of the development on the environment and on European sites in the vicinity of the development site.
- considered that this application for leave to apply for substitute consent has demonstrated that public participation in an assessment of the likely significant impacts on the environment or signification effects on European sites have not been substantially impaired.
- considered the submission of an rNIS would facilitate an assessment of the potential for the remediation of any signification effects on European sites,
- noted that the planning authority is not currently pursuing enforcement proceedings against the applicant in this case and considered that the applicant is making reasonable efforts to regularise the planning status of the development.

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.

Hugh Mannion
Senior Planning Inspector

30th January 2023