



An
Bord
Pleanála

Inspector's Report ABP-313730-22

Question

Whether the continuation of quarrying in a manner commensurate with the level of activity which prevailed pre-1963 is or is not development and is or is not exempted development.

Location

Dereendrislagh, Sneem Co. Kerry

Declaration

Planning Authority

Kerry County Council.

Planning Authority Reg. Ref.

EX 1002

Applicant for Declaration

Timothy O'Sullivan.

Planning Authority Decision

No Declaration.

Referral

Referred by

Kerry County Council.

Owner/ Occupier

Timothy O'Sullivan.

Observer(s)

None.

Date of Site Inspection

14 February 2024.

Inspector

Daire McDevitt

1.0 Introduction

The quarry (Gleesk 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.

There is extensive planning history associated with the Quarry at Dereendrislagh, Sneem, Co. Kerry. 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.

2.0 Site Location and Description

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 Derreendrislough, 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.

I refer the Board to the site description contained in the Inspector's Report for ABP 306076-19 which remains broadly relevant:

There are a number of dwellings in the vicinity, with the closest being a house c. 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. There is a fork in the road at the entrance to the quarry, with a track (northern route) leading to the quarry (rear of houses) and a second access track travelling south eastwards towards the sea, and then westwards alongside the coast to enter the quarry from the south. This track 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 portion of the quarry.

The quarry consists of two excavation areas. One is located at the northern end close to the entrance and is sited on the landward side of the northern access track. The second area is located to the south-east of the northern haul road and comprises most of the rest of the excavation area. The lower level extends towards the sea and coastline.

I was accompanied on the day of my inspection by the owner, Timothy O'Sullivan, and while no works taking place at the time of inspection the presence of stockpiles of aggregate, excavators and other associated machinery indicated that the southern part of the quarry is active. There was no evidence of any settlement lagoons. 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.

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, Macgillicuddy's Reeks and Caragh River Catchment SAC and a number of SPAs including Iveragh Peninsula SPA. A river located to the north of the quarry 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 The Question

The Requester (Kerry County Council) asks-

Is the whether the continuation of quarrying in a manner commensurate with the level of activity which prevailed pre-1963, is or not development or is or is not exempted development.

The Owner in response to the referral to An Bord Pleanála has submitted that he is seeking a declaration that the level of quarrying commensurate (proportionate) with the pre-1963 level of quarrying is exempted development.

In the interest of clarity I wish to highlight to the Board that I am considering the question as follows:

Whether the continuation of quarrying in a manner commensurate with the level of activity which prevailed pre-1963, is or is not development or is or is not exempted development.

4.0 Planning Authority Declaration

4.1 Declaration

The planning authority in correspondence received by An Bord Pleanála on the 7th June 2022 that they have not made a declaration in this instance and referred the matter to An Bord Pleanála for a determination under Section 5 (4) of the Planning and Development Act, 2000 as amended.

5.0 Planning History

ABP Ref. 306076-19 refers to a Leave to Apply for Substitute Consent for a quarry on the site—which was refused by the Board on the 14th October 2021. 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.

ABP Ref. 08.LS0015 refers to a Leave to apply for Substitute Consent for a quarry at the site which was refused by the Board on the 16th 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.

Registration under Section 261 of the Planning and Development Act 2000 as amended.

QY 117. The quarry is said to have commenced prior to the appointed day (1st 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). Kerry County Council registered the quarry on 27/04/07 under the provisions of S261, subject to 55 no. conditions.

Determination under Section 261A(3)(a) of the Planning and Development Acts

EUQY117. Kerry County Council 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 1st February 1990, which would have required an Environmental Impact Assessment, in accordance with the EIA Directive.
- development had been carried out after the 26th February 1997, which would have required an Appropriate Assessment to have been carried out.

However, neither assessment was carried out.

The Determination under Section 261A(3)(a) (dated 7th 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 (30th October 2012). No such application was made, and the applicant submitted information submitted under ABP 306076-19 that notification of the determination was never received.

Planning Enforcement

There is an extensive history of enforcement proceedings pertaining to the Quarry since c.2006, predating the 261 regulations. Following non compliance with the Section 261A Direction and the refusal of Leave to Apply for Substitute Consent applications further enforcement action has taken place.

6.0 Policy Context

6.1 Development Plan

The referral was submitted in 2022 when the Clare County Development Plan 2017-2023 was the operative Plan.

The current operative plan is the Clare County Development Plan 2023-2029 which came into effect in April 2023.

6.2 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 c. 3km to the north-west.

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

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

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

7.0 The Referral

7.1 Requestor's Case to the planning authority.

The request to the planning authority by the owner, Timothy O'Sullivan is summarised as follows:

The continuation of quarrying in a manner commensurate with the level of activity which prevailed pre-1963. The case for declaring the continuation of quarrying at pre-1963 levels, exempted planning is outlined as follows:

- It is accepted by the planning Authority that the Gleesk Quarry is a pre-1963 development.
- The pre-1963 level of activity (development) was not captured by Section 261, 261A or the "substitute consent" legislation.

Section 24 of the Local Government (Planning and development) Act 1963 must be interpreted to permit the continuation to completion of works which commenced prior to the date appointed in the Act i.e 1 October 1964.

Included in their documentation a site location map and Topographical Site Survey and sked:

7.2 Referrer's Case to An Bord Pleanála/Planning Authority Reports

The planning authority referred the matter to An Bord Pleanála for a determination under Section 5 (4) of the Planning and Development Act, 2000 as amended.

7.2.1 Planning Reports

There is no report on file.

7.2.2 Other Technical Reports

None on file.

7.3 Owner/Occupier's response

The Owner/occupier (Timothy O'Sullivan) in his response received by An Bord Pleanála on 1 July 2022 to this declaration request raised inter alia the following points:

- It is not disputed by the planning authority (PA), that the quarry existing prior to 1963.
- The quarry was subjected to the Quarry registration process under section 261 of the Planning and Development Act 2000 – with a decision issuing for the PA to grant registration with conditions on the 3rd March 2007.
- Section 24 of the Local Government (Planning & Development) Act 1963 has not been overtaken or superseded by subsequent legislation and as such permits the continuation to completion of works which commenced prior to the date appointed in the Act ie 1st October 1964.
- Summary of planning history set out.
- Commentary on planning procedures.
- Implications of section 24 of the Local Government Act 1963.
- Reference to court judgements including: *Hehir v. An Bord Pleanála* (2016) and *Waterford County Council v. John A. Wood Limited* [1991]1IR556.
- Section 24 of the Local Government (Planning and Development) Act 1963 allowed works ie development which had commenced prior to the appropriate date, 1st October 1964 to continue to completion.

It is submitted that the owner has been wrestling with a confusing planning process for up to 20 years where grounds rules are unclear. It is irrefutable that section 24 of the Local Government (Planning and Development) Act 1963 is the overruling legislation in relation to this quarry – Gleesk Quarry and as such can continue to operate at a level of activity which prevailed pre-1963 and can operate in a proportionate manner.

ABP is requested to confine their examination to the narrow issue of planning law, the pre-1963 level of development (ie quarrying activity) is exempted or in other words permitted by virtue of section 24 of the Local Government (Planning & Development) Act 1963.

7.4 Further Responses

No response was received from Kerry County Council on foot of a section 131 request by An Bord Pleanála dated 27th September 2022 following the response from Owners/Occupiers (Timothy O'Sullivan) received by An Bord Pleanála on the 1st July 2022 .

8.0 Statutory Provisions

8.1 Planning and Development Act, 2000 (as amended)

Section 2(1)

In this Act, except where the context otherwise requires:

“exempted development” has the meaning specified in section 4;

“unauthorised development” means, in relation to land, the carrying out of any unauthorised works (including the construction, erection or making of any unauthorised structure) or the making of any unauthorised use.

“unauthorised works” means any works on, in over or under land commenced on or after 1 October 1964, being development other than –

(a) Exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act), or

(b) Development which is the subject of a permission granted under part IV of the Act of 1963 or under section 34 or 37G of this Act, being a permission which has not been revoked, and which is carried out in compliance with that permission or any condition to which that permission is subject.

"works" includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal.

“quarry” means an excavation or system of excavations made for the purpose of, or in connection with, the getting of minerals (whether in their natural state or in solution or suspension) or products of minerals, being neither a mine nor merely a well or bore-hole or a well and bore-hole combined, and shall be deemed to include—

- (i) any place on the surface surrounding or adjacent to the quarry occupied together with the quarry for the storage or removal of the minerals or for the purposes of a process ancillary to the getting of minerals, including the breaking, crushing, grinding, screening, washing or dressing of such minerals but, subject thereto, does not include any place at which any manufacturing process is carried on;
- (ii) any place occupied by the owner of a quarry and used for depositing refuse from it but any place so used in connection with two or more quarries, and occupied by the owner of one of them, or by the owners of any two or more in common, shall be deemed to form part of such one of those quarries as the Minister may direct;
- (iii) any line or siding (not being part of a railway) serving a quarry but, if serving two or more quarries shall be deemed to form part of such one of them as the Minister may direct;
- (iv) a conveyor or aerial ropeway provided for the removal from a quarry of minerals or refuse.

Section 3

Section 3(1) defines "development" as follows:

In this Act, "development" means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land.

Section 4

Section 4(2) of the Act provides that the Minister may, by regulations, provide for any class of development to be exempted development. The principal regulations made under this section are the Planning and Development Regulations, 2001.

Section 4 was amended by the Environmental (Miscellaneous Provisions) Act 2011 such that section 4(4) provides that: Notwithstanding paragraphs (a), (i), (ia) and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required.

Section 5(1) of the Act, which is the basis for this referral, states that: If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter.

Section 32 This section has a general obligation to obtain permission in respect of any development of land not being exempted development and in the case of development not authorised for the retention of unauthorised development.

Section 34 Section 34(12): A planning authority shall refuse to consider an application to retain unauthorised development of land where the authority decides that if an application for permission had been made in respect of the development concerned before it was commenced the application would have required that one or more than one of the following was carried out.

- (a) an environmental impact assessment
- (b) a determination as to whether an environmental impact assessment is required, or
- (c) an appropriate assessment.

8.2 Planning and Development Regulations, 2001 8.3.

Article 9 of the Planning and Development Regulations 2011, as amended, provides for exceptions to the classes of exempted development provided for in Article 6.

Article 9(1)(c) provides that development is not exempted development if it is development to which Part 10 applies, unless the development is required by or under any statutory provision (other than the Act or these Regulations) to comply

with procedures for the purpose of giving effect to the Council Directive. Part 10 refers to the requirement to carry out EIA.

8.3 Referrals Database

Referral Relating to a Quarry and Section 261A

RL3356 Smithstown, Belmont, Ferbane, Co Offaly

The referral site comprised the northern portion of an established quarry. The quarry owner made the case that the overall quarry site should be viewed as two distinct pits and that a ruling of Offaly County Council with regard to the extent of the section 261A(3) decision should not remove existing pre 1963 rights.

The Board concluded that:

- The expansion of the quarry after 1963, and after 2005 in particular, both within the registered area and beyond it, constitutes works within the scope of the definition in section 2(1) of the Act, having regard to the rate of that expansion, and therefore constitutes development,
- The quarrying undertaken after 1963, and after 2005 in particular, both within the registered area and beyond it, also comprised a significant intensification of a previous use, which intensification of use is considered to be material, having regard to the potential for impacts to have arisen or increased in planning terms (including the generation of noise, dust, heavy vehicular traffic on narrow roads, impacts on multiple sensitive receptors in close proximity,

and landscape impacts in a prominent location including the removal of established woodland), and, therefore, constitutes development,

- The area of the quarry registered under section 261 of the Act, being the lands the subject of the referral, forms part of the overall quarry that was the subject of the planning authority's notice under section 261A(3)(a),
- In accordance with the determination of the Board under An Bord Pleanála ref. 19.QV0181, the development undertaken at this quarry after the 1st day of February, 1990 would have required EIA, but such an assessment was not carried out,
- Under section 261A(7) of the Act, the effect of the determination and decision of the Board under 19.QV.0181 was to require an application to be made to the Board for substitute consent in respect of this quarry. No such application was made, and therefore, under section 177O(3) of the Act, and notwithstanding any other provision in the Act, the quarry constitutes unauthorised development, and
- for the avoidance of doubt, there are no provisions in legislation under which the development that has taken place could avail of an exemption from the general obligation to obtain planning permission.

9.0 Assessment

9.1 Introduction

As this is a referral case, in accordance with Section 5 of the Planning and Development Act 2000, as amended, the decision to be made does not relate to the merits or demerits of any proposed development / works, simply to the question of what in any particular case, is or is not development or is or is not exempted development within the meaning of the Act.

The question as referred is:

“whether the continuation of quarrying in a manner commensurate with the level of activity which prevailed pre-1963, is or is not development or is or is not exempted development.”

Section 5 of the Planning and Development Act (as amended) provides a mechanism by which questions as to whether something is or is not development and/or is or is not exempted development can be asked. The default position per Section 32 of the Planning and Development Act is that there is a general obligation to obtain permission for development that is not exempted development. The Act defines “development”, and, along with the Regulations set out provisions for exempted development. If a development is not among these provisions, then it is not exempted development.

The main parties in this referral are as follows:

- Timothy O’Sullivan (Owner and Requester to Kerry County Council)
- Kerry County Council (Referrer to the Board)

Kerry County Council sought a declaration from An Bord Pleanála in respect of *“whether the continuation of quarrying in a manner commensurate with the level of activity which prevailed pre-1963, is or is not development or is or is not exempted development.”*

Section 261 of the Planning and Development Act 2000 (as amended) introduced a once off system of registration for all quarries. I note that Section 261 does not confer or bestow development consent in accordance with the provisions of Section 34 of the Planning and Development Act 2000. Essentially quarry registration and development are separate legal entities, I further note that in *An Taisce v Ireland and Others*: [2010] IEHC 415, in his judgement Charleton J referred indicated that “it is settled as a matter of law that the registration of a quarry under s261 does not alter its status. If the use of a quarry was unlawful before registration, that status remains afterwards”.

I note that the question of pre-1964 authorisation of quarrying use on the lands at this location was determined by Kerry County Council when carrying out an assessment pursuant to Section 261A of the Planning and Development Acts, 2000 as amended, EUQY117 and it is not a matter to be revisited in terms of a determination under

Section 5 which relates to whether the use or works on the site is or is not development.

The crux of the issue raised by the requester in this case relates to the view that the operation of the quarry at this location is commensurate with the level of activity that prevailed pre-1963 on the site (Quarry).

The owner has submitted that the planning authority registered the quarry under section 261 subject to 55 no. conditions. Section 261A (3)(a) Notices were served on the owner directing him to apply to An Bord Pleanála for substitute consent as a rEIA and RNIS were required (it is submitted by the owner that he did not receive same). No application was lodged. Subsequently two separate applications for Leave to Apply for Substitute Consent were lodged with An Bord Pleanála which were refused in 2014 (LS.08.LS0015) and in 2021 (ABP 306076-19). The Board determined that Board determined that such works would have required EIA and NIS but such an EIA and NIS were not carried out and refused Leave to apply for Substitute Consent in the basis that the applicant has not demonstrated exceptional circumstances. The provisions of Section 17(1) (b) of the Environment Miscellaneous Provisions Act 2011, which amends Section 4 of the Planning and Development Act 2000, effectively provides that notwithstanding any regulations made under section 4(2) of the 2000 Act, development shall not be exempted development if environmental impact assessment or an appropriate assessment of the development is required.

The landowner in their response to the Board states that:

- It is not disputed by the planning authority (PA), that the quarry existing prior to 1963.
- The quarry was subjected to the Quarry registration process under section 261 of the Planning and Development Act 2000 – with a decision issuing for the PA to grant registration with conditions on the 3rd March 2007.
- Section 24 of the Local Government (Planning & Development) Act 1963 has not been overtaken or superseded by subsequent legislation and as such

permits the continuation to completion of works which commenced prior to the date appointed in the Act ie 1st October 1964.

9.2 Is or is not development

The subject development comprises *continuation of quarrying in a manner commensurate with the level of activity which prevailed pre-1963*, I am satisfied that due to the nature of the proposed works, that these would fall within the definition of 'works' under Section 2 of the Act and thus are considered to constitute 'development' for purposes of Section 3 of the Planning and Development Act.

9.3 Is or is not exempted development

Based on available information there is substantial evidence to suggest a quarry has been in-situ at this site in some form or other prior to 1963 with aerial photography dated from 1995. I have no reason to doubt that a quarry was active at this location pre-1963.

It is clear from the information on file that following section 261A (3)(a) Notices the owner was directed to apply to An Bord Pleanála for Substitute Consent as it was Determined under section 261A(3)(a) that a rEIA and rNIS were required. No application was lodged and subsequently in 2014 and 2021 applications for Leave to apply for Substitute Consent were refused by the Board as it was concluded that the exceptional circumstance had not been clearly demonstrated.

Arising from my assessment and based on the information on file. I consider that the Section 261 registered area constitutes an integral part of the overall quarry site. As previously determined by the Board, the increase in scale and intensity of works on site post 2005 constitute development and not exempted development. On this basis the quarrying works and use of the Section 261 registered area is development and is not exempted development.

From the site inspection it is clear the quarry activity is ongoing. This is not disputed by any of the parties involved. The crux of the referral is whether the continuation of quarrying is in a manner commensurate with the level of activity which prevailed pre-1963.

9.4 Restrictions on exempted development

I note the Board's conclusion in referral RL3356, as discussed above, which is considered relevant to the subject case. In RL3356, the overall quarry had been the subject of a section 261 determination by the Board that development had been carried out at the site that would have required EIA, but such an assessment was not carried out, ref. 19.QV.0181. The applicant had therefore been required to make application to the Board for substitute consent. The question arose as to whether a material intensification of quarrying use of the lands registered under section 261 of the Act and quarrying works and use of these registered lands was exempted development.

The following parts of the Board order of RL3356 are considered particularly relevant to the subject case:

(c) the area of the quarry registered under Section 261 of the Planning and Development Act, 2000, as amended, being the lands the subject of this referral, forms part of the overall quarry that was the subject of the planning authority's notice under Section 261A(3)(a) of the Planning and Development Act, 2000, as amended, (d) in accordance with the determination of the Board under An Bord Pleanála reference number 19.QV0181, the development undertaken at this quarry after the 1st day of February, 1990 would have required an environmental impact assessment, but such an assessment was not carried out,

(e) under Section 261A(7) of the Planning and Development Act, 2000, as amended, the effect of the determination and decision of the Board under 19.QV.0181 was to require an application to be made to the Board for substitute consent in respect of this quarry,

(f) no such application was made, and therefore, under Section 177O(3) of the Planning and Development Act, 2000, as amended, and notwithstanding any other provision in the Act, the quarry constitutes unauthorised development, and (g) for the avoidance of doubt, there are no provisions in legislation under which the development that has taken place could avail of an exemption from the general obligation to obtain planning permission.

In the case of RL3356, therefore, the overall quarry was deemed to be unauthorised development on the basis of non-completion of the section 261A substitute consent process. The owner in this instance submits that Section 24 of the Local Government (Planning & Development) Act 1963 has not been overtaken or superseded by subsequent legislation and as such permits the continuation to completion of works which commenced prior to the date appointed in the Act ie 1st October 1964, therefore the works are exempt development. However, I consider that the above conclusion would also apply at the subject site. Under Section 261A(7) of the Act, the effect of the determination and decision of the PA under EUQY79 was to require an application to be made to the Board for substitute consent in respect of this quarry. No such application was made, and therefore, under Section 177O(3) of the Planning and Development Act, 2000, as amended, and notwithstanding any other provision in the Act, the existing quarry constitutes unauthorised development.

The matter of enforcement falls under the jurisdiction of the planning authority and not with An Bord Pleanála.

While I have no reason based on the information on file to doubt that a quarry existing at this location pre-1963, however by the same token I have no evidence that the continuation of quarrying at this location has been in a manner commensurate with the level of activity which prevailed pre-1963. And in the absence of such information I cannot determine beyond a reasonable doubt that quarry activity has not intensified at this location to such an extent that it is not considered commensurate with the level of activity which prevailed pre-1963 and therefore the requirements of the Habitats Directive apply for post 1997 works.

This matter could be explored further if the Board consider it appropriate. However, based on the information before me I must conclude that it has not been clearly demonstrated that the continuation of quarrying in a manner commensurate with the level of activity which prevailed pre-1963.

Therefore I must conclude based on the information on file that the continuation of quarry at this location is development and is not exempted development.

10.0 Appropriate Assessment

This section of the report considers the likely significant effects of the proposal on Natura 2000 European sites with each of the potential significant effects assessed in respect of each of the European sites considered to be at risk and the significance of same. The assessment is based on the submitted Appropriate Assessment Screening Report & Natura Impact Statement (NIS) submitted with the application.

I have had regard to the submissions of the owner and planning history in relation to the potential impacts on European sites, as part of the Natura 2000 Network of sites.

Introduction

The Quarry at Gleesk has been the subject of assessment under section 261A where Kerry County Council was the competent authority and carried out appropriate assessment screening and two Leave to Apply for Substitute Consent application to ABP where An Bord Pleanála was the competent authority. The quarry which is the subject of the current section 5 before the Board refers to the quarry that was the subject of ABP 306076-19 where the Board Determined in 2021 that a rNIS and rEIA were required.

Documentation submitted with ABP 306076-19 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.

The Project and Its Characteristics

The assessment before the Board refers to a section 5 referral relating to a quarry (Gleesk Quarry) at Dereendrislagh, Sneem, Co. Kerry where the question asked is:

“Whether the continuation of quarrying in a manner commensurate with the level of activity which prevailed pre-1963 is or is not development and is or is not exempted development.”

The European Sites Likely to be Affected (Stage I Screening)

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 to the west of the site.

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 rNIS submitted with ABP306076-19 screened out all European sites at Stage One, 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.”

In carrying out my assessment I have had regard to the nature and scale of the project, the distance from the site to European sites, and any potential pathways which may exist from the development site to a European site, as well as the information on file, including response from the owner to the referral, the planning history and I have also visited the site.

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

Site (site code).	Distance from development site
Qualifying Interests/Species of Conservation Interest (Source: EPA / NPWS)	
Conservation Objectives	

<p>Kenmare River SAC (site code 002158)</p> <p>Large shallow inlets and bays [1160]</p> <p>Reefs [1170]</p> <p>Perennial vegetation of stony banks [1220]</p> <p>Vegetated sea cliffs of the Atlantic and Baltic coasts [1230]</p> <p>Atlantic salt meadows (<i>Glauco-Puccinellietalia maritimae</i>) [1330]</p> <p>Mediterranean salt meadows (<i>Juncetalia maritimi</i>) [1410]</p> <p>Shifting dunes along the shoreline with <i>Ammophila arenaria</i> (white dunes) [2120]</p> <p>Fixed coastal dunes with herbaceous vegetation (grey dunes) [2130]</p> <p>European dry heaths [4030]</p> <p><i>Juniperus communis</i> formations on heaths or calcareous grasslands [5130]</p> <p>Calaminarian grasslands of the <i>Violetalia calaminariae</i> [6130]</p> <p>Submerged or partially submerged sea caves [8330]</p> <p><i>Vertigo angustior</i> (Narrow-mouthed Whorl Snail) [1014]</p> <p><i>Rhinolophus hipposideros</i> (Lesser Horseshoe Bat) [1303]</p> <p><i>Lutra lutra</i> (Otter) [1355]</p> <p><i>Phoca vitulina</i> (Harbour Seal) [1365]</p> <p>Conservation Objectives:</p> <p>To maintain or restore the favourable conservation condition of qualifying interests/species of conservation interest for which the SAC has been selected.</p> <p>This SAC overlaps with Iveragh Peninsula SPA (004154), Beara Peninsula SPA (004155) and Deenish Island and Scariff Island SPA (004175). It also adjoins Old Domestic Building, Dromore Wood SAC (000353), Cleanderry Wood SAC (001043), Cloonee and Inchiquin Loughs, Uragh Wood SAC (001342), Mucksna Wood SAC (001371), Glanmore Bog SAC (001879) and Drongawn Lough SAC (002187).</p> <p>These conservation objectives should be used in conjunction with those for overlapping and adjacent sites as appropriate.</p>	<p>Adjoins site to the south. A portion of the site overlap the SAC.</p>
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<p>Killarney National Park, Macgillicuddy's Reeks and Caragh River Catchment SAC (site code 00365)</p> <p>Oligotrophic waters containing very few minerals of sandy plains [3110]</p> <p>Oligotrophic to Mesotrophic Standing Waters [3130]</p> <p>Floating River Vegetation [3260] - Wet Heath [4010]</p> <p>Dry Heath [4030]</p> <p>Alpine and Sub- Alpine Heaths [4060]</p> <p>Juniper Scrub [5130]</p> <p>Calaminarian Grassland [6130]</p> <p>Molinia Meadows [6410]</p> <p>Blanket Bog (active) [7130]</p> <p>Rhynchosporion Vegetation [7150] - Old Oak Woodlands [91A0]</p> <p>Alluvial Forests [91E0]</p> <p>Yew woodlands [91J0]</p> <p>Annex I /II species</p> <p>Kerry Slug (<i>Geomalacus Maculosus</i>) [1024]</p> <p>Freshwater Pearl Mussel (<i>Magaritefera Magaritefera</i>) [1029]</p> <p>Marsh Fritillary (<i>Euphydryas aurinia</i>) [1065]</p> <p>Sea Lamprey (<i>Petromyzon marinus</i>) [1095]</p> <p>Brook Lamprey (<i>Lampetra planeri</i>) [1096]</p> <p>River Lamprey (<i>Lampetra Fluviatilis</i>) [1099]</p> <p>Twaite shad (<i>Alosa fallax</i>) [1103]</p> <p>Atlantic Salmon (<i>Salmo Salar</i>) [1106]</p> <p>Lesser Horseshoe Bat (<i>Rhynolophus hipposideros</i>) [1303]</p> <p>Otter (<i>Lutra lutra</i>) [1355]</p> <p>Killarney Fern (<i>Trichomanes speciosum</i>) [1421]</p> <p>Slender Naiad (<i>Najas flexilis</i>) [1833]</p> <p>Conservation Objectives:</p> <p>generally relate to the maintenance of a favourable conservation condition of Annex I and Annex II habitats</p>	<p>c. 3km to the northwest</p>
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Potential Effects on Designated Sites

The potential impacts on these two European sites arising from the quarrying activities at this location relate to:

- Potential 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.
- Potential reduction in air quality owing to dust emissions.
- Potential disturbance from quarrying machinery.

The potential for impacts on the Killarney National Park, Macgillicuddy Reeks and Caragh River Catchment SAC can be 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.

Kenmare River SAC (site code 002158):

This SAC traverses two counties (Cork and Kerry). Site Synopsis and Conservation Objectives are attached to the file for reference (accessed via NPWS website on the 21 February 2024). Kenmare River SAC contains an exceptional complement of marine and terrestrial habitats, many of which are listed on Annex I of the E.U. Habitats Directive, as well as four species that are listed on Annex II of this Directive. The presence of populations of rare Red Data Book species, in particular of Kerry Lily, together with the ornithological interest of the area, adds to the conservation significance of the site.

Impacts arising from aquaculture, fishing, dumping of wastes and water pollution are the principal threats to the nature conservation interests of Kenmare River. There are several resorts for water sports and a number of popular beaches within this large coastal site and impacts associated with such recreational activities may also pose a threat. Bait digging is also a potential threat in some areas. Housing developments within the areas of dry heath present another possible threat to the integrity of the site. The seals and bats may be vulnerable to disturbance. Grazing at Derrynane is managed for the conservation of the dune habitats and the rare species they contain.

Due to the nature of the works/development there is a considerable risk of water quality impacts on the Kenmare River SAC from suspended solids. And potentially in the absence of mitigation measures, could result in a deterioration in water quality.

Potential impact on otters and seals 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. In addition arising from the potential for contaminants to enter the SAC during construction and result in negative impact upon the Otter in particular, which have the potential to be negatively impacted by changes to the aquatic environment.

Given the absence of available information and conflicting information on history files and that submitted by the owner detailed surveys would be required to full determine potential impacts habitats or species along the foreshore or within/adjoining the site, either of recent or historical origin.

I note under ABP 306076-19 the Inspector concluded that *“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”*.

Conclusion on need for Appropriate Assessment

Based on the lacunae in information submitted a full analysis of potential impacts of quarrying activities cannot be carried out. Information submitted under ABP 306076-19 failed to acknowledge that the quarry activities extended 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 the Leave to Apply for Substitute Consent File (ABP 306076-19 and LS.08.LS0015. It is unclear whether any parts of the sea cliff were removed/excavated, but it appears that stockpiles of stone have been stored directly adjacent to the HWM, and it would also appear that an earth berm has been placed adjacent to the remaining part of the sea cliff separating the current operations from the foreshore.

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, there a needs to be considered when assessing in-combination effects.

Having regard to the available information, planning history, nature of the development/works on site and conservation objectives for the Kenmare River SAC (site code 002158) I cannot say beyond reasonable scientific doubt 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. Based on the limited 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.

I conclude therefore on the basis of the information provided with the referral and in the absence of a Natura Impact Statement the Board cannot be satisfied that the proposed development individually, or in combination with other plans or projects would not be likely to have a significant effect on the Kenmare River SAC (002158) or any other European site, in view of the site's Conservation Objectives.

11.0 Conclusion & Recommendation

In considering this referral, I have had regard to the Planning and Development Act 2000 (as amended); the Planning and Development Regulations 2001 as amended.

Having examined the issues, I recommend that the Board should decide this referral in accordance with the following draft order.

WHEREAS a question has arisen as to whether the continuation of quarrying in a manner commensurate with the level of activity which prevailed pre-1963, is or is not development or is or is not exempted development.

AND WHEREAS Timothy O’Sullivan requested a declaration on this question from Kerry County Council and the Council did not make a Declaration in this instance.

AND WHEREAS Kerry County Council referred this declaration for determination by An Bord Pleanála, received on the 7th June 2022.

AND WHEREAS An Bord Pleanála, in considering this referral, had regard particularly to –

- (a) sections 2, 3, 4 & 5 of the Planning and Development Act 2000, as amended,
- (b) section 4(4) of the Planning and Development Act 2000 as substituted by section 17(1)(b) of the Environmental (Miscellaneous Provisions) Act, 2011,
- (c) the nature, scale and location of the development and works on lands assessed over a period of time, existing use and planning history of the site,
- (d) the planning history on the lands
- (e) the submissions of the Requester/Owner/Occupier and the Referrer and
- (f) the report of the Inspector:

AND WHEREAS An Bord Pleanála has concluded that the continuation of quarrying in a manner commensurate with the level of activity which prevailed pre-1963

- (a) Does constitute the carrying out of works which comes within the meaning of development in Section 3(1) of the Planning and Development Act, 2000 as amended
- (b) the area of the quarry registered under Section 261 formed part of the overall quarry that was the subject of the planning authority's notice under Section 261A(3)(a).
- (c) the development undertaken at this quarry after the 1st day of February, 1990 would have required an EIA, which was not undertaken.
- (d) the development undertaken at this quarry after the 26th day of February 1997 would have required an AA, which was not undertaken.
- (e) The overall quarry was the subject of an assessment under section 261A of the Planning and Development Act 2000 (as amended), wherein it was determined that substitute consent would be required, but no subsequent application in this regard has been made to An Bord Pleanála. Given that no such application was made, under Section 177O(3), the quarry constituted development and not exempted development.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) (a) of the 2000 Act, hereby decides that the continuation of quarrying in a manner commensurate with the level of activity which prevailed pre-1963 subject to this referral is development and is not exempted development.

I confirm that this report represents my professional planning assessment, judgement and opinion on the matter assigned to me and that no person has influenced or sought to influence, directly or indirectly, the exercise of my professional judgement in an improper or inappropriate way.

Dáire McDevitt
Senior Planning Inspector

29th February 2024