



An  
Bord  
Pleanála

## Inspector's Report

**01.LQ.0001**

**01.LS.0019**

### Development

- (i) Quarry (LQ.0001)
- (ii) Production/Manufacturing Plant  
Area (LS0019)

### Address

Clonmelsh, Garryhundon,  
Powerstown, County Carlow.

### Planning Authority

Carlow County Council.

### Applicants

Paul McCann and Stephen Tenant,  
Grant Thornton, receivers of the  
entire assets and undertakings of  
Dan Morrissey (Irl) Ltd.

### Site Inspection

18 November, 2016.

### Inspector

B. Wyse.

## **Contents**

1.0 Introduction.....	3
2.0 Legislative Framework/Provisions .....	3
3.0 The Development Site, Location and Description .....	10
4.0 The Applications .....	11
5.0 Planning History.....	17
6.0 Submissions in Response to Public Notice [Ref. 01.LQ0001] .....	35
7.0 Policy and Guidance.....	37
8.0 Assessment.....	39
9.0 Recommendation.....	57

## **1.1 Introduction**

- 1.1. These two applications originated in a single application for leave to apply for substitute consent under Section 177C, Planning and Development Act 2000, as amended, lodged to the Board on 6<sup>th</sup> July, 2015. Given the two elements to the development in question, namely the quarry 'proper' (as per the definition of a quarry under Section 2 of the Act) and a production/manufacturing plant area (and which does not fall within the said definition of a quarry) it was considered necessary to split the application into two cases in order to deal with each element under the appropriate legislative provisions (see letter from Board to applicants dated 4<sup>th</sup> February, 2016). Hence, the creation of two files and the assignment of two references, LQ0001 for the quarry element and LS0019 for the production/manufacturing plant area.
- 1.2. While the two elements of the development fall to be dealt with under separate legislative provisions they are, in reality, closely related, being located within the same general site area, sharing some infrastructure and having an intertwined planning history. For this reason, the two cases are examined here in a single report, a copy of which is attached to both files.

## **2.0 Legislative Framework/Provisions**

- 2.1. In the interests of clarity, and because Ref. LQ.0001 is the first case to come before the Board under Section 261A(21)-(24) of the Act, it is considered appropriate to set out the key elements of the legislative provisions under which these cases fall to be examined.
- 2.2. **The Quarry 'Proper'**

### **Section 261A(21)-(24)**

These new subsections are the most recent additions to Section 261A of the Act in relation to quarries. They came into effect on 22<sup>nd</sup> July, 2015.

They were designed to address a small number of quarries where the Section 261A process could not and was not fully applied because the earlier Section 261 process had not been fully resolved in time. The quarries in question had been required to submit applications under Section 261(7) but these applications were either subject to appeal before the Board or to legal proceedings at the time the planning authority was required to complete the assessment under Section 261A. No notices under Section 261A were issued and no review to the Board was possible.

In the cases concerned the Section 261(7) applications were subsequently either refused planning permission or were subject to adverse rulings in the Courts. The subject quarries, therefore, were left with no permission but were also never assessed fully under Section 261A in order to establish if there was a requirement/entitlement to apply for substitute consent.

The scheme of the new subsections is generally as follows:

**Subsection 21(a)** sets down the parameters that trigger the application of the new provisions to a given quarry.

These are:

*(21)(a) Paragraph (c) applies to a quarry where –*

- (i) at the expiry of the time period set out in paragraph (a) of section 261A(2) for the making of a determination under that paragraph either of the following applied:*
  - (I) the decision of a planning authority in relation to an application for permission for that quarry required under section 261(7)(a) was under appeal to the Board under section 37;*
  - (II) legal proceedings in relation to a decision of a planning authority under section 34 or a determination of the Board on an appeal under section*

*37 in relation to an application for permission for that quarry required under section 261(7)(a) had not yet been concluded,*

- (ii) (I) an application under section 177C in respect of that quarry is being considered by the Board on the date on which this subsection comes into operation, and*
- (II) an application under section 177C in respect of that quarry is made after the date on which this subsection comes into operation, or*
- (iii) no notice has been issued in respect of the quarry under subsection (3)(a), (4)(a) or (5)(a) of section 261A prior to the date on which this subsection comes into operation.*

It should be noted that the subject quarry was deemed to fall within these parameters by reason of the following (see ABP letter to the applicants dated 4<sup>th</sup> February, 2016):

- (a) At the expiry of the time period for the planning authority to make its determination under section 261A(2) the decision of the planning authority in relation to P.A. Ref. 10/130, an application for permission for the quarry required under section 261(7)(a) was under appeal to the Board, ABP Ref. PL01.238679.
- (b) The current application for leave to apply for substitute consent under section 177C for the quarry was under consideration by the Board on the date on which subsection (21)(a) came into operation (22 July 2015).
- (c) No notice was issued in respect of the quarry under subsection (3)(a), (4)(a) or (5)(a) of section 261A prior to the date on which subsection (21)(a) came into operation (22 July 2015).

**Subsections 21(c) and 24(a)** essentially require the Board to carry out the same assessment exercise as originally carried out by planning authorities under Sections 261A(2)(a) and (3)(a). The provisions are:

*(21)(c) The Board shall make a determination in relation to a quarry to which this paragraph applies as to whether –*

- (i) development was carried out at that quarry after 1 February 1990 which development would have required, having regard to the Environmental Impact Assessment Directive, an environmental impact assessment or a determination as to whether an environmental impact assessment was required, but that such an assessment or determination was not carried out or made, or*
- (ii) development was carried out at that quarry after 26 February 1997, which development would have required, having regard to the Habitats Directive, an appropriate assessment, but that such an assessment was not carried out.*

*(24)(a) Where the Board makes a determination under paragraph (c) of subsection (21) that subparagraph (i) or (ii) or both, if applicable, of that paragraph apply in relation to the quarry and the Board also decides that –*

- (i) either*
  - (I) the quarry commenced operation before 1 October 1964, or*
  - (II) permission was granted in respect of the quarry under Part III of this Act or Part IV of the Act of 1963, and*
- (ii) if applicable, the requirements in relation to registration under section 261 was fulfilled,*

*the Board shall grant leave to apply for substitute consent in respect of the application under section 177C.*

**Subsection 21(b)** requires the Board to publish notices indicating that the application has been made in relation to the quarry and inviting submissions, within 6 weeks, for consideration by the Board.

It should be noted that notices in this case were published on 3<sup>rd</sup> May, 2016 – see copy on file.

**Subsection 22(a)** refers to the matters that the Board must have regard to in making its determination under subsection (21)(c) and its decision under subsection (24)(a).

These are:

- (i) *any submissions or observations received by the Board in relation to the quarry not later than 6 weeks after the date of the publication of the notice under subsection (21)(b);*
- (ii) *any information submitted to the planning authority in relation to the registration of the quarry under section 261;*
- (iii) *any relevant information on the register;*
- (iv) *any relevant information obtained by the planning authority in an enforcement action relating to the quarry;*
- (v) *any other relevant information.*

### 2.3. **Production/Manufacturing Plant Area**

#### **Sections 177C and 177D**

This is the general provision in the Act that allows applications for leave to apply for substitute consent to the Board. Such applications can relate to any type of development (including quarries in certain circumstances).

**Subsection 177C(2)** sets down the parameters or tests that must be met such that this type of application can be made.

These are:

*177C (1) A person who has carried out a development referred to in subsection (2), or the owner or occupier of the land as appropriate, to whom no notice has been given under section 177B, may apply to the Board for leave to apply for substitute consent in respect of the development.*

*(2) A development in relation to which an applicant may make an application referred to in subsection (1) is a development which has been carried out where an environmental impact assessment, a determination as to whether an environmental impact assessment is required, or an appropriate assessment, was or is required, and in respect of which –*

*(a) the applicant considers that a permission granted for the development by a planning authority or the Board may be in breach of law, invalid or otherwise defective in a material respect, whether pursuant to a final judgement of a court of competent jurisdiction in the State or the Court of Justice of the European Union, or otherwise, by reason of –*

*(i) any matter contained in or omitted from the application for permission including omission of an environmental impact statement or a Natura impact statement or both of these statements, as the case may be, or inadequacy of an environmental impact statement or a Natura impact statement or both of those statements, as the case may be, or*

*(ii) any error of fact or law or a procedural error,*

*Or*

*(b) the applicant is of the opinion that exceptional circumstances exist such that it may be appropriate to permit the regularisation of the development by permitting an application for substitute consent.*



It should be noted that the subject application is predicated on there being exceptional circumstances in the case [subsection 177C(2)(b)].

**Section 177D** provides that the Board shall only grant leave to apply for substitute consent where it is satisfied that the above tests are met.

**Subsection 177D(2)** specifies the matters that the Board shall have regard to in considering whether exceptional circumstances exist. These are:

- (a) *Whether regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive.*
- (b) *Whether the applicant had or could reasonably have had a belief that the development was not unauthorised.*
- (c) *Whether the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or an appropriate assessment and to provide for public participation in such an assessment has been substantially impaired.*
- (d) *The actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development.*
- (e) *The extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated.*
- (f) *Whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development.*
- (g) *Such others matters as the Board considers relevant.*

## 2.4. Board Decision

2.4.1. It should be noted that the final Board decision under both processes is essentially the same – a decision to grant leave to apply for substitute consent or to refuse to grant such leave. If the outcome is the former, **Section 177D(7)** provides as follows:

*(7) Where the Board decides to grant leave to apply for substitute consent, the notice under subsection (6) shall also contain a direction –*

*(a) to apply for substitute consent not later than 12 weeks after the giving of the notice, and*

*(b) to furnish with the application a remedial environmental impact statement or a remedial natura impact statement, or both of those statements as the Board considers appropriate.*

## 3.0 The Development Site, Location and Description

3.1. The development is located at Clonmelsh, Garryhundon, Powerstown, County Carlow. This is a rural area approximately 5 kilometres south of Carlow Town. The site is located a short distance to the south-east of the M9 Motorway. Vehicular access is via the local road network. Junction 6 on the M9 is approximately 1.5 kilometres to the south-west. The Dublin – Waterford rail line runs approximately 0.5 kilometres to the west.

3.2. The area generally is characterised by good agricultural land with scattered housing. The Powerstown Landfill site is located approximately 2.0 kilometres to the south-west of the subject development. There is also some further quarry activity in this area.

3.3. The River Barrow runs north-south at a distance of approximately 1.5 kilometres to the west. A stream (Powerstown/Clonmelsh Stream) runs along the north-west

boundary of the site and enters the River Barrow approximately 2 kilometres to the south-west. There is a licensed discharge from the quarry site to this stream. Water arising from the on site dust suppression system flows in a culvert along the northern boundary of the site and also appears likely to discharge to the stream. A second stream enters the quarry site from the east. Its current course across the quarry lands is unclear but it seems likely that it has been diverted into the quarry water management system with eventual discharge to the Powerstown/Clonmelsh Stream.

- 3.4. As previously indicated the development comprises two elements. The quarry, which is for sand, gravel and limestone, and the production/manufacturing plant area. The quarry comprises two distinct areas, the northern area at Clonmelsh and the southern area at Garryhundon. The former is the main active area and includes the production/manufacturing plant. The latter appears to be largely inactive with widespread revegetation in evidence.
- 3.5. Maps and photographs included in the file pouch illustrate the main elements of the development and relevant features of the site and the immediate vicinity.

## **4.0 The Applications**

### **4.1. Documentation lodged 6<sup>th</sup> July, 2015**

Includes a cover letter and a series of supporting documents/appendices.

Relevant information presented can be summarised as follows.

#### **4.1.1. Introductory Information**

Includes:

- The applicants, Grant Thornton, are the receivers of the entire assets and undertakings of Dan Morrissey (Ireland) Limited ('The Company') (DMIL) appointed on 18<sup>th</sup> June, 2014. The company is the owner and/or occupier of

lands located at Clonmelsh and Garryhundon, Powerstown, County Carlow which extends to over 210 hectares, a significant proportion of which are in use for aggregate extraction, namely sand and gravel and limestone.

- The application is made on the basis that development has been carried out where an EIS is required and in respect of which exceptional circumstances exist to permit the regularisation of the development.
- The application is made without prejudice to the company's position that the quarry is an established pre-1963 use and that the continued quarrying on the lands is exempted development.
- The application is in respect of:
  - a quarry of 81 hectares in extent over two benches to a depth of 25 aOD – see Figure 1 that identifies the Indicative Substitute Consent Boundary hatched red,
  - associated plant located within the 81 hectare quarry site occupying an area of 3.1 hectares. This is identified on a site layout map in Appendix 10 and comprises:
    - (a) weighbridge office and welfare facilities contained in a portacabin (109 square metres),
    - (b) ESB substation (50.6 square metres),
    - (c) bunded fuel tanks and pumphouse (202.2 square metres),
    - (d) workshop (180.3 square metres),
    - (e) demountable asphalt production plant (84.7 square metres),

(f) demountable readymix plant (219 square metres),

(g) concrete batching plant (110 square metres),

(h) precast product shed (1,244 square metres),

(i) septic tank.

#### 4.1.2. **Planning History**

The relevant history is presented generally in chronological order although there is some overlap in terms of timings/decisions. Supporting documentation is included in a series of appendices, 1 to 15.

#### 4.1.3. **Grounds for Leave to Apply for Substitute Consent**

Includes:

- The criteria in relation to EIA, a determination as to whether an EIA is required or an AA was, or is required, in respect of the development is met in that aggregate extraction development was occurring on lands in excess of 5.0 hectares, the relevant threshold for EIA.
- Exceptional circumstances exist in this case by reference to the following:
  - The quarry was registered under Section 261 and DMIL complied with the requirement for an application pursuant to section 261(7). However, planning permission was subsequently refused.
  - The quarry was examined under section 261A with a “no further action” outcome on the basis that a planning application, including an EIS and AA Screening Report, was pending before the Board. As a result, the Planning

Authority did not determine the status of the quarry under section 261A(2) or decide whether or not the quarry fell within sections 261A(3) or (4), thus depriving the quarry of a statutory entitlement to seek substitute consent.

- P.A. Ref. 10/130, ABP Ref. 02.238679 and P.A. Ref. 12/240, ABP Ref. 01.242648 ran concurrently with the Section 261A process. The Company has been granted leave to apply for Judicial Review in relation to the former Board decision.
- The Company has relied on Planning Authority Declaration Ref. SEC 5/13/13, confirming the pre-1964 quarrying use on CW2075F (part), CW6068F and CW236F (see Order Appendix 11).
- The applicants are cognisant of the subsequent Planning Authority Declarations (Refs. SEC 5/13/16 and SEC 5/13/17) where the Planning Authority reiterated its findings in relation to pre-1964 status. The Company has been granted leave for Judicial Review in relation to both of the Board's subsequent referral decisions.
- It is submitted that had the Planning Authority carried out the Section 261A assessment as prescribed it would have determined that the requirements of Section 261A(3) were satisfied and would have directed the making of an application for substitute consent.

**4.2. Applicants Response dated 24<sup>th</sup> February, 2016 to An Bord Pleanála Letter of 4<sup>th</sup> February, 2016.**

This indicates agreement that the application in respect of the quarry 'proper' be dealt with under Section 261A(21) to (24) of the Act.

The submission addresses the production/manufacturing plant area at greater length. It includes:

- It is agreed that the production/manufacturing plant area does not require EIA.
- It is clarified that the production/manufacturing plant area that is the subject of the application for leave to apply for substitute consent is the extant production/manufacturing plant area for which retention planning permission was sought under P.A. Ref. 12/240, ABP Ref. 01.242648, and not the other elements of that application for which permission was sought (namely; the proposed office building; replacement WWTS; new weighbridge; car parking; and storage areas). The area in question, and the facilities that require retention permission/substitute consent, are as illustrated on the site layout plan included in Appendix 10 to the original application submission. The site area is as stated, 3.1 hectares. It is also stated that the subject development does not rely on water management elements outside its site area.
- In relation to Application P.A. Ref. 12/240, ABP Ref. 01.242648, neither the Planning Authority nor the Board decided that a Stage 2 AA was required.
- The report entitled “Appropriate Assessment: Natura Impact Assessment Screening Report, October 2012”, was a Stage 1 AA Screening Report that concluded that a Stage 2 AA was not required.
- A submission from the Department of Arts, Heritage and the Gaeltacht on the application indicates that the department was not of the view that a Stage 2 AA was required.
- The reference in the Board’s second reason for refusal of planning permission under P.A. Ref. 12/240, ABP Ref. 01.242648 to the Report submitted as an NIS was a term that was used to refer to the totality of AA Screening information submitted with that application, at that time, and which included surface water management proposals, including settlement lagoons, located outside the application site and which do not form part of the current application. The extant production/manufacturing plant does not rely on the settlement lagoons, which

were proposed as part of planning application P.A. Ref. 10/130, ABP Ref. 01.238679 and which have not been constructed.

- AA, therefore, is not required in respect of the retention of the production/manufacturing plant area.
- Accordingly, the Board is requested to refuse the leave to apply for substitute consent in respect of the production/manufacturing plant area on the basis that neither EIA (or a determination in relation to EIA) nor AA is required and that an application for retention permission be made to Carlow County Council.
- In the alternative, if the Board does decide that a Stage 2 AA is required then it is submitted that exceptional circumstances exist such as to grant leave to apply for substitute consent.
- By reference to each of the tests provided for under Section 177D(2) of the Act it is submitted that:
  - (a) Allowing an application for substitute consent would not circumvent the purpose and objectives of the Habitats Directive. The Board will be able to conduct a Stage 2 AA.
  - (b) The Company has consistently maintained that the quarry is an established pre-1963 use. This status has been accepted at all material times by the Planning Authority. The Company complied with the request pursuant to Section 261(7) and applied for planning permission in respect of the quarry and in so doing were presented with condition 4(a) of P.A. Ref. 10/130 which excluded certain items then proposed for retention and which required the Company to apply for retention permission for the production/manufacturing plant.
  - (c) The ability to carry out a Stage 2 AA has not been substantially impaired and the public will be afforded the opportunity to participate in same.
  - (d) The Stage 2 AA Screening Report submitted as part of the application for retention of the production/manufacturing plant (and for permission for



new development) concluded that no further assessment was required. Accordingly, a Stage 2 AA is not required.

- (e) The production/manufacturing plant area does not have a significant effect on the environment or adverse effects on the integrity of a European Site.
- (f) The applicant endeavoured via both P.A. Ref. 10/130, ABP Ref. 01.238679 and P.A. Ref. 12/240, ABP Ref. 01.242648 to regularise the status of the production/manufacturing plant area and continues to seek regularisation via this application for leave to apply for substitute consent.
- (g) Regularisation of the production/manufacturing plant area is in the interests of the sustainable development of the immediate and wider area.

## 5.0 Planning History

On the basis of the available documentation the following is the relevant planning history of the subject lands – presented generally in chronological order (earliest to most recent).

### 5.1. P.A. Ref. PL1509 (Documentation attached)

March 1970 permission to Dan Morrissey Limited for the installation of portable plant for washing chippings at Clonmelsh and Milford.

### 5.2. P.A. Ref. PL2981 (Documentation attached)

March 1974 permission to Dan Morrissey Limited for erection of a 60 tonne weighbridge at Clonmelsh and Milford.

### 5.3. P.A. Ref. PL2979 (Documentation attached)

April 1974 permission to Dan Morrissey Limited for the erection of a gate entrance at Garryhundon, Milford.

**5.4. P.A. Ref. PL3842 (Documentation attached)**

July 1976 permission to Dan Morrissey Limited for the extension of plant at Clonmelsh.

**5.5. P.A. Ref. PL92/137 (Documentation attached)**

July 1992 permission to Dan Morrissey Ireland for construction of a mobile asphalt plant at Clonmelsh, Milford.

**5.6. P.A. Ref. QY/25 – Section 261 (Documentation attached)**

**Registration Application – received 27 April 2005.**

**Application documentation included.**

- Owner/occupier: Philip Morrissey.
- Folios on which quarry located: 6068F, 2075F.
- Acquisition of lands for quarry purposes: 2075F – 1968, 6086F – 1964.
- Previous planning permissions: Yes – multiple.
- Did quarry commence operation pre 1 October 1964: Yes – marked on early O.S. Mapping.
- Date quarry operation commenced: 1947.
- Total site area of quarry: 323 hectares.
- Extraction area of quarry: 85 hectares.
- Annual extraction rate (tonnes): 1,000,000.
- Method of extraction: Blasting.
- Ancillary processing/manufacturing: Crushing, screening, washing, concrete, concrete blocks and tarmac.

- Operating hours: Normal plus occasional 7 days/week, 24 hours/day.
- Traffic generated: Average 200 loads per day.
- Details of emissions: No measurements available.
- Site Map indicating lands outlined in red.

### **Planning Report – undated**

Includes:

- The south section of the quarry is in Garryhundon and extraction takes place by blasting and then track machine. There is also screening, crushing and washing. There is a lot of traffic movements from this section of the quarry.
- The northern end of the quarry is situated in Clonmelsh. This section is being extracted by blasting (weekly). There is ancillary processing of concrete, block making and tarmac.
- There is a lot of commercial activity from the site. Access is from a third class road.
- Excavation is being carried out below the water table level at a section of the Garryhundon site which would be of concern to the existing environment and groundwater sources in the vicinity.
- Recommendation for planning permission on basis of manner in which the quarry is being used and because it is greater than 5 hectares.

### **Planning Authority Decision – dated 26 April 2006**

Requirement, pursuant to section 261(7) to apply for planning permission and to submit an EIS in respect of the continued operation of the relevant portions of the lands in respect of which the application was made.

Also included:

- Planning application to be consistent and correspond with the operator's entitlements under the statutory and common law provisions relating to land use intensification and shall therefore be limited to lands the operator is entitled to continue to quarry and to which the provisions of section 261 apply.
- The operator shall be required to apply for planning permission independent of the provisions of section 261 for the additional lands included in the quarry registration application received. Included in the latter are inter alia:
  - (1) Lands that cannot reasonably be anticipated to be a natural and logical extension of the existing development.
  - (2) Lands that involve the quarrying of deposits that are not the same as that which is currently being worked.
  - (3) Lands which would necessitate or constitute an intensification of the development.

**5.7. P.A. Ref. DL7/233, ABP Ref. 01.WW.0371 (File attached)**

June 2009 decision by the Board to amend/add conditions to a licence granted by Carlow County Council, on 25 June 2008, under Section 4, Local Government (Water Pollution) Acts 1977 – 2007, for the discharge of trade effluent from the subject quarry to a discharge channel entering Powerstown Stream at Clonmelsh, Milford, County Carlow.

According to the Inspector's Report the discharge was groundwater and rainwater generated surface water arising at the quarry. The point of discharge was at the northernmost point of the quarry and where the Powerstown Stream runs along the north-western boundary of the quarry lands. The Powerstown Stream joined the River Barrow at a distance of approximately 2 kilometres downstream, and to the south-west, of the quarry.

## 5.8. P.A. Ref. 10/130, ABP Ref. 238679 (File attached)

This is the application lodged in response to the outcome to the Section 261 process (see Section 5.6 above) and which required an application for planning permission pursuant to Section 261(7).

### 5.8.1. Application lodged to Planning Authority – 28 April 2010

#### Application documentation included:

- Application: Dan Morrissey (Ireland) Limited – owner.
- Development Description:

Continued use and development of the quarry (extraction area 123.8 hectares) within an application area of 167.2 hectares. Proposed quarry floor level to be at -75m OD.

Development comprises; extraction of rock using conventional blasting techniques; excavation of sand and gravel; processing of extracted material using mobile crushing, screening and washing plant; production stockpiles; topsoil/overburden storage; settlement ponds; screening berms and landscaping; realignment of section of L3044 local road; closure of sections of L3044 and L3045 local roads; demolition of 3 no. houses; restoration.

- Wastewater Management/Treatment: existing.
- Surface Water Disposal: to watercourse.
- EIS.

### 5.8.2. Further Information lodged to Planning Authority – 21 December 2010

Included:

- Details of layout of water management system, including discharge to stream (Appendix D).
- AA: NIS Screening Report (Appendix G).
- Details of Land Registry Folios (Appendix M).
- Indication that permission was sought for 100 years duration.

#### **5.8.3. Planning Authority Notification of decision to Grant Permission – 13 February 2011**

Conditions included:

2(a) Restriction of permission duration to 50 years.

4(a) Restriction to specified activities and exclusion of use of certain plant, machinery and buildings within the application boundary.

#### **5.8.4. Appeal lodged to Board – 22 March 2011**

This comprised a first party appeal against conditions and a third party appeal against the decision.

#### **5.8.5. Further Information (Section 137 of the Act) Request by the Board – 21 February 2013**

This focussed, in particular, on the pre-1964 status of the quarry and inadequacies in the EIS submitted.

#### 5.8.6. **Submission by Applicants in Response to Section 137 Notice – 19 March 2013**

Included:

- Reductions to the scale of the proposed development as follows:
  - Extraction area reduced to 68.4 hectares.
  - Quarry floor level to -25m OD.
  - Elimination of road closures and realignment.
  
- Submission/documentation in relation to pre-1964 status

#### 5.8.7. **Board Decision – 27 May 2013**

To refuse permission for the following reasons and considerations.

1. *Having regard to:*

- *All documentation on file in relation to the planning status of the site, including information regarding land ownership based on folio maps and other correspondence; documentation including aerial photographs and historic mapping showing the field patterns, townland boundaries, road alignments, the principal geographical features in the area and the extent of the site's physical boundaries; and the documentation submitted in the registration process, including observations, and in the course of the planning application and appeal;*
  
- *an examination of the nature, scale and extent of the activities on site at various stages, current rates of extraction as detailed in the application and the proposed extraction rates of up to 1,000,000 tonnes per annum depending on market demand;*

- *the provisions of the Quarries and Ancillary Activities, Guidelines for Planning Authorities issued by the Department of the Environment Heritage and Local Government in April 2004, and*
- *the provisions of Section 261 of the Planning and Development Act, as amended,*

*it is considered, having undertaken an appropriate enquiry into the matter, and notwithstanding that quarry activity appears to have been occurring on lands prior to the 1st day of October, 1964, at Garryhundon and also at Clonmelsh on a separate landholding, that the quarrying activity registered by Carlow County Council and forming the basis for the current application for the continued use and development of a quarry is of a scale, nature and intensity that could not have been envisaged at the time of coming into operation of the Local Government (Planning and Development) Act, 1963. No planning permission for the extensive quarrying of rock, sand and gravel is in place on these lands and it is therefore considered that the quarry operation in question includes unauthorised development both in terms of the nature, scale and intensity of operations and the footprint of the quarry which includes lands outside of the folios associated with the pre 1st day of October, 1964 development. It is therefore considered that the proposed development which is subject to Environmental Impact Assessment (EIA) should include elements of retention. Pursuant to the European Court judgement (Case C- 215-06, Commission -v-Ireland delivered on 3rd day of July 2008) it was held that the retention permission system, as it applies in Irish law to projects that are required to be subject to Environmental Impact Assessment under the EIA Directives, does not comply with the Directives. Having regard to this ECJ judgement and also to the provisions of section 34(c)(12) of the Planning and Development Act 2010 the Board considers that it is precluded from considering a grant of planning permission in this case.*



2. *Having regard to the large scale of the proposed development to be continued and developed the Board is not satisfied that the Environmental Impact Statement submitted with the planning application, as supplemented at further information stage and in the ensuing response to the Board's notice under section 137 of the Planning and Development Act, 2000, provides adequate information to enable the Board to carry out an Environmental Impact Assessment. The Board has particular concerns regarding the information provided in relation to; impacts on, i) hydrology, in particular the local stream which it is proposed to divert and the diversion of which might impinge upon the amenities of other landowners; ii) groundwater and hydrogeology; iii) amenities arising from noise and dust; and iv) impacts on the historic graveyards at Clonmelsh and Killogan. To grant planning permission in the absence of such information, which is necessary to enable the Board to complete an Environmental Impact Assessment, would be contrary to the proper planning and sustainable development of the area.*

5.8.8. This decision is currently the subject of Judicial Review proceedings before the **High Court (Rec. No. 213/556)**.

5.9. **Section 261A (Documentation attached)**

5.9.1. **Correspondence, including information and questionnaire, issued by Planning Authority to Philip Morrissey – 29 February 2012.**

Included known information in relation to the quarry based upon the Section 261 Registration (P.A. Ref. QY/25).

5.9.2. **Completed Questionnaire submitted by DMIL – 4 April 2012**

Includes:

- Property is a quarry.

- Material extraction – sand, gravel and limestone.
- Drawing/indicating:
  - Dan Morrissey (Ireland) Limited. Land interest (c.171.1 hectares).
  - Existing extracted area (surveyed March 2012).
- Quarry in continuous operation since before 1 October 1964.
- Extraction in the southern area (Garryhundon) commenced in c.1995; lands were purchased by Dan Morrissey from the Conran family in 1963 before the commencement of the 1963 Act and have been in continuous use since. Folio No. 4124 (now 6068F) was registered in Dan Morrissey's name in June 1964.
- Extraction in the northern area (Clonmelsh) commenced in c.1945; lands were purchased from Mrs. Kelly in 1967 and registered on three separate dates thereafter.

### 5.9.3. **Planning Authority Section 261A Report – 23 August 2012**

Includes:

- GPS measurements, on 4 May 2012, indicate an extraction area of 78.70 hectares.
- Reference to 1973 Ortho photography indicating quarry pits present measuring 12.77 hectares (combined total). Note – Drawing No. 3 “1970's aerial photography” attached.

- For the purposes of the review, and noting the lodgement of planning application P.A. Ref. 10/130, with an EIS, it is deemed that the owner/operator has fulfilled the requirements of Section 261.
- By 1995 (aerial photograph attached) the extraction area had increased to 50.53 hectares (combined total).
- Given that the area of extraction exceeded the 5-hectare threshold it is considered that EIA was required.
- In relation to the Habitats Directive it would appear from the 1995 to 2005 ortho photography (aerial photographs attached) that consistent and steady quarrying works were also carried out during that period.
- Given the proximity of the site to the River Barrow and River Nore cSAC, approximately 1.17 kilometres to the west, and the fact that the site is located in immediate proximity to the Clonmelsh Stream which runs down gradient directly to the River Barrow, it is deemed that an AA screening was required to determine the possible significant effects on the Natura 2000 site.
- Taking into consideration the scale and complexity of the subject quarry and the AA screening carried out as part of this process, it is deemed that an AA would have been required (AA Screening Report and Conclusion Statement attached).
- Having examined the EIS and AA Screening submitted with planning application P.A. Ref. 10/130 it is noted that the advice of the DoEHLG (now DAHG) found that the AA Screening submitted was flawed as it did not assess the cumulative effect of other plans and projects.
- It is concluded that AA would have been required.

- Based on 2010 ortho photography (aerial photograph attached) it would appear that works have progressed southwards from the main Clonmelsh site. Comparing the 2005 and 2010 ortho photography gives a clear view of work progressing through the site, both in the lateral scale and in depth.
- Developments on site appear to congregate around the principal Clonmelsh site with stockpiling in the Garryhundon site.
- The extraction area for 2005 works out at 59.92 hectares (combined total). Therefore, there is a 31.91% increase (19.12 hectares) in development between 2005 and 2010.

#### 5.9.4. **Planning Authority Notice ‘No Further Action Required’ – 23 August 2012.**

Includes:

- Determination that EIA, determination in relation to EIA, and AA not required because planning permission P.A. Ref. 10/130, including an EIS and an AA Screening Report, was submitted to the Planning Authority and noting that it was, at that time, before the Board on appeal.

#### 5.10. **P.A. Ref. 12/240, ABP Ref. 01/242648 (File attached)**

5.10.1. This is the application lodged by Dan Morrissey (Ire) Ltd in response to Condition 4(a) of the Planning Authority decision to grant permission under P.A. Ref. 10/130 and the Planning Authority’s subsequent Enforcement Action (P.A. Ref. 06/15). The application was lodged on 22 October 2010 and was in respect of the following:

Retention of:

1. Quarry office (10.29 square metres).
2. Septic tank.
3. ESB Substation (50.6 square metres).
4. Bunded fuel tanks and pumphouse (202.2 square metres).
5. Workshop (180.3 square metres).
6. Mobile canteen facility (27 square metres).
7. Plant control building (66.5 square metres).
8. Two containers (43.5 square metres).
9. Asphalt plant (847 square metres).
10. Concrete block and pre-cast shed (1,244 square metres).
11. Readymix concrete plant (110 square metres).
12. Readymix concrete plant (219 square metres).

Permission for:

1. New office development (387.2 square metres) and parking area.
2. Check-in weighbridge (54.9 square metres).
3. Raw material and finished product storage areas.
4. New effluent treatment system (replacement of septic tank).

Site area: 4.0 hectares

The application documentation included an AA NIS: Screening Report.

#### 5.10.2. **Board Decision - 13 November 2014**

To refuse permission for the following reasons and considerations.

1. *The subject production plant cannot reasonably be viewed as a separate and independent operation to the adjoining quarry with which it has been closely associated over an extended period of time and which quarry does not have the benefit of a grant of planning permission. It is considered inappropriate for the Board to consider a grant of permission in such circumstances as to do so would militate against proper overall consideration of all operations at this location in terms of environmental impact assessment and proper planning and sustainable development. The development proposed to be retained and the proposed development, in this instance, would constitute haphazard and disorderly development and would, therefore, be contrary to the proper planning and sustainable development of the area.*
2. *The surface water management proposal to serve the existing quarry buildings, for which retention is sought, includes the provision of an off-site settlement lagoon. This settlement lagoon forms part of the water management system of the neighbouring quarry which does not have the benefit of a grant of planning permission. It is considered that, in the absence of an appropriate and authorised system of surface water management, the Board is not satisfied that the subject development would not result in an unacceptable risk of pollution of surface or groundwaters. Furthermore, it is considered that the Natura impact statement relating to the subject application does not demonstrate to the satisfaction of the Board that the development proposed to be retained and the proposed development would not adversely*

*affect natural habitats in Annex I of the Habitats directive or of species in Annex II of the Habitats directive located in the nearby designated Natura 2000 site- the River Barrow and River Nore Special Area of Conservation (Site Code 002162). The development proposed to be retained and the proposed development would, therefore, be contrary to the proper planning and sustainable development of the area.*

3. *On the basis of the traffic information submitted, which relates to traffic activity at the subject site at a date in the past when by implication the adjacent quarry was at a peak of activity, the Board considers that it is unable to properly assess the potential traffic impacts associated with the development proposed to be retained and the proposed development given the fundamentally different nature of the proposed use of the subject lands whereby raw materials would be imported by road from other locations for processing at the subject site with subsequent re-export of product. Accordingly, it is considered that the development proposed to be retained and the proposed development would endanger public safety by reason of traffic hazard and obstruction of road users and would, therefore, be contrary to the proper planning and sustainable development of the area.*

**5.11. P.A. Ref. 11/301, ABP Ref. 01.240883 (File attached)**

20 November 2013 permission to Dan Morrissey (Ireland) Limited for the retention/development of a biofuel plant at Clonmelsh.

This development is located on the immediately adjacent site to the east and within the applicants landholding. The plant is no longer operational.

**5.12. P.A. Ref. SEC 5/13/13**

Planning Authority Declaration, 1 August 2013, indicating that the quarry and quarrying use of the lands is exempted development.

See Appendix II to subject application documentation (Section 4.1.2 above).

**5.13. P.A. Ref. SEC 5/13/16, ABP Ref. RL3149 (File attached)**

Referrer - Garryhundon Residents Association

**An Bord Pleanála Decision**, 20 January 2015, in relation to the following (reconfigured) question:

*Whether in the townland of Clonmelsh, Powerstown, County Carlow the quarrying as carried out within Land Registry folio CW2075F in the townland of Clonmelsh, Powerstown, County Carlow is or is not development or is or is not exempted development.*

**AND WHEREAS** *An Bord Pleanála has concluded that -*

- (a) *There is insufficient information before the Board to make a determination as to whether or not quarrying activity at Land Registry folio CW6086F was commenced after the appointed date (that is, the 1st day of October, 1964).*
- (b) *There was not a reasonable anticipation of continuing to quarry sand and gravel only within the lands comprising Land Registry folio CW2075F, in Clonmelsh, to completion.*
- (c) *There has been material intensification of quarrying within Land Registry folio CW2075F, in Clonmelsh, by the development of rock quarrying, and the use of blasting and the increase in the rate of blasting since the appointed date.*
- (d) *Pre 1964 establishment of quarrying activity which was carried on within the holding covered by Land Registry folio CW6086F, in Garryhundon, did not*



*permit the extension of the quarrying into Land Registry folio CW2075F at Clonmelsh or Garryhundon which were subsequent acquisitions:*

**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 said development of quarrying in the townland of Clonmelsh, Powerstown, County Carlow as carried out within Land Registry folio CW2075F is development and is not exempted development.*

**5.14. P.A. Ref. SEC 5/13/17, ABP Ref. RL3148 (File attached)**

Referrer - Garryhundon Residents Association

**An Bord Pleanála Decision**, 20 January 2015, in relation to the following (reconfigured) question:

*Whether the extension of quarrying from Land Registry folio CW6068F to Land Registry folio CW2075F in the townland of Garryhundon, Powerstown, County Carlow is or is not development or is or is not exempted development.*

**AND WHEREAS** *An Bord Pleanála has concluded that -*

- (a) *The quarrying use of the lands comprising Land Registry folio CW6086F commenced before the appointed date (that is, the 1st day of October, 1964).*
- (b) *There was a reasonable anticipation of continuing to quarry sand and gravel only within the lands comprising Land Registry folio CW6086F to completion.*
- (c) *There is insufficient information before the Board to make a determination as to whether quarrying activity at Land Registry folio CW6086F was abandoned after the appointed date.*
- (d) *There is insufficient information before the Board to make a determination as to whether there has been material intensification of quarrying within Land*

*Registry folio CW6086F by the development of rock quarrying, and the use of blasting since the appointed date.*

- (e) *Pre 1964 establishment of quarrying activity which was carried on within the holding covered by Land Registry folio CW6086F did not permit the extension of the quarrying into Land Registry folio CW2075F which was a subsequent acquisition.*

**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 said extension of quarrying from Land Registry folio CW6086F to Land Registry folio CW2075F in the townland of Garryhundon, Powerstown, County Carlow is development and is not exempted development.*

**Note:** Both referral decisions (**ABP Ref. RL3149 and RL3148**) are currently the subject of Judicial Review proceedings before the High Court (**Ref. No. 2015/147 JR**).

Note: Both of the above referral files include a copy of an aerial photograph, entitled “1973 Aerial Photo” and which appears to be the same photograph as that referred to in the Planning Authority Section 261A Report and entitled “1970’s aerial photography” (see Section 5.9.3 above).

**5.15. P.A. Ref. 06/15 – Enforcement File (documentation attached)**

Documentation available includes Warning letters and Enforcement Notices issued over the period 2006 to 2012. The most recent Enforcement Notices, issued on 11 October 2011, are currently subject to legal proceedings..

## **6.0 Submissions in Response to Public Notice pursuant to Section 261A(21)(b) – re. the quarry 'proper', Ref. 01.LQ0001**

### **6.1. Philip Morrissey, Clonmelsh House, Milford, County Carlow.**

Includes:

- I am the owner of the subject quarry, folios CW2075F and CW6086F, being the main body of approximately 250 acres of my personally owned limestone quarry since 1967.
- I was a 33% shareholder in Dan Morrissey Ireland Limited (DMIL) and a 21% shareholder in Dan Morrissey Limited (DML).
- There is a lease between me and DMIL from 1985 and a similar lease from 1970 to 1985 for DML. Copy of 1985 lease enclosed.
- You will note that the lease was purely for sand and gravel removal only.
- The blasting and removal of limestone rock I personally executed down through the years.
- I never gave DMIL/DML, now in receivership, authority to blast or remove limestone from my quarry in these leases. Reference Clause 3e of the lease.
- The subject application as lodged did not have my consent as owner of the quarry or was it ever requested.
- Please defer any decision on the application until consent of the landowner over the above quoted folios is approved and provided in writing.

### **6.2. Planning Authority**

Includes:

- The Planning Authority acknowledges the decision of the Board to proceed with the application for leave to apply for substitute consent for the quarry 'proper'

element of the development and will provide submissions/observations as required.

### 6.3. Garryhundon Residents Association (GRA)

Includes:

- The Board should not grant leave to apply for substitute consent in this case.
- Development was carried out at the quarry after 1 February 1990 which development would have required EIA but such assessment was not carried out.
- Development was carried out at the quarry after 26 February 1997 which would have required AA but such assessment was not carried out.
- The subject development described as a quarry of 81 hectares where stone is extracted by blasting did not commence operation before 1 October 1964. The small area of sand and gravel quarry that existed near the subject site was quarried out several decades ago.
- Permission was not granted in respect of the quarry under Part III of the Act or Part IV of the Act of 1963.
- The requirements in relation to registration under Section 261 of the Act were not fulfilled.
- The 35 homes in the immediate Clonmelsh, Garryhundon and Powerstown area have followed the letter of the law for many years and at great expense in seeking enforcement of proper planning and development in their vicinity.
- Many more homes are impacted by unscheduled road closures during blasting.
- Losses extends to noise from explosives and blasting, fumes from asphalt plants, and constant airborne dust.

## 6.4. Peter Sweetman and Associates

Includes:

- Reference to denial of access to the file and to the Aarhus Convention in relation to public participation.
- The Board must prove that there are exceptional circumstances to allow an application for substitute consent.

## 7.0 Policy and Guidance

### 7.1. Development Plan

#### 7.1.1. Carlow County Development Plan 2015-2021

This is the current county development plan.

Section 9.1.11 – Geological Heritage Sites, includes Morrissey’s Quarry, Clonmelsh (a large working quarry with extensive overburden of glacial till comprising Carboniferous Limestone). Some of these sites may in future be proposed by GSI/NPWS as pNHAs.

Landscape Character Assessment (App. 6) - Site located within Central Lowlands. Deemed to be moderately sensitive to development.

Site not affected (within compass) of any listed views/prospects/scenic routes.

### 7.2. Natural Heritage Designations

#### 7.2.1. European Sites

## **River Barrow and River Nore SAC (Site Code: 002162)**

Located approximately 1.0 kilometre to the south-west at its nearest point (straight line distance).

Note: The Powerstown/Clonmelsh Stream, running along the north-west boundary of the quarry lands, appears to enter the SAC (and then the River Barrow) approximately 1.5 kilometres to the south-west.

Map/Conservation Objectives/Site Synopsis/Data Sheet attached.

### **7.3. Records of Monuments and Places**

Indicates a number of potential sites within and in vicinity of the quarry area.

### **7.4. Guidance**

“Section 261A of the Planning and Development Act, 2000 and Related Provisions – Guidelines for Planning Authorities”, DECLG, January 2012.

“Section 261A of the Planning and Development Act, 2000 and Related Provisions – Supplementary Guidelines for Planning Authorities”, DECLG, July 2012.

Circular Letter PL4/15

Re. EU (EIA and Habitats) (No. 2) Regulations 2015, S.I. No. 320 of 2015.

## **8.0 Assessment**

### **8.1. Introduction**

8.1.1. As indicated in Section 1.0 above there are two distinct elements to the development that is before the Board in these applications, namely the 'quarry proper' (ABP Ref. LQ0001) and the production/manufacturing plant area (ABP Ref. LS0019). This assessment addresses each in turn in accordance with the appropriate legislative provisions.

### **8.2. The 'Quarry Proper'**

8.2.1. This element of the development falls to be considered under Section 261A(21)-(24) and the relevant provisions are as summarised at Section 2.2 above.

8.2.2. As indicated in the application for leave to apply for substitute consent the quarry area in respect of which leave is sought is 81 hectares as identified on Figure 1 attached to the application letter [Separate copy in file pouch for convenience]. It will be noted that this includes the production/manufacturing plant area of some 3.1 hectares at the northern extremity of the quarry [roughly outlined on copy map in file pouch].

8.2.3. It will also be noted that the subject substitute consent area comprises two distinct parts, to the north of Clonmelsh and to the south at Garryhundon, within a larger landholding under the control of the applicants. This holding is stated in the letter of application to extend to over 201 hectares while various drawings attached to the application, and associated with the previous Section 261 Registration and previous planning applications, indicate areas of approximately 323 hectares and 172.2 hectares.

8.2.4. By reference to the most recent aerial photography, and on foot of my site inspection it appears that, with the exception of one field at the Garryhundon part of the quarry,

quarrying to date has been contained within the areas in respect of which leave to apply for substitute consent is sought.

### **Section 261A(21)(c) Determination**

- 8.2.5. The first step for the Board is to make the determination required under section 261A(21)(c), namely, whether development has been carried out at the quarry which should have been subject to EIA, or a determination in relation to EIA, or AA but where no such assessments were carried out or made.
- 8.2.6. In addressing these matters, and following the advice contained in “Section 261A of the Planning and Development Act, 2000 and Related Provisions – Guidelines for Planning Authorities”, DECLG, January 2012 (the DECLG Guidelines) the first or preliminary issue to consider is whether or not any post 1 February 1990 development (development potentially subject to the EIA Directive) or post 26 February 1997 development (development potentially subject to the Habitats Directive) could be considered to have been authorised by an earlier planning permission or on foot of pre-1964 use rights (‘pre-1964 authorisation’, as per the DECLG Guidelines). If either of these was found to be the case, then no EIA or AA issues would arise at the quarry and there would be no requirement for substitute consent.
- 8.2.7. It is clear from the planning history of the subject quarry that none of the earlier planning permissions were of such a nature or scope to have authorised quarrying as such – they were all for just relatively minor works associated with the quarry (see sections 5.1 – 5.5 above).

### **Pre-1964 Status**

- 8.2.8. This leaves the pre-1964 issue. This matter has clearly been the subject of recent and detailed consideration by the Board, most recently in relation to the Section 5



Referral cases P.A. Ref. SEC 5/13/16, ABP Ref. RL3149 and P.A. Ref. SEC 5/13/17, ABP Ref. RL3148, decisions issued on 20 January 2015, and previously in relation to planning application/appeal P.A. Ref. 10/130, ABP Ref. 238679, decision issued 27 May 2013.

8.2.9. By reference to the Section 5 Referral cases, in particular, I include in the file pouch a sketch map illustrating the relevant land folios superimposed on the substitute consent areas the subject of the current application and the associated overall landholding (172.2 hectares).

8.2.10. In effect, and for the purpose of the subject application, the Board's decisions in these referral cases can be summarised as follows:

**P.A. Ref. SEC 5/13/16, ABP Ref. RL3149**

Notwithstanding the possibility that quarrying commenced pre-1964 there is no 'pre-64 authorisation' for the quarrying of either sand and gravel or rock that subsequently took place within Land Registry Folio CW2075F (both parts).

**P.A. Ref. SEC 5/13/17, ABP Ref. RL3148**

There may be 'pre-64 authorisation' for quarrying of sand and gravel and rock within Land Registry Folio CW6086F. Any such 'authorisation' did not permit the extension of quarrying into Land Registry Folio CW2075F which was a subsequent acquisition.

It will be noted that Land Registry Folio CW6086F lies entirely outside of the area for which leave to apply for substitute consent is sought in the current application.

8.2.11. The Board's decision under **P.A. Ref. 10/130, ABP Ref. 238679** is consistent with these referral decisions (Reference Reason for Refusal No. 1- See Section 5.8.7 above).

- 8.2.12. As previously advised both the referral decisions and this appeal decision are currently the subject of challenge before the High Court.
- 8.2.13. The applicants, in continuing to quarry the lands, have placed reliance on the earlier August 2013, Declaration issued by the Planning Authority under P.A. Ref. SEC 15/13/13 and which was not referred to the Board for review. By reference to Appendix II to the application documentation this Declaration of exempted development, effectively based on a conclusion that there was a 'pre-64 authorisation', extended to all of the lands indicated on the sketch map within Land Registry Folio CW2075F, CW6086F and CW236F. It will be noted that this includes almost all of the area for which leave to apply for substitute consent is sought, the exception being a small area that extends south of the northern part of Land Registry Folio CW2075F. It will also be noted that, while Folio CW236F was not the subject of either of the referrals before the Board, relevant information in relation to the folio was and was considered (see, for example, Section 11.1.23 Inspector's Report ABP Ref. RL3149).
- 8.2.14. The applicants have made it clear that the current application for leave to apply for substitute consent is made without prejudice to their position that the quarry does have the benefit of 'pre-1964 authorisation'.
- 8.2.15. As no new substantive information in relation to the pre-1964 issue has been placed before the Board in the subject case, either by the applicants (see Section 4.0 above) or in submissions received on foot of the public notice (see Section 6.0 above), and noting that the Planning Authority Declaration P.A. Ref. SEC 15/13/13, and all supporting information, was before the Board in its consideration of the subsequent Section 5 Referral cases [P.A. Ref. SEC 5/13/16, ABP Ref. RL3149 and P.A. Ref. SEC 5/13/17, ABP Ref. RL3148] there is no basis, in my view, for the Board to reach a different decision to those reached in those referrals. In short, the Board's decision in the subject case should remain that there is no 'pre-64

authorisation' for the quarrying that has been carried out on the lands the subject of this application for leave to apply for substitute consent.

### **Environmental Impact Assessment (EIA)**

8.2.16. The next step is to consider whether or not the quarrying that has been carried out since 1 February 1990 should have been subject to EIA or a determination in relation to EIA.

8.2.17. As indicated from the extensive planning history documentation associated with this quarry site (Section 5.0 above) evidence of the development and expansion of the quarry over time is available from a number of sources. The most definitive and easily accessible evidence comes from aerial photography and maps on the Planning Authority's 261A file and the consideration given to this material in the Planning Authority's Section 261A Report (see Section 5.9.3 above). There is also some more recent aerial photography available. For convenience I include in the file pouch copies of the following:

- Aerial Photograph 1973 (OSI)
- Aerial Photograph 1995 (OSI)
- Aerial Photograph 2000 (OSI)
- Aerial Photograph 2010 (OSI)
- Aerial Photograph post 2010 (Bing)
- Drawing 1 – Site Boundary. Existing extracted area – survey March 2012.

8.2.18. It is very clear from this information that there has been a substantial expansion of quarrying activity at the site since 1973, in total from approximately 13 hectares

extraction area to something of the order of 80 hectares post 2010 (and to the present day). While it is not possible to pinpoint exactly the extent of development that has occurred since 1990 I would essentially adopt the measurements and sequencing as outlined in the Planning Authority's Section 261A Report.

8.2.19. The evidence is that by 1995 the extraction area was at approximately 50 hectares, by 2005 at approximately 60 hectares and by 2010 approaching 80 hectares. The additional, lateral extraction area, therefore, post 1990 has probably been of the order of 30 hectares and perhaps more than this. It is also evident from the aerial photography that extraction over the period has not just been lateral but has also involved further vertical extraction across various parts of the quarry void.

8.2.20. By reference to EC (EIA) Regulations 1989, and subsequent relevant legislation, the minimum threshold for triggering a mandatory EIA for quarry developments has been 5 hectares [Article 24, First Schedule, Part II of the above Regulations – Class 2(d) Extraction of stone, gravel, sand or clay, where the area involved would be greater than 5 hectares].

8.2.21. I am satisfied, therefore, that the extent of quarrying that has been carried out at the subject site since 1 February 1990 should have been subject to EIA.

### **Appropriate Assessment (AA)**

8.2.22. The next step is to consider whether or not the quarrying that has been carried out since 26 February 1997 should have been subject to AA.

8.2.23. It is clear from the evidence considered above in relation to EIA that substantial development has taken place at the quarry since February 1997. Additional lateral expansion of the extraction area of perhaps 20-30 hectares with further vertical extraction across various parts of the quarry void of almost 80 hectares.

8.2.24. Information submitted for the Section 261 Registration in 2005 (Section 5.6 above) indicated activities included sand, gravel and rock (limestone) extraction, including blasting, and ancillary crushing, washing and screening and block/tarmac manufacturing. The annual extraction rate was stated as 1 ml tonnes and traffic generated was estimated at 200 loads per day. No measurements of emissions were stated to be available.

8.2.25. The high levels of activity at the site was noted in the Planning Authority Planning Report. It was also noted that excavation was occurring below water table level at the Garryhundon end of the site.

8.2.26. The outcome of the Section 261 Registration process was a requirement for a planning application under Section 261(7), including an EIS, in respect of the continued operation of the quarry and this requirement was duly complied with in the lodgement of planning application P.A. Ref. 10/130, ABP Ref. 238679 in April 2010 (see Section 5.8 above). Further information lodged to the Planning Authority in December 2010 included an AA: NIS Screening Report.

8.2.27. While it is noted that this planning application was for the continued operation and substantial expansion of the quarry the AA: NIS Screening Report included significant information on the then existing operation of the quarry, including:

- The quarry had a discharge licence (Ref. No. DL7/233) from Carlow County Council that required regular water quality monitoring of the discharge and the Clonmelsh Stream.
- The site has a through-going surface water channel flowing through it which has been diverted on a number of occasions in the past to allow quarry workings to progress. The existing alignment leads to streambed loss of approximately 80% of flow in to the quarry.

- Influent water, comprising groundwater and also surface water lost from the stream traversing the site, appears to originate mainly from the southern and western margins of the quarry and is collected at the central sump. From here, it is pumped to a surface water discharge point in the north-western part of the quarry (to the Clonmelsh/Powerstown Stream).
- Incident rainfall water collects on the quarry floor and drains to the sump at the lowest point in the quarry. From here it is discharged with influent groundwater to the discharge point.
- Process water is used in crushers to assist crushing and prevent dust generation. Process water for crushing, screening and washing is sourced at the quarry floor in sumps. Process water for concrete products is sourced from a diverted spur of the discharge outlet.
- General water supply for the quarry offices and canteen facilities is from an on-site well located near the north-west part of the site.
- An existing septic tank and percolation area treats foul water from the site.

8.2.28. The report correctly identifies the River Barrow and River Nore SAC (Site Code: 002162) as the nearest European site and the site most likely to be affected by the quarry operations. As noted in the report (and at Section 7.2.1 of this report) the Powerstown/Clonmelsh Stream, that receives discharge waters from the quarry, enters the SAC approximately 1.3 – 1.5 kilometres to the south-west. Copies of the Conservation Objectives, Site Synopsis and Standard Data Form for this site are included in the file pouch.

8.2.29. By reference to the Standard Data Form legal protection for this site appears to date from February 2002 when it was first proposed as a Site of Community Importance

(SCI). In effect, therefore, it has been a European Site for most of the period since February 1997 and over which the quarry operation expanded substantially.

8.2.30. The Conservation Objectives/qualifying interests for the site include an extensive number of habitats and species, many of which are water dependent. The AA: NIS Screening Report correctly focuses on the potential impacts on water quality and quantity.

8.2.31. The Report also considers mitigation measures, both existing and proposed, particularly in relation to the Water Management System. These include:

- A proposed settlement pond for discharge waters, taking account of the requirements of the discharge licence, and including monitoring equipment.
- A revised, permanent, lined stream alignment to be constructed to restore flows within the Clonmelsh Stream (appears to be stream entering the quarry from the east), improve water quality within the stream and reduce discharge volumes from the quarry.

8.2.32. In my view the scope and nature of the 'Screening' Report is more in the nature of Stage 2 appropriate assessment report or NIS. This is evident in the language used in the report, which consistently refers to "adverse impacts/effects" rather than to "likely significant effects" and in the detailed consideration given to and the reliance placed on mitigation measures. Screening, as such, should be carried out without reference to mitigation measures [Ref. "Appropriate Assessment of Plans and Projects in Ireland – Guidance for Planning Authorities", DEHLG (Revision) 2010].

8.2.33. Further, while the Board did not pursue this matter in its decision P.A. Ref. 10/130, ABP Ref. 238679, I note the view expressed by the Inspector in the case that AA was required and the reservations expressed in the submission from the DEHLG (NPWS). A similar conclusion was drawn in the Planning Authority's Section 261A

Report in relation to quarrying already carried out (See Section 5.9.3 above). It should also be noted that no further AA screening report has been submitted with the subject application.

8.2.34. Given the evident scale and complexity of quarrying activities carried out at the subject site since February 1997, including, in particular, significant water management issues involving stream diversions and discharges to the nearby SAC, and noting that the discharge licence dates only from 2008, I am of the opinion that a screening exercise alone could not have ruled out the likelihood of significant effects on the SAC and that the bulk of the development carried out since that date should have been subject to AA.

#### **Section 261A(24)(a) Decision**

8.2.35. The final step is for the Board to make the decision under Section 261A(24)(a), namely; either the quarry commenced operation before 1 October 1964 or permission was granted in respect of the quarry under Part III of the Act of 2000 or Part IV of the Act of 1963; and, if applicable, the requirements in relation to registration under Section 261 were fulfilled.

8.2.36. In relation to the question of commencement before October 1964 it should be noted that this is a much lesser test than the pre-1964 status test addressed earlier. The requirement here is merely that quarrying commenced prior to October 1964 and not that it conferred 'pre-1964 authorisation' (Ref. "Section 261A of the Planning and Development Act, 2000 and Related Provisions – Guidelines for Planning Authorities", DECLG, January 2012).

8.2.37. It is evident from the assessment already carried out at parags. 8.2.8 to 8.2.15 above that it can be concluded in this case that quarrying did commence prior to 1 October 1964. It is also likely, again by reference to the Guidelines, that some of the



permissions granted on the lands between 1970 and 1992, would satisfy the permission requirement.

8.2.38. The requirements in relation to Section 261 were also clearly fulfilled in this case. The quarry was registered and a planning application was lodged as required under Section 261(7) (P.A. Ref. 10/130, ABP Ref. 238679, refers).

## **Conclusion**

8.2.39. As both the determination under Section 261A(21)(c), in relation to EIA and AA, and the decision under Section 261A(24)(a), in relation to pre-1964 commencement/planning permission and Section 261 registration, are in the affirmative, Section 261A(24)(a) requires that the Board shall grant leave to apply for substitute consent for the application under Section 177C.

8.2.40. In this instance the application refers to the 'quarry proper' as defined (see Section 1.0 above). As indicated the application area is identified on Figure 1 attached to the letter of application as 'Indicative Substitute Consent Boundary' hatched red (Copy in file pouch). While this indicative site area of approximately 81 hectares appears reasonable in relation to the extent of quarrying carried out to date, it should be noted that the application for substitute consent, being in effect a retrospective/retention application, can only relate to actual quarried areas at the time of the application. Any consent granted will not confer consent for further quarrying on unquarried lands that might be included within the red line boundary.

8.2.41. The application for substitute consent should be accompanied by both an rEIS and an rNIS.

8.2.42. Finally, the Board will have noted the submission of Philip Morrissey – see Section 6.1 above. Clearly the matter of legal entitlement to make the application is in dispute. Having regard to the information provided in the application in relation to the

applicants in this case I am satisfied that there is no impediment to the Board proceeding to deal with the application.

### **8.3. Production/Manufacturing Plant Area**

8.3.1. This element of the development falls to be considered under Sections 177C and 177D. The relevant provisions are summarised at Section 2.3 above.

8.3.2. As indicated in the application for leave to apply for substitute consent the production/manufacturing plant area in respect of which leave is sought comprises an area of 3.1 hectares contained within the overall quarry area and as identified on Drawing D03 attached as Appendix 10 to the application documentation (separate copy in file pouch for convenience). The area is located at the extreme northern end of the quarry holding, in Clonmelsh, and includes the following:

- (a) Weighbridge office and welfare facilities contained in a portacabin (109 square metres).
- (b) ESB Substation (50.6 square metres).
- (c) Bunded fuel tanks and pumphouse (202.2 square metres).
- (d) Workshop (180.3 square metres).
- (e) Demountable asphalt production plant (84.7 square metres).
- (f) Demountable readymix plant (219 square metres).
- (g) Concrete batching plant (110 square metres).
- (h) Precast product shed (1,244 square metres).
- (i) Septic tank.

- 8.3.3. It will be noted that Drawing D03 also indicates an existing settlement pond within the red line boundary of the 3.1 hectare that appears to be associated with the quarry 'proper'.
- 8.3.4. It is further stated in the applicants response letter to the Board, dated 24 February 2016 (see Section 4.2 above), that the production/manufacturing plant area does not rely on water management elements outside of its site area.

### **Section 177C(2) – Qualifying Development**

- 8.3.5. The first step for the Board is to decide under Section 177C(2) whether or not the development is one which should have been subject to EIA, or a determination in relation to EIA or AA but where no such assessments were carried out or made.

### **Environmental Impact Assessment (EIA)**

- 8.3.6. As alluded to at Section 4.2 above the question of EIA in relation to the production/manufacturing plant area was referred to in the Board's letter to the Applicants, dated 4 February 2016. It was indicated that as this element of the development is not a class of development for the purposes of EIA no EIA requirements can be deemed to have arisen. The applicants have concurred with this view. I can confirm that the development does not fall within any of the Classes in Schedule 5, Planning and Development Regulations, 2001 as amended, or in any relevant preceding regulations, or in any of the Annexes to the EIA Directives. The development, therefore, was not one that should have been subject to EIA or a determination in relation to EIA.

### **Appropriate Assessment (AA)**

- 8.3.7. As indicated at Section 4.2 above it is the applicants' contention, in the first instance, that AA was not required for the production/manufacturing plant area. In this

reference is made, in particular, to P.A. Ref. 12/240, ABP Ref. 01.242648 and the associated “Appropriate Assessment: Natura Impact Assessment Screening Report, October 2012” that concluded that a Stage 2 AA was not required.

8.3.8. In relation to P.A. Ref. 12/240, ABP Ref. 01.242648 it will be noted that this application, in addition to retention element, also included proposed development on a site area of 4.0 hectares – see Section 5.10 above. This latter development was never carried out. The applicants also indicate (Section 4.2 above) that that development relied on surface water management proposals, including settlement lagoons, proposed as part of P.A. Ref. 10/130, ABP Ref. 01.238679 and which have not been constructed.

8.3.9. By reference to the “Appropriate Assessment: Natura Impact Assessment Revised Screening Report, March 2013”, submitted as further information to the Planning Authority under P.A. Ref. 12/240, ABP Ref. 01.242648, I note the following:

- While it is acknowledged that the title of the report indicates that it is a screening report and that its stated purpose is to provide a ‘screening statement’ the report repeatedly refers to “adverse effects” and “integrity of Natura sites”, including within the concluding statements. The latter terminology is appropriate to a Stage 2 AA report or NIS and not to a screening assessment.
- The report does not provide a clear description of the then existing water management arrangements on the site. It appears that surface waters and other waters emanating from the development are likely to have been routed via the water management system associated with the adjacent quarry, ultimately discharging to the Powerstown/Clonmelsh Stream. Notwithstanding references to the discharge licence (P.A. Ref. No. DL7/233) there is no express description of relevant elements of the water management system, including for example, any then existing settlement lagoons.

- 8.3.10. The report correctly identifies the River Barrow and River Nore SAC (Site Code: 002162) as the nearest European site and the site most likely to be affected by the subject development. Details in relation to this site were considered at parags. 8.2.28 to 8.2.30 above and copies of relevant documentation, including Conservation Objectives, are included in the file pouch.
- 8.3.11. I note that the documentation included in the current application for leave to apply for substitute consent does not provide any substantial additional information on the previous or current water management arrangements for the production/manufacturing plant area save to state that it does not rely on water management elements outside of its site area. Specifically, how water is managed entirely within the site area is not described. The status of the settlement pond indicated within the site area, in terms of its role in relation to the production/manufacturing area, is unclear as is the nature of the connection, if any, to the quarry drain and discharge to the Powerstown/Clonmelsh Stream. Again, no further AA screening report has been submitted.
- 8.3.12. Given the level of uncertainty in relation to water management arrangements at the production/manufacturing plant area, and its close association with the adjacent quarry, and the conclusion reached that that development should have been subject to AA, I am also of the opinion that a screening exercise alone in relation to the production/manufacturing plant area could not have ruled out the likelihood of significant effects on the SAC and that this development also should have been subject to AA.

### **Exceptional Circumstances**

- 8.3.13. The final step is for the Board to consider if exceptional circumstances exist. The matters that the Board must have regard to are set out under Section 177D(2)(a)-(g) – see Section 2.3 above. Taking each of these in turn I would comment as follows:

- (a) **Whether the regularisation of the development concerned would circumvent the purpose and objectives of the EIA Directive or the Habitats Directive.**

As the development is not a class of development for the purposes of EIA no issues in terms of circumventing this Directive can arise.

In relation to the Habitats Directive it appears to me that there may have been an element of confusion as to the requirement for AA in this case. I also agree with the applicants that, on receipt of an application for substitute consent with appropriate documentation, the Board will be in a position to conduct an AA.

- (b) **Whether the applicant had or could reasonably have had a belief that the development was not unauthorised.**

Given the close association of the production/manufacturing plant area with the adjacent quarry and the lengthy planning history of the overall site, and notwithstanding past and ongoing planning enforcement action, I am satisfied that the applicants could reasonably have had a belief that at least a substantial part of the development was not unauthorised.

- (c) **Whether the ability to carry out an assessment of environmental impacts of the development for the purposes of EIA or an AA and to provide for public participation in such an assessment has been substantially impaired.**

For reasons referred to above the matter of EIA does not arise. I am satisfied that ability to carry out an AA, and to ensure public participation, has not been substantially impaired.

- (d) **The actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from carrying out or continuation of the development.**

For reasons referred to above the matter of EIA does not arise.

I am satisfied that the information available, and which suggests that appropriate mitigation measures can be applied, does not indicate actual/likely adverse effects on the integrity of a European site.

- (e) **The extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated.**

For reasons referred to above the matter of EIA does not arise.

I am satisfied from the information available that remediation to avoid or remedy adverse effects on the integrity of a European site is unlikely to be necessary.

- (f) **Whether the applicant has complied with previous planning permissions granted or has previously carried out an authorised development.**

There is no substantive evidence to suggest that the applicant has not complied with previous planning permissions. The question of unauthorised development is clearly a matter that is still contested.

- (g) **Such other matters as the Board considers relevant.**

Nothing specifically occurs under this heading.

8.3.14. It is noted that the legislation does not provide any guidance as to the weight to be attributed to each of the matters considered above or whether a positive outcome

must be recorded in relation to all or just some of them in order for the Board to conclude that exceptional circumstances exist. I conclude, therefore, that the Board must come to an overall judgement having regard to all of the aforesaid matters.

8.3.15. It is my conclusion that exceptional circumstances should be considered to exist in this case. In reaching this conclusion I place particular emphasis on; the fact that regularisation of the development would not circumvent the purpose or objectives of the Habitats Directive; that the ability to carry out AA and provide for public participation has not been substantially impaired; the absence of any indication for actual/likely adverse effects on the integrity of a European site resulting from the development; and the lengthy planning history of the site and adjacent quarry lands.

### **Conclusion**

8.3.16. I conclude, therefore, that the Board should grant leave to apply for substitute consent for the production/manufacturing plant area under Section 177C.

8.3.17. In the interest of clarity, the application area refers to the production/manufacturing plant area as outlined in red on Drawing D03 attached as Appendix 10 to the application documentation.

8.3.18. The application for substitute consent should be accompanied by an rNIS.



## 9.0 Recommendation

### 9.1. The Quarry 'Proper' (Ref. LQ.0001)

- 9.1.1. I recommend that leave to apply for substitute consent should be granted for the following reasons and considerations.

#### **Reasons and Considerations**

Having regard to Section 261A(21)(c), Planning and Development Act, 2000, as amended, the Board hereby determines that:

- (i) development was carried out at the quarry after 1 February 1990, which development would have required, having regard to the Environmental Impact Assessment Directive, an environmental impact assessment but that such an assessment was not carried out or made, and
- (ii) development was carried out at the quarry after 26 February 1997, which development would have required, having regard to the Habitats Directive, an appropriate assessment, but that such an assessment was not carried out.

Having regard to section 261A(24)(a), Planning and Development Act, 2000, as amended, the Board hereby decides that:

- (i) the quarry commenced operation before 1 October 1964 and permission was granted in respect of the quarry under Part IV of the Act of 1963, and
- (ii) the requirements in relation to registration under section 261 were fulfilled.

In accordance with the requirements of the section, therefore, the Board hereby grants leave to apply for substitute consent.

The Notice to the applicants advising of the decision should also direct that:

- (a) the application be made within 12 weeks of the giving of the notice or such longer period as the Board may, on request, consider appropriate, and

- (b) the application includes a remedial Environmental Impact Statement and a remedial Natura Impact Statement, and
- (c) the application site area refers to that area identified as 'Indicative Substitute Consent Boundary' and hatched red on Figure 1 attached to the letter of application that accompanied the application for leave to apply for substitute consent.

## 9.2. **Production/Manufacturing Plant Area (Ref. LS.0019)**

9.2.1. I recommend that leave to apply for substitute consent should be granted for the following reasons and considerations.

### **Reasons and Considerations**

Having regard to Section 177D, Planning and Development Act, 2000, as amended, the Board is satisfied that:

- (a) the development is one where appropriate assessment is required, and
- (b) that exceptional circumstances exist by reference, in particular, to the following:
  - the fact that regularisation of the development would not circumvent the purpose or objectives of the Habitats Directive;
  - that the ability to carry out appropriate assessment and provide for public participation has not been substantially impaired;
  - the absence of any indication for actual/likely adverse effects on the integrity of a European site resulting from the development;
  - the lengthy planning history of the site and the adjacent quarry lands.

The Notice to the applicants advising of the decision should also direct that:

- (a) the application be made within 12 weeks of the giving of the notice or such longer period as the Board may, on request, consider appropriate, and
- (b) the application includes a remedial Natura Impact Statement, and
- (c) the application site area refers to the production/manufacturing plant area as outlined in red on Drawing D03 attached as Appendix 10 to the application for leave to apply for substitute consent.

---

Brendan Wyse,  
Assistant Director of Planning.  
2 December, 2016.