



An  
Bord  
Pleanála

## Inspector's Report 05. LS0027

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<b>Development</b>	Quarry
<b>Location</b>	Gortlettragh, Stranorlar, Co. Donegal
<b>Planning Authority</b>	Donegal County Council
<b>Applicant</b>	Patton Bros. Quarry Ltd.
<b>Type of Application</b>	Leave to apply for substitute consent under section 177C(2)(b) of the act
<b>Date of Site Inspection</b>	16 <sup>th</sup> August 2016
<b>Inspector</b>	Stephen J. O'Sullivan

## 1.0 Site Location and Description

- 1.1. The site is a quarry in a rural area in the east of Co. Donegal, c2.5km north-east of the centre of Stranorlar. Access to the site is by a county road that runs in a loop on the northern side of the N15 national primary road. The western junction of that road with the N15 lies within the speed limit zone for Stranorlar c2km south-west of the site. The landscape in the area rises from the Finn Valley in the south to the peak at Mullaghagarry to the north of the site. The level of the Finn c1.5km south of the site is shown at 14mOD, while the peak c1.5km to the north of the site as at 219mOD. The site lies mainly between the contour lines at 50mOD and 60mOD. Forestry stands on the higher land to the north of the site. The site drains, via ponds, to ditches to the lower land to the west, and thence to a tributary of the River Finn.
- 1.2. The application included plans showing an area of 2.03ha from which extraction occurred before 2009, and another area of 0.49ha that was excavated between 2009 and 2015 along with the removal of topsoil from another 1.62ha. These plans are not to scale and do not provide survey evidence of the condition of the site. However there are consistent with the general observations made at the time the site was inspected for this application.

## 2.0 Planning History

- 2.1. Planning Authority reg. ref. 99/2647: Planning permission was granted for the re-opening of a disused quarry and extraction of materials on land subject to 13 no. conditions. The following conditions are of note:
1. life of permission is for three years from date of Managers Order (02/12/99)
  2. area of excavation limited to drawings submitted to Planning Authority
- 2.2. Planning Authority reg. ref. 05/60249: Planning permission was granted for the retention of continuation of works to include the extraction of stone, including blasting, crushing, washing and ancillary site works, retention of site office and canteen and construction of a septic tank. Conditions number 1 states that the life of permission is for three years from date of Managers Order (16/01/06)

- 2.3. Planning Authority reg. ref 07/60597: Planning permission was sought for the erection of plant for the manufacture of ready mix concrete, storage silo, water storage, aggregate storage, settlement ponds and all associated site works. Permission was refused on the grounds that conditions of the previous application had not been complied with.
- 2.4. Planning Authority reg. ref. 09/60062: Planning permission was granted for the retention of a quarry including weighbridge, wheelwash, settlement lagoons, site office, canteen and all associated works, permission for continuation of processing of extracted materials from within the retention area and from new area, permission for extension of quarry by means of rock blasting, crushing and processing of extracted materials. Conditions of note:
1. life of permission five years from 20/08/09 and no part of quarry to extend beyond a line 25m internal to the developers boundary as identified in site location map
- 2.5. 05. QV0012, Reg. Ref. EUQY31 – The planning authority made a determination under section 261A of the act that works were carried out after 1<sup>st</sup> February 1990 that would have required EIA, and that works were carried out after 26<sup>th</sup> February 1997 that would have required an appropriate assessment having regard to the discharge to a tributary of the River Finn which is designated as an SAC, and which directed the operator to apply for substitute consent with remedial EIA and a remedial NIS. The board reviewed that determination on 13<sup>th</sup> June 2013. It confirmed the direction to apply for substitute consent with a remedial EIS, but determined that works requiring appropriate assessment had not occurred. No application for substitute consent was made on foot of that determination within the specified period.
- 2.6. Reg. Ref. 15/50834 – The planning authority refused to consider an application for permission to continue and extend the quarry on the site under section 34(12) of the act.

### 3.0 Legislation

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

(1) A person who has carried out a development referred to in subsection (2) .... may apply to the Board for leave to apply for substitute consent in respect of the development.

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

.....

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

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Section 177D states –

(1) Subject to section 261A(21), the Board shall only grant leave to apply for substitute consent in respect of an application under section 177C where it is satisfied that an environmental impact assessment, a determination as to whether an environmental impact assessment is required, or an appropriate assessment, was or is required in respect of the development concerned and where it is further satisfied—

.....

(b) that exceptional circumstances exist such that the Board considers it appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent.

(2) In considering whether exceptional circumstances exist the Board shall have regard to the following matters:

- (a) whether regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive;
- (b) whether the applicant had or could reasonably have had a belief that the development was not unauthorised;
- (c) whether the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or an appropriate assessment and to provide for public participation in such an assessment has been substantially impaired;
- (d) the actual or likely significant effects on the environment or adverse effects on the integrity of a European site 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 other matters as the Board considers relevant.

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## 4.0 Policy Context

### 4.1. Development Plan

The Donegal County Development Plan 2012-2018 applies. Chapter 7 of the plan sets out general policies in relation to extractive industries. Policy EX-P-01 is that new extractive industry proposals will not normally be permitted in areas of especially high scenic amenity or where they would adversely impact upon any Natura 2000 site or other area important for natural heritage. The site is not within an area of especially high scenic amenity.

## 4.2. Natural Heritage Designations

The River Finn SAC site code 002301 lies c1.3km south of the appeal site. The quarry drains to that river via settlement ponds, drainage ditches and a tributary stream. The conservation objectives of the site refer to the following habitats-

3110 Oligotrophic waters containing very few minerals of sandy plains (4010

Northern Atlantic wet heaths with *Erica tetralix*

7130 Blanket bogs (\* if active bog)

7140 Transition mires and quaking bogs,

and the following species -

1106 Salmon *Salmo salar*

1355 Otter *Lutra lutra*

## 5.0 The Application

5.1. The applicant requests that the board grant it leave to appeal for substitute consent in respect of the quarry on the site in accordance with section 177C(2)(b) of the planning act. The applicant is of the opinion that exceptional circumstances exist such that it would be appropriate to permit the regularisation of the development by permitting an application for substitute consent. The exceptional circumstances are as follows-

- The operator of the quarry has sought to comply with its obligations at all times. Quarry works were established on the site before 1<sup>st</sup> October 1964. Subsequent works that were carried out were authorised under permissions granted under Reg. Ref. Nos. 99/2647, 05/60249 and 09/60062. The latter permission authorised works until 10<sup>th</sup> December 2014 and the increase in the total extraction area to 3.89ha on a total site area of 5.44ha. The operator also complied with his obligations under section 261 of the planning act.
- Extraction occurred from an area of 0.33ha before 1<sup>st</sup> of February 1990. In fact this extraction occurred before 1<sup>st</sup> October 1964. The quarry was reopened in 2000. Quarrying occurred on an area of 2.03ha before the

making of application 09/60062 in 2009. Only an additional 0.03ha was extracted between that time and the time the quarry was inspected by the planning authority on 1<sup>st</sup> May 2012 for registration under section 261A of the act. So the area that was extracted between the time the requirements of the EIA Directive came into force and the time to which the planning authority's determination under section 261A refers was 2.06ha. This area is only 41% of the threshold of 5ha above which quarries require EIA set out in class 2(b) of part 2 of schedule 5 of the planning regulations. It would have been reasonable to conclude that a quarry so much below the relevant threshold would not require EIA. The total area of extraction by June 2015 was only 2.52ha, still well below the relevant threshold. Topsoil has been removed from another 1.62ha. Quarrying ceased when permission 09/60062 expired, although some of the stockpiled aggregate has been removed from the site since then.

- The planning authority based its determination under section 261A on the permitted area of the quarry rather than the area that had actually been worked at that time, referring to an extraction area of 4.64ha on a site of 5.44ha. The same figures were cited in the board's review of the determination. Substitute consent can only be sought for works that have been carried out, rather than those which have been authorised by a permission but not carried out. The basis of the planning authority's declaration and the board's review was therefore misconceived.
- The quarry operators sought at all times to comply with their legal obligations. They only became aware of the implications of the section 261A determination when the planning authority refused to consider an application to commence new works at the quarry in 2015. Extraction works have ceased on the site and the permission granted under 09/60062 has expired. Therefore the additional permitted extraction area which was considered by the planning authority and the board under section 261A is no longer relevant. The extracted area of the quarry is currently 2.52ha. As this is well below the applicable threshold of 5ha, it would be appropriate to permit the regularisation of the quarry by an application for substitute consent.

- Given the size of the extracted area of the quarry in relation to the applicable threshold, regularization of the development would not circumvent the purpose of the EIA directive. The applicants had a reasonable belief that the development was not unauthorised. The ability to carry out an assessment of the environmental impacts of the development and to provide for public participation has not been substantially impaired. The actual effects of the development would be limited in scope. The board has already determined that an appropriate assessment would not be required for a larger development of 4.64ha of which the actual development that has occurred is a smaller part. There are few houses within 1km of the site, most of which were built after the quarry re-opened in 2000. A drainage system is in place on the site and the effluent from the site is monitored in accordance with the discharge licence issued by the county council. There are no outstanding enforcement proceedings in respect of the development. The matters set out in section 177C(2) would therefore support a conclusion that exceptional circumstances exist in this case.

## 5.2. Planning Authority Response

The planning authority submitted copies of correspondence with the applicant which confirmed that there were no outstanding enforcement issues with the site. The correspondence stated the authority's opinion that, although permission for quarry operations had expired in December 2014, the removal of stockpiled material from the site as part of an orderly wind-down over 2016 would be reasonable. It also confirmed that it refused to consider an application for permission for further works on the site in 2015 under section 34(12) of the act.

## 6.0 Assessment

- 6.1. The board's decision to partly confirm and partly set aside the determination of the planning authority under section 261A with respect to the quarry on the site is not open to review in the course of this application for leave to apply for substitute consent. Its conclusions stand even though the period within which an application for substitute consent might have been made in response to it has expired.



Therefore the development that was carried out on the site after the 1<sup>st</sup> February 1990 would have required an environmental impact assessment but one was not conducted prior to the development being carried out. The board may therefore satisfy itself as to compliance with the first requirement set out in section 177D(1) of the act on the basis of its previous decision under 05. QV0012.

- 6.2. The question therefore arises as to whether exceptional circumstances now exist that would make it appropriate to permit the opportunity for regularisation of that development by an application for substitute consent. The applicant's arguments in this regard are persuasive. The board is advised that such circumstances do arise in this case having regard to the matters set out in section 177D(2) of the act. Quarrying was established on the site before 1964, as shown on the historic Ordnance Survey maps of the area. The operator of the quarry sought and received planning permission for further quarrying operations on the quarry in 1999, 2005 and 2009. The permissions authorised works on the site until December 2014, after which extraction ceased there. The compliance issues which arose during the operation of the quarry were addressed to the satisfaction of the planning authority and no enforcement proceedings remain open in respect of it. The requirements of section 261 of the planning act were met. A discharge licence was sought and granted to control the effluent from the quarry. At 2.52ha, the total extraction area of the quarry to date has been well below the threshold of 5ha for EIA set out in the planning regulations. In these circumstances the applicant could reasonably have had a belief that the development was not unauthorised. Those circumstances also mean that regularisation of the development would not circumvent the purposes of the EIA or Habitats Directive and that the ability to carry out an assessment of its environmental impacts with public participation has not been substantially impaired. They also mean that the actual or likely significant effects on the environment from the development and the extent to which they can be remediated would not make it inappropriate to allow the development to be regularised. Neither would any previous unauthorised development by the applicant or any failure by it to comply with previous planning permissions. The site is not in an area of especially high amenity designated in the development plan, nor is it in any area designated for the protection of natural heritage. Therefore the development would not have contravened the provisions of the development plan.

### 6.3. Screening for appropriate assessment

The board's decision under 05. QV0012 also establishes that the development which was carried out on the site before May 2012 did not require an appropriate assessment. The additional development that was carried out on the site since May 2012 was insignificant in scale compared to that which already occurred on the site and was, both in itself or in combination with any other works, much smaller than that described in the reasons and considerations (1)(b) of the board's previous decision. The subsequent works would also have been within the scope of those considered by the planning authority before its grant of permission under Reg. Ref. 09/60032. The effluent from them would have been subject to the discharge licence issued by the county council. No circumstances have therefore arisen which would support a different conclusion from the one reached by the board under 05. QV0012 with regard to screening for appropriate assessment. The development which is the subject of this application would not give rise to any potential for an impact on the SAC at the River Finn, or any other Natura 2000 site, that was not considered by the board before its previous decision. It is reasonable to conclude that on the basis of the information on the file, which I consider adequate in order to issue a screening determination, that the development on the site, individually or in combination with other plans or projects would not be likely to have a significant effect on the River Finn SAC no.002301, or any other European site, in view of the site's Conservation Objectives, and a Stage 2 Appropriate Assessment and the submission of a remedial NIS would therefore not be necessary for an application for substitute consent for the prior development on this site.

## 7.0 Recommendation

- 7.1. I recommend that the board grant leave to apply for substitute consent for the quarry on the site under section 177D of the Planning and Development Acts 2000-2015 and to direct that a remedial Environmental Impact Statement be furnished with that application.

## 8.0 Reasons and Considerations

Having regard to Section 177D(1), Planning and Development Act, 2000-2015, and to the conclusions reached by the Board in its review of the determination made by the Planning Authority under Section 261A of that act with respect to the quarry on the site, Ref. No. 05. QV0012, the board is satisfied that an Environmental Impact Assessment was required for the development upon the site and that one was not carried out.

The Board concluded that exceptional circumstances exist by reference to the following matters:

- the fact that the regularisation of the development would not circumvent the purpose or objectives of the Environmental Impact Assessment Directive,
- the relatively small scale of the development when compared to the threshold set at class 2(b) of part 2 of schedule 5 of the Planning and Development Regulations, 2000-2016,
- the fact that there is uncertainty regarding the applicant's belief that the development was not unauthorised and the applicant might reasonably have believed that the development was not unauthorised,
- the ability to carry out an Environmental Impact Assessment and provide for public participation has not been substantially impaired,
- the limited nature of the actual or likely significant effects on the environment resulting from the development,
- the extent to which significant effects on the environment, if any, can be remediated,
- the location of the development and relevant development plan policies and objectives in respect of development of this type and at this location, and
- the planning history of the site and, based on the information available from the planning authority, the applicant's history of general compliance with permissions elsewhere and resolution of matters at an early stage,

and considered that it would be appropriate to consider an application for the regularisation of the development by means of an application for substitute consent.

The Board noted that the proposed development is not directly connected with or necessary to the management of a European Site.

In completing the screening for Appropriate Assessment, the Board accepted and adopted the screening assessment and conclusion carried out in the Inspector's report in respect of the identification of the European sites which could potentially be affected, and the identification and assessment of the potential likely significant effects of the proposed development, either individually or in combination with other plans or projects, on these European sites in view of the site's Conservation Objectives. Having regard to that assessment and the conclusions reached by the Board in its review of the determination made by the Planning Authority under Section 261A of that act with respect to the quarry on the site, Ref. No. 05. QV0012, the Board is satisfied that the development, either individually or in combination with other plans or projects, would not have been likely to have had a significant effect on the Special Area of Conservation at the River Finn, or any other European site, in view of the site's Conservation Objectives.

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Stephen J. O'Sullivan  
Planning Inspector

21<sup>st</sup> December 2016