

Sinead White

From: Bord
Sent: 24 April 2024 14:14
To: Appeals2
Subject: FW: Ref. 319218
Attachments: 20240424-ABP-319218.pdf

From: Phoebe Duvall <Phoebe.Duvall@antaisce.org>
Sent: Wednesday, April 24, 2024 2:11 PM
To: Bord <bord@pleanala.ie>
Subject: Ref. 319218

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A Chara,

Please find attached a submission from An Taisce in relation to Ref. 319218.

Regards,

Phoebe Duvall

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20240424-ABP-319218

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64 Marlborough Street
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Sent by email to: bord@pleanala.ie

24th April 2024

Ref. 319218

App. Hudson Brothers Limited

For: Further development under 37L. EIAR and NIS submitted with application

Site: Athgarrett, Philipstown and Redbog, Co. Kildare

A Chara,

An Taisce wishes to make the following submission on the above s.37L application for further development of a quarry.

As a preliminary matter, we would refer the Board to our submission in relation to Ref. 319217 for substitute consent for quarrying on the subject site. Without prejudice to the fact that we consider that the substitute consent should be refused for the reasons detailed in that submission, we make the following observations on the subject application.

1. Overarching Comments on the Process for s.37L Applications

The s.37L process permits applications for new development on a site at the same time as a substitute consent application. Critically, the new development can be materially different to that covered by the substitute consent application (s.37L(3)).

By allowing an applicant for substitute consent, therefore an applicant who has developed without authorisation, to apply to directly to An Bord Pleanála for new development, s.37L permits applicants to go through a procedure with fewer opportunities for public participation and no option for appeal. On top of that, the public must also then consider two highly complex and technical applications concurrently (or roughly concurrently).

We would highlight paragraphs 57 and 58 of the CJEU judgment in c-215/06:

"57. While Community law cannot preclude the applicable national rules from allowing, in certain cases, the regularisation of operations or measures which are unlawful in

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the light of Community law, such a possibility should be subject to the conditions that it does not offer the persons concerned the opportunity to circumvent the Community rules or to dispense with applying them, and that it should remain the exception.

58. A system of regularisation, such as that in force in Ireland, may have the effect of encouraging developers to forgo ascertaining whether intended projects satisfy the criteria of Article 2(1) of Directive 85/337 as amended, and consequently, not to undertake the action required for identification of the effects of those projects on the environment and for their prior assessment. The first recital of the preamble to Directive 85/337 however states that it is necessary for the competent authority to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes, the objective being to prevent the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects."

These two paragraphs set out what Mr Justice Garrett Simons described in *Suaimhneas Limited v Kerry County Council* (neutral citation [2021] IEHC 451)¹ as "*the limits of a Member State's discretion to regularise the status of development projects carried out in breach of the requirement of the EIA Directive*" (para. 49). Essentially, these limits are:

- A regularisation system (such as substitute consent) should not allow for opportunities to circumvent EU laws and should not incentivise the circumvention of EU laws.
- Any regularisation still must adhere to and apply EU laws.
- Any regularisation should be permitted *only* in exceptional circumstances.

In our considered opinion, the 37L process could have the effect of rewarding applicants who have developed without permission and breached EU laws. At worst, it could even incentivise unauthorised development. This would run contrary to the findings of c-215/06.

2. Hydrology

We note that in Chapter 7 of the EIAR, upon which the NIS relies, the applicant states:

"The Red Bog SAC is understood to be perched above the main water table, due to a clay rich layer in the underlying sands and gravels at this location (GSI, 2017). The Red Bog SAC is largely recharged by rainwater percolating through the topsoil and unsaturated sand."

and

"The Red Bog water levels respond instantaneously to rainfall events, indicating that the surface water feature is largely recharged by direct rainfall and infiltration through shallow soils".

Evidence of water levels on the wetland responding to rainfall events, is not in and of itself conclusive evidence that the feature is recharged primarily by direct rainfall.

¹ https://www.courts.ie/acc/alfresco/942c2409-e346-4a08-b2ed-e9488b943ea3/2021_IEHC_451.pdf/pdf#view=fitH

We would refer the Board to our submission on Ref. 319217, in particular the sections in Part 2 of that submission on the significant uncertainty regarding the hydrological and hydrogeological connectivity of the subject site with the Red Bog SAC.

Additionally, there is no indication of a robust assessment of impacts on drinking water throughout the EIAR.

2.1 Water Framework Directive

We note that the groundwater body underlying the subject site has been designated as good status, but the EPA determines it is at risk of not maintaining good status by 2027, under the Water Framework Directive (WFD). Therefore, preserving the good ecological integrity of the site is essential. Concerns exist due to the uncertainty regarding the hydro-geological regime of the site and its connectivity with Red Bog SAC.

Therefore, we submit that the proposal should be assessed against Article 4 of the WFD to determine whether the project may cause a deterioration of the status of a surface or ground water body or if it may jeopardise the attainment of good surface or ground water status or of good ecological potential and good surface or ground water chemical status.

We particularly emphasise the requirements for groundwater:

(i) Member States shall implement the measures necessary to prevent or limit the input of pollutants into groundwater and to prevent the deterioration of the status of all bodies of groundwater, subject to the application of paragraphs 6 and 7 and without prejudice to paragraph 8 of this Article and subject to the application of Article 11(3)(j);

(ii) Member States shall protect, enhance and restore all bodies of groundwater, ensure a balance between abstraction and recharge of groundwater, with the aim of achieving good groundwater status at the latest 15 years after the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4 and to the application of paragraphs 5, 6 and 7 without prejudice to paragraph 8 of this Article and subject to the application of Article 11(3)(j);

(iii) Member States shall implement the measures necessary to reverse any significant and sustained upward trend in the concentration of any pollutant resulting from the impact of human activity in order progressively to reduce pollution of groundwater.

Impacts on all surface waterbodies in the area of the subject site must also be assessed and WFD compliance determined.

We would draw the Board's attention to the following points of relevant European case law regarding the WFD. In c-461/13 Weser the CJEU held:

"Article 4(1)(a)(i) to (iii) of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy must be interpreted as meaning that the Member States are required

— unless a derogation is granted

— to refuse authorisation for an individual project where it may cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive."

In c-529/15, the CJEU held as follows:

"It should be borne in mind that, when a project is liable to have adverse effects on water, consent may be given to it if the conditions set out in Article 4(7)(a) to (d) of that directive are satisfied (see, to that effect, judgment of 4 May 2016, Commission v Austria, C-346/14, EU:C:2016:322, paragraph 65).

In order to determine whether a project has been authorised without infringing Directive 2000/60, a court may review whether the authority which issued the authorisation complied with the conditions laid down in Article 4(7)(a) to (d) of that directive, by determining, first, whether all practicable steps were taken to mitigate the adverse impact of the activities on the status of the body of water concerned; second, whether the reasons behind those activities were specifically set out and explained; third, whether those activities serve an overriding general interest and/or the benefits to the environment and society linked to the achievement of the objectives set out in Article 4(1) are outweighed by the benefits to human health, the maintenance of human safety or the sustainable development resulting from those activities; and, fourth, whether the beneficial objectives pursued by that project cannot, for reasons of technical feasibility or disproportionate cost, be achieved by other means which are a significantly better environmental option (see, to that effect, judgment of 11 September 2012, Nomarchiaki Aftodioikisi Aitolokarnanias and Others, C-43/10, EU:C:2012:560, paragraph 67)."

There is also provision for the protection of water-dependent Natura 2000 sites under Article 4(1)(c) of the WFD, the Red Bog SAC in the case of the subject application. The Planning Authority should therefore evaluate if the proposal has the potential to affect the achievement of compliance with the conservation objectives of the water-dependent Natura 2000 sites listed as 'Protected areas' in the context of WFD Article 4(1).

3. Dust

Section 4.1.5 of the NIS outlines that:

"As a point of reference, the Institute of Air Quality Management (IAQM) (2016) Guidance on the Assessment of Mineral Dust Impacts for Planning indicates that significant dust impacts are typically restricted to 100 m of quarrying activities."

As outlined in our commentary on the rAA screening in our submission on Ref. 319217, this is factually incorrect, and misrepresents what the IAQM said in their document²:

"Large dust particles (greater than 30 µm), which make up the greatest proportion of dust emitted from minerals workings, will largely deposit within 100 m of sources. Intermediate-sized particles (10-30 µm) are likely to travel up to 200-500 m."

² https://iaqm.co.uk/text/guidance/Mineral-Guidance_ConsultationApril16.pdf

The applicant again relies on a threshold of 1g/m²/day to rule out impact:

"Guidance from IAQM (2016) cites Farmer (1993) when making the following statement: "The level of dust deposition likely to lead to a change in vegetation is very high (over 1 g/m² /day⁸) and the likelihood of a significant effect is therefore very low except on the sites with the highest dust release close to sensitive habitats.""

Having reviewed the Farmer (1993) study³, we note that this isn't entirely accurate. The study says that Sphagnum subject to dust deposition had a decreased photosynthetic rate and chlorophyll a content, with species decline noted where deposition was circa 1-2.5 g/m²/day. However, they could still detect effects of the dust at a distance from the source where the deposition rate was only 0.07 g/m²/day.

Additionally, the applicant then relies on a table produced by the IAQM in a 2014 document⁴, which specifically assesses demolition dust and advises that above a distance of 50 metres the ecological impact of dust on high sensitivity ecosystems is medium. The applicants rely on this to infer that:

"Whilst the table does not provide details for further distances, it can be reasonably inferred that emissions arising further than 50 m from a receptor of 'High' sensitivity would be considered to pose a low risk of significant impacts."

We would highlight that this does not marry with the distances outlined by the IAQM specifically in relation to quarry dust, whereby distances of up to 500 metres were liable to dust deposition. There is a clear discrepancy here, and it must be logically concluded that demolition dust may have a lesser diameter of influence than quarry dust, and as such the appropriateness of relying on these findings to determine sensitivity must be called into question.

The studies which the applicant relies on to reach the conclusion of no impact actually highlight that impacts from dust on sphagnum could be detected at just 0.07 g/m²/day (Spatt & Miller (1981) cited in Farmer (1993)). Additionally, the IAQM outline that the distance these can travel is up to 500 metres, as outlined above.

As such, we strongly submit that the issue of dust emission warrants further assessment. The mean and maximum levels have been previously demonstrated in peer reviewed studies to have a negative impact on sphagnum moss, which is the primary vegetation in the Red Bog SAC, and the SAC is well within the impact zone previously established for quarry dust. We submit that the findings of previous studies clearly indicate that there is reasonable scientific doubt in regard to the potential impact of dust on a European protected site, and in our view concluding that it will have no likely significant effect is premature and erroneous.

4. Impacts to Birds

In section 4.2.6 of the NIS, the applicant clearly outlines that: *"The site presents suitable foraging habitat for greylag geese from Poulaphouca SPA."*

³ <https://www.resolutionmineeis.us/sites/default/files/references/farmer-dust-effects-1993.pdf>

⁴ <https://iaqm.co.uk/text/guidance/construction-dust-2014.pdf>

In regard to the loss of functionally linked habitat, the NIS concludes:

"The area of affected habitat (28 ha) represents ~0.027% of available foraging habitat (a maximum of approximately 104321 ha) for greylag geese from Poulaphouca SPA. Furthermore, it has been concluded that greylag geese prefer large, elevated fields remote from human settlements (Rosin, et al., 2012). This would suggest the presence of an active quarry and associated human presence at the Site for approximately 70 years would deter any foraging geese.

Due to the factors described above, no significant effects on greylag goose are anticipated as a result of loss/degradation of functionally linked habitat. Therefore, no adverse effect on site integrity has been identified."

And in regard to population declines of greylag goose due to disturbance and displacement, the NIS concludes:

"Considering:

- The abundance of suitable foraging habitat in the surrounding landscape The size of the affected area relative to the available habitat (~0.027% as described above);*
- The most recent peak count data for Poulaphouca Reservoir suggest that greylag geese are present in very small numbers (8 individuals);*
- The quarry has been in operation since the 1950s and fauna have become acclimatised to conditions arising from Site operations;*
- The Proposed Development is temporary in nature,*

it is considered that disturbance from the Proposed Development will not undermine the conservation objectives of the SPA. Due to the factors described above, no significant effects on greylag goose are anticipated as a result of disturbance/displacement impacts. Therefore, no adverse effects on site integrity have been identified."

In the first instance, measuring impact based on the percentage loss of foraging habitat is problematic legally. Several judgements of the CJEU set out very clearly very specific requirements in relation to site specific considerations and the thresholds of scientific certainty required for each of the different tests required to be addressed under Article 6(3) as clarified by the CJEU. The Court's consideration of the case-specific context for how effects need to be considered relies in large part on the specific ecological considerations at issue for the habitat or species at issue, and the nature of impacts.

For example, in c-258/11 Sweetman, the loss of approximately 1% of the protected habitat was considered to be an adverse effect on the integrity of the site. Furthermore, in assessing the potential effects of a plan or project, their significance must be established in the light, inter alia, of the characteristics and specific environmental conditions of the site concerned by that plan or project as clarified by the CJEU in c-127/02 Waddenzee. So both the project and site characteristics are required to be considered. An overly simplistic area lost calculation does not suffice for a more rigorous ecological assessment.

While the applicant outlines in Section 4.2.6 of the NIS that they are of the view that the absence of wintering bird surveys targeting greylag geese is not considered to be a significant limitation, we would contest this. For the relevant authority to grant permission for this project

they need to be certain beyond all reasonable scientific doubt that there will be no significant impact on the integrity of the Natura 2000 site. The applicant has clearly outlined that the site provides suitable foraging habitat for Geese, but then appears to rely on the very low numbers of Greylag Geese in the most recent survey. Table 6.1 outlines that annual peak counts of Greylag Goose in 2017, 2018 and 2019 reported 96, 73 and 8 geese respectively. As such, this species would appear to be undergoing an alarming decline in numbers, and as such any potential impact on their foraging area should be very carefully considered. They provide no rationale for concluding that there will be no impact other than that the numbers in the SPA are low, and that the geese would be simultaneously, and paradoxically, both inured to human activity given the quarry has been in place for 70 years, while also avoiding the site because of said active quarrying. Absent of scientific evidence this is little more than conjecture, and does not meet the threshold of certainty required for Article 6(3) of the Habitats Directive. An NIS cannot, and should never be, based on guess work.

5. Alternative Quarrying Sites

The NIS outlines that:

"2.1.8. It is considered that the recovery of the valuable aggregate resources from within the Site will be a more environmentally sustainable option than recovering aggregates from a greenfield site elsewhere."

While this is presented as a statement of fact, this would depend entirely on the sensitivity of the ecological receptors in the area. This is not an ecologically robust viewpoint.

6. Cumulative Impact Assessment

Annex IV of the EIA Directive (2011/92/EU) requires that an EIAR provide a:

"description of the likely significant effects of the project on the environment resulting from...the cumulation of effects with other existing and/or approved projects, taking into account any existing environmental problems relating to areas of particular environmental importance likely to be affected or the use of natural resources."

It is crucial that the cumulative impact assessments in the EIAR and NIS take into account *all* activities on the subject site and in the surrounding area, including unauthorised works. This is needed to ensure robust protection of the environment in and around the subject site as well of human health for the surrounding population.

7. Habitats Directive Legal Requirements

It is now well established in law that approval can only be granted for plans and projects when it has been established beyond all reasonable scientific doubt that the subject proposal will not adversely impact any Natura 2000 sites.

In **Case C-258/11, Sweetman & Others v An Bord Pleanála & Others**, it was held that the provisions of Articles 6(2)–(4) of the Habitats Directive must be interpreted together *"as a coherent whole in the light of the conservation objectives pursued by the directive"* and that they impose a series of specific obligations necessary to achieve and maintain favourable

conservation status. A plan or project will negatively impact upon a site if it prevented the "lasting preservation of the constitutive characteristics" of the site for which it was designated, with reference to the site's conservation objectives. Significantly it was determined that:

*"authorisation for a plan or projectmay therefore be given only on condition that the competent authoritiesare certain that the plan or project will not have lasting adverse effects on the integrity of the site. That is so where **no reasonable scientific doubt remains** as to the absence of such effects"* [emphasis added].

The competent authority must therefore refuse authorisation for any plans or projects where there is uncertainty as to whether the plan or project will have adverse effects on the integrity of the site. It was also held in paragraph 44 that:

*"So far as concerns the assessment carried out under Article 6(3) of the Habitats Directive, it should be pointed out that it **cannot have lacunae and must contain complete, precise and definitive findings** and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned (see, to this effect, Case C 404/09 Commission v Spain, paragraph 100 and the case-law cited)..."* [emphasis added].

In *Kelly v An Bord Pleanála & Others, [2013 No 802 J.R.]* with reference to *Commission v Spain c-404/09*, the High Court held in paragraph 36 that the competent authority must carry out an Appropriate Assessment for a plan or project in light of the best scientific knowledge in the field. It was also held that the competent authority must lay out the rationale and reasoning which was used to arrive at the determination.

The Kelly Judgement has provided a very helpful clarification of the requirements of an AA, and in particular in paragraph 40, a summary of what must be delivered by the process in order to be lawfully conducted:

"(i) Must identify, in the light of the best scientific knowledge in the field, all aspects of the development project which can, by itself or in combination with other plans or projects, affect the European site in the light of its conservation objectives. This clearly requires both examination and analysis.

(ii) Must contain complete, precise and definitive findings and conclusions and may not have lacunae or gaps. The requirement for precise and definitive findings and conclusions appears to require analysis, evaluation and decisions. Further, the reference to findings and conclusions in a scientific context requires both findings following analysis and conclusions following an evaluation each in the light of the best scientific knowledge in the field.

(iii) May only include a determination that the proposed development will not adversely affect the integrity of any relevant European site where upon the basis of complete, precise and definitive findings and conclusions made the Board decides that no reasonable scientific doubt remains as to the absence of the identified potential effects."

It should therefore be ensured that the requirements of Article 6(3) of the Habitats Directive with regard to the direct, indirect and cumulative impacts of the proposal are satisfied.

8. Biodiversity Restoration

We also note that the EIAR indicates that the proposed development will include the removal of hedgerows, treelines and scrub which are important bird nesting habitats, as well as providing habitat for other flora and fauna and providing important ecosystem services for nature and the wider community. These removals appear to be unmitigated and lack immediate remediation measures such as supplementary planting at alternative sites.

While a restoration plan is briefly outlined, it only provides for habitat restoration within the quarry pit during the decommissioning phase of the subject proposal. We submit that, should permission be granted, biodiversity remediation measures are also necessary earlier than this timeframe to offset habitat loss and bolster ecosystem rehabilitation at an early stage.

9. Impact on Landscape Character of the Area

We submit that applying for a quarry extension of 64 hectares represents a potential adverse impact upon the landscape character of Kildare's Eastern Uplands region which is identified as a Class 3 area of high sensitivity in the Kildare County Development Plan 2023-2029. The description ascribed to this region appears to be at odds with accommodating further quarry extraction:

*"Areas with **reduced capacity to accommodate uses** without **significant adverse effects** on the **appearance or character of the landscape** having regard to prevalent sensitivity factors."* [An Taisce emphasis added]

This area is already experiencing pressures and visual amenity impacts from intensive quarrying activities, which have in some cases continued without authorisation.

Please acknowledge our submission and advise us of any further consultation periods and of any decision made.

Is muidne le meas,

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