

File With _____

SECTION 131 FORM

Substitute Consent Application NO: _____
Defer Re O/H

Having considered the contents of the submission received 14/5/24 from
An Taisce I recommend that section 131 of the Planning and Development Act, 2000
be/not be invoked at this stage for the following reason(s): _____

E.O.: _____ Date: _____

For further consideration by SEO/SAO

Section 131 not to be invoked at this stage.

Section 131 to be invoked – allow 2/4 weeks for reply.

S.E.O.: _____ Date: _____

S.A.O.: _____ Date: _____

M _____

Please prepare SC _____ - Section 131 notice enclosing a copy of the attached
submission

to: _____ Task No: _____

Allow 2/3/4weeks – BP _____

EO: _____ Date: _____

AA: _____ Date: _____

File With _____

CORRESPONDENCE FORM

Substitute Consent Application No: ABP- 319397-24

M _____

Please treat correspondence received on 14/5/24 as follows:

1. Update database with new agent for Applicant/Appellant _____	1. RETURN TO SENDER with SC _____
2. Acknowledge with SC <u>40</u>	2. Keep Envelope: <input type="checkbox"/>
3. Keep copy of Board's Letter <input type="checkbox"/>	3. Keep Copy of Board's letter <input type="checkbox"/>

Amendments/Comments	
<u>observation redd from An Taisce</u>	
<u>by email</u>	
<u>case narrative</u>	<u>An Taisce</u>
<u>Task 385168-24</u>	<u>BC 40 to observer</u>
<u>LID 14</u>	<u>Add observer name to file cover</u>

4. Attach to file (a) R/S <input checked="" type="checkbox"/> (d) Screening <input type="checkbox"/> (b) GIS Processing <input type="checkbox"/> (e) Inspectorate <input type="checkbox"/> (c) Processing <input type="checkbox"/>	RETURN TO EO <input type="checkbox"/>
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	Plans Date Stamped <input type="checkbox"/>
	Date Stamped Filled in <input type="checkbox"/>
EO: <u>Karen Hickey</u>	AA: <u>Daniel Moore</u>
Date: <u>21/5/24</u>	Date: <u>21/5/24</u>

Karen Hickey

Karen

From: Bord
Sent: Wednesday 15 May 2024 08:45
To: Appeals2
Subject: FW: Ref. 319397
Attachments: 20240514-ABP-319397.pdf

From: Phoebe Duvall <Phoebe.Duvall@antaisce.org>
Sent: Tuesday, May 14, 2024 5:04 PM
To: Bord <bord@pleanala.ie>
Subject: Ref. 319397

Caution: This is an **External Email** and may have malicious content. Please take care when clicking links or opening attachments. When in doubt, contact the ICT Helpdesk.

A Chara,

Please find attached a submission from An Taisce in relation to Ref. 319397.

Regards,

Phoebe Duvall

Senior Planning and Environmental Policy Officer
An Taisce - The National Trust for Ireland
5 Foster Place, Dublin 2, Ireland
Phone: 01 454 1786
www.antaisce.org

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Please note that I work Monday through Thursday.



An Taisce

The National Trust for Ireland

5 Foster Place

Dublin 2, Ireland

DC2 V0P9

20240514-ABP-319397

An Bord Pleanála
64 Marlborough Street
Dublin 1

Sent by email to: bord@pleanala.ie

14th May 2024

Ref. 319397

App. Keegan Quarries Limited

For: Substitute consent for quarry and ancillary precast concrete manufacturing yard

Site: Tromman Quarry, Tromman, Rathmolyon, Co. Meath.

A Chara,

An Taisce would like to make the following observation on the above application for substitute consent.

We consider that this application warranted referral to An Taisce under Article 28 of the Planning and Development Regulations 2001 (as amended) as it contains an rEIAR and rNIS.

1. Exceptional Circumstances

1.1 Definition of Exceptional Circumstances

Section 177K(1J) of the Planning and Development Act 2000 (as amended) states the following with regard to defining exceptional circumstances:

"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;

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An Taisce – The National Trust for Ireland | *Protecting Ireland's heritage, safeguarding its future*

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Company Limited by Guarantee no. 12469 | Charity CHY4741 | Charity Regulator no. 20006358 | EU Transparency Register no. 473905437651-60

Directors: Stuart McCaul (Chair), Trish O'Connell (Vice Chair), Laura Segura Gutierrez (Hon Secretary), John Conroy (Treasurer)

Olivia Rogers, Rónán O'Brien, Finbarr Murray, Helen Shaw, Terri Morrissey, Sinead Mercier, Phil Doyle

- (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."

As a preliminary matter, An Taisce submits that the definition of exceptional circumstances per Section 177K(1J) requires consideration by the Irish Courts to determine its alignment with CJEU judgements regarding the standards for exceptionality in, for example, c-215/06. It is our view that s.177K(1J) is not consistent with the views of the European Court.

First, 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 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.

It is our firm view that the current definition of exceptional circumstances in s.177K(1J) incorrectly amalgamates two separate issues: a) what actually constitutes an exceptional circumstance, and b) the other limits on regularisation as detailed above.

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

- Second, the definition in s.177K(1J) gives the Board exceptionally broad discretion to consider any issue it so chooses when determining whether or not exceptional circumstances exist (per s.177K(1J)(g) "such other matters as the Board considers relevant").

We would highlight that neither *An Taisce v An Bord Pleanála* (neutral citation [2020] IESC 39)² nor *Friends of the Irish Environment CLG v Minister for Communications, Climate Action and the Environment & Others* (neutral citation [2019] IEHC 646)³ actually examined the adequacy of the definition of exceptional circumstances in s.177K(1J) in comparison with the CJEU's judgements in -215/06, etc. The Supreme Court judgement in [2020] IESC 39 only compared the checks in the leave application process against the requirements of exceptional circumstances in s.177K(1J). Similarly, in [2019] IEHC 646, the High Court was comparing new regulations with the existing definition in the Act at the time.

We therefore submit that An Bord Pleanála should seek a referral to the High Court on the proper definition of exceptional circumstances as laid out in s.177K(1J) of the Planning and Development Act 2000 (as amended) and its alignment with the standards of exceptionality set out by the CJEU in c-215/06 and others.

1.2 Lack of Exceptional Circumstances in the Subject Case

Without prejudice to the above points on the definition of exceptional circumstances, An Taisce submits that the applicant has failed to demonstrate the existence of exceptional circumstances in the subject case, per s.177K(1J) of the Planning and Development Act 2000 (as amended).

There is an extensive history of planning non-compliance on the subject site (and indeed on other sites the applicant operates). Attempts to regularise development do not negate the fact that continuation of activities after the expiry of permissions, breaches of permissions, and breaches of planning conditions appear to have occurred on multiple occasions. We also do not consider that the Statement of Exceptional Circumstances has sufficiently demonstrated that the applicant could have reasonably believed the work was authorised, particularly in light of the clear expiry of permission in 2018. Therefore, we do not consider that exceptional circumstances exist, per s.177K(1J) (b) and (f).

The applicant states in 3.2 of the Statement of Exceptional Circumstances:

As is apparent, the Applicant has sought through numerous mechanisms available to it to regularise matters pertaining to the site. Through no fault of the Applicant those efforts have not succeeded. The Applicant is entitled to a remedy and the fact that the Applicant, in the exceptional circumstances of this case, has exhausted the remedies available to it such that this Application for SC is now necessary is, of itself, an exceptional circumstance such as to warrant the granting of the application. To find otherwise is to render the Act redundant in the circumstances of this site, which simply cannot be correct

The applicant is not entitled to a remedy or to regularisation – they may seek a remedy, but must comply fully with all of the relevant provisions of national and EU law. It is then entirely the decision of the Planning Authority whether or not regularisation is warranted. Any grant

² https://www.courts.ie/acc/alfresco/80f2cbbf-4f1e-4065-8ca3-f8c14308035b/2020_IESC_39.pdf/pdf#view=fitH

³ https://www.courts.ie/acc/alfresco/1cca7ae8-4d3b-4529-8126-20158df62867/2019_IEHC_646_1.pdf/pdf#view=fitH

of regularisation is not a foregone conclusion. It is also our firm view that the exhaustion of remedies does not in any way constitute an exceptional circumstance. Regardless, all remedies have not in fact been exhausted since the applicant is applying for substitute consent.

Works have been ongoing since 2018, almost six years now, without the benefit of planning permission or assessment under the EIA and Habitats Directives and the public participation requirements of both those processes. We consider this to be an excessively long period and do not consider that exceptional circumstances exist in relation to 177K(1J)(c).

In section 3 of this submission, we detail what we consider to be deficiencies and uncertainties in the rNIS, rEIAR and hydrological assessment. We do not consider there to be an adequate scientific basis to rule out significant adverse effects to water quality as a result of the development, and significant uncertainties also remain about the extent to which any potential adverse impacts could be remedied. Therefore, we consider that exceptional circumstances have not been demonstrated in relation to 177K(1J)(d) and (e).

On the basis of the above points, we submit that exceptional circumstances have not been demonstrated and do not exist in relation to the subject case and that substitute consent should therefore be refused.

2. Stay on Works

We note that s.177J of the Planning and Development Act 2000 (as amended) gives An Bord Pleanála the power to issue a draft direction to suspend works pending determination of an application for substitute consent:

"177J(1) Where the Board has received an application for substitute consent made in accordance with section 177E and is considering that application, it may give a draft direction in writing to the person who made the application requiring the person to cease within the period specified in the draft direction, all or part of his or her activity or operations on or at the site of the development the subject of the application, where the Board forms the opinion that the continuation of all or part of the activity or operations is likely to cause significant adverse effects on the environment or adverse effects on the integrity of a European site.

We would query whether the Board considered issuing such a direction under s.177J in relation to the subject case? If not, why not? If so, what were the reasons for the ultimate decision not to issue a s.177J draft direction?

Works on the subject site appear to have occurred consistently for almost six years since permission expired in August 2018, and we therefore recommend that the Board now issue a s.177J draft direction.

3. Remedial Assessments

Without prejudice to the above reasons outlining why we consider that exceptional circumstances do not exist in this case and therefore consider that the subject application should be refused, we wish to make the following comments on the remedial Natura Impact Statement (rNIS) and remedial Environmental Impact Assessment Report (rEIAR).

We note that in the context of the rNIS a great deal of weight rests upon the hydrological connection between the streams which run along the south of the site (Tromman stream) and the one that runs along the northwest of the site (Rathmoylan stream). The former being directly linked to the River Boyne and Blackwater SAC. The applicant appears to rely on a one-day site study, as outlined on page 10 of the hydrological report, for evidence that the two waterbodies do not meet. Section 4.1 of the rNIS outlines:

*"Following a review of the Hydrogeological and Hydrological Impact Assessment for the site (BCL Consultant Hydrogeologists Ltd., 2023), it was discovered that there is no direct hydrological pathway to the stream located to the south of the quarry (Formal Stream), and therefore no risk of pollution to this watercourse. **In light of this, a worst-case scenario would only occur where the proposals result in a significant detrimental change in water quality within the stream located to the north of the site (Rathmolyon Stream), either alone or in combination with other plans or project**" [our emphasis]*

Table 2 in the rNIS clearly elucidated the risks posed to the Natura site in the screening exercise, with water quality risks as a result of the unauthorised development and ongoing quarrying activity. The rNIS screening outlines that EPA mapping showed the hydrological link with the SAC to be immediately north-west of the site, via the Rathmolyon Stream flowing into the Tromman Stream, which is designated as an SAC along this section. From the bolded text above, and cross referencing with Table 4 it is clear that the risk outlined in the rNIS screening in regard to impact on the SAC at this geographical point is not being considered further on foot of their one day survey which found no hydrological connection. We have cross referenced the map presented as Reference 12 (Figure 1) in the hydrological report with other open source mapping tools (Figure 2-4). This lack of convergence of the two waterbodies is not evident on the other online mapping tools we consulted. Given that this is one of the primary pieces of evidence relied on to rule out potential impact on the River Boyne SAC we submit that it is vital that more rigorous evidence is sought on this, given this is a key point for the rNIS. A long-term hydrological survey, including during prolonged wet periods, is necessary to establish the hydrological connection, or lack thereof, before a decision is made. As stands, we submit that this does not meet the threshold of beyond reasonable scientific doubt, and the Board should seek further clarification on this important point.

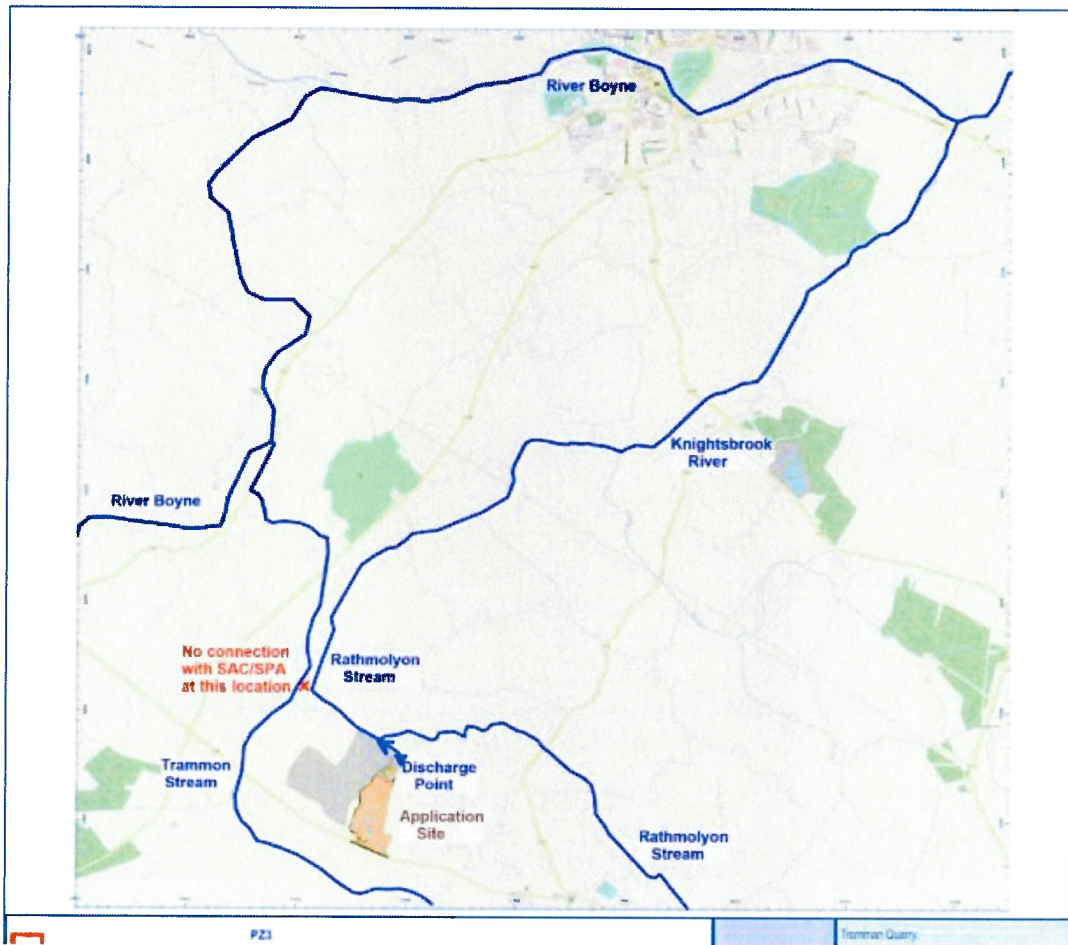


Figure 1: Reference 12 from Hydrological Report



Figure 2: Map from EPA GIS viewer- rivers appear to converge northwards of the red cross

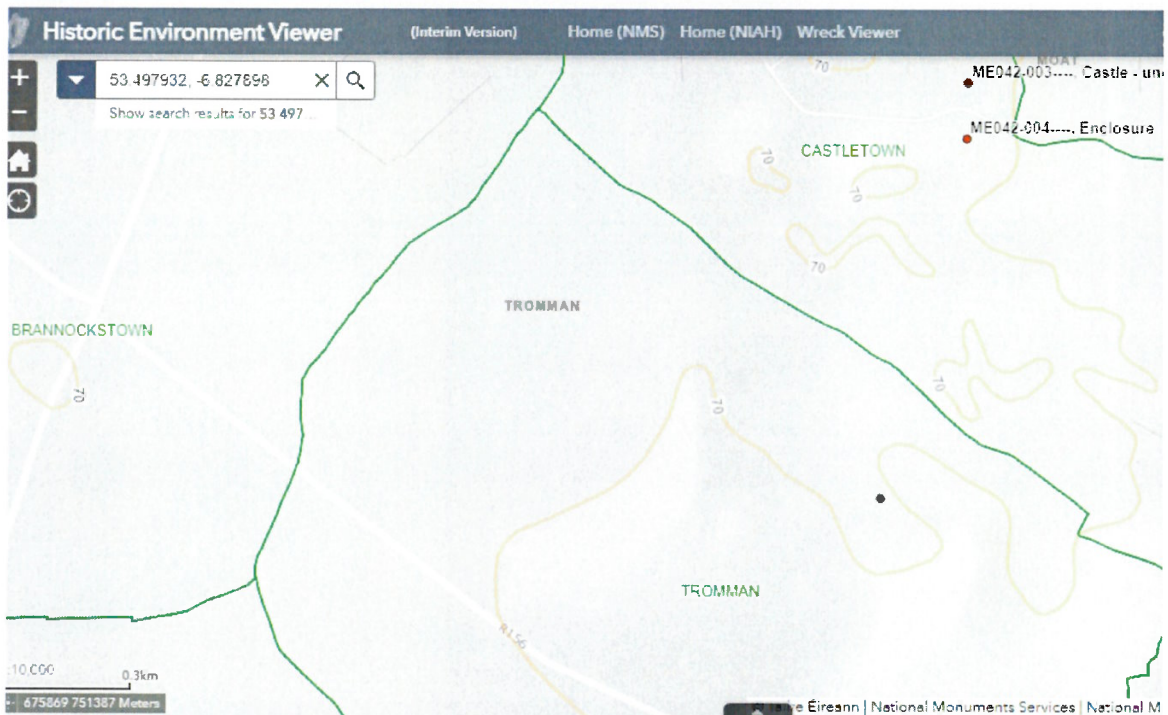


Figure 3: Historical map viewer – again the two rivers appear to converge at the top of the screenshot

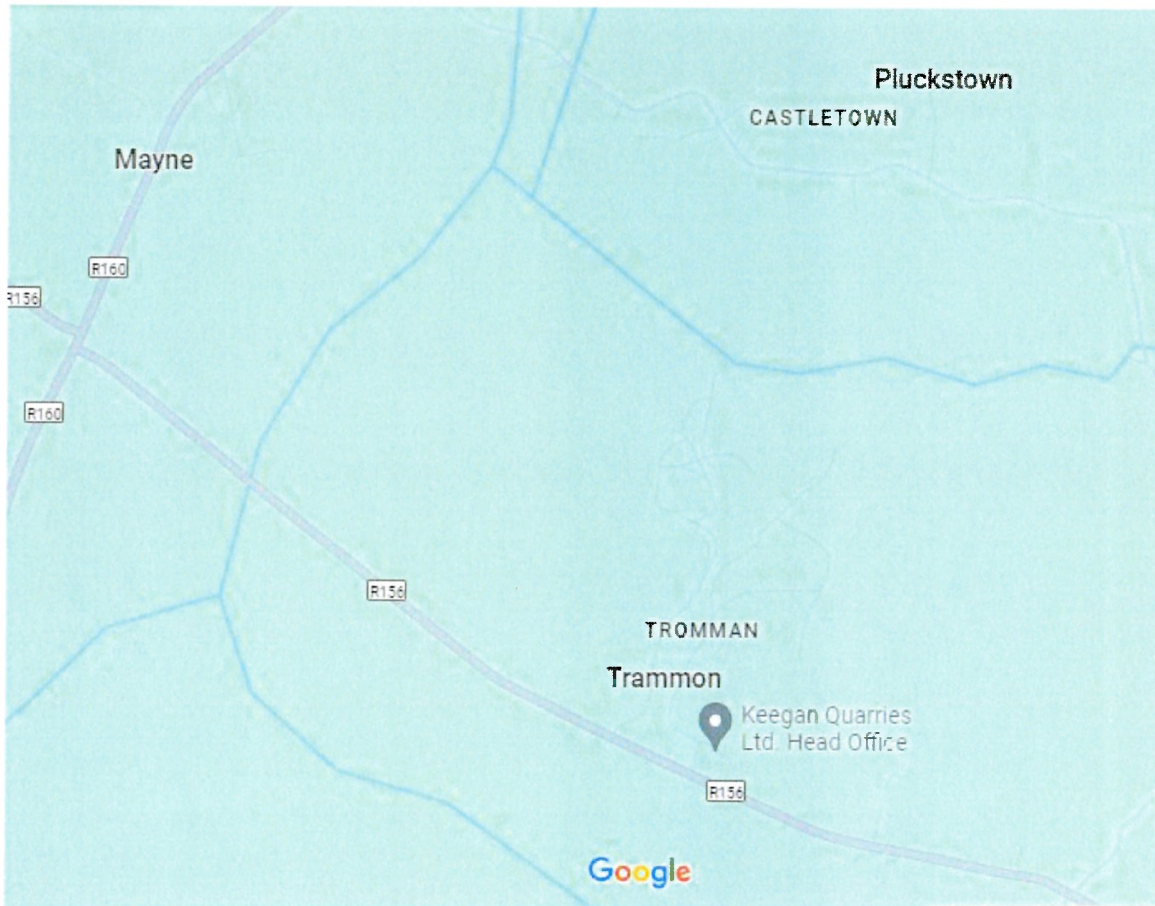


Figure 4: Google map view- again the rivers appear to converge at the top of the screenshot

3.1 Water Framework Directive (2000/60/EC)

We note that the suspended solids were elevated above the acceptable regulated level on one occasion. The rNIS outlines that:

"However, the measured values for suspended solids mostly remained below the Emission Limit Values (ELV) of 35 mg/l set out within the EPA (2006) environmental management guidelines for the extractive industry, as well as the European Communities (Quality of Salmonid Waters) Regulations 1988 (S.I. No. 293 of 1988), which established a standard of ≤ 25 mg/l for salmonid waters."

The applicant posits in the rNIS in regard to the breaches:

'Despite a broad level of compliance, it is important to note some instances where measured values exceeded those limits specified in the consent, particularly concerning suspended solids (Discharge Effluent Quality Reports provided by Byrne Environmental Consulting Ltd.) These incidents, while relatively infrequent, underscore the need for continued vigilance regarding water quality standards'

We note that the Water Framework Directive compliance does not appear to have been assessed in the rEIAR, nor was it adequately considered in the rNIS, despite breaches in the regulated standards. The promised 'extra vigilance' does not equate to the legally binding

obligation on a decision maker to ensure there is no deterioration in water quality (see case law cited below). The watercourse directly to the south and the one to the northwest of the site have both been classed as poor water quality status by the EPA. They were previously classified as good status in the 2013-2018 assessment cycle. There has been a clear decline in water quality in the river bodies closest to the quarry, yet no Article 4 WFD specific assessment has been carried out either in the rEIAR or via the rNIS.

Per the obligations of the Water Framework Directive, all waterbodies must achieve and/or maintain at least good status by 2027. Development that may impact water quality requires assessment as to whether it could affect the attainment of the Article 4 WFD Objectives. Since activity on the site post 5th August 2018 was unauthorised, no assessment of the activities/project against Article 4 was carried out. We therefore submit that this must be undertaken now as part of the hydrological portion of the rEIA and rNIS and should be done using the post-2013 baseline used in the hydrological and hydrogeological assessments accompanying the application.

We would highlight the following points of relevant European case law regarding the WFD. In Case C-461/13 (Weser), the CJEU held that:

"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 Case 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 Aitoloakarnanias and Others, C-43/10, EU:C:2012:560, paragraph 67)."

Further, we note that the applicant seeks to claim there is no in-combination impact on water quality as a result of their works:

"In-combination water quality impacts relate to both localised impacts on the Rathmolyon and Knightsbrook streams, as well as downstream impacts on the River Boyne and River Blackwater SAC and SPA. The most recent Q-value rating (2020) classifies the Knightsbrook stream as having 'Moderate Status' (Q3-4) in accordance with Water Framework Directive (WFD) monitoring. While this signifies a minor decline in water quality compared to the previous monitoring cycle, it remains marginally superior to another monitoring station located upstream of where the Rathmolyon (which receives discharge from Tromman Quarry) and the Knightsbrook streams converge. This suggests that while there may have been other pressures elsewhere in the river network, the quarry itself is unlikely to have contributed to cumulative water quality impacts."

We would observe that the granularity of the data does not provide a robust scientific platform on which to reach such a conclusion. The results for the nearby streams are based on modelling by the EPA, and even had they been based on sampled results, the proximity of the site to the sampling point would be an important factor to consider in reaching any conclusion. As such, we submit that this is an unscientific basis on which to claim no in-combination impact on water quality. This is applicable both in a WFD context and in a Habitats Directive context.

3.2 Dust

We note there is no mention of dust impacts in the rNIS. While the rEIAR did discuss dust impacts, the potential impact on the nearby watercourses and Natura 2000 sites do not appear to have been assessed. We submit that this should be assessed as part of the rNIS.

Please acknowledge this submission and advise us of any decision made.

Is muidne le meas,

Phoebe Duvall
*Senior Planning and Environmental Policy Officer
An Taisce – The National Trust for Ireland*

Dr. Elaine McGoff
*Head of Advocacy
An Taisce – The National Trust for Ireland*

Seán O'Callaghan
*Planning Officer
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