


FW: Ref. 322189

From Bord <bord@pleanala.ie>
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 1 attachment (163 KB)
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From: Phoebe Duvall <Phoebe.Duvall@antaisce.org>
Sent: Monday 28 April 2025 15:25
To: Bord <bord@pleanala.ie>
Subject: Ref. 322189

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A Chara,

Please find attached a submission from An Taisce in relation to Ref. 322189.

Kind regards,

Phoebe Duvall

Senior Planning and Environmental Policy Officer
An Taisce - The National Trust for Ireland
5 Foster Place, Dublin 2, Ireland
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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

D02 V0P9

20250428-ABP-322189

An Bord Pleanála
64 Marlborough Street
Dublin 1

Sent by email to: bord@pleanala.ie

28th April 2025

Ref. 322189

App. JJ Floods and Sons Ltd

For: Substitute Consent pursuant to Section 177E of the Planning and Development Act 2000, as amended for development consisting of the extraction and processing of gravel and stone over 39ha area and associated infrastructure.. A remedial EIAR was submitted with this application.

Site: Murrens, Oldcastle, Co. Meath, A82 R6A0

A Chara,

An Taisce wishes to make the following submission on the above application for substitute consent.

1. 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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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, Phil Doyle, Tony Holohan

- (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 *Suaimehneas 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, in the first instance, 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.

The onus is then on the Board to justify the existence (or lack thereof) of exceptional circumstances in relation to the subject case.

2. Remedial Appropriate Assessment Screening

The remedial Appropriate Assessment screening focuses primarily on the current hydrological regime on and around the subject. As the remedial assessment covers the time period from 1990 on, it is submitted that further information is required on the historic surface and groundwater regime, any potential changes to it in the period since 1990, any historic discharges, etc. Without this information, we consider that significant adverse effects cannot be ruled out. We note that the hydrological assessment accompanying the rEIAR states that it is assessing the current hydrological regime. We note previous concerns regarding groundwater contamination to nearby Natura 2000 sites which require close consideration by the Board.

2.1 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:

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

*"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*¹, 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 quarrying since 1990 are satisfied.

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

Is muidne le meas,

Seán O'Callaghan

Planning and Environmental Policy Officer

An Taisce – The National Trust for Ireland

Phoebe Duvall

Senior Planning and Environmental Policy Officer

An Taisce – The National Trust for Ireland