

Mr Norman Berry & Mrs Patricia Berry

Knockduff House

Knockduff

Dunmanway

Co. Cork

P47 PF68

trishlucy@live.co.uk

023 8856664

22 May 2026

The Secretary

An Coimisiún Pleanála

64 Marlborough Street

Dublin 1

D01 V902

AN COIMISIÚN PLEANÁLA

LDG- _____

ACP- _____

27 MAY 2026

Fee: € _____ Type: _____

Time: 9:15 By: Reg. Post

RE: Submission/Observation on Application for Substitute Consent — Murray Brothers Tarmacadam Ltd., Ardcahan Quarry, Dunmanway, Co. Cork

Application reference: SU04.324277

Site notice date: 6 May 2026

Applicant: Murray Brothers Tarmacadam Ltd.

Applicant's Agent: McCutcheon Halley, 6 Joyce House, Barrack Square, Ballincollig, Co. Cork

Dear Sir/Madam,

We wish to make the following submission and observations on the above-referenced application for substitute consent in respect of quarrying development at Ardcahan, Dunmanway, Co. Cork, submitted pursuant to Section 177E of the Planning and Development Act 2000 (as amended) (the "PDA"). We respectfully request that An Coimisiún Pleanála ("ACP") **refuse** the application for the reasons set out below.

By operation of Section 37L of the PDA, the simultaneous application for future development at the site must also be refused in the event that substitute consent is refused. This submission therefore addresses the substitute consent application as the determinative matter.

1. Standing and Interest

We are residents of Knockduff, Dunmanway, in the immediate vicinity of the Ardcahan Quarry, Co. Cork. We rely on the right under Section 177E(2) and Article 6 of Directive 2011/92/EU (as amended) (the "EIA Directive") and Article 6(3) of Council Directive 92/43/EEC (the "Habitats Directive") to participate in this consent procedure.

2. Summary of Grounds of Objection

We object on the following principal grounds, each of which is developed in detail below:

- **Ground 1.** Exceptional circumstances under Section 177K(1A)(a) and 177K(1J) of the PDA are not made out on the evidence submitted by the Applicant.
- **Ground 2.** The Appropriate Assessment under Article 6(3) of the Habitats Directive cannot be lawfully concluded in favour of the development. The Applicant's own remedial Natura Impact Statement (rNIS) discloses likely contribution to adverse effects on the Bandon River SAC and admits that the supporting data is incomplete. The required standard of certainty (no reasonable scientific doubt) cannot be met.
- **Ground 3.** The ability to carry out an EIA and AA has been substantially impaired within the meaning of Section 177K(1J)(c) by reason of the absence of contemporaneous environmental monitoring data over the 24-year period 1990–2014.
- **Ground 4.** The development has resulted in permanent loss of two Annex I habitats — Old Sessile Oak Woods with Ilex and Blechnum (91A0) and European Dry Heath — which the Applicant's rEIA expressly concedes are irreplaceable. The proposed remediation cannot mitigate this loss.
- **Ground 5.** The application site boundary has been artificially drawn so as to exclude parts of the wider quarry, the macadam plant and pre-1990 extraction areas. This amounts to impermissible project-splitting contrary to the EIA Directive and Section 261(10) of the PDA, and was a basis for the previous refusal of leave to apply under ABP Ref. 302158-18.
- **Ground 6.** Use of polyaluminium chloride (PAC) in on-site water management, disclosed in the rNIS, presents a direct and unquantified toxicity pathway to qualifying species of the Bandon River SAC, including Freshwater Pearl Mussel.
- **Ground 7.** Cumulative and in-combination effects with the macadam plant, other quarries identified in the Bandon Sub-Catchment Plan, forestry and agriculture, are not adequately assessed.
- **Ground 8.** Continuation of unauthorised quarrying after the 2011 refusal (Reg. Ref. 11/317) and the 2013 enforcement notice (CCC Ref. SKBE/13/7) defeats the Applicant's submission under Section 177K(1J)(b) that it could reasonably have believed the development to be authorised.
- **Ground 9.** Quarry expansion after 1 July 1999, when the Bandon River SAC became legally protected, was undertaken without Appropriate Assessment. This is directly

contrary to the Habitats Directive and is a serious infringement that retrospective consent cannot lawfully remedy.

3. Legal Framework

Section 177K(1A)(a) of the PDA provides:

“the Board shall not grant substitute consent (whether subject to conditions or not) unless it is satisfied that exceptional circumstances exist that would justify the grant of such consent by the Board.”

Section 177K(1J) sets out the matters to which ACP shall have regard when considering whether exceptional circumstances exist, including:

- (a) whether regularisation would circumvent the purpose and objectives of the EIA Directive or the Habitats Directive;
- (b) the applicant's belief as to the unauthorised status of the development;
- (c) whether the ability to carry out EIA or AA, and to provide for public participation, has been substantially impaired;
- (d) the actual or likely significant effects on the environment or adverse effects on the integrity of a European site;
- (e) the extent to which significant effects can be remediated;
- (f) whether the applicant has complied with previous planning permissions or has previously carried out unauthorised development.

The legal threshold for Appropriate Assessment under Article 6(3) of the Habitats Directive is settled by the Court of Justice of the European Union in Case C-127/02 Waddenzee, Case C-258/11 Sweetman v An Bord Pleanála, Case C-323/17 People Over Wind and Case C-461/17 Holohan. Consent may only be granted where the competent authority has “made certain” that the project will not adversely affect the integrity of the European site concerned, beyond reasonable scientific doubt. Conjecture, generalised reassurance, or mitigation by way of natural regeneration cannot meet that standard.

Substitute consent does not displace this standard. The Supreme Court in *An Taisce v An Bord Pleanála* [2020] IESC 39 and the CJEU in Case C-215/06 *Commission v Ireland* have made clear that retrospective EIA is exceptional, narrowly construed, and cannot become a routine substitute for prior assessment.

4. Grounds of Objection in Detail

4.1 Ground 1 — Exceptional Circumstances Are Not Made Out

The Applicant relies heavily on the earlier grant of leave to apply for substitute consent under ABP Ref. 305621-19. ACP is not bound by that decision, and the current application must be considered *de novo*. Material new evidence has come to light since 2020, including the Freshwater Pearl Mussel surveys of 2023 and 2024 commissioned by the Applicant's own

ecologists, which disclose silt deposition at Ardcahan Bridge, the functional extinction of the FWPM population, and the absence of juvenile recruitment. None of this was before An Bord Pleanála in March 2020. The exceptional circumstances test must therefore be assessed afresh on the totality of the now-available evidence.

The cumulative effect of the matters set out below is that, on a proper application of the Section 177K(1J) factors, exceptional circumstances are not established.

4.2 Ground 2 — Appropriate Assessment Cannot Lawfully Be Concluded in Favour of the Development

The Applicant's rNIS (Malone O'Regan Environmental, March 2026) acknowledges a direct hydrological pathway from the Site to the Bandon River SAC via the boundary stream, which enters the SAC approximately 350m–375m downstream. The qualifying interests for which the Site has been screened in include Freshwater Pearl Mussel (*Margaritifera margaritifera*), Brook Lamprey, the Annex I river-vegetation habitat (3260), and Alluvial Forests (91E0).

At Section 7.1.2.2 of the rNIS the Applicant's own consultants record:

"it is also likely that the quarry played a role in the cumulative silt load. This combined effect may have contributed to the ongoing failure of juvenile mussels to survive in the SAC."

And immediately thereafter:

"Given the absence of specific surface water survey data during the period of Substitute Consent, it is not possible to confirm or quantify the contribution of silt from the quarry operations to the boundary stream or the River Bandon."

These two statements are determinative. They confirm (i) likely contribution to a continuing adverse effect on a qualifying species and (ii) absence of the evidence required to discount it. The Waddenzee / Sweetman / People Over Wind standard cannot be met. ACP is required to refuse consent.

In addition, the Bandon Sub-Catchment Plan identifies the Ardcahan Quarry as one of four quarries with potential to be contributing to FWPM impacts. The conservation status of FWPM is assessed nationally as "bad". The 2023 and 2024 surveys recorded no juveniles (individuals under 60mm) and observed silt plumes when the riverbed was disturbed both at Ardcahan Bridge and at downstream sampling locations. This is direct evidence of ongoing adverse impact within the SAC.

4.3 Ground 3 — Use of Polyaluminium Chloride (PAC) Is an Unquantified Toxic Pathway

Section 7.1.2.3 of the rNIS discloses that PAC was used in the on-site water management process during quarrying operations. The Applicant's own report acknowledges that, in certain conditions, PAC residuals can:

- clog fish gills, impair osmoregulation and oxygen transfer, leading to fish mortality;

- cause oxidative stress and increased mortality in mussels and snails, with filter-feeders being more sensitive than other species; and
- vary in toxicity according to pH, water hardness and dosage.

Freshwater Pearl Mussel is a filter-feeding species and is a qualifying interest of the SAC. No data is provided in the rNIS quantifying residual aluminium concentrations in discharges from the on-site settlement ponds to the boundary stream over the 1990–2014 period. The risk is therefore named, plausible and unquantified. This further confirms that the Appropriate Assessment cannot lawfully exclude adverse effects beyond reasonable scientific doubt.

4.4 Ground 4 — Substantial Impairment of EIA and AA Under Section 177K(1J)(c)

The development took place over 24 years from February 1990 to October 2014. The rEIAR and rNIS rely substantially on historical aerial photography, post-hoc surveys and reconstructed assumptions because contemporaneous monitoring data is, for the most part, absent.

Specific evidential gaps include:

- No contemporaneous surface water quality monitoring data demonstrating compliance with WFD/Article 6 standards for the boundary stream or the River Bandon during the relevant period.
- No contemporaneous monitoring of residual aluminium from PAC use in on-site water management.
- Blasting vibration monitoring data exists only for 2009–2014 — i.e. five of twenty-four years — and the Applicant’s rEIAR (Chapter 10) expressly concedes that the monitoring locations “do not represent the nearest noise sensitive location to the blast area in each case” and that “it cannot be determined if other receptors located closer to the blast site were exposed to peak noise levels greater than those permitted.”
- No contemporaneous dust deposition monitoring at sensitive receptors during the construction or operational phases.
- No contemporaneous biodiversity baseline surveys conducted prior to or during the period in which Annex I habitats (91A0 and European Dry Heath) were destroyed.

In Case C-215/06 Commission v Ireland, the CJEU held that retrospective EIA can only be available in narrowly exceptional circumstances and cannot be used in a manner that undermines the effectiveness of the EIA Directive. The applicant cannot now construct an assessment that should have been done before extraction commenced — and the rEIAR/rNIS demonstrably depend on conjecture, qualitative reasoning and ex-post-facto rationalisation. The ability to carry out a meaningful EIA and AA has been substantially impaired.

4.5 Ground 5 — Irreversible Loss of Annex I Habitats

At Section 14.5.1 of the rEIAR (Volume 2, Chapter 14) the Applicant's own ecologists state:

“Historical quarrying has led to the permanent loss of nationally important Annex I habitats, specifically Old Sessile Oak Woods with Ilex and Blechnum (91A0) and European Dry Heath, which are irreplaceable.”

The Remediation Plan offers protection of the remaining areas of those habitats and the planting of native woodland that, on the Applicant's own admission, is “expected to mature into a mixed broadleaved woodland of notable local importance within 60–100 years.”

A timescale of 60–100 years cannot rationally be regarded as remediation of a significant adverse effect within the meaning of Section 177K(1J)(e) of the PDA. Under the mitigation hierarchy set out in the National Planning Framework and the National Biodiversity Action Plan (avoid, minimise, restore, offset), avoidance and minimisation were never undertaken; restoration is impossible (the Applicant accepts as much); and offsetting on a 60–100 year horizon does not meet the principle of no net loss. National Policy Objectives 84, 85, 86 and 87 of the draft First Revision to the NPF, and the EU Nature Restoration Law, all militate against grant.

4.6 Ground 6 — Impermissible Project-Splitting and Boundary Manipulation

The current red-line boundary captures only the 1990–2014 extraction area (5.2 ha) and certain ancillary land, within a 19.1 ha site. It excludes:

- Pre-1990 extraction areas (within the same landholding).
- The macadam/asphalt plant area permitted under Reg. Ref. 98/284 / 98/294, which is operationally integrated with the quarry and shares its access road, hydrology and operator.
- Ancillary lands associated with the wider quarry operation.

In its decision under ABP Ref. 302158-18 the Board expressly noted that the proposed substitute consent area “does not include all of the former quarry that is unauthorised development”, and refused leave on that basis. The current boundary remains drawn so as to suit the Applicant rather than to capture the true extent of the development. Section 261(10) of the PDA, and the statutory definition of “quarry” under Section 2 of the PDA (as amended by S.I. No. 584 of 2011, regulation 3), make clear that the meaning of “quarry” is not restricted to areas of extraction.

The carve-out of the macadam plant is particularly problematic: it shares the same hydrological pathway to the SAC, the same access, the same workforce and the same operator. Assessing the quarry separately from the plant for EIA and AA purposes is project-splitting prohibited by Article 2(1) of the EIA Directive and the principles in Case C-72/95 Kraaijeveld and Case C-2/07 Abraham.

4.7 Ground 7 — Inadequate Cumulative and In-Combination Assessment

Article 6(3) of the Habitats Directive requires assessment of a project's effects "in combination with other plans or projects." The Bandon River Sub-Catchment Plan identifies four quarries, including Ardcahan, as potentially contributing to FWPM impacts. The rNIS does not adequately assess the cumulative loading from those quarries, the integrated macadam plant on the same landholding, regional forestry operations, and agricultural diffuse pollution. A meaningful in-combination assessment is therefore absent.

4.8 Ground 8 — Applicant's Asserted Belief in Authorised Status Is Not Sustainable Post-2011

The Applicant's case under Section 177K(1J)(b) is that it believed the quarry to be authorised until Cork County Council's refusal of Reg. Ref. 11/317 on 13 July 2011 and the subsequent enforcement notice (Ref. SKBE/13/7) in 2013. That submission cannot extend beyond 2011. Quarrying continued at the Site until October 2014, after Cork County Council confirmed compliance with the enforcement notice. Any quarrying carried out by the Applicant between July 2011 and October 2014 was undertaken with full knowledge that the quarry was unauthorised. The Section 177K(1J)(b) consideration cannot operate in the Applicant's favour for that period.

4.9 Ground 9 — Quarry Expansion Post-1999 Without Appropriate Assessment

The Bandon River SAC has been legally protected since 1 July 1999. The Section 261A Heritage Officer's assessment (cited in the Planning Statement at Section 4) records that the quarry expanded by approximately 2.0 ha between 2000 and 2005, and further between 2005 and 2010. All such expansion required Appropriate Assessment under Article 6(3) of the Habitats Directive. None was undertaken at the time. To grant substitute consent in respect of such development would, in the words of Section 177K(1J)(a), circumvent the purpose and objectives of the Habitats Directive.

4.10 Ground 10 — Section 37L: Refusal of Substitute Consent Requires Refusal of the Future Development Application

Section 37L of the PDA (as amended by the Planning and Development, Maritime and Valuation (Amendment) Act 2022) provides that if substitute consent is refused, the linked application for future development must also be refused. The Applicant has elected to bundle a Section 37L future-development application with this substitute consent application. We submit that the appropriate course is for ACP to refuse the substitute consent application on the merits, with the consequence that the future development application falls.

The Section 37L mechanism does not lower the bar for substitute consent. The "Janus-faced" reasoning in the High Court judgment in PL88.245174 (Ní Raifeartaigh J.) does not assist the Applicant where, as here, the backward-looking assessment cannot lawfully conclude that adverse effects on a European site can be excluded.

5. Specific Observations on the Application Documents

5.1 rNIS (Malone O'Regan Environmental, March 2026)

- Section 4.1 (Hydrological Connection) confirms a direct surface-water pathway to the Bandon River SAC, with the SAC commencing approximately 350m downstream.
- Section 6.3 screens four qualifying features into Stage 2 AA: Annex I 3260 floating river vegetation; Annex I 91E0 alluvial forests; Freshwater Pearl Mussel; and Brook Lamprey.
- Section 7.1.2.2 concedes likely contribution to silt loading affecting juvenile FWPM survival; concedes absence of contemporaneous data to quantify the contribution. These admissions are inconsistent with a lawful AA conclusion.
- Section 7.1.2.3 discloses PAC use with named risks to filter-feeding qualifying species and no quantification of residual aluminium discharges.

5.2 rEIAR Volume 2 (Main Statement, February 2026)

- Chapter 4 (Alternatives Considered) does not adequately address the “Do Nothing” scenario in the context of an unauthorised development. The “Alternatives” chapter is largely concerned with alternative site boundaries for the substitute consent application, rather than alternative ways of meeting the underlying need without the adverse effects identified.
- Chapter 10 (Noise and Vibration) admits monitoring locations were not representative of the nearest sensitive receptors and that exposure of those receptors cannot be determined.
- Chapter 14 (Biodiversity) concedes the irreplaceable loss of Annex I habitats.
- Chapter 14, Section 14.5.1 (Remediation Plan) relies on a 60–100 year horizon for woodland maturation. This does not constitute remediation in any meaningful sense for the purposes of Section 177K(1J)(e).

5.3 Planning Statement (McCutcheon Halley, February 2026)

- The Applicant's reliance on the “pre-1963” status of the quarry is not relevant to the unauthorised development assessed by Cork County Council under Section 261A, as expressly recorded in ABP's Note 1 to its decision under ABP Ref. 302158-18.
- The Applicant's account of compliance with planning permissions is incomplete: it does not adequately address the refusal of Reg. Ref. 11/317, the quashing on judicial review of PL88.245174, the previous refusal of leave under ABP Ref. 302158-18, and the withdrawal of the previous substitute consent application under ABP Ref. 313649-22.

6. Conclusion and Relief Sought

For the reasons set out above, We respectfully submit that the application for substitute consent does not satisfy the threshold of exceptional circumstances under Section 177K(1A)(a) of the PDA. Further, on the Applicant's own evidence, the Appropriate Assessment cannot lawfully conclude that the development has not adversely affected, and does not continue to adversely affect, the integrity of the Bandon River SAC. The grant of substitute consent in these circumstances would circumvent the purpose and objectives of the EIA Directive and the Habitats Directive.

We therefore respectfully request that An Coimisiún Pleanála **refuse the application for substitute consent**, with the consequence under Section 37L of the PDA that the simultaneous application for future development is also refused.

We confirm that this submission is made within the eight-week statutory period as provided for in the application procedure.

We would be grateful for written acknowledgement of receipt and confirmation of the assigned case reference.

Yours faithfully,



Mr Norman Berry



Mrs Patricia Berry