Karen Byrne

From:	Phoebe Duvall <Phoebe.Duvall@antaisce.org>
Sent:	Tuesday 28 July 2026 16:48
To:	Appeals2
Subject:	Ref. 324277
Attachments:	20260728-ACP-324277.pdf

A Chara,

Please find attached a submission from An Taisce in relation to Ref. 324277.

Best regards,

Phoebe Duvall

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Please note that I work Monday through Thursday.

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20260728-ACP-324277

An Coimisiún Pleanála,
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Sent by email to: appeals@pleanala.ie

28th July 2026

Ref: 324277
App: Murray Brothers Tarmacadam Ltd
For: Application for Substitute Consent pursuant of Section 177E of the Planning and Development Act 2000 (as amended) consisting of the quarrying of rock that took place between February 1990 and October 2014, along with all associated site development works. The application is accompanied by a remedial Environmental Impact Assessment Report (rEIAR) and a remedial Natura Impact Statement (rNIS)
Site: Ardcahan, (townland), Dunmanway, Co. Cork.

A Chara,

Thank you for referring the above application for substitute consent to An Taisce for comment.

1. Preliminary Matter: 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;
(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-e346-4b08-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)[2] actually examined the adequacy of the definition of exceptional circumstances in s.177K(1J) in comparison with the CJEU's judgements in c-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 Coimisiún 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.

2. Remedial Environmental Impact Assessment and Impacts to Water

In the first instance, while we recognise the value in requiring the remediation of the subject site, which can only be mandated through a grant of substitute consent, this does not negate the need for a thorough and legally compliant rEIA and rAA.

As noted in the application documentation, there is a direct hydrological link between the subject site and the Bandon River SAC via a watercourse that bounds the subject site. This connection existed during the substitute consent period. Both the Bandon and its tributary in the area of the subject site, the Caha River, are classed by the EPA as moderate water quality status per Water Framework Directive (WFD) requirements and as at risk of not meeting the legal obligation to achieve and maintain at least good status by 2027. The subject site is also located in area of extreme groundwater vulnerability.

The rEIAR identified the following as potential impacts of historic quarrying on the local aquatic environment: ammonia from blasting, silt and clay loading in watercourses, hydrocarbon spills or leaks, contaminated surface water runoff from hardstanding, and faecal coliforms from on-site facilities. It also states in section 7.2.3 that there were five discharge points from the site to the boundary stream that were used over the course of the substitute consent period. The rEIAR then concludes that: "*Any of these impacts would have been temporary to short term with a longer term cumulative effect.*" However, we consider there to be a general lack of historic surface and groundwater monitoring data presented to support this conclusion. We recommend that further information is sought in this regard. We concur with the recommendations made by the Cork County Council Environment Officer (Air and Water) in their report's conclusion regarding additional information that should be sought from the applicant (page 37 of the PDF of the Planning Authority report, page 33 of the report itself).

While we recognise that historic data and records can be hard to find or non-existent, gaps in the information make conducting a legally compliant remedial assessment very difficult. It also makes it difficult to establish an adequate and thorough remediation regime. Where information is unavailable,

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

this must be clearly noted and the limitations on the assessment discussed. Where assumptions, estimates or predictions are made, the reasoning behind them should be more clearly explained.

Regarding the use of poly-aluminium chloride to settle solids and silts, we would highlight that PAC is toxic and harmful to aquatic ecosystems, particularly when in concentrated forms. We share the concerns raised by the Cork County Council Environment Officer (Air and Water) that the use of PAC does not appear to have been regulated and that more information on potential impacts is required, including if sediment is disturbed.

We also recommend that a Water Framework Directive assessment be sought, covering both the current status of the waters in the area of the site and the substitute consent period to determine whether the historic activities may have caused a deterioration of the status of a surface or ground water body or if it may have jeopardised the attainment of good surface or ground water status or of good ecological potential and good surface or ground water chemical status.

3. Remedial Natura ImpactStatement and Impacts to Bandon River SAC

The Bandon River SAC has been designated for the follow habitats and species:

- Water courses of plain to montane levels with the Ranunculion fluitantis and Callitricho-Batrachion vegetation [3260]
- Alluvial forests with Alnus glutinosa and Fraxinus excelsior (Alno-Padion, Alnion incanae, Salicion albae) [91E0]
- Margaritifera margaritifera (Freshwater Pearl Mussel) [1029]
- Lampetra planeri (Brook Lamprey) [1096]

As stated in the report by the Cork County Council ecologist (appended to the Council's submission to An Coimisiún on the subject application):

> **The protection of a very high standard of water quality and the maintenance of a stable of hydrological regime are critical requirements to protect favourable conservation condition of these habitats and species. One of the qualifying interest species, Freshwater Pearl Mussel, particularly sensitive to any deterioration in water quality including arising from the introduction of silt, toxic contaminants or nutrients to the aquatic environment. This species is known to occur within 300m of the quarry site.**

We note that Freshwater Pearl Mussel were found at the confluence of the stream bounding the subject site and the River Bandon in surveying done in 2023 and 2024. The Freshwater Pearl Mussel is listed as critically endangered on the IUCN Red List of Threatened Species and acts as an important bio-indicator for pristine freshwater ecosystem quality. While the assessment did not find Brook Lamprey in the area of the site, they are present in the wider catchment and, like Freshwater Pearl Mussel, are very sensitive to siltation and other changes in water quality.

The rNIS states that the quarrying activity likely led to increases in suspended solids and siltation in the Bandon. While it states that these were likely occasional and isolated events (often associated with high water flow periods), the rNIS does acknowledge that the quarry very likely did contribute to overall siltation in the river given the nature of the operation and the hydrological connection. It is stated that that overall amount of silt contributed cannot be quantified given the absence of specific surface water data during the substitute consent period. Overall, we consider that there is a lack of data to support to the rNIS's conclusions, including that the effect of siltation on the SAC was negligible. The rNIS also concludes that the siltation is "*considered to have had a slight to moderate*

effective, with medium to long-term negative effects on the quality of juvenile pearl mussel habitat with in the Bandon River SAC". However, in absence of surface water quality data, it is difficult to confirm those conclusions.

Similarly there is a lack of information supporting the conclusions that, for example,:

- the drainage/settlement ponds (such as ponds F,G,L) had negligible effects on water quality;
- blasting effects would have been damped by water browsers or intercepted by settlement ponds (are there records confirming the use of such mitigation?);
- hydrocarbon spills would not have occurred or would not have a water quality impact (are there records confirming the use of bunds for fuels, use of designated areas for refuelling?).

While we recognise that historic data and records can be hard to find or non-existent, the gaps in the information make conducting a legally compliant remedial Appropriate Assessment very difficult, if not impossible. It also makes it difficult to establish an adequate and thorough remediation regime.

We recommend that further information be sought by An Coimisiún. Where information is unavailable, this must be clearly noted and the limitations on the assessment discussed. Where assumptions, estimates or predictions are made, the reasoning behind them should be more clearly explained.

4. Cumulative Assessment and the Adjoining Tarmacadam Plant

The subject quarry supplied aggregate to the adjoining tarmacadam plant, and the rNIS confirms that the majority of the quarried material was used in this plant following its completion in 1999. While the plant is not included in the substitute consent area as it appears to be planning-compliant (we recommend An Coimisiún confirm this), it is correct that potential impacts arising from the adjoining tarmacadam plant have been assessed cumulatively with the historic quarrying given the clear and direct functional interdependence between the two. To not assess them cumulatively would constitute project splitting, which is not permissible.

Regarding potential cumulative siltation impacts on the River Bandon, the rNIS states the following section 6.2

> Dry periods where erodible material had time to accumulate on the Site's surfaces, followed by heavy rainfall, had the potential to enter the boundary stream onsite. It is likely that several such runoff events occurred each year from this source. These are believed to have only minor and short-lived effects on most aspects of the receiving environment. Specifically, they are not expected to have lowered water quality, cause mortality or significant effects to habitats for fish (including salmonids), lamprey or FWPM.
>
> However, these events could have previously contributed to the accumulation of silt in areas where FWPM may have occurred or could have potentially survived, particularly in slow-flow marginal zones. In these locations, while the physical habitat may appear suitable, the presence of silt could have reduced habitat quality below the threshold needed for survival.
>
> The extent and severity of this historical potential effect are difficult to determine, as such silt deposits are likely to have been dispersed, and no records have been kept of sediment releases into the boundary stream or condition assessments of the stream. Any potential effect is considered to be localised and would have extended no more than a few hundred metres downstream of the quarry stream confluence due to the volume of water within the Bandon River SAC.

There is clearly uncertainty about the potential impacts of cumulative siltation, however, the rNIS rules out significant in-combination impacts. We consider that further assessment is required here.

The rEIAR in section 7.3.6 states: "*There was a risk of a cumulative effect from elevated suspended sediment arising during rainfall events from the tarmac plant and impacting the boundary stream and Bandon River*". However, it does not elaborate further to assess the potential significance of the cumulative siltation effects. This is also inadequate in our view and requires further assessment.

Additionally, the rNIS screens out any other in-combination effects on water quality in the Bandon River SAC besides those from the tarmacadam plant, for example from one-off housing and agricultural developments in the area. However, the rEIAR contradicts this assessment and states:

> *"The intensification of agricultural activity in the lands to the south and east of the site area over the last two decades are likely to pose a long-term cumulative risk in contributing potential sediment and nutrient runoff to the small local watercourse and Bandon River system. The management of fertilizer applications, clearance of areas of scrub and the vegetated riparian zone adjacent to the stream to increase the areas of grass growth for silage and livestock as well as the direct access that livestock have to the bed of the stream for drinking water, pose a very high risk and potential cumulative impact on the water quality of the small stream in areas upstream, adjacent to and downstream of the site."*

We therefore recommend that the rNIS be updated to assess potential cumulative impacts on the River Bandon from local agricultural activity over the substitute consent period.

5. Remediation

The rEIAR and rNIS demonstrate that significant areas of high value habitat were removed as part of quarrying operations over the substitute consent period. This included areas of Dry siliceous heath and oak-birch-holly woodland (historically known as Clashnagallagh Wood), both of national level importance. These habitats correspond to Annex I habitats European Dry Heaths [4030] Old Sessile Oak Woods with Ilex and Blechnum [91A0], respectively, which are protected under the Habitats Directive.

We consider that further detail is needed to adequately assess whether the proposed remediation measures are adequate to a) remediate the full extent of the impacts caused by historic habitat removal, particularly the removal of the aforementioned habitats of national importance *and* b) protect the current habitats and species on the site, as these have also been assessed to be of biodiversity value. We note that some of the measures listed in the rEIAR as ecological mitigation appear to be more targeted at future development rather than at remediation of historic impacts (avoiding future vegetation removal during bird nesting season).

Crucially, remediation of historic impacts must take priority over future development, as proposed in the related application made under s.37L. We therefore concur with Cork County Council's assessment below:

A third issue raised relates to the concurrent application for further development of the quarry under s.37L which is currently before An Coimisiún Pleanála. It is the Planning Authority's view that adequate and appropriate compensatory mitigation is required to be proposed and agreed in respect of the substitute consent application prior to any decision being made on the application for further development. Further habitats of high ecological value are proposed to be removed for which insufficient detail has been provided in relation to post works remediation. In addition, land proposed for further development of the quarry may be required to be incorporated into the remediation plan, together with proposals for active restoration of damaged habitats in this area, in order to achieve meaningful compensation for the extent of (at least) nationally important habitat which was removed from the site during the substitute consent period (between 1990 and 2014).

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

Is mise le meas,

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