

File With \_\_\_\_\_

## SECTION 131 FORM

Appeal NO: A88-313030-22Defer Re O/H ☐

TO: SEO

Having considered the contents of the submission received 16/03/2022 fromPatrick McLaffrey  
8 Son Limited

I recommend that section 131 of the Planning and Development Act, 2000

☒ be not be invoked at this stage for the following reason(s): for clarificationE.O.: Aisling KellyDate: 22/03/2022

To EO: \_\_\_\_\_

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 C. LawlorPlease prepare BP PL70 - Section 131 notice enclosing a copy of the attached submissionto: Larner (2)Task No: 322024-23Allow 2/3/4 weeks -- BP PL70EO: Aisling KellyDate: 22/03/2022AA: Ian KellyDate: 29/03/2022

X BPRL23 → P.T.O

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## CORRESPONDENCE FORM

Appeal No: ABP-313030-22Mc LamberPlease treat correspondence received on 16/03/2023 as follows:

|   |   |
|---|---|
| 1. Update database with new agent for Applicant/Appellant _____ |   |
| 2. Acknowledge with BP <u>RL 23</u>                             | 1. RETURN TO SENDER with BP _____                       |
| 3. Keep copy of Board's Letter <input type="checkbox"/>         | 2. Keep Envelope: <input type="checkbox"/>              |
|   | 3. Keep Copy of Board's letter <input type="checkbox"/> |

| Amendments/Comments                                   |
|---|
| <u>Earth Science Partnership Limited on behalf of</u> |
| <u>Patrick McLafferty &amp; Sons Limited</u>          |
| <u>Response to Section 132 Notice</u>                 |
|   |
|   |

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|---|--|
| <b>4. Attach to file</b><br>(a) R/S <input type="checkbox"/> (d) Screening <input type="checkbox"/><br>(b) GIS Processing <input type="checkbox"/> (e) Inspectorate <input type="checkbox"/><br>(c) Processing <input type="checkbox"/> | <b>RETURN TO EO</b> <input type="checkbox"/> |
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|--------------------------|--|
|                          | Plans Date Stamped <input type="checkbox"/><br>Date Stamped Filled in <input type="checkbox"/> |
| EO: <u>Aisling Kelly</u> | AA: <u>Ian Kelly</u>   |
| Date: <u>21/03/2023</u>  | Date: <u>29/03/2023</u>  |

**Earth Science Partnership (Ire) Ltd**  
**CONSULTING ENGINEERS, GEOLOGISTS & ENVIRONMENTAL SCIENTISTS**

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An Bord Pleanala

64 Marlborough Street,  
Dublin 1,  
D01 V902

16<sup>th</sup> March 2023

**AN BORD PLEANALA**

LDG- \_\_\_\_\_  
ABP- \_\_\_\_\_

**16 MAR 2023**

Fee: € \_\_\_\_\_ Type: \_\_\_\_\_  
Time: 12.19. By: Courier

**Re: PA Reg Ref. SS 22/07**

**Whether the ongoing quarrying and ancillary activities at site is or is not development or is or is not exempted development.**

**P. McCaffrey & Sons Limited Quarry, Ballymagroarty, Ballintra, Co. Donegal.**

Dear Sir/ Madam,

In relation to the above matter, we wish to make the following comments;

Before we address the issues raised in the referral it is important to give some background to the site, as a whole.

**1.0 Brief Background leading up to the Section 261A Proceedings.**

The following events occurred in the lead up to the section 261A proceedings; -

**1.1** This Quarry was registered under Section 261 as a pre-1963 development and this was accepted by the Local Authority in 2007 or thereabouts, and no further action was taken. During the period, between 2005 and 2008 the Quarry set about complying with the requirements of European environmental legislation and the following actions were undertaken.

**1.2** Application for a Water Discharge Licence for the North Quarry was appealed to An Bord Pleanala (Ref. WW0298) on 20/04/2005. This was refused by the Board (Decided 18/10/2005) for the following reason; *'Having regard to Article 32 of the European Communities (Natural Habitats) Regulations, 1997 (S.I. number 94 of 1997) and, in particular, sub-articles (1) and (3) of the said Regulations, it is considered that an*



*appropriate assessment of the environmental implications of the proposed discharge for the Durnesh Lake candidate Special Area of Conservation has not been carried out. In the absence of such an assessment having ascertained that the discharge will not adversely affect the integrity of the Durnesh Lake candidate Special Area of Conservation, it is considered that the local authority and the Board are precluded from granting a licence.'*

- 1.3 A second Water Discharge Licence for the North Quarry was granted by An Bord Pleanála on 18<sup>th</sup> February 2008 (ABP Ref. PL05.WW0330). This was subject to Article 32 of the European Communities (Natural Habitats) Regulations, 1997 (S.I. number 94 of 1997) and, in particular, sub-articles (1) and (3) of the said Regulations, it is considered that an appropriate assessment of the environmental implications of the proposed discharge for the Durnesh Lake candidate Special Area of Conservation has been carried out. Such an assessment having ascertained that the discharge will not adversely affect the integrity of the Durnesh Lake candidate Special Area of Conservation.
- 1.4 A Water Discharge Licence for the main (Southern) Quarry was appealed and granted by An Bord Pleanála on 28<sup>th</sup> July 2006 (Ref.WW0303). The granting of this licence was subject to assessment under Habitats Legislation being submitted and assessed by the Board.
- 1.5 An Air Emissions Licence was appealed and granted by An Bord Pleanála on 2<sup>nd</sup> November 2005. Part of the review by the Board was to consider the environmental impact and therefore the Board must reasonably be assumed to have carried out an AA in relation to the proposed emissions.
- 1.6 It is a matter of record that an E.I.S. was submitted to Donegal County Council as part of the Planning Ref No. P01/106 and was found to be inadequate. However subsequent to this, implementation of the An Environmental Management System (EMS) was introduced for the quarry and this was submitted to Donegal Co. Co. in 2006
- 1.7 In accordance with the EMS, Annual Environmental Report were submitted to Donegal County Council from 2006 and these were referred as AER from 2011 onwards. This is proof that the Environmental legislation was considered and complied with by the Quarry from 2006 onwards and that these were submitted to Donegal Co. Co. each and every year since 2006 and are on file. Please find attached a copy of the original EMS submitted together with AERs from 2011 and 2012 as a sample.

## **Submission on Behalf of the O’Gorman Family**

The submission made by McCarthy, Keville, O’Sullivan (MKO) makes reference to the 2001 Planning application. This application was refused on the ground of insufficient information and therefore has little bearing on this present section 5 application.

MKO then goes on to rely heavily on the section 261A, ABP Inspectors Report, therefore in order to address the matter, it is necessary to take into consideration the Inspectors report in its entirety and our comments are as follows;

### **Section 10 Planning Status;**

- Following 10.3.0 the inspector failed to include or refer to PL05.WW0330 (LWAT41) Discharge licence granted by ABP for the north quarry
- 10.5.0 refers to planning 07/21124 which was invalidated.
- 10.6.0 refers to planning 07/21125 which was invalidated.

### **Section 12 Assessment**

12.0.1 states that “Due regard is had to the Section 261A Guidelines”. It is self-evident that the criteria set down in the guidance document was not followed.

12.1.6 Concludes that part of the quarry is a pre1963 development.

12.2.2 This section is quoted in its entirety by MKO. It is a matter of record that all quarries in the country were registered a single entity under section 261. (The only distinction made at that time was the working quarry and the entire quarry lands). The PL05.131103 is reference to a 2001 application which was refused based on inadequate information and therefore to infer some importance to this permission is misleading.

12.2.6 This section is quoted in its entirety by MKO. The quarry, like any other quarry can be considered as a single operation. However, in accordance with section 261A we must assess if

- A) Was development carried after 1990, which would require rEIS. The general method applied to all quarries was based on the 1995 OSI aerial photo of the development and only the area which was disturbed after the appropriate date required Substitute Consent with rEIS.

- B) Was development carried after 1997, which would require rNIS. The general method applied to all quarries was based on the 2000 OSI aerial photo of the development and only the area which was disturbed after the appropriate date required Substitute Consent with rNIS.

If the quarry was treated the same as all other quarries in the country, it is abundantly clear from OSI aerial photographs attached to the inspectors report that the quarry areas were developed prior to the designated dates and on the face of this evidence and in accordance with the 261A guidelines should not have been required to apply for Substitute Consent.

12.2.9 Accepts that an area of 4.9 hectares within the quarry is a pre-1963 development.

12.2.11 Appears to rely on the word of the objector when it is clear from OSI evidence that development predated both 1990 and 1997 thresholds. This is not an objective conclusion.

12.3.3 This point fails to take into consideration the previous conclusion (12.2.9) that 4.9 hectares of the quarry is pre-63.

12.3.5 The inspector fails to consider the EMS and yearly records of environmental monitoring which has been carried out since 2006 and has been lodged with the Planning Authority.

12.4.9 concludes that there is no impact on Ballintra SAC as there is no direct source receptor link

12.4.14 The report wrongly states that there is no AA carried out and no discharge licence for the North quarry. Please refer to ABP own records (PL05. WW.0330). This was not considered by the report. Following on from this the report falsely represented statements by the quarry operator. Thereafter the report goes on to base a conclusion for AA which does not take all of the relevant facts into account.

12.4.16 The recommendation is based on only part of the facts and is therefore flawed. It should be also pointed out, at this point, that ongoing AERs and other relevant environmental information were on file with the Planning authority but were not considered by this report.

13.0.1 Not all of the information on the files within the County Council or the Boards own files were reviewed.

13.0.2 There was no clear evidence on an additional 4.7 hectares being carried out since 1990 and this is self-evident on the OSI Aerial photography. It appears that the report relies on hearsay evidence from the objector.

13.0.3 This conclusion fails to take into account that AA was carried out twice and that these assessments are a matter of record within the Boards own files. Therefore, the conclusion is highly questionable.

As much of the submission made by MKO also relies on the Section 261A and other matters relating to the quarry it is necessary to make the following points;

### **Section 261A Proceedings**

The following are the sequence of events surrounding the Section 261A application;

- 2.1 With the introduction of Section 261A an assessment was carried out by Donegal County Council (Quarry Ref. No. EUQY01). This report, to say the least, is hopelessly flawed, inaccurate and totally misrepresents the truth.

None of the issues referred to in the lead up to the Section 261A were taken into consideration and no reference is made to this very important information available from the County Council's own files. In addition, no reference was made to the fact that the development being assessed was, in part, a pre-1963 and the development predated both the EIA Directive and the Habitats Directive. The evident from aerial photography attached to Donegal Co. Co. report, inferring that the EIA offence determination rested solely on the area of the development not covered by a pre-1963 authorisation.

However, Donegal Co. Co. chose to ignore its own report and issued a Section 261 (A) (4) decision.

- 2.2 The Section 261A decision was appealed to An Bord Pleanala on the basis that a substantial area of the Quarry was, in fact, a pre-1963 development and this was verified by An Bord Pleanala under Section 261(A)(6) which stated that Donegal County Council had made an error in issuing a S261A(4) decision.

Following the decision of the Board the matter was sent back to Donegal Co. Co. to issue new notice on the 22/5/2014 in accordance with Part XA Section 177B of the Planning & Development Act 2000 (as amended) pursuant to Section 261A(12) directing the Quarry to apply for Substitute Consent. In accordance with Section 261A(14) of the Planning and Development (Amendment) Act 2010, which states; "Where an application for substitute consent is required to be made under this section it shall be made in relation to that



development in respect of which the **planning authority** has made a determination under subsection (2)(a).”

However while there was no area specified in the original assessment by Donegal Co. Co. (see item 3.0 above) it should be noted that the Donegal Co. Co. report did use Sub-Threshold E.I.A. (Schedule 7) criteria to evaluate the E.I.A. requirements.

- 2.3 The Quarry owner then sought clarification as to which area of the Quarry was exempted from the Substitute Consent process by virtue of its pre-1963 authorisation and that it pre-dated both the E.I.A. and A.A. requirements.

After some correspondence with Donegal Co. Co. it was determined that the Northern Quarry was the subject of the Substitute Consent and that the Southern Quarry was the pre-1963 area. Following this clarification under Section 261A(14) the pre-1963 area was not included in the Substitute Consent application.

### **3.0 Substitute Consent & Section 37L Application.**

Both the Substitute Consent and the 37L Applications were made to An Bord Pleanala and following assessment by the Board the Substitute Consent Application was dismissed and the Section 37L application was refused. Both of these decisions are now the subject of a judicial review and therefore will not be discussed at this point.

### **4.0 The Section 5 Application**

Donegal Co. Co. has referred this application to An Bord Pleanala for decision without the knowledge of the quarry owner.

#### ***1. 2001 Planning Application***

This application (P01/106) was submitted by the Quarry owners to address ongoing issues in the Quarry at that time and it included an E.I.S. as part of this application. However the application was refused and therefore has no legal standing.

## **2. *Application for Registration under Section 261***

At the time of S261 Registration, Quarries were encouraged to register their entire lands and the present working area. It did not require the Quarry to distinguish between pre 1963 and post 1963 areas.

## **3. *Section 261A***

At the time of Section 261A, the Quarry had already carried out an E.I.S., 3No. Appropriate Assessments and ongoing environmental monitoring had been in place for a number of years. However none of these environmental controls were considered by the Planning Authority. In addition the pre-1963 status of the Quarry, which had never been questioned before, was suddenly ignored by the Planning Authority without any consultation with the Quarry owner.

In the review of the 261A decision by An Bord Pleanála again no reference was made to the Habitats legislation related assessments and ongoing monitoring at the Quarry.

The only question that was addressed was if part of the Quarry was or was not a pre 1963 development. The Board found that part of the Quarry was pre 1963 and subsequent correspondence with Donegal County Council established this exact area.

## **4. *Substitute Consent Application***

It is important to look at the requirements of Section 261 & 261A in relation to Quarries.

Under the legislation all Quarries were required to comply with both the E.I.A. Directive and the Habitats Directive and the planning process was used to achieve this goal. As such it was also required to ascertain if a Quarry had either a current planning authorisation either by way of a permission granted or a pre 1963 use.

As this process was being applied retrospectively the only means of assessment was by records on each site. In the absence of any other information the general rules applied was that the 1995 aerial photography would be taken as the area baseline for development prior to the E.I.A. (1990) Directive and the 2000 Aerial Photograph would be taken as the area baseline for the Habitats Directive (1997).

In relation to the planning status on the extent of a particular Quarry development and in the absence of any planning permission records, Quarries were required to prove that the

works commenced prior to 1963 and this was achieved by providing evidence such as historical data and/or affidavits.

So the criteria was as follows;

**E.I.A. Directive**

- *Did the development precede the E.I.A. Directive (Refer to 1995 Aerial photo)*
- *If development was carried out after this date (Refer to 1995 photo) then was the area developed post this date of such size as to warrant a sub-threshold ELA determination decision or a mandatory ELA, if so was this carried out.*

**Habitats Directive**

- *Did the development precede the Habitats Directive (Refer to 1995 Aerial photo)*
- *If development occurred after this date (Refer 2000 photo) then was an Appropriate Assessment carried out on the site.*

**Planning Status**

- *Did the development precede the 1963 Planning & Development Act*
- *If substantial development occurred after this date, was planning permission granted for this further development.*

In many instances within existing Quarries which did not have pre 1963 authorisation but were developed pre 1990 were excluded from EIA requirements. For example An Bord Pleanála Ref. 23.QV.0004.

This general approach has been applied to Quarries in the country to date and there are numerous Quarries which are presently operating which have part of its quarry lands registered as pre 1963 works and other parts of the remaining quarry lands being subject to either E.I.A., A.A., Planning Permission or a combination of these processes. If the development is pre 1963 and no conditions have been imposed under Section 261 process then the development can work within the pre 1963 area until the natural resources within this area are worked out.

This present Section 5 application appears to be based upon the premise that if an area of the Quarry is used in conjunction with any other part of a Quarry then all the interacting areas of the Quarry

should be included in any further planning permissions and this is clearly not the case which has been established by precedents.

Please note that the submission on behalf of the third party application to Donegal Co. Co. asks the question;

*'Whether the ongoing quarrying and ancillary activities at P McCaffrey & Sons Ltd Quarry, Ballymagroarty, Ballintra, Co. Donegal is or is not development requiring planning permission from Donegal County Council-and is or is not exempted development'.*

However, we note in the correspondence from An Board Pleanála has been amended to the following question;

*Whether the ongoing quarrying and ancillary activities at site is or is not development or is or is not exempted development. P. McCaffrey & Sons Limited Quarry, Ballymagroarty, Ballintra, Co. Donegal*

It is our opinion that the question as to whether or not the development requires planning permission cannot be decided under section 5. Section 5 has a narrow focus and is limited to the questions of whether or not an activity is development and/or whether or not it is exempted development. The section is unconcerned with whether or not an activity requires planning permission.

It is perfectly possible for a pre-1963 development to be development and not exempted development, but not require planning permission.

To uphold this Section 5 application is to be in direct conflict with the protocols applied to the assessment and determination of all Quarries under Section 261 and Section 261A.

It should be noted that the very basis of this Section 5 application is the subject of ongoing court proceedings and as such it is our opinion that the entire application is sub-judice.

The same issues have been raised in statement of grounds by the applicant in the judicial review (Court Record No. 2017 Judicial Review) as follows;

*"an order of certiorari by way of application for judicial review quashing the determination of the respondent to dismiss the applicant's application for substitute consent for a development comprising a quarry at Ballymagroarty Irish and Glasbolie, Ballintra, Co. Donegal which said decision was made on the 23<sup>rd</sup> of May 2017 (ABP Ref. SU0128)"*

and

*"An order of certiorari by way of application for judicial review quashing the determination of the respondent to refuse consent pursuant to section 37L of the Planning and Development Act 2000 (PDA 2000) for a development comprising an extension to the existing quarry at Ballymagroarty Irish and Glasbolie, Ballintra. Co. Donegal which said decision was made on the 23<sup>rd</sup> of May 2017 (ABP Ref QD0018)."*

It is our opinion McCaffrey's and Donegal Co. Co. are bound by sub-judice rule and therefore cannot comment further on the matter raised as any discussion outside the Judicial Review could prejudice the case.

In conclusion we wish to point out that the O'Gorman family have carried out, what appears to be a very personal vendetta against the quarry owners for over 25 years. The records will show that while they are not the nearest property to the quarry they have appealed every decision made in relation to the quarry and they have taken every opportunity to harass and frustrate the quarry in its day to day activities. The quarry have been trying to comply with planning and related environmental matters for many years but due to the actions of this one family who have seized on every opportunity and minor technicality the Quarry owners have been utterly exasperated.

This quarry has been in existence for over sixty years and they have provided a valuable source of building material in the south Donegal area down the years as well as proving a great deal of employment.

Yours sincerely,



Patrick O'Donnell. C.Eng., B.Sc.Eng., Dip Eng., M.I.E.I.

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