

Referral by Kilkenny County Council ("KCC") to An Bord Pleanála ("the Bord") pursuant to Section 5(4) of the Planning and Development Act, 2000 (as amended)

Replying Submission & Book of Exhibits

AN BORD PLEANÁLA	
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19 MAY 2022	
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Time:	16:45 by HAND

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Our Reference
299978/0002/MOC/CW

Your Reference
ABP-313122-22

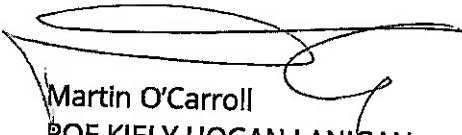
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19 May 2022

**Re: Our Clients: Donal O Regan Senior and Don O'Regan of Moate Road Ballyragget Co Kilkenny
Quarry lands at Lismaine Jenkinstown Co Kilkenny**

Dear Madam,

We refer to your letter dated 22nd of April 2022, addressed to our clients. By reply we now enclose herewith submissions and observations made on behalf of our clients together with enclosures referred to therein.

Yours sincerely,



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Referral by Kilkenny County Council ("KCC") to An Bord Pleanála ("the Bord") pursuant to Section 5(4) of the Planning and Development Act, 2000 (as amended)

We refer to the referral dated 16 March 2022 ("**the Referral**") made by KCC to the Bord pursuant to Section 5(4) of the Planning and Development Act, 2000 (as amended) ("**the Act**"), in respect of the quarry located in the Townland of Lismaine, Jenkinstown, Co Kilkenny ("**the Quarry**"). The Quarry is owned by our client, Mr Donal O'Regan (together with the Estate of John O'Brien, deceased) and operated by Kilkenny Sand and Gravel Limited.

We will now set out below our submissions by way of response to the Referral in accordance with the terms of Section 129 of the Planning and Development Act, 2000 (as amended). We will set out, first, an Exective Summary, followed by our full Submissions.

EXECUTIVE SUMMARY

Question One

Whether excavation of land to create a lagoon system, including associated pipe work and mounding to facilitate ground water lowering and discharge of water from the quarry at Lands at Lismaine, Jenkinstown, Co. Kilkenny is or is not development and is or is not exempted development within the meaning of the Planning & Development Act 2000 (as amended).

- (i) The works to create the ponds (described in the Referral as a “lagoon system”) constitute development, either,
 - (a) Falling within the authorisation enjoyed by the Quarry, by reason of its pre-1964 planning status, or,
 - (b) Is exempted development pursuant to Planning and Development Regulations 2001-2021, Part 3, Article 6,and, does not require the preparation of an Appropriate Assessment.
- (ii) Over several decades of the operation of the Quarry, a large silt pond system was in place primarily on the adjoining land, but also on land which forms part of the Quarry site, the subject of this Referral. More recently, a new lagoon system has replaced the original silt pond system on the Quarry site.
- (iii) This type of drainage management system is a regular feature of most quarry operations, primarily to manage the drainage of storm water. As the excavation of a quarry progresses, the location and nature of the system may need to be altered or a new pond/lagoon system created. This is ancillary to the quarry process.
- (iv) The continuous use of ponds in the Quarry form part of the authorisation enjoyed by the Quarry by reason of its pre-1964 user and planning status.
- (v) In the alternative, and strictly without prejudice to the foregoing, the works engaged to create the ponds involve the replacement of the original silt pond system with new ‘lagoon system’, in a rural area, and as part of a rural based activity (i.e. quarrying).
- (vi) These works constitute exempted development pursuant to the Planning and Development Regulations 2001-2021, Part 3, Article 6:

“Rural - Minor works and structures - CLASS 3”

“Works relating to the construction or maintenance of any gully, drain, pond, trough, pit or culvert, the widening or deepening of watercourses, the removal of obstructions from watercourses and the making or repairing of embankments in connection with any of the foregoing works.”

- (vii) It is noteworthy that the foregoing Class of *exempted development* includes the construction or maintenance of any:
 - (i) Gully;
 - (ii) Drain,
 - (iii) Pond;
 - (iv) Trough;

- (v) Pit; or
- (vi) Culvert

- (viii) The contention that the use of the new lagoon system is to facilitate “ground water lowering” is not correct. As above, an integral part of the Quarry operation for decades has been the management of water in the Quarry.
- (ix) The new lagoon system replaces the previously existing “silt pond” to continue the management of ground-water at the site. Therefore there has been no change of use, or intensification of use such as is contended for by KCC.
- (x) The contention of lowering ground water is further rebutted by the fact that the quarrying (excavation process) takes place above the water table. It is the seasonal rainfall that determines the level of the water table and not the water management system in operation at the Quarry.
- (xi) The works to create the new ponds/lagoon system have not caused more water to be discharged from the site. As set out in greater detail in the reply to Question 2 pipe-works have always existed to direct groundwater from the Quarry to the local watercourse. The quantity of water discharged is determined by the level of seasonal rainfall. The lagoon system can be used to regulate the flow of water in times of heavy rainfall so as to prevent flooding.
- (xii) No Appropriate Assessment is required (for the reasons set out in the reply to Question 2 of this Referral). Therefore the said works, even if not “authorised development” by virtue of the Quarry’s pre-64 user, would qualify as “exempted development” by virtue of Class 3 of the Regulations.

Question Two

Whether the operation of the quarry at Lismaine (which is an established use under the P&D Act 2000 as amended) with discharge of water from the quarry to land outside the site ownership boundary at Lands at Lismaine, Jenkinstown, Co. Kilkenny with hydrological connection to the River Barrow/Rover Nore SAC and Inch beg pNHA is or is not development and is or is not exempted development within the meaning of the Planning & Development Act 2000 (as amended).

Preliminary Objection

- (xiii) The question raised by the Council is: whether the Quarry, which enjoys the benefit of pre-1964 permission with discharge from the quarry to land outside its ownership boundary, with hydrological connection to a nearby SCA/pNHA is/is not exempted development.
- (xiv) The question raised is not understood. On its face, it queries whether the Quarry, which enjoys the benefit of pre-1964 Permission, is or is not exempted development. It is submitted by way of preliminary objection that the question is misconceived and that the Bord should decline to consider the question. The question acknowledges, as KCC must, that the Quarry "*is an established use under the P&D Act 2000 as amended*", i.e., is a quarry that has pre-1964 user. Quarry operations which are covered by a pre-1964 user have an 'authorised' planning status and do not require planning permission; the question of whether they are exempted development simply does not arise because they do not require to be 'exempted' from the requirement to obtain planning permission for development.

Without prejudice to the foregoing objection:

- (xv) There has been no change in the discharge of water from the Quarry to the local watercourse. It is accepted that the local watercourse is outside of the Quarry boundaries.
- (xvi) In other proceedings it had been contended by KCC that the Respondent was guilty of permitting pollutants to enter the local watercourse and or was discharging "Trade Effluent" within the meaning of the Water Pollution Acts, into the local watercourse. (Those proceedings are extant and the Respondent has raised a full defence.)
- (xvii) In the within Referral, KCC has resiled from any allegation of pollution or discharge of trade effluent. Those allegations have been proved to be false. In response to the said allegations, the Respondent retained AWN Consulting to carry out an analysis of the water discharged from the Quarry.
- (xviii) The primary findings provided by AWN Consulting were as follows:
 - a. The Quarry is not using water as part of its quarrying operations;
 - b. Water discharged from the Quarry contains no pollutants and is not trade effluent;
 - c. A single floating pump operates seasonally (intermittently) to discharge accumulated ground water from the Quarry.
 - d. Water test results show full compliance with the appropriate specifications and the total suspended solids (TSS) concentrations were below detection on each occasion.
- (xix) It is important to note that whilst KCC places particular emphasis on the pumping of water and "ground water lowering" in this Referral, all water management takes place on site and does not alter the discharge of waters to the local watercourse, in either quality or volume.

- (xx) It remains the position, from time immemorial, that gravity fed drains and/or pipe-work have discharged groundwater/stormwater from the site into the local watercourse.
- (xxi) The pumping of water has occurred for years and is wholly contained within the Quarry for the purpose of managing ground water levels and to prevent overflow (across the quarry yard and/or onto the public road into adjoining grasslands).
- (xxii) The storage of water has always occurred in ponds/lagoons located on the site and in adjoining lands (as more particularly set out in the Reply to Question 1 above).
- (xxiii) The capability to store water allows the occupier to manage the release of water and to direct water into the local watercourse, rather than flooding adjoining lands or permitting the water to flow onto the adjacent public road.
- (xxiv) The contention that the pumping of water in the Quarry constitutes a new development of lowering the water level in the quarry is not correct. The Appropriate Assessment Screening carried out by KCC pursuant to section 261A PDA 2000, in 2012, identified the existence of a pump. That assessment further concluded that that there was no likelihood of a significant effect on any European site including the River Barrow and River Nore SAC and that Appropriate Assessment was not required.
- (xxv) There has been no material change of use, or intensification, of the quarrying activities since the assessment by KCC in 2012. KCC make various bald assertions citing "uncertainty" and urges that there is a material change.. KCC has not adduced any evidence to indicate that the position on the ground in terms of the discharge has altered since 2012 such that, while it concluded then by way of Appropriate Assessment screening determination, that the quarry, with its pumping of water, was not likely to have a significant effect on any European site, the opposite conclusion is now warranted. KCC merely baldly asserts that there is now a potential for significant effects on the SAC that was not present in 2012, but, contrary to case law cited in the body of this submission, has provided no credible scientific evidence to back up this assertion, to explain what has changed and to identify the source and nature of the potential significant effect on the European site. The expert scientific evidence of AWN establishes that the water that continues to be discharged from the site is non-polluted ground water and there is therefore no risk of significant effect on the SAC.
- (xxvi) Further and in any event, the discharge of water from the site does not constitute a new development outside of the exiting pre-1964 permission and is deemed to have an "authorised" status by virtue of its pre-1964 user.

SUBMISSIONS

1. Background

Unfortunately, many of the facts underlying the submission made by KCC to the Bord in support of the Referral are misleading and/or inaccurate in respect of our clients' position. This is difficult to understand in circumstances where, in addition to the Referral, Section 160 Circuit Court proceedings in relation to the planning status of the Quarry are ongoing before Kilkenny Circuit Court (**"the Proceedings"**) and our client's position has been clearly articulated and averred to on Affidavit within those proceedings. In these circumstances, it is necessary for us to set out what we believe is a full and accurate summary of the relevant background as follows:-

1. The Quarry is a pre-1964 quarry which originally formed part of a larger quarry site.
2. Mr Donal O'Regan originally acquired the adjoining site (while also formed part of the original Quarry site) to the Quarry (from which the business of Asphalt Roofing Limited and subsequently Kilkenny Asphalt Roofing Limited was and continues to be carried out), jointly with Mr John O'Brien, (deceased) in 1981 and Mr O'Regan and Mr O'Brien then acquired the adjoining Quarry site in 1994.
3. Notwithstanding the allegations originally made by KCC in the Proceedings, the uncontested evidence by way of Affidavit before Kilkenny Circuit Court is that all material times, the owners, occupiers, and operators of the Quarry have been carrying out the quarrying and extraction of sand, gravel, and limestone including from 1994 when Mr O'Regan acquired the Quarry, to date.
4. In April 2005 (and not 2012 as suggested by KCC in their submission (page 2)), Mr O'Regan submitted an application pursuant to section 261(1) of the Act to register the Quarry within one year from the coming into force of the operation of that section.
5. The Quarry continued its operations uninterrupted, with no issue having been raised by KCC by way of response to the application. However, this position changed when an enforcement notice was issued by KCC on 15 October 2010 which required our clients to "cease all quarry activities" at the Quarry.¹
6. Our clients sought legal advice and entered into correspondence with KCC through their solicitors. In that correspondence the position that was essentially set out on behalf of our

¹ It is very surprising that KCC have submitted to the Bord that an enforcement notice was first issued in 2009. This is incorrect as was clearly identified on Affidavit by Mr O'Regan in the proceedings. That enforcement notice did not relate to the Quarry and it is difficult to understand why KCC have once again sought to assert otherwise to the Bord.

clients was that the Quarry was authorised and there had been no intensification of use to render the use of the Quarry unauthorised and a request was made for the enforcement notice to be withdrawn.

7. That led to a meeting taking place between our clients and KCC and it was at that meeting that our clients were made aware, for the first time, that KCC was adopting a position that there had been non-compliance with section 261(1) of the Act by virtue of the registration application having being made late.
8. This position was disputed and this led to further correspondence in which KCC maintained their position that the Quarry was unauthorised but notwithstanding this position, the enforcement notice was withdrawn by KCC by letter dated 22 December 2010.²
9. Our clients continued to carry on their quarrying activities following the withdrawal of the enforcement notice and they did not cease quarrying activity as alleged by KCC.
10. Having regard to the terms of section 261A of the Act, KCC carried out an assessment to ensure compliance with the provisions of the EIA Directive and the Habitats Directive.³ That detailed assessment was completed and the conclusion reached by KCC was that having regard to the terms of the assessment no further action was required pursuant to section 261A. In reaching the conclusion the Senior Executive Planner stated in his report of 14 May 2012 that:-

"Due to the nature and size of the Quarry, I do not consider that the Quarrying activity at this new location would pose a threat to the River Nore SAC. A screening exercise for the need for Appropriate Assessment was carried out and it was concluded that the unauthorised works⁴ do not require appropriate assessment".

11. KCC subsequently issued a further enforcement notice in October 2014⁵. This led to our clients corresponding with KCC and to state that they would temporarily suspend activities pending receipt of legal advice. However, they maintained their position that the Quarry was authorised and that there had been no intensification and referred again to the fact that the 2010 enforcement notice had been withdrawn. After a short delay and following receipt of that advice our clients recommenced quarrying activity and no further communication was received

² Surprisingly, KCC did not acknowledge in their submission that the 2010 enforcement advice was withdrawn.

³ It is now clear from a review of the S261A assessment carried out by KCC that they remained of the (mistaken) view at that time that the Quarry was not authorised. However, that position was not communicated to our clients.

⁴ At this point KCC were under the mistaken belief that the section 261 registration application had been made out of time.

⁵ There was no enforcement notice issued in 2012 as alleged in KCC's submission.

from KCC and it was again understood that our clients position was accepted i.e. that the Quarry was authorised.

12. That remained the position until a further enforcement notice was issued in November 2020 which ultimately led to the issuing of the Proceedings.⁶
13. Following the issue of the enforcement notice in November 2020, the parties entered into further correspondence through their solicitors. Essentially KCC's position was once again that there had periods of inactivity at the Quarry following the issuing of enforcement notices and that our clients had not succeeded in successfully registering the Quarry pursuant to section 261 of the Act and in those circumstances the Quarry was unauthorised. KCC clarified that their position was that the registration was not received until 28 April 2005 (one day late) and therefore was not registered in time as it should have been received on 27 April 2005.
14. In these circumstances the Section 160 Proceedings were issued by KCC on 9 April 2021 and were grounded by Affidavits sworn by Mr Malone, Mr Donohoe, Mr Corrigan, and Mr O'Reilly of KCC. Their evidence related to the allegations upon which the Proceedings were based and the concerns of KCC namely that the Quarry was unauthorised because it had not been registered on time in accordance with the relevant statutory requirements and that there had been a history of our clients ceasing quarrying activity following the issuing of enforcement notices.⁷
15. The Proceedings were also grounded on Affidavits sworn by local residents namely Mr Cahill, Mr Conway and Mr Brophy and their evidence was put forward to substantiate the allegation that there was periods of inactivity at the Quarry and also, in the case of Mr Brophy, that water was being pumped from the Quarry which allegedly caused flooding to his fields. It is an unfortunate feature of this ongoing dispute between our clients and KCC that the issues of concern of KCC are driven by and a reaction to the views of local residents who have been objecting to the operation of the Quarry for many years (as was evident from an inspection carried out by us of the relevant files of KCC at their offices).⁸
16. Mr Donal O'Regan and Mr Don O'Regan swore Replying Affidavits in the Proceedings on 6 May 2021 in which they fully addressed all the allegations that had been made. In particular,

⁶ In these circumstances, it is again very difficult to understand how KCC's position as submitted to the Bord is that, following the issuing of enforcement notices "*On each occasion, the developer ceased the unauthorised activities in response to the Enforcement Notices...*". This is clearly not the position as explained on Affidavit by our clients and notwithstanding that further Affidavits were submitted on behalf of KCC, our client's position remains uncontested.

⁷ This is incorrect in the circumstances described above.

⁸ This applies in particular to Mr Aidan Brophy who has made several complaints over the years to KCC, not only in respect to our clients Quarry but other quarries operating in adjacent lands.

the evidence put forward (and which has not been contested in the subsequent Replying Affidavits delivered by the KCC) is that :-

- 16.1 There was no ceasing of quarry activity following the issuing of previous enforcement notices as alleged. In fact, quarrying activity continued at all material times and detailed evidence (comprising sale records of the operator of the quarry) was submitted which clearly showed that this was the case.
- 16.2 The application for registration under section 261 of the Act was prepared by Aidan O'Connell & Associates, Engineers on behalf of Mr O'Regan on 27 April 2005 and that Mr O'Regan believes that it was submitted on that date because it was prepared in the belief that the time period was due to expire that day. The application form stated that any correspondence in relation to the registration was to be submitted to Mr O'Connell and no rejection letter was issued to either Mr O'Connell (or to Mr O'Regan).
- 16.3 In any event, Mr O'Regan has been advised that whether or not the application was received on 27 April or 28 April 2005 is irrelevant by virtue of the provisions of section 251 of the Act which state that the one year period for registration had to be read as one year and nine days. Consequently, the registration was undisputedly submitted in accordance with section 261(1) of the Act, and the position that KCC had been maintaining in relation to the registration since 2010 was legally incorrect (see *Browne v Kerry County Council* [2011] 3 I.R. 514).
- 16.4 Mr Don O'Regan also made averments in relation to the complaints made by local residents and in particular Mr Brophy. He averred that in addition to investigations and enforcement actions taken by KCC, in recent months our clients had also been the subject of multiple inspections by several State agencies including the HSA, ESB and the Environmental Department attached to KCC (in respect of alleged water pollution). Mr Don O'Regan confirmed that he was advised by the various State agencies that the inspections were carried out following recent complaints about the Quarry and he believed that all of these actions were part of an ongoing campaign by Mr Brophy and other residents to put the Quarry out of business.
- 16.5 Mr Don O'Regan also addressed the fact that notices have been issued pursuant to the Local Government (Water Pollution) Acts alleging that our clients had been discharging, inter alia, trade effluent into the local course and explained how those

notices were without foundation (as it has been made abundantly clear by the testing and investigation carried by AWN Consulting – see below).⁹

17. In a Replying Affidavit sworn by Mr Malone on 5 July 2021 he accepted that the relevant time period for registration pursuant to section 261 of the Act was one year and nine days. This was a clear—and, in the light of the decision in *Browne v Kerry County Council*, necessary—concession that the registration was made in time.¹⁰
18. It was only in these circumstances (once KCC became aware of the fact that the registration had been validly made on time, thereby negating the central argument underpinning its application for relief under Section 160) that new allegations were made by Mr Malone in an attempt to support KCC's position that the activities at the quarry were unauthorised. In this regard it is alleged in the Affidavit sworn by Mr Malone on 5 July 2021 that:-
 - 18.1 The operation of the Quarry in recent times was very different from the information provided on registration in April 2005 and the information provided when the AA assessment of the Quarry was carried out by KCC in 2012. He alleged that the current operation of the Quarry is based on pumping water which is flowing into the adjacent SAC and accordingly the Quarry's activities, insofar as they were based on that pumping of water from the Quarry and the discharge of water from the site, were not authorised by the information submitted by the Quarry owner in 2005.
 - 18.2 Mr Malone relied on the fact that the section 261(1) registration form as completed on 27 April 2005, the answer to question 10, namely "*Is pumping carried out at the development?*" was allegedly "*No*".¹¹
19. Affidavits were also sworn by Ms Moran and Mr Byrne of KCC in support of the position set out by Mr Malone and it seems that the proposition being put forward in those Affidavits in support of the new allegation by KCC is that:-

⁹ Mr Don O'Regan also averred to the fact that he had been subject to abuse and threats from Mr Brophy, who trespassed onto the Quarry which ultimately led to a threat against his life. This in turn led to an investigation being carried out by An Garda Síochána, which resulted in a formal caution being issued to Mr Brophy.

¹⁰ In these circumstances, it is again very difficult to understand on what basis KCC have submitted to the Bord that the case is currently active before the Courts "*with the respondents arguing that by virtue of the provisions of section 251 of the P&D Act, 2000 as amended the period of one year referred to in section 261(1) has to be read as one year and nine days and therefore the information was submitted within the prescribed period in the P&D Act 2000. This is currently an active case and is presently before the Circuit Court and awaiting a hearing date*". It is remarkable that the concession made by Mr Malone has not been referred to.

¹¹ That was not the answer provided. The answer was N/A and that issue is addressed below

- 19.1 “pumps”¹² are located in the Quarry pit and are being used to discharge water from the Quarry site into a public drain.
- 19.2 flooding had taken place to adjacent properties with the implication being that his flooding had been caused by water discharge from the Quarry;
- 19.3 the pipe allowing for the discharge of water to a lagoon located on the adjacent lands owned by Brennan Brothers had been back-filled so that water could no longer be discharged to the lagoon;
- 19.4 following several inspections, the water levels in the Quarry floor had increased and then decreased;
- 19.5 following an inspection on 24 May 2021 water discharge had been observed which “appeared heavily silted/milky in appearance” with the implication being that this discharge had emanated from the Quarry;¹³
- 19.6 water samples had been tested from a specified discharge point (Point A) and the analysis of those samples had identified results which were not in compliance with the relevant legislation.¹⁴
20. These new issues as raised by KCC were then addressed by Mr Don O’Regan in a Replying Affidavit sworn on 18 November 2021 in which he averred to the following points:-
- 20.1 It is common case that due to the prevailing weather conditions and the nature of the limestone rock formation which dominate the locality that the accumulation of water in the area is a natural occurrence;
- 20.2 This water accumulation has always happened and is entirely weather dependent and landowners in the locality have had to manage the accumulation and flow of surface water for time immemorial and localised flooding in the area is a regular occurrence in times of high rain fall.
- 20.3 As explained in the Affidavit sworn by Mr Donal O’Regan on 6 May 2021 (paragraph 55), the flow of spring water from the Quarry site is dependable on the weather. Its natural flow has always brought the water down to a roadside drain. Over 30 years

¹² This is incorrect. A single floating pump is located in the Quarry pit.

¹³ Which was a very serious allegation to make on Affidavit particularly when it was unfounded as the testimony/inspection carried out by KCC was flawed – see below.

¹⁴ This testing was flawed – see below.

ago, Mr O'Regan installed a drain pipe system¹⁵ to carry the spring water to a lagoon situated in the adjoining land owned by Brennan Brothers and also directly to the roadside drain to avoid pooling on the site and to avoid any build-up of spring water when the springs ran high in Spring time.

20.4 In these circumstances the natural acumination of waters has at all material times been managed by a piping system. This was further facilitated by KCC carrying out flood relief works in or about 2010 to deal with a confluence of waters emanating from various lands including the Quarry, the subject matter of the proceedings.

20.5 Mr O'Regan referenced the new proposition put forward by Mr Malone namely that the Quarry activities, insofar as they were based on the pumping of water from the Quarry and the discharge of water from the site, were not authorised by the information submitted during the registration process of April 2005. Mr O'Regan averred to the fact that this proposition was incorrect and did not have any effect on the planning status of the Quarry. He said firstly the pumping or piping of waters was entirely separate to the Quarry activities and that at all material times they were required to manage the natural accumulation and flow of water and same had always been managed through a system of piping and, where required, periodic pumping. He added that regardless of whether any activity takes place on the lands, quarrying or otherwise, the natural accumulation of waters must be managed otherwise the Quarry simply overflows with a risk of causing additional flooding on the O'Regan properties with a resulting run off into the local water course. Consequently the piping or pumping of water was an historic means of managing naturally occurring rain water or spring water or otherwise referred to as "*storm water*".

20.6 Following the blocking of the lagoon on the Brennan site, the O'Regans were required to identify other means of draining the storm waters in times of heavy rain fall. Consequently the storm waters were diverted directly to the land drain adjacent to the Quarry entrance which then flows downstream joining with waters draining from other lands including the Brennan Quarry and the Lismaine Quarry. This was essentially done through the pipes which had been constructed over 30 years ago¹⁶. Mr O'Regan

¹⁵ Which is the surface water drainage system as referred at Condition 7 of Planning Permission 08/1233 grand in respect of the adjoining yard premises.

¹⁶ As stated above, previously, the storm water flowed to the Brennan's Lagoon and directly to the roadside drain through the existing pipework. From this point, the storm water flowed directly to the roadside drain.

states that he is advised that the discharge of storm waters does not concern the planning status of the Quarry.

- 20.7 Mr O'Regan states that having now conceded that the Quarry was in fact registered on time and in accordance with the statutory requirements, and that the Quarry activities did not require planning permission, KCC now appeared to be attempting to "*shoe horn*" the allegations concerning the pumping of waters into an application for a section 160 planning injunction. He stated that it appeared that the remaining allegations being made related to the new allegation of pumping/piping of waters and a suggestion that this could involve water pollution.
- 20.8 Mr O'Regan then referred to a report which had been obtained by Mr Conor McGrath, Consultant Hydrologist, AWN Consulting, which he exhibited to his Affidavit and he referred to the following points made by Mr McGrath:-
- (a) The water tests carried out on site by Mr McGrath in respect of water accumulating in the Quarry showed "*full compliance with the appropriate specifications*";
 - (b) Mr McGrath noted that the sampling point utilised by KCC (point A) is not the discharge point from the Quarry i.e. it is not exclusive to water emanating from the Quarry but is further downstream at the point where the waters discharging from the lands had mixed with waters discharging from the Brennan Quarry, the Lismaine Concrete site and other lands in the surrounding areas. In these circumstances, where several sources of water have merged prior to reaching "*point A*", the KCC cannot be relied upon at all as evidence to support the case KCC is now purporting to advance. Mr McGrath, however, carried out testing on a water sample discharging directly from the Quarry and this demonstrates that any allegation that waters discharged from the Quarry contains pollutants is wholly without merit: the tests carried out by Mr McGrath establish that the water emanating from the Quarry fully complies with all relevant requirements.
21. Mr O'Regan stated that following on from the complaints made by Mr Brophy and other local residents, they had arranged for three tailing lagoons on the lands to be formed to stymie the flood of any storm water as they would serve to abate any sudden accumulation of storm water and gradually permitted to drain away slowly.

22. Mr McGrath of AWN's report is dated 5 October 2021. A copy is being included with this submission and should be treated as forming part of this submission and should be considered in full, but, by way of summary only, we would draw attention to the following points made by Mr McGrath:-

- 22.1 Due to the surrounding topographic gradient, water accumulates in the Quarry floor in the centre of the site. It is intermittently pumped to a drain which is connected to a sump at the access point to (but outside of) the Quarry which is the final discharge point from the Quarry. The pumping frequency is influenced by a seasonal factors and ranges from 20 minutes per day in the summer to 2 times hourly per day in the winter (and involves a single floating pump).
- 22.2 The quarry is not using water as part of its quarrying operations. There are no washing pumps on site and so no process water is generated and consequently the water discharging from the Quarry contains no polluting matter and is not trade effluent – it is in essence natural storm water.
- 22.3 Ground water flooding is common in the locality and occurs when the natural underground system is incapable of sufficiently draining itself, resulting in the emergence of ground water at the surface. Ground water flooding can occur in the area following prolonged rain fall causing a water table rise. The prevalence of ground water flooding in the area is fundamentally linked to the bedrock geology which means there is very little room within the ground water system to store excess recharge. During prolonged rainfall, the ground water system is unable to drain recharge quickly causing surface flooding in topographic depressions. Mr McGrath states that AWN understand that water has being flowing from the site for many years.
- 22.4 Mr McGrath refers to his test results taken from the Quarry and states that the first set of samples were collected on 13 July 2021 and the second set of samples were collected on 30 September 2021. He states that the water test results show full compliance with the appropriate specifications and the total suspended solids (TSS) concentrations were below detection on each occasion.
- 22.5 He referred to the fact that KCC took samples from point A which was not the discharge point from the O'Regan Quarry and therefore any results from point A, as taken by KCC, were erroneous and did not comprise of discharge arising from the O'Regan Quarry.

- 22.6 Mr McGrath concludes that the site is not using water as part of its quarrying operations and is not discharging polluting matters. The Quarry does not extract water and does not use water to wash stone on site. The water discharging from the Quarry is in effect storm water and he notes the ground water has been flowing from the Quarry lands for many years and will continue to do so regardless of whether any quarrying activity is being undertaken on the site or not.
23. An inspection was carried out by KCC on the site on 21 October 2021 following a complaint by Sean Cahill (a neighbour who had sworn an Affidavit in support of KCC's application as referred to above). At this meeting they inspected the lagoons which were being formed in the Quarry, which are in fact located within what was previously a large settling pond which was mostly located on the land owned by the Brennans but part of which was on the Quarry site. The note of that meeting as provided by KCC to the Bord as part of its submission, states that an explanation was provided as to the purpose of the excavated areas namely a sump, soak way and settling pond and a similar pre-existing use was previously in situ.¹⁷
24. KCC subsequently issued an enforcement notice on 5 November 2021 in relation to *"unauthorised evacuation of land and all associated works at Lands at Lismaine, Jenkinstown, County Kilkenny."*¹⁸ It is important to note, as outlined further below, that this enforcement notice was subsequently withdrawn by KCC, on 25 November 2021.
25. Malcolm Lane, Planning Consultant of PD Lane, sworn an Affidavit on 24 November 2021 to address the issues raised in the recent Affidavit sworn on behalf of KCC and in the enforcement notice. The main points addressed by him are as follows:
- 25.1 He referred to KCC's new argument that, due to the absence of an express reference to the pumping of water in the documentation submitted as part of the section 261 registration process in April 2005, the pumping of water currently taking place rendered the development unauthorised.¹⁹ Mr Lane stated that in his opinion, there was no basis for such a proposition. Firstly, the description of the Quarry is neither exhaustive nor conclusive of any level activity which may have been taking place. He

¹⁷ The report goes on to state that the satellite imagery indicates no evidence of the alleged pre-existing development but KCC clearly misunderstood what was said. What was explained was that these lagoons were now to be utilised in place of the lagoon on the Brennan property which had been utilised up until 2020 following the issuing of the November 2020 enforcement notice by KCC and following which the Brennan's blocked off the access to their lagoon from the pipe which was connected to it from the Quarry.

¹⁸ The day after the Affidavit of Mr Malcolm Lane, Planning Consultant, was served on KCC as referred to below. It is again very surprising that no reference is made to this enforcement notice or its withdrawal in the submission made by KCC to the Bord.

¹⁹ As stated above, KCC seem to have once again moved their position having considered the evidence put forward by or on behalf of our clients and are not seeking to rely on this allegation in their submission to the Bord.

explained that the document in question was a very simplified (pro forma) questionnaire and that when assessing the level of development carried out in respect of any type of development, whether it be quarrying or otherwise, one had to have regard to evidence of the actual activities that have been taking place at the time of registration. In this regard, he referred to Mr McGrath's report and to the fact that the ground water flooding was common in the locality and that ground water had been flowing through the site for many years. He also referred to the fact that the Quarry was not using water as part of its operation and was not discharging polluting matters and that the water flowing from the Quarry is in effect storm water. He explained that he had been advised that the pumping of water from the Quarry had been taking place for many years as was evident from the photographs annexed to the section 261 AA assessment carried out by KCC in May 2012. He said he was advised that the pumping is seasonal in its nature, not directly connected to the Quarry process and that ground water would continue to flow from the Quarry site regardless of whether any quarrying activity is carried out on the site or not. In these circumstances, he believed that the answer of "NA" (and not "No" as alleged by KCC) was provided in that context. He said moreover, and leaving aside those points, if the Quarry site is deemed authorised by virtue of its registration (which he understood to be the case) and the management and pumping of water has taken place for many years (which he also understood to be the case) there could be no intensification or material change of use as this pumping process has continually been carried out in tandem with the working of an authorised quarry and consequently planning permission is not required.

- 25.2 Mr Lane referenced the enforcement notice issued on 5 November 2021. He stated that he had reviewed the works and highlighted that the carrying out of drainage works constituted an exempted development as provided by the Planning and Development Regulations 2001-2021. Mr Lane quoted Part 3, Article 6 and stated that in his opinion, the class of exempted development permits the works carried out by our clients to manage the flow of water, including the opening or enlargement of ponds and lagoons. He stated that it is important to recognise that, in the absence of the drainage mechanism provided, which controlled the diversion of ground water to the local land drain, there is likely to be a flow of ground water which would naturally flow across the lands travelling downhill, accumulating in neighbouring landowners properties. Should this occur, it is entirely caused by the prevailing weather conditions rather than the activities of our clients at the Quarry.

- 25.3 Mr Lane also referred to the fact he was instructed that during the operation over the larger Quarry site over several decades, a large silt pond was opened up primarily on the adjoining land owned by the Brennans but also on land which formed part of the Quarry site. He stated that he understood our clients had constructed new tailing ponds/lagoons on their land which was formally part of the silt pond and that ponds/lagoons are a regular feature of any quarry and the new ponds/lagoons are required to manage the drainage of storm water from the Quarry site. He stated that the opening or enlargement of ponds/lagoons is an integral and dynamic part of the use of land for quarrying. As the excavation of the Quarry progresses, the location of a pond/lagoon may have to be altered or a new pond/lagoon created. This is ancillary to the extraction process. He stated that he understood that the new ponds/lagoons constructed are on our clients' lands which form part of the original (much larger) silt pond and these works, which are part of the ongoing Quarry operation, are not a new development requiring separate planning permission.
26. The Proceedings were listed for hearing before the Nenagh Circuit Court on 26 November 2021. The hearing did not go ahead and discussions took place between the parties and Heads of Agreement were reached (as set out in our letter to Harte Solicitors dated 7 December 2021) as follows:
- 26.1 Our clients would cease pumping any water off the quarry lands i.e. directly into the roadside drain through a pipe;
- 26.2 Our clients would be permitted to pump water from the Quarry floor into the lagoons and sump pits, however once these became full the pumping would have to cease;
- 26.3 A technical meeting would be arranged between the parties Engineers in order to reduce a final settlement to writing;
- 26.4 The matter would be adjourned to Kilkenny Circuit Court on 25 January 2022 and subject to an agreement being reduced to writing, the matter would be struck out and both parties would bear their own costs.²⁰
27. It is important to note that these discussions took place the day after KCC had withdrawn their enforcement notice of 5 November 2021 (which related to the lagoon construction) and at no stage during those discussions, when the Heads of Agreement were agreed, was it suggested by KCC that they believed that the lagoons required planning permission and/or that it was

²⁰ Which was a very significant concession by our clients in circumstances where the Quarry had been validly registered in April 2005.

inappropriate for the lagoons to operate and our clients understood that the terms of the Heads of Agreement recognised the points that had been raised in the Affidavit of Mr Malcom Lane as sworn two days earlier on 24 November 2016.

28. For reasons unknown, KCC then subsequently changed its position and purported to object to any water emanating from the Quarry irrespective of whether it was being pumped or not. Our clients position by way of response was as set out in the letter of 7 December 2021 which included the following:-

"Our clients are managing storm water by pumping it into the lagoons. Some quantities of storm water drain into the land drain from the lagoons in a controlled manner by way of gravity flow. This drainage occurs through a pipe by way of gravity and is directly related to the prevailing conditions. Gravity flow drainage from the site to the roadside drain is a continuation of what has occurred over several decades. If such drainage was now to be blocked, storm water will flow from the site in an uncontrolled manner inevitably causing flooding downhill at certain times of the year.

We are concerned at the close relationship between the KCC's, servants and agents, and our clients' neighbours. It is clear that our clients cannot turn-off the rainfall. Our clients are endeavouring to manage the flow of storm water and it is very frustrating for them to then be faced with continuous attempts by KCC to block such drainage of storm water following consultation with our clients' neighbours. These attempts, initially related to completely unfounded claims that the storm water that was draining from the site contained pollutants, have now moved to the drainage of storm water more generally. Those claims are equally unfounded as they ignore that the water flowing from the site is storm water that has flowed for decades and also ignore the natural flooding that occurs from adjoining lands.

The KCC has responsibility for the management of storm water and flood prevention in the area. Our clients have set up a water management system which will control the flow of storm water from our clients' lands. In the absence of a controlled flow, there could be significant natural flooding downhill, at certain times, particularly in times of high springs. While we are instructed that the KCC's, servants or agents, have expressed the view that they "do not care"

where the storm water flows,²¹ they, nevertheless, continue to place blame on our clients for the natural occurrence of ground water and any consequential flooding despite our clients' best endeavours to manage same and notwithstanding the flow of storm and other water from adjoining properties."

29. KCC issued a further enforcement notice on 10 December 2021 on the same terms as the enforcement notice issued on 5 November 2021, without any explanation as to why this notice was issuing notwithstanding the withdrawal of the previous notice two weeks beforehand, and notwithstanding the fact that Heads of Terms were agreed. In these circumstances, a response was sent to Mr Malone on 17 December 2021 referring to the uncontested evidence as put forward by Mr Lane in the proceedings and noting that KCC had not provided any independent expert to the contrary. No response was sent to that correspondence and Mr Lane's affidavit evidence remains uncontradicted and uncontested.
30. The parties attended a site meeting on 20 January 2022 but this did not resolve the issues in dispute. In these circumstances the Proceedings were mentioned before Kilkenny Circuit Court on 25 January 2022 and KCC sought time to put in replying Affidavits to the Affidavits submitted on behalf our clients. Notwithstanding that an Order was made on those terms, no replying Affidavits were in fact delivered by KCC. The case was mentioned again on 15 March 2022 and as KCC had not filed any replying Affidavits, it was adjourned to the County Registrar's list. KCC took no further steps and instead, without any notice to our Clients or the Court, KCC decided to make the Referral.
31. In these circumstances and before addressing the specific points made in relation to questions 1 and 2 which are subject of the Referral, we believe that an accurate summary of the relevant factual position is as follows:-
 - 31.1 KCC took a position in 2010 that the Quarry was unauthorised as the registration form was allegedly submitted one day late;
 - 31.2 KCC issued enforcement notices over time which were either withdrawn or not acted upon and our clients continued with their quarrying activities at all material times (which is now undisputed);

²¹ In fact, Mr Malone of KCC advised Mr Donal O'Regan (a 78 year old man) that he "did not give a fu*k" where the water went to.

- 31.3 This issue was raised again in late 2020 and on this occasion KCC issued section 160 Proceedings based on the allegations that quarrying activity had recently recommenced and the Quarry was unauthorised due to late registration;
- 31.4 KCC was wrong in respect of both of these allegations. The Quarry was registered on time (which has now been conceded by KCC) and the Quarry activity has continued at all material times (which is clear from the evidence adduced in the section 160 and is also uncontested);
- 31.5 It was in these circumstances that KCC sought to raise new allegations, which did not form part of the legal and factual basis upon which the application for relief under Section 160 was originally grounded, and, “shoehorn” them into the section 160 Proceedings based on allegations concerning the pumping of water from the site;
- 31.6 KCC alleged that the position had changed since 2005 since the Quarry was registered and/or since 2012 when KCC carried out an Appropriate Assessment under section 261A of the Act;
- 31.7 KCC was and are incorrect in both cases as water has been discharged from the Quarry site to a lagoon and/or directly to the roadside drain for over 30 years and that remains the case. Similarly, the pumping of the storm water from the Quarry pit has occurred at times of heavy rainfall and/or high springs for many years. The only material change is that the Brennan lagoon was blocked off to the flow of water from the Quarry in late 2020; in these circumstances, the storm water was discharged directly to the roadside drain and more recently to the roadside drain via a new lagoon constructed on the Quarry lands;
- 31.8 The water is natural storm water that flows across the Quarry lands in times of heavy rain or springs and it is the same water that has flowed across the Quarry lands from time immemorial (as the Quarry uses no water in its processes);
- 31.9 The allegation previously made by KCC that the Quarry could have been discharging pollutants or sediments was only raised once it became apparent that the Quarry registration was made on time. These allegations were and are groundless in circumstances where the tests carried out by KCC officials were fundamentally flawed, based on a sample of water taken from a point downstream from the convergence of watercourses from many different lands and sources, and the testing carried out by AWN on behalf of our clients shows that the water being discharged is in effect storm

water and complies with all relevant regulatory requirements. KCC has unsurprisingly not contested this clear position as put forward by AWN;²²

- 31.10 Rather than continuing with the ongoing section 160 Proceedings, KCC has sought to change its position once again and resile from the Heads of Terms reached and make a section 5 Referral in a further attempt to try and prevent the current operations of the Quarry continuing. In so doing, they have failed to disclose all relevant facts to the Bord and in particular failed to disclose that the discharge of water from the Quarry is a discharge of storm water which has flowed across the Quarry lands from time immemorial and has been discharged to the public drain for over 30 years.

2. Questions referred by KCC

We will now address the questions referred by KCC to the Bord as follows:

Question 1 **Whether excavation of land to create a lagoon system, including associated pipe work and mounding to facilitate ground water lowering and discharge of water from the quarry at Lands at Lismaine, Jenkinstown, Co. Kilkenny is or is not development and is or is not exempted development within the meaning of the Planning & Development Act 2000 (as amended).**

32. KCC have submitted that the issues which arise in respect of this question are whether or not the work carried out is development and if so is it exempted development or not? However, there is in fact an additional aspect which arises for the Bord's consideration on this Referral.
33. It is not disputed that acts of excavation occurred, thus meeting the definition of 'works' and 'development'. Before moving on immediately, as KCC does, however, to the question of whether those works constitute 'exempted' development, one must first ask whether those works are authorised by virtue of a pre-1964 user. If they are, the question of an exemption from the requirement to obtain planning permission never arises, because they are effectively deemed to have an 'authorised' status by virtue of that pre-1964 user (see decision of the Supreme Court in *Waterford County Council v John A Wood Ltd.* [1999] 1 I.R. 556).
34. The pre-1964 user of the Quarry is not in dispute. Moreover, it cannot be disputed but that, as set out above, the opening or enlargement of ponds/lagoons is an integral and dynamic part of the use of land for quarrying. As the excavation of the Quarry progresses, the size, shape or location of a pond/lagoon may have to be altered or a new pond/lagoon created. This is ancillary to the extraction process, and any excavation works entailed in it are covered by the

²² An updated report of Mr McGrath of AWN summarising all tests carried out to date is included with this submission.

pre-1964 user just as the excavation works entailed in the ongoing extraction of stone/sand/gravel are so covered.

35. On this basis, the works the subject matter of the Referral do not require planning permission because they are part and parcel of the pre-1964 user of the Quarry.
36. For completeness, Section 261A gave the planning authority, in effect, the power to over-ride the Quarry's pre-1964 status if it considered that an Appropriate Assessment was required for the purposes of Article 6(3) of the Habitats Directive. However, the planning authority carried out its Section 261A review and concluded that the operation of the Quarry did not require Appropriate Assessment and it is estopped from seeking to revisit that now in the absence of evidence establishing a material alteration in terms of potential effects on a European site of the Quarry operations.
37. Strictly without prejudice to the foregoing, KCC's argument that the works are not exempted development only arises for determination if the pre-1964 user does not apply. For completeness, it is proposed, in the alternative, to address the exemption argument, without prejudice to the position already set out above.
38. In support, it appears, of KCC's position that the works are not exempted development, KCC states as follows:-

"It is the contention of the Planning Authority that due to the recent excavations to create a lagoon system and associated works to facilitate ground water lowering and discharge of water from the quarry to an area located outside the site ownership boundary, that there is a potential significant impact on the surrounding environment, particularly the Special Area of Conservation: River Barrow River Nore SAC....."

39. It is notable that KCC have offered no scientific evidence to the Bord in support of this contention. It is conjecture only, and KCC makes no effort to explain what has changed since its Section 261A assessment to give rise to this diametrically opposed conclusion.
40. The Quarry operates on a benched basis and quarrying activities only take place above the water table. As it clear from the factual position as outlined above, water will flow from these lands regardless due to springs and storm water and if the Quarry was not there, those waters would flow naturally across those lands and fall, by gravity, down into the public drain and/or pool on lands within our clients' ownership and their neighbouring lands. This was occurring in 2012 when the Section 261A Appropriate Assessment screening was carried out and KCC determined that Appropriate Assessment was not required.

41. If KCC are attempting to suggest that this recent construction is to facilitate the discharge of water which did not previously occur, then the allegation is baseless and simply incorrect. The lagoon that has been constructed (within the confines of a much larger silt pond) is to replace the lagoon previously used on the Brennan Lands (which is also located within the confines of a larger silt pond and was blocked off as identified above) and the water flows into the public drain as it has done from a lagoon and/or directly for over 30 years. That position has been clearly averred to on Affidavit by our clients and has not been disputed by way of reply by KCC. AWN have also confirmed, as a result of tests carried out from the Quarry Floor Sump and from the Discharge Point that show full compliance with the appropriate specifications. In these circumstances, the facts relied on by KCC to allege that the discharge of water from a lagoon is in some way a new occurrence causing a potential significant impact to the surrounding environment, including the River Nore, is an allegation which is not supported by the facts or by any evidence. Whilst the location of the lagoon has moved there is no material change to the position regarding discharge of water from the Quarry to the public drain since KCC carried out an Appropriate Assessment under section 261A of the Act in 2012 and this discharge has been occurring for over 30 years.
42. In these circumstances, we do not believe that the determination that seems to have been made by KCC that “*the impact of the works carried out are uncertain and cannot be screen(ed) out from the requirement of the Natura Impact Statement (Stage 2 Assessment)*” is a bona fide determination, nor is it based in best – and verifiable – scientific evidence. As noted by the High Court in *Harrington v An Bord Pleanála* [2014] IEHC 232, a person who is making assertions of potential effects on European sites for the purposes of Article 6(3) of the Habitats Directive cannot make a ‘bald assertion’ but must provide “*credible evidence*” to support it: it is not permissible “*merely to make a bald assertion, and no more*” and thereby shift the onus on the person carrying out the development concerned to disprove the assertion.
43. Contrary to what is being alleged, there is certainty as to how the storm water is being discharged from the site and certainty as to the quality of the water that is being discharged (and which has been discharged for many years). In this regard we refer to the updated report provided by Mr McGrath of AWN dated 18 May 2022 which concludes that the water discharging from the Quarry is in full compliance with the appropriate specifications and has a TSS (total suspended solids) concentration which has been, on all tests undertaken, below the relevant Urban Wastewater Treatment Regulations limit of 35mg/l. Given the water quality of the discharge, there is no evidential basis for concluding that this discharge is likely to have a significant effect on the River Barrow and River Nore SAC having regard to that site’s conservation interests.

44. As stated above, KCC has sought to continually make allegations which are groundless and to move on to make new allegations in an attempt to shut down the Quarry. Our clients do not understand why this is the case but it appears that this position has been driven by the active involvement of local neighbours who have been making objections to the operation of the Quarry for many years. In these circumstances, we believe that the Referral is a continuation of this strategy and KCC are seeking a validation of their determination that an appropriate assessment is required (notwithstanding their Section 261A determination to the contrary) not as a result of legitimate concerns about any possible impact of the discharge of water into the River Nore and the SAC, but in order to gain a litigation advantage. This is because if the Bord determines that an appropriate assessment is required, then KCC can then maintain their position that what would otherwise come within the scope of exempted development is not in fact exempted development and seek to rely on the enforcement notice issued in December 2021 and rely on these facts for the purpose of the Proceedings.²³
45. What is of critical importance is that the discharge of storm water from the Quarry, via lagoon and/or directly to the public drain, is the position that has been in place for over 30 years and has not changed, (subject to operation of a new lagoon as constructed in place of the Brennan lagoon) and in circumstances where AWN are entirely satisfied as to the quality of this natural water that is being discharged into the public drain. The suggestion now being made by KCC that this is somehow a new situation which has developed is disingenuous and entirely incorrect. In so far as concerns the discharge and potential effect on the downstream SAC, the position remains as it has been for over 30 years, including when the KCC made its Section 261A determination that Appropriate Assessment was not required.
46. It is noted that KCC dispute the averments made by Mr Lane in his Affidavit sworn on 24 November 2021. However, it is noteworthy that KCC choose not to submit any evidence by way of reply to Mr Lane's Affidavit in the Proceedings despite being invited to do so, and have not provided to the Bord any scientific evidence rebutting Mr. Lane's evidence. For the avoidance of doubt, our clients continue to rely on the averments made by Mr Lane and in particular:-
- 46.1 That the works are exempt works as the class of development permits the works carried out by and on behalf of our clients to manage the flow of water from the site, including the opening/enlarging of ponds/lagoons;

²³ Notwithstanding that the S160 Proceedings are based on the allegations concerning late registration and cessation of works as referred to above.

46.2 The opening up of a new lagoon which is within the original (much larger) existing silt pond is part of the ongoing Quarry operation and is not development requiring planning permission. In this regard, KCC have suggested that there is no evidence in support of this fact.²⁴ This is incorrect and we refer to satellite photographs as exhibited to this submission which clearly show the extent of the historical silt pond and for ease of reference Mr O'Regan has marked on one of those photographs the location of the new lagoon and the location of the Brennan lagoon which was previously connected to the Quarry.

Question 2 Whether the operation of the quarry at Lismaine (which is an established use under the P&D Act 2000 as amended) with discharge of water from the quarry to land outside the site ownership boundary at Lands at Lismaine, Jenkinstown, Co. Kilkenny with hydrological connection to the River Barrow/Rover Nore SAC and Inch beg pNHA is or is not development and is or is not exempted development within the meaning of the Planning & Development Act 2000 (as amended).

47. This Question largely overlaps with Question 1 and we rely on the answer to Question 1 in response to this Question 2 also.

48. By way of Preliminary Objection, the Question raised is not understood and does not make sense. On its face, its queries whether the Quarry, which enjoys the benefit of pre-1964 user and does not therefore require planning permission, is or is not exempted development. The question acknowledges, as KCC must, that the Quarry "is an established use under the P&D Act 2000 as amended", *i.e.*, is a quarry that has pre-1964 user and does not therefore require planning permission. Thus, the question of whether this Quarry with a pre-1964 user / authorisation qualifies for exempted development simply does not and cannot arise: it is nonsensical – a development cannot be exempted from a requirement—the requirement to apply for and obtain planning permission—which does not apply to it in the first place.

49. Strictly without prejudice to the foregoing, we believe that the latest allegation inherent in question 2 is unfounded and is being made in circumstances where previous allegations relied upon in the Section 160 proceedings have proven to be unfounded in the following circumstances:-

49.1 The Quarry registration submitted in April 2005 was in fact submitted on time;

²⁴ At page 3 of the notes of the site meeting of 21/10/2021 as prepared by KCC.

- 49.2 The water being discharged from the Quarry site is storm water which complied with all relevant requirements and contains no pollutants;
- 49.3 The pumping of water from the Quarry pit at times of heavy rain/springs by a single flowing pump has been taking place for many years.
- 49.4 The pumping of water was occurring when KCC made its Section 261A Appropriate Assessment screening determination and concluded that there was no likelihood of a significant effect on any European site including the River Barrow and River Nore SAC and that Appropriate Assessment was not required.
50. In these circumstances, it seems that KCC is now alleging that the discharge of water from the site is recent development which has occurred since the registration application in 2005 and which constitutes development.
51. For the reasons set out above it is clear that this allegation is baseless and in this regard we refer again to the clear and uncontested evidence provided by our clients in relation to the fact that water has been discharged from the Quarry site into the public drain for over 30 years.
52. Leaving this aside, we will in any event address the “facts” relied on by KCC which are essentially that the Quarry registration form submitted in April 2005 in some way substantiates their position. We address the particular contents of that form as relied on by KCC as follows:-
- 52.1 *Question 10* – KCC refers to the fact that the answer to the question concerning pumping was “NA”²⁵. Remarkably they also refer to the final part of question 10 which is “*Licence reference under which discharge is being carried out*” and the fact that the answer was “N/A”. They say that in these circumstances “*it is not unreasonable to assume that if there had been a discharge of water at this time, questions would have been answered in the affirmative*”. Clearly, the question was directed at whether a discharge licence had been obtained not if water was being discharged. No discharge licence was obtained as it was not required but water was being discharged.
- 52.2 *Question 14* – this question asks for details of emissions “*where measurements are available*”. The answer provided was “N/A”. This answer was correct as no measurements were available at the time and it not understood on what basis this question could in any event support the allegation made under question 2 which relates to the discharge of water.

²⁵ Our clients’ position in this regard has been clearly set out above and our clients rely on the averment made by Mr Lane as referred to at paragraph 25.1 above.

- 52.3 *Question 16* – asks for the details of the level relative to the water table and the answer provided was “*water table not identified*”. Again, this answer was correct and it not understood on what basis this question could be in anyway informative or of assistance to KCC. For the reasons explained above, the water emanating and being discharged from the Quarry is surface water and is not ground water caused by any excavation.
53. It was of course open to KCC to raise any further questions in relation to the section 261 registration application at the time. They did not do so. Instead, they choose to wait until 2010 to allege – incorrectly – that the registration was made out of time and it took another 11 years before KCC had to concede that this position was incorrect.
54. KCC also allege that the answers to those questions are “*credible evidence as to the scale and extent of the quarry operations in 2005*”. That is clearly not the case and the scale and extent of the Quarry operations in 2005 have been fully addressed on Affidavit by our clients (with relevant records exhibited) and that position has not been contested by KCC notwithstanding that they have replied to those Affidavits.
55. KCC then refer to the section 261A report prepared in May 2012 in support of their proposition that there has been a change of position concerning the discharge of water since 2005. They allege that this report states that “*recent quarrying had taken place to below the water table as the extracted area was filled with water*”. This is incorrect. What it stated in the report is that “*On inspection it is clear that significant quarrying has taken place to well below the allowed yard level. The yard is now a water filled quarry with solid limestone walls*”. This statement is confusing as it is referring to the Quarry in the field adjacent to the yard but in any event it is simply stating that there is a quarry on site that is below yard level that is filled with water. That is correct but it is not stating that quarrying had taken place below the water table and this had not occurred.
56. KCC then state that an appropriate assessment screening was carried out and having regard to the site visit, the nature and size of the Quarry, and all relevant information available, and it was concluded that by virtue of there being no pathway from the Quarry to the River Nore, any impact on the SAC would be unlikely. This is not correct. The reasons for the decision in fact state “*Due to the nature and size of the quarry I do not consider that the quarry activity at this new location would pose a threat to the River Nore SAC*”.
57. The position at the time that the appropriate assessment screening was carried out in 2012 was that there was a discharge of water from the Quarry to the public drain and that remains the case. In these circumstances there is no substance or bona fides to the allegation made by KCC that there has been a material change to the nature and scale of the operation of the Quarry

which amounts to “development”. Nor has KCC adduced any or any credible scientific evidence to explain why the current operations require an Appropriate Assessment whereas in 2012 they determined that the same operations did not require Appropriate Assessment. In the absence of any such evidence, and given the evidence of AWN in relation to the nature of the water being discharged, the Bord can conclude, consistent with KCC’s 2012 Appropriate Assessment screening report and determination, that the operation of the Quarry does not require an Appropriate Assessment.

19 May 2022

Encs:

1. Replying Affidavit of Don O'Regan dated 6th May 2021;
2. Replying Affidavit of Donal O'Regan dated 6th May 2021
3. Supplemental affidavit of Denis Malone dated 6th July 2021;
4. Replying Affidavit of Don O'Regan dated 18 November 2021
5. Exhibit 2 to that affidavit : AWN report dated 5th October 2021;
6. Affidavit of Malcolm Lane of PD Lane dated 24 November 2021;
7. S261 Registration dated 27th April 2005;
8. S261A Report of KCC dated May 2012
9. Enforcement Notice dated 5th November 2021;
10. Letter of withdrawal of Enforcement Notice (of 5th November 2021) dated 25th November 2021;
11. Letter from PKHL to KCC dated 7th December 2021;
12. Enforcement Notice dated 10th December 2021;
13. Letter from PKHL to KCC dated 17th December 2021.
14. Report of AWN Consulting dated 18th May 2022

**THE CIRCUIT COURT
AN CHUIRT CHUARDA**

RECORD NO 2021/

SOUTH EASTERN CIRCUIT

COUNTY OF KILKENNY

**IN THE MATTER OF SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000
AND IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACTS 2000 - 2020**

BETWEEN

KILKENNY COUNTY COUNCIL

Applicant

And

KILKENNY ASPHALT ROOFING LIMITED AND DONAL O'REGAN

Respondents

REPLYING AFFIDAVIT OF DON O'REGAN

I, DON O' REGAN , Quarry manager of **Moate Road, Ballyragget**, aged 18 years and upwards MAKE OATH and say as follows: -

1. I am the son of the Second Named Respondent to the aforementioned proceedings and I make this Affidavit from facts within my own knowledge save where otherwise appears, and whereso appearing I believe the same to be true and accurate.
2. I beg to refer to the proceedings had herein when produced.
3. I was born in 1985 and from my early years I recall travelling to the Quarry at Lismaine with my father. For as long as I can remember there has been continuous quarrying taking place at the Quarry.

4. In more recent years, and in particular from in or about 2003 I became involved in the running of the quarry/asphalt business(s) with my father.
5. At present, I am the Company Secretary of the company, Kilkenny Sand and Gravel Limited. Kilkenny Sand and Gravel Limited is currently the operator of the Quarry and I am the Quarry Manager.
6. At present, Kilkenny Asphalt Roofing Limited does not carry on any business at or from the Quarry.
7. Over the years there have been a number of companies operating from the Quarry:

Asphalt Roofing Limited (1982 – 2003)

During this period (following the acquisition of the first parcel of land on the site by Donal O'Regan and John O'Brien in 1981), the quarry activity was carried out by Asphalt Roofing Limited, a company owned and operated by Donal O'Regan and John O'Brien.

The company was a roofing contractor but was also a producer of Asphalt Material which it used as part of its contracting activities. It operated from a yard on the site originally purchased in 1981. In order to produce the asphalt product, it required sand and limestone chippings and these materials were sourced from the land originally purchased in 1981. As these resources became depleted, my father and John O'Brien purchased the next door site which was part of the original quarry lands and it is this site ("the Quarry") which is the subject of these proceedings

Asphalt Roofing Limited continued to quarry the lands at the Quarry from 1994 until 2001.

Foulksrath Developments Limited (2003 – 2012)

This was a company which was also owned by Donal O'Regan and John O'Brien. It was a stand-alone company that was set up in order to undertake the quarry activity on the Quarry. It extracted limestone and sand and gravel which was used by Asphalt Roofing Limited, Kilkenny Asphalt Roofing Limited and was also sold to third party customers including Booth Concrete and Lismaine Concrete (see below).

Kilkenny Asphalt Roofing Limited (2010 – Jan 2020)

Following on from the Recession which started in 2008, Asphalt Roofing Limited ceased trading in 2010.

It was immediately replaced by Kilkenny Asphalt Roofing Limited which was also a company owned and operated by my sister and her husband and which operated from the same premises. It essentially took over the previous activities of Asphalt Roofing Limited.

In order to carry out its operations at the quarry, Kilkenny Asphalt Roofing Limited retained Kilcarrig Quarries Ireland Limited, which came into the Quarry on a "contract crushing" basis. Essentially, Kilcarrig dug out and crushed the stone and dug out gravel and was paid a fee for doing so by on a per ton basis and it also purchased quarry material for onward sale to third party customers .

Kilkenny Asphalt also used crushed rock which was quarried by Kilcarrig Quarries under their contract crushing arrangement for its own manufacturing purposes.

Kilkenny Sand and Gravel Limited (Jan 2020 -)

This company was registered on the 20th day of January 2020. My wife is the sole director and shareholder of this company and I am the Company Secretary and the Quarry Manager.

It commenced operations at the Quarry in January 2020 and continued to engage Kilcarrig Quarries under a contract crushing arrangement on the same basis as with Kilkenny Asphalt Roofing Limited.

Kilkenny Sand and Gravel Limited continues to sell crushed rock and gravel to Booth Concrete, Kilcarrig Quarries and to Lismaine Concrete Limited which has a concrete facility on lands adjacent to the Quarry.

Continuity of quarrying operations at the Quarry

8. I say that I have collated a quantity of invoices [note: we should include the booth concrete account statements for Foulksrath and Kilkenny Asphalt in this bundle] going back to 2003 which shows the continuous output of the Quarry whilst operated by the above companies. I beg to refer to a copy of the said invoices,

upon which fixed together and marked with the letters "DORJ 1" I have signed my name prior to the swearing hereof.

9. It is clear from the included Invoices that the Quarry has been continuously operational for that period – and not only for the periods as averred to in the various affidavits submitted by and on behalf of the Applicant.

10. For the avoidance of doubt, in the time available I have only been able to collate the documentation going back to 2003. It remains the position, as averred to above, that the Quarry has been operational since in or about the 1950's.

Submission of Application for Registration pursuant to Section 261 of the Act of 2000

11. In April 2005 I was aware that new legislation had come into effect requiring all quarries to be registered with the relevant local authority pursuant to section 261 of the Planning and Development Act 2000.

12. My father was similarly aware of same and we retained Aidan O'Connell & Associates, Consulting Engineers, to prepare the necessary paperwork.

13. On the 27th day of April 2005 I completed and signed the relevant form and whilst I do not have any records as to how the application form was delivered, I believe that it was delivered that day as we were under the impression at that time that it had to be delivered that day. I beg to refer to the relevant document submitted on the 27th day of April 2005 upon which marked with the letters "DORJ 2" I have signed my name prior to the swearing hereof.

14. I say that I was not aware that the said documentation was rejected by the Applicant, on the grounds of being late, or at all, until I attended a meeting with my father at the offices of Kilkenny County Council in late November 2010 following the issuing of an enforcement notice on 15th October 2010, over 5 years after the registration form was submitted

15. Having made enquiry with Aidan O'Connell, Consulting Engineer, I say and believe that Mr. O'Connell was not notified by the Applicant that the application for registration had been rejected (in that respect, the application form specifically stated that any correspondence to be issued in relation to the application from Kilkenny County Council was to be sent to my father c/o Aiden O'Connell).

16. In this regard, having learned in 2010 that the Council were treating the Application for Registration pursuant to Section 261 as being 'late', our solicitor

was instructed to enter into correspondence with the Council. I say that through the various communications between our solicitor and the Applicant's Solicitor I understood that this issue was resolved. At the time, the enforcement notices were withdrawn and therefore I understood that we were permitted to continue quarrying as usual – which we did as did the Quarry next door to us operated by Brennan Brothers.

17. Similarly, following the issuing of an enforcement notice by the Applicant in or about October 2014, I made contact with Mr. Nicholas Louw, Kilkenny County Council, to advise him that we would suspend activities at the site pending the receipt of legal advice but further explained the prevailing situation as I understood it i.e.:

- (i) The Quarry was a pre-1964 development;
- (ii) It was in continuous use, which use never intensified;
- (iii) The 2010 Enforcement Notices were withdrawn when the Council were advised of the above.

18. I say that works were suspended for a brief period and following receipt of legal advice they recommenced shortly thereafter. Following the recommencement of the quarrying no further communication was received from the Applicant and it was again understood that the Respondent's submissions were accepted i.e. that the Quarry did not constitute an unauthorised development.

19. The Respondents thereafter continued to carry on quarrying to the present day.

Complaints made by third parties concerning the Quarry

20. I am aware that the Council has received several complaints over the years from Mr. Aidan Brophy concerning quarrying activities and flooding in the area, not only in respect of the Respondent's Quarry but other quarries operating in adjacent lands.

21. I say that the averments in Mr. Brophy's Affidavit are incorrect. I am concerned that Mr. Brophy has tailored his evidence to suit his ongoing agenda and campaign of complaints made against, *inter alia*, the Respondents. As averred to in my father's Affidavit, Mr. Brophy's own correspondence to the Council in respect of quarrying activity at the Quarry undermines his own sworn evidence in the affidavit prepared for the within proceedings.

22. In addition to investigations and enforcement action taken by the Applicant's planning department, in recent months the Respondents have been the subject

of multiple inspections by several State agencies including the Health and Safety Authority, ESB, and the Environmental Department attached to the Applicant (in respect of alleged water pollution). I have been advised by the various State agencies, their servants and agents, that the inspections were carried out following the receipt of complaints about the Quarry and I do not believe that this is coincidental. In fact, I believe that all of these actions are part of a campaign by Mr Brophy and other residents to put us out of business.

23. I say that having facilitated all inspections and co-operated fully with the various entities – as would be the norm – no issues of concern have arisen.
24. However, the Applicant herein has persisted in issuing several Notices pursuant to the Local Government (Water Pollution) Acts alleging that the Respondents are discharging, *inter alia*, trade effluent, into the local watercourse.
25. Those Notices have been fully responded to making it very clear that no pollutants whatsoever are being discharged from the Quarry. In fact, what is occurring is that natural spring water is being piped off the lands and this has been occurring for over 30 years. In this context, it is telling that the Applicant, notwithstanding that officials from its Environmental Section have attended on site on numerous occasions to take samples, has not adduced any evidence of 'pollution' to support the issuing of such Notices. Nevertheless, I have engaged Smart Test Solutions Limited to prepare a report in reply to the Notices issued by the Applicant. I say and believe and am advised that following the carrying out of tests in relation to water emanating from the Quarry, the results demonstrate that the water is uncontaminated spring water percolating naturally through the Quarry.
26. The excess water generated by the said natural spring is diverted to a lagoon and road drain adjacent to the Quarry though a series of drainage pipes installed over thirty years ago for the purpose of channelling and controlling this excess spring water.
27. There is no contaminated water emanating from the Quarry, nor the adjacent yard. In fact, when the Applicant granted the Respondents Planning Permission to extend the storage yard area of the Quarry (1.5 hectares) in 2008, the Respondents engaged Martin Peters Associates, Consulting Engineers, to investigate the storm drainage layout and soak-way system necessary to ensure no contaminants were discharged into the local watercourse. The said report is included in the Application for Planning Permission granted by the Applicant for the extension of the said storage yard in 2008, and upon which marked with the letters "DORJ 3" I have signed my name prior to the swearing hereof. All works were carried out in compliance with the said planning permission and to the satisfaction of the Applicant.

Altercation with Aidan Brophy

28. Mr. Brophy has been constantly trespassing on our lands and has made threats to put us out of business. This culminated in a very distressing incident, which occurred on 3rd March 2021. Your deponent was at the Quarry with Tom McDonald of Kilcarrig Quarries and one of his employees.
29. Aidan Brophy trespassed onto the Quarry with his son and walked up to me. He started to shout abuse at me for working on a Saturday (which we are permitted to do) and said that he would *"go to jail"* to put us out of business.
30. I asked him to leave, as he was trespassing, but he ignored me. He walked closer to me and put his face up into my face and said that we would *"never get another stone out"*.
31. I again asked him to leave and he eventually did so, saying that they *"would be back"* if we did not stop operating. He took various photographs of the Quarry as he was leaving.
32. About 20 minutes later Tom McDonald, his employee and I, were leaving the Quarry. Mr. Brophy was present at the entrance and he was with Thomas Brennan, of the Applicant's Engineering Department (Mr. Brennan is the signatory of the various Water Pollution Notices referred to above which have issued from the Council).
33. Aidan Brophy, in the presence of Thomas Brennan and Tom McDonald, became abusive and aggressive again, this time referring to the pumping of water. He entered into the Quarry again and moved closer to me. Thomas Brennan had to restrain him. Whilst leaving, Mr. Brennan said to me *"you will receive another letter in the post on Monday"*.
34. I say a second Water Pollution Notice was received the following Tuesday from the Applicant.
35. Whilst I understood that Aidan Brophy had departed the Quarry, he returned later that day with two of his sons. He again trespassed onto the Quarry. I say and believe that Mr. Brophy challenged an employee of Kilkenny Asphalt Roofing Limited and threatened to *"kill Don O'Regan and throw him in the Quarry"*.

36. An Garda Síochána were immediately notified and, following an investigation, Mr. Brophy received a formal caution.

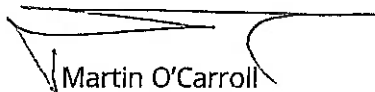
37. This whole incident was extremely distressing to me, my father and the rest of my family. It emphasised to me how far Mr Brophy was prepared to go to try to put us out of business. His complaints over the years to Kilkenny County Council, which I say and believe have led to the issuing of these proceedings, are part of a wider campaign being undertaken by him and we now find ourselves with no alternative but to defend these proceedings so that we can continue with our lawful quarry Operations that have been ongoing since 1981.



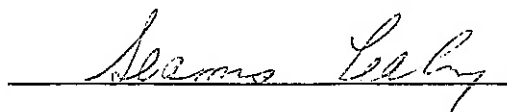
Donal O'Regan Junior

SWORN this 16 day of MAY 2021
at 21, Patrick Street, Kilkenny in the
County of Kilkenny by the Donal O'Regan
Junior before me, a Commissioner for
Oaths/ Practicing Solicitor, and the
deponent has been identified to me by
Martin O'Carroll who is personally known
to me

Commissioner for Oaths/ ~~Practicing~~
~~Solicitor~~.



I certify that I know the deponent



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THE CIRCUIT COURT

RECORD NO 2021/

SOUTH EASTERN CIRCUIT

COUNTY OF KILKENNY

**IN THE MATTER OF SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000
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BETWEEN**

KILKENNY COUNTY COUNCIL

Applicant

And

KILKENNY ASPHALT ROOFING LIMITED AND DONAL O'REGAN

Respondents

REPLYING AFFIDAVIT OF DONAL O'REGAN

I, Donal O'Regan, Businessman, of Moate Road, Ballyragget, Co. Kilkenny aged 18 years and upwards MAKE OATH and say as follows: -

1. I am the Second Named Respondent to the aforementioned proceedings and I am also an owner of the quarry the subject matter of these proceedings and have had an involvement with activities thereon since I purchased the quarry with my now deceased business partner, John O'Brien. I make this affidavit from facts within my own knowledge save where otherwise appears, and where so appearing I believe the same to be true and accurate.
2. I beg to refer to the proceedings had herein when produced.
3. I make this Affidavit in reply to the several Affidavits sworn on behalf of the Applicant herein and in particular:-
 - i. Affidavit of Eddie O'Reilly sworn on the 9th day of April 2021.
 - ii. Affidavit of Denis Malone sworn on the 1st day of April 2021.
 - iii. Affidavit of DJ Donohue sworn on the 9th day of April 2021.
 - iv. Affidavit of Sean Cahill sworn on the 20th day of April 2021.
 - v. Affidavit of Aidan Brophy sworn on the 20th day of April 2021.
 - vi. Affidavit of Eamon Conway sworn on the 21st day of April 2021.

Introduction

4. The within proceedings are brought by the County Council for the County of Kilkenny (hereinafter "the Council") against Kilkenny Asphalt Roofing Limited and your Deponent (hereinafter "the Respondents", which reference shall include the Respondents, each or either of them, their servants or agents unless otherwise stated) and solely concern the operation of a quarry situate at Lismaine, Jenkinstown, in the County of Kilkenny (hereinafter "the Quarry").
5. It is common case that extraction operations at the Quarry commenced prior to October 1964. The Quarry was originally in the ownership of one James Treacy and in 1964 it formed part of a larger quarry operated by James Treacy which has since been subdivided into a number of separate quarries. The said James Treacy sold his lands in two lots in the 1970's and 1980's with your Deponent and John O'Brien acquiring one of those lots in 1981. The lot we purchased in 1981 ("the 1981 plot") is immediately west of the Quarry the subject of these proceedings. It can be identified on the satellite photo exhibited at DM1 to the Affidavit of Denis Malone sworn herein on behalf of the Council as the square edged in red immediately to the west of that other square edged in red which is surrounded by a black circle and identified thereon as 'the Site'. "The Site" so identified on DM1 largely equates to the Quarry the subject of these proceedings.
6. In 1982, Asphalt Roofing Limited ("Asphalt Roofing"), a company owned by and operated by John O'Brien and me, obtained Permission for an asphalt processing plant on the 1981 plot. This continues in operation to this day.
7. Asphalt Roofing set up a premises in the existing quarry pit on the lands purchased and quarried the area around the premises for materials for its Asphalt Plant. As the materials on the site were becoming exhausted, John O'Brien and I purchased the adjacent Quarry the subject of these proceedings in 1994 for the purposes of providing a continued source of raw materials required for the Asphalt plant. We also supplied sand and gravel from the Quarry to construction customers. We purchased the Quarry from one Cornelius Phelan, who had earlier inherited it from his uncle, James Treacy. It is common case that the Quarry formed part of the original pre-1964 quarry owned by James Treacy.
8. I say and believe that at all material times the said James Treacy, the occupants, and operators of the Quarry, lawfully carried on works and/or development, namely the quarrying and extraction of sand, gravel and limestone, up to and including acquisition of the Quarry by the Respondents.
9. Further, during the entire period from our acquisition of the Quarry in 1994 to date I, initially with John O'Brien and subsequently with members of my family,

have simultaneously and continuously operated a number of companies from the Quarry, primarily focused on the production of asphalt and asphalt related products such as roofing materials. In addition to producing materials required by those companies, we have also produced materials namely rock, sand and gravel for sale to third party customers. While some of the buildings associated with this activity are located on the 1981 plot, the extraction throughout this period has been from the Quarry.

10. For completeness, I should indicate that on the satellite image exhibited at DM1, the area immediately north of the 1981 plot and the Quarry is now owned and operated by Brennan Brothers Limited, an entirely separate quarry operator, with Lismaine Concrete, another company, operating from a small portion on the south of this area. Brennan Brothers Limited also own and operate the quarry area to the immediate south of the 1981 plot.

The within application

11. The primary relief sought by the Council is an Order pursuant to Section 160 of the Planning and Development Act 2000 ("the PDA 2000") restraining the Respondents, their servants, or agents, from carrying out or continuing any "unauthorised development" on lands situate at Lismaine, Jenkinstown, in the County of Kilkenny and identified on the map attached to the Notice of Motion (*i.e.*, the Quarry).
12. Mr Denis Malone, in his Affidavit sworn on behalf of the Council, deals with the planning history of the Quarry. This is set out in relatively brief terms (and, as discussed further below, a number of important aspects have been surprisingly omitted from his account). However, it is clear from his Affidavit that the Council's case for relief under Section 160 is based on the argument that the Quarry became unauthorised by operation of law on or about 28th April 2005 by virtue of our alleged failure to register the quarry with the Council within one year from the coming into operation of Section 261 of the PDA 2000, as required by sub-section (1) thereof. Section 261(10)(a) provides that a quarry in respect of which the owner or operator fails to provide information in relation to the operations of the quarry in accordance with Section 261(1) shall be unauthorised development. Section 261 came into operation on 28th April 2004.
13. While it is not expressly stated by Mr Malone in his Affidavit, the Respondents are aware from a combination of discussions with the Council in or around 2010 and recent correspondence from the Council's solicitors, that the Council's position is that our registration application and the requisite information contained therein was received on 28th April 2005, one day late, and that the Quarry was therefore unauthorised.

14. The Respondents' response to this is two-fold.
15. In the first instance, our application form was prepared by our Engineers, Aidan O'Connell and Associates, for submission to the Council on 27th April 2005. It is signed and dated 27th April 2005 and it is my belief that the application was submitted to the Council on that date. Further, while the Council informed me (and my son, Don O'Regan) at a meeting in late November 2010 that our registration was ineffective as it was received one day late and they had sent us a letter rejecting the application for registration, I have no record or recollection of receiving such a letter and would certainly have acted upon it—and would recall it—had I received it. In this regard, I should also note that the application form specifically stated that any correspondence in relation to the registration was to be sent to me c/o Aidan O'Connell. Having checked with Mr O'Connell, I can confirm that he likewise has no record of ever having received a rejection letter.
16. I should add that we were recently informed in correspondence from the Council's solicitors that the Council's position is that they received the application form on 28th April 2005; while the Council had informed us orally in 2010 that the application was received a day late, this was the first time we received written confirmation of the Council's position that it had received the application on 28th April 2005 and not 27th April 2005.
17. Second, however, I say, believe and am advised that it is in any event immaterial whether the application was received on 27th April or 28th April 2005 in circumstances where, by virtue of the provisions of Section 251 of the PDA 2000, the period of one year referred to in Section 261(1) has to be read as one year and nine days. Consequently, I say, believe and am advised that the required information was provided to the Council in accordance with Section 261(1) and Section 261(10)(a) of the PDA 2000 does not apply.
18. In these circumstances, I say, believe and am advised that the central premise of the Council's application for relief under Section 160—the basis on which it is said that the Quarry is unauthorised—is erroneous. The Information for registration was submitted with the period prescribed in the PDA 2000.
19. Turning to the detail of the planning history of the matter, your Deponent, together with the other Deponents of Affidavits on behalf of the Respondents, will set out hereunder how the quarrying operations—which commenced prior to 1964 and in fact as far back at least the 1950s—are not unauthorised development by reason of the following:-
- a. It is common case that the Quarry predates 1964.

- b. The Quarry was registered pursuant to Section 261 of the Planning and Development Act 2000.
- c. No assessment is required to be carried out under the Habitats Directive or the Environmental Impact Assessment Directive.
- d. There has been no intensification of the quarrying from its pre 1964 levels such as would constitute intensification or otherwise rendering the continuing works as *unauthorised development*.

Existence of Quarry prior to the 1st day of October 1964.

20. It is common case that the Quarry pre-existed the coming into force of the Planning and Development Act 1963 (which came into effect on the 1st day of October 1964) and therefore, at all material times between the 1st of October 1964 and the coming into force of the PDA 2000, the continued quarrying was authorised and did not require planning permission. This remained the position subsequent to the coming into force of the PDA 2000.

Registration pursuant to Section 261, Planning and Development Act 2000

21. Section 261 of the PDA 2000 was commenced on the 28th day of April 2004. As can be seen from the said provision, all existing quarries were required to be registered within "one year" of the coming into force of that provision i.e. within "one year" of the 28th day of April 2004.

22. As averred above, having regard to Section 251 of the PDA 2000 (which provides for the calculation of time periods provided by the PDA 2000), I say, believe and am advised that the period of "one year" referred to in Section 261 Act means a period of one year and nine days.

23. As will be seen hereunder, the Respondents' belief is that the application was submitted to the Council on the 27th day of April 2005. The Council claims that the application was not received until the 28th day of April 2005. Using either party's account of the relevant dates, however, the application was still completed and submitted within the period of "one year" as required by section 261(1).

Requirement of Assessments under the European Directives.

24. Section 261A of the PDA Act was inserted by the Planning and Development (Amendment) Act 2010 and required the planning authorities to carry out further analysis of all quarries within their functional area for the purposes of ascertaining

whether those quarries operated in accordance with the Environment Impact Assessment ("EIA") Directive (1985) and the Habitats Directive (1992). In or about May 2012 the Council was mandated to carry out its own assessment of the Quarry in accordance with Section 261A. Having carried out the requisite assessment in respect to the Quarry, the Council concluded that the Quarry did not require to be the subject of either an Environment Impact Assessment ("EIA") pursuant to the EIA Directive or an Appropriate Assessment for the purposes of the Habitats Directive.

25. By way of notification made by letter dated the 27th day of July 2012 the Council notified Asphalt Roofing Limited that *"I wish to inform you that by County Managers Order, the Planning Authority has decided that **no further action is required pursuant to Section 261(A)** of the Planning and Development Act 2010 (as amended) in respect of your Quarry located at Lismaine, Jenkinstown, County Kilkenny – Reference No. QR020"*.
26. No further documentation was transmitted to me, Asphalt Roofing or to anyone else connected to me at that time. I beg to refer to a copy of the said letter dated the 27th of July 2012 upon which marked with the letters **"DOR 1"** I have signed my name prior to the swearing hereof.
27. I say that as can be seen from the said Determination, I was advised that the Quarry did not require any action to be taken for the purposes of bringing it into compliance with the Habitats Directive or the EIA Directive.
28. Further, in the context of these proceedings, the Respondent's Solicitor has sought to take up copies of the relevant files held by the Council relevant to the Quarry. In this context, he identified a number of internal Council documents underlying this Section 261A determination. In this regard, there is, first, a Planning Report signed by N Louw, Senior Executive Planner, and A.M. Walsh, Senior Executive Officer. This concludes that the Quarry did not require to be the subject of an EIA or Appropriate Assessment. Second, there is an accompanying 'Habitats Directive Project Screening Assessment' which appears to be signed by JN Louw. Third, there is a County Manager's Order dated 27th July 2012 and which appears to be signed by Denis Malone as Acting Director of Services.
29. I assume this to be the same Denis Malone who has sworn an Affidavit in these proceedings on behalf of the Council. If I am correct in this assumption, this renders the averment at paragraph 5 of his Affidavit surprising and incomplete. He notes in the said paragraph that the Quarry is located 700 metres from a Special Area of Conservation ("SAC") and goes on to aver *"Kilkenny County Council is not aware of any Environmental Impact Assessment or Appropriate Assessment*

having been carried out with regard to the operations of this quarry/sandpit". He omits to refer to the fact that in 2012, Kilkenny County Council itself carried out a screening assessment as to whether the Quarry required an EIA or Appropriate Assessment and concluded that it did not and that he had signed off on this determination.

30. I beg to refer to a copy of the said Planning Report, Habitats Directive Project Screening Assessment and Manager's Order, upon which, pinned together and marked with the letters "**DOR 2**", I have signed my name prior to the swearing hereof.

Reply to Affidavit of Denis Malone

31. In reply to paragraph 4 of Mr Malone's Affidavit he avers that the *"the operators of the Quarry [...] subsequently attempted to register pursuant to [Section 261] but failed to do so by the appropriate deadline in 2005 and accordingly, this deemed, that the quarrying activity at Lismaine was unauthorised development."* Whilst Mr Malone does not provide any further detail in this regard or exhibit any supporting documentation, as already averred above, the Council's position is that it received the application on 28 April 2005.
32. The application for registration was prepared by Aidan O'Connell Associates for submission on 27th April 2005 and I believe that it was submitted on that date. In this regard I beg to refer to a copy of the application upon which marked with the letters "**DOR-3**" I have signed my name prior to the swearing hereof. Further, I beg to refer to a copy of the Affidavit of my son, Don O'Regan, when produced
33. In any event, I am advised that having regard to Section 251 of the Act of 2000, nothing of substance turns on either of these dates: the application for registration was submitted within the period of "one year" within the meaning of the PDA 2000, and the Respondents accordingly complied with their obligations pursuant to Section 261 of the Act of 2000.
34. In reply to paragraph 5 of Mr Malone's Affidavit he raises the concern that the lands the subject of the proceedings are located approximately 700 metres from the River Barrow/River Nore a Special Area of Conservation. He further avers that the Council is not aware of any Environmental Impact Assessment or Appropriate Assessment having been carried out with regard to the operations at the Quarry. I am very surprised by this averment in circumstances where the Council's own internal documentation, already exhibited above at "**DOR2**" (and which was not referred to or exhibited by the Applicant in its application), show that this is plainly

incorrect in circumstances where the Council itself determined that the carrying out of an Appropriate Assessment or an EIA was not required. It is also notable that Mr Malone signed the County Manager's Order to this effect.

35. In reply to paragraph 6 of Mr Malone's Affidavit I say that whilst it is correct to state that an Enforcement Notice issued on or about the 8th day of December 2009, the said enforcement notice—exhibited at 'DM2'—did not relate to the Quarry the subject matter of these proceedings. It was directed at my daughter and concerned works she was carrying out in an adjoining field (which actually entailed the digging out of a vehicular access). These works ceased on foot of the enforcement notice and I say and believe that the said works and the enforcement notice of 8th December 2009 have no relevance to the subject matter of these proceedings.
36. It is the case, however, that the Council purported to serve an Enforcement Notice relating to the Quarry the subject of these proceedings on the Respondents under cover of letter dated the 15th day of October 2010. This Enforcement Notice has not been referred to by Mr Malone in his Affidavit. The said Enforcement Notice required the Respondents to "cease all quarrying activities" on its lands at Lismaine, Ballyragget, Co. Kilkenny.
37. By letter dated the 1st day of November 2010 Arthur Cox, on behalf of the Respondents, wrote to the Council, *inter alia*, in the following terms:
- (i) The quarry was a pre-1964 quarry and had not changed since that date to a degree so material as to require a grant of planning permission;
 - (ii) There has been no intensification of use such as to render the use unauthorised.
 - (iii) Requesting the Council to withdraw the Enforcement Notice.
38. An exchange of correspondence ensued between the Council and Arthur Cox Solicitors and a meeting was held between Council officials and myself and my son, Don O'Regan, on 24th November 2010. I recall the meeting was attended by Mr Nicholas Louwe and one other official on behalf of the Council. It was at this meeting that I first became aware that the Council's position was that there had been non-compliance with Section 261(1) by virtue of the application for registration having been submitted one day late. Further correspondence was

exchanged subsequent to and having regard to the information provided by the Council at this meeting, which culminated in a letter dated the 10th day of December 2010 from the Council's Solicitors to the Respondents' Solicitors, notifying them that the Enforcement Notices were being withdrawn and stating the following:

" [...] Kilkenny County Council initially thought that the development being carried out by your client arose under the Planning Permission which was granted to it for the extensions of its existing yard used for the storage of roofing material. At the time the council was concerned that unauthorised quarrying activities were being undertaken under the mask of this Planning Permission. [...] Subsequent to the service of the Enforcement Notices it has come to the attention of the County Council that this is not the case of an excessive degree of excavation being undertaken in the context of the existing Planning Permission, but rather it is the case that your client is intent on developing a commercial quarry on these lands which my clients regard as unauthorised development."

39. The Council's solicitors went on to state that the Respondents had indicated an intention to seek leave to apply for judicial review in respect of the enforcement notices and that the Council had decided to withdraw the enforcement notice *"because the Council now intends to pursue an alternative enforcement mechanism namely an application for a Court Injunction and wishes to avoid unnecessary Judicial Review Proceedings in this matter"*. Notwithstanding this threat, and the Council's apparent position, notwithstanding the withdrawal of the enforcement notice, that the Quarry was unauthorised by virtue of Section 261(10), no such injunction issued and no further action was taken.
40. The Enforcement Notice was formally withdrawn by letter of the Council dated 22nd December 2010, again something which has not been averred to by the Council's deponents.
41. I beg to refer to a copy of the correspondence transmitted between the parties between October and December 2010 upon which marked with the letters **"DOR 4"** I have signed my name prior to the swearing hereof.
42. For the avoidance of doubt, we continued to carry on quarrying activities after the withdrawal of the enforcement notice in 2010 (as we had done for the preceding 18 years), and any suggestion to the contrary by the Council is simply incorrect.
43. In this respect, in reply specifically to paragraph 7 of Mr Malone's Affidavit, I say that it is incorrect to say that quarrying activity 'resumed' at the site in 2014. It had never stopped. In a similar vein, with reference to paragraph 8, there is also no

question of the Respondents "recommencing" any unauthorised use, or indeed "recommencing" quarrying, at the property in or about August 2020. There was no cessation of quarrying between 2009 and 2014 or between 2014 and 2020, as alleged by Mr Malone.

44. At all material times since the 1980s there has been continuous extraction of sand, gravel and rock from the Quarry and in this regard, I beg to refer, in particular, to the affidavit sworn by my son, Don O'Regan, when produced.
45. Insofar as concerns the enforcement notice of 5th September 2014, referred to at paragraph 7 of Mr Malone's affidavit, I also beg to refer to the Affidavit of my son when produced.
46. In relation to paragraph 8, it is admitted that the Council saw fit to issue Enforcement Notices in November 2020 and the issuing of these enforcement notices was contested fully in correspondence on behalf of the Respondents through their Solicitors Messrs. Arthur Cox. Mr Malone's Affidavit exhibits the correspondence transmitted between the parties' solicitors since October 2020 (exhibit DM5). As can be seen from the correspondence, Messrs Arthur Cox disputed the Council's entitlement to issue the enforcement notices and highlighted pertinent issues that are also relevant to this application, in particular that:-
 - a. The Quarry was operated by the previous owner prior to the 1st of October 1964.
 - b. The Respondents liaised with the Planning Authority in 2010 and 2014 when enforcement notices were issued and made various submissions to the Council such that no enforcement or other action was pursued. In these circumstances, it was difficult to understand how the matter was now considered so urgent as to require the service of enforcement notices requiring summary cessation, without the warning letter procedure having first been followed.
 - c. There has been no material change in the Respondents' continuous activities.
 - d. In any event, the Respondents' Solicitors sought further information in relation to an undertaking sought by the Council (by letter dated the 22 day of October 2020) in respect of the cessation of all works on site.
47. There followed a further exchange of correspondence between the parties' solicitors relating to the issues of:

- (i) Registration of the Quarry under section 261
- (ii) The level of quarrying taking place at the Quarry.

I say that, at all times during the exchange of correspondence, it was reiterated to the Council that the same level of quarrying activity has been taking place at the Quarry for the past forty years (and beyond). This was accepted by the Council when the same issues were raised in 2010 and in 2014 (the issue then, as now, was the alleged unauthorised status of the Quarry by virtue of Section 261(10)).

48. It is clear from the letter of Harte Solicitors on behalf of the Council of 19th March 2021 (exhibited at DM5 of Mr Malone's Affidavit) that the Council's contention of "*long periods of inactivity*" at the Quarry is based on the accounts of neighbouring landowners and the Council have seen fit to rely upon affidavit evidence of certain neighbouring landowners for the purpose of advancing this argument.

49. The suggestion that the Quarry has been largely inactive for a number of years and only recommenced in August 2020 (and/or for a brief period in 2014) is simply false. As averred above, quarrying activities have been continuously carried on at the Quarry for several decades now and the extracted limestone is used for manufacturing asphalt and related materials and for sale to third party customers. In this regard, I refer to the affidavit sworn by my son, Don O'Regan when produced, and the exhibits thereto containing evidence of the Respondents' ongoing business activity, as well as to the other affidavits sworn herein on the Respondents' behalf. These affidavits and the documents exhibited thereto will be relied upon at the hearing of this application to establish the continuous nature of the quarrying activity over the years.

50. Indeed, I might also observe that this is also borne out by the fact that some of the neighbours (and deponents of affidavits to the within proceedings) themselves have corresponded with Kilkenny County Council about the quarrying activities outside the narrow periods to which the Council are now suggesting such activity has been confined.

Reply to Affidavit of Aidan Brophy sworn on the 20th day of April 2021

51. For the purpose of the within application, and moreover for the purpose of emphasising the environmental hazards allegedly created by the Respondents, Mr. Brophy avers that the quarrying activities took place only between the following dates:

- (i) March/April 2009 to Sept/Oct 2010;

- (ii) 27th March 2014 to winter 2015/2016
- (iii) 17th August to-date.

52. Mr. Brophy avers that outside of the above times the quarry lay dormant.
53. Mr. Brophy further avers that the quarry water is being pumped into the drainage system which leads to the River Nore and the SAC and that we are pumping over 1 million litres of water nightly and this is causing flooding to his fields. While nothing further is stated, I believe that these averments are made by Mr Brophy solely to give the impression that the Respondents are polluting the local watercourses or otherwise carrying on in a manner that will have a direct effect on the local River Nore Special Area of Conservation and his lands.
54. This is simply untrue. The water which emanates from the Quarry is natural spring water and there are numerous similar springs in the surrounding lands. The spring water contains no pollutants and is not used by the Respondents or our agents in any production or other process; it simply flows down to the roadside drain as described hereunder.
55. The spring dries up during the summer and the flow of the spring water is dependable on the weather. Its natural flow has always brought this water down to a roadside drain. Over 30 years ago, I installed a drainpipe to carry the spring water to a lagoon situated in the adjoining land owned by Brennan Brothers and also directly to the roadside drain to avoid pooling on my site and to avoid any build-up of spring water when the springs run high, in Spring time. However, the water flowing from my lands and from other neighbouring lands often accumulated on the road at its lowest point. Consequently, the road flooded occasionally and this may have impacted Mr Brophy's property which is located on the other side of the road from the entrance to the Quarry. Kilkenny Council carried out works in or around 2010 which alleviated the accumulation of water which came from many sources, not just the springs on my land
56. . We have, over the years, pumped the spring water out of the quarry pit when the springs have been running high at spring time, but this has occurred at night-time and is simply an acceleration of the process by which the spring water flows out to the roadside drain.
57. I am advised that allegations of nuisance are not relevant to the Council's application but, in any event, I wish to make it clear that the occasional pumping process of spring water on my lands is not causing any flooding to Mr Brophy's (or anyone else's) lands.

58. In this context, I note that at paragraph 6 of his affidavit, Seán Cahill alleges that water is being pumped into the Brennan's site without permission which is resulting in an overflow onto his land. This is not correct. The water was piped into the lagoon in the Brennan's site for many years with their consent and any overflow is piped down to the roadside drain. It was only very recently that the Brennan's blocked the pipe to their lagoon and now the water is piped straight to the roadside drain.
59. For completeness, I should state that Mr. Brophy and the Respondents are not on favourable terms. Mr. Brophy has levied various allegations against the Respondents for several years. He has been constantly trespassing on my lands and has made threats to put us out of business. This culminated in a very distressing incident, which occurred on 3rd March 2021 wherein Mr Brophy trespassed onto the Quarry and said that he would *"go to jail"* to put us out of business and that we *"would never get another stone out"*. In a separate incident later that day he trespassed onto the Quarry again and told one of my employees that he would kill my son and *"throw him into the Quarry"*. This necessitated an immediate investigation that same day by An Garda Síochána and I understand that a formal Garda caution was accepted by Mr. Brophy. I beg to refer to the Affidavit of Don O Regan when produced.
60. Mr Brophy has filed multiple complaints with the Council over the years concerning the ongoing quarrying and has entered into constant correspondence with the Council. In this regard, I beg to refer to a letter of complaint concerning the Quarry, dated the 22nd day of February 2017, sent by Mr. Brophy to the Council, upon which marked with the letters **"DOR 5"** I have signed my name prior to the swearing hereof.
61. As can be seen from the letter Mr. Brophy has been writing to the Council since 2007 complaining about the Quarry. It is clear from the content of the letter that he is aggrieved at the continuous activities over a period of ten years from 2007 to 2017 and this is entirely inconsistent with the version of events set out in his affidavit concerning the alleged limited activity of the Quarry during this period. It is also clear that he is aggrieved that the activities are continuing and his attempts to stop the quarrying activities have intensified in recent times in a very unsavoury manner.

Conclusion

62. I say and believe and advised that the within application is entirely based on the erroneous opinion held by the Applicant that the quarrying activity carried on at the Respondents' Quarry constitutes an unauthorised development within the meaning of the Act of 2000.

63. The said erroneous opinion is also grounded on two distinct sets of incorrect facts, namely that;

- a. the application for registration of the Quarry submitted by the Respondents pursuant to Section 261 of the Act of 2000 was late;
- b. the quarrying activity has not been continuous in that there have been long periods of inactivity, and that the within application was triggered by a recommencement of quarrying after one such period of activity (of allegedly circa 6 years).

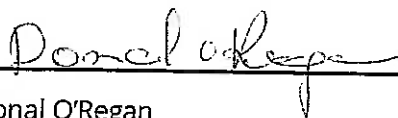
64. Firstly, as has been demonstrated above, the application for registration of the Quarry pursuant to Section 261 was indeed lodged with the Applicant within the prescribed period.

65. Secondly, in contrast to the relatively sparse and inconsistent averments submitted on behalf of the Applicant as to the level of quarrying activity carried on at the Quarry, the Respondents have advanced a significant volume of evidence to demonstrate that there has been continuous and consistent quarrying carried on over the years at this pre-1964 Quarry.

66. In circumstances where the Quarry is not deemed to be an unauthorised development pursuant to section 261(10) of the Act of 2000, and further, taking into consideration that there has been a consistent level of quarrying activity at the Quarry for several decades, and since prior to October 1964, I say and believe and am advised that the complaint of unauthorised quarrying contended for by the Applicant is without foundation.

67. In circumstances where the relief sought by the Applicant is discretionary in nature, I also say and believe and am advised that an injustice would occur should the Council be entitled to rely upon its own error of law in securing discretionary relief from this Honourable Court. This is particularly so in circumstances where the Council has made various actions, assessments and/or determinations over the years which have been consistent with permitting the continued use of the Quarry, and where, save with respect to one enforcement notice that was withdrawn and another than was not pursued, the Council have not advanced any enforcement action against the Respondents notwithstanding its claim herein that the Quarry is unauthorised since 2005.


to stop the quarrying activities have intensified in recent times in a very unsavoury manner.



Donal O'Regan

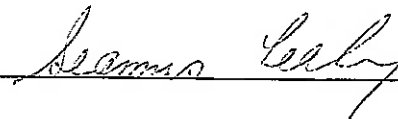
SWORN this 6th day of MAY 2021
at 21, Patrick Street, Kilkenny in the
County of Kilkenny by the Donal O'Regan
before me, a Commissioner for Oaths/
Practicing Solicitor, and the deponent has
been identified to me by Martin O'Carroll
who is personally known to me

Commissioner for Oaths/ Practicing
Solicitor.



Martin O'Carroll

I certify that I know the deponent



Thomas Leahy

Record Number:...../2021

THE CIRCUIT COURT
SOUTH EASTERN CIRCUIT **COUNTY OF KILKENNY**
IN THE MATTER OF SECTION 160 OF THE PLANNING AND DEVELOPMENT
ACT 2000
AND IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACTS 2000-
2020

BETWEEN:

KILKENNY COUNTY COUNCIL

APPLICANT

-and-

KILKENNY ASPHALT ROOFING LIMITED

-and-

DONAL O'REGAN

RESPONDENTS

SUPPLIMENTAL AFFIDAVIT OF DENIS MALONE

I, Denis Malone, Senior Planner, of Kilkenny County Council, County Hall, Kilkenny, aged 18 years and upwards **MAKE OATH** and say as follows:

1. I say that I am a Senior Planner in the Planning section of Kilkenny County Council, the Applicant herein and I make this Affidavit on its behalf and with its authority from facts within my own knowledge save where otherwise appearing and whereso otherwise appearing I believe the same to be true and supplemental to my affidavit of 1st April 2021.
2. I say that I wish to clarify that Section 261 of the Planning and Development Act, 2000 which specifically dealt with the issue of quarries (and Section 261a of that Act, introduced by SI 246 of 2012) required that the owners of quarries provide certain information to the Planning Authority within one year of the coming into effect of that section and on receipt of that information the Planning Authority shall register the quarry pursuant to Section 261 of the Planning and Development Act, 2000. I erroneously suggested in my previous affidavit that a quarry that was not registered was deemed unauthorised development. In fact Section 261 subsection 10 of the Planning and Development Act, 2000 provides that where the owner of the quarry fails to provide the information required by Section 261 that the quarry is unauthorised. The non registration of the quarry does not of itself render it unauthorised.

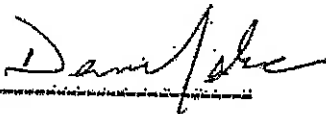
3. I say that Section 261 became operative on the 28th April 2004. Accordingly the latest date for the receipt of information was regarded as 27th April 2005. I say that the operators of the quarry the subject matter of the within proceedings submitted information with regard to the quarry on the 28th April 2005 which was regarded as outside of the 1 year permitted by the section. As a result the Planning Authority did not register the quarry and wrote to the owner of the quarry on the 13th June 2005 informing him of that fact.
4. I say that in correspondence dated 8 December 2010 between Arthur Cox Solicitors on behalf of the quarry owner and James Harte and Son Solicitors, the information was acknowledged as late as follows: *"we are advise that the information required for the registration of our client's quarry was sent to the Council on 27 April 2005. The Council, however, susequently returned this information to our client indicating that because the period for registration had expired by one day, our client's quarry could not be registered. In the circumstances, we trust that your client will understand that there was no attempt to circumvenrt the controls imposed on our clien's operations by the planning anjd development legislation and any failure in this regard was inadvertent."* I beg to refer to a copy of the aforementioned letter upon which marked with the inscription "DM1a" I have endorsed my name prior to the swearing hereof.
5. I say that at the time of receipt of the information on the 28th April 2005 and indeed at the time of writing of the letter by Arthur Cox SAolicitors in 2010, a year was understood to contain 365 days. However in the case of Brown v Kerry County Council 2011, the Supreme Court ruled that a year for the purpose of the Planning and Development Act 2000 consisted of 374 days. On the basis of this ruling , it is accepted that the information provided by Mr O'Regan was within time for the quarrying operations to which they related.
6. I say that however the information provided by Mr O'Regan was in the form of an Application Form completed by Mr O'Regan with regard to the quarry. Question 10 of that form asks the question "Is pumping carried out at the development?" Mr O'Regan answered "No" and I beg to refer to a copy of the aforesaid application form upon which

marked with the inscription "DM2a" I have endorsed my name prior to the swearing hereof.

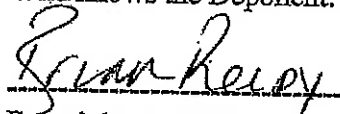
7. I say and believe that a screening assessment of the quarry the subject of these proceedings was carried out by Nicholas Louw in 2012 for the purpose of AA assessment of the quarry as it existed (and to the extent that it had been excavated) at that time. Water at that time was being disposed of to a tailings pond on site. The assessment concluded that the operation of the quarry did not have an effect on the nearby River Nore Special Area of Conservation on the presumption that the quarry was not discharging to the SAC and I beg to refer to a copy of the aforesaid screening assessment form upon which marked with the inscription "DM3a" I have endorsed my name prior to the swearing hereof.
8. I beg to refer to the affidavits of Regina Moran and Philp Byrne. I say that it is clear from those affidavits that the operation of the quarry in recent times is very different from that for which information was provided in 2005 and that which was assessed in 2012. I say that the current operation of the quarry is based on the pumping of significant volumes of water from the quarry which is flowing into the adjacent SAC.
9. I say that accordingly the quarrying activities in so far as they are based on the pumping of water from the quarry and the discharge of that water from the site is not authorised by the information submitted by the owner if the quarry in 2005.
10. I say that Section 160 (6) of the Planning and Development Act 2000 states that "*an application to the High Court or Circuit Court for an order under this section in respect of a development where no permission has been granted after the expiration of 7 years from the date of commencement of the development*". Section 29 of the Environment (Miscellaneous Provisions) Act 2011 amended Section 160 of the Planning and Development Act, and stated that "*an application to the High Court or Circuit Court may be made at any time for an order under this section to cease unauthorised quarry development ..*" Accordingly I say that the quarrying activities which involve the pumping of water from this quarry are unauthorised development and it is immaterial if these activities are alleged to have been ongoing for in excess of 7 years.

11. I therefore pray this Honourable Court for an Order in terms of the Notice of Motion herein and for such further and other Order as this Honourable Court may seem meet including an Order providing for the costs of and incidental to this application.

SWORN this 5th day of July 2021,
At Parliament Street, Kilkenny.
Before me, Brian Reidy, a Practicing
Solicitor, and I know John Harte
Who knows the Deponent.



Denis Malone



Practicing Solicitor

Filed this ... day of 2021, by Messrs. Harte, Solicitors on behalf of the Applicant of
Parliament Street, Kilkenny.

Brian Reidy
Solicitor
Reidy & Foley
Solicitors
Parliament House
Kilkenny

**THE CIRCUIT COURT
AN CHUIRT CHUARDA**

RECORD NO. 2021/

SOUTH EASTERN CIRCUIT

COUNTY OF KILKENNY

**IN THE MATTER OF SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000
AND IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACTS 2000 – 2020**

BETWEEN

KILKENNY COUNTY COUNCIL

APPLICANT

-AND-

KILKENNY ASPHALT ROOFING LIMITED

-AND-

DONAL O'REGAN

RESPONDENTS

REPLYING AFFIDAVIT OF DON O' REGAN

I Don O' Regan, businessman, of Moate Road, Ballyragget, in the County of Kilkenny, aged eighteen years and upwards MAKE OATH and say as follows:

1. I am the son of the Second Named Respondent to the within proceedings and the quarry manager for Kilkenny Sand and Gravel Limited, the current occupier of the lands the subject matter of the within proceedings. I make this affidavit from facts within my own knowledge save where otherwise appears and where so appearing I believe the same to be true and accurate.
2. I beg to refer the proceedings had herein when produced.

3. I make this Affidavit in supplement to the Replying Affidavit of Donal O'Regan (my father) and my Replying Affidavit both sworn on the 6th of May 2021.
4. I also make this affidavit in reply to the affidavits filed on behalf of the Applicant including:
 - (i) Supplemental Affidavit of Denis Malone 5th July 2021
 - (ii) Affidavit of Regina Moran 5th July 2021
 - (iii) Affidavit of Paul Byrne 5th July 2021
5. I say that Kilkenny Sand and Gravel Limited is the current operator of the Quarry situate on the lands in question. I say that as Quarry manager, I exercise control of the Quarry, the lands the subject matter of these proceedings (hereinafter "the Lands") and the activities that take place therein. Further, I say that the second named Respondent is a man of advanced years and does not have any role in the running of the quarry operations.
6. Further, at all material times since in or about 2003 I have been directly involved in the running of the Quarry the subject matter of the proceedings.

Concession by the Applicant in respect of the Registration of the Quarry

7. I say that the concession made by Mr. Malone at paragraph 2 of his Supplemental Affidavit sworn on the 5th July 2021 is most welcome.
8. In essence this confirms that the Quarry the subject matter of the proceedings was registered in accordance with the Act of 2000.
9. Further, in circumstances where the Quarry is a "pre-1964" quarry the continued quarrying activities do not require the benefit of planning permission and do not constitute "unauthorised development" within the meaning of the Act of 2000.

Concern raised by the Applicant regarding the accumulation of water and/or pumping of water

10. It is common-case that due to the prevailing weather conditions and the nature of the limestone rock formation which dominates the locality that the accumulation of water in the area is a natural occurrence.

11. I say that it has always happened and is entirely weather dependent. Further, I say and believe and am advised that the land-owners in the locality have had to manage the accumulation and flow of water for time immemorial and that localised flooding in the area is a regular occurrence in times of high rainfall.
12. Further, I beg to refer to the Replying Affidavit of Donal O'Regan sworn on the 6 May 2021 Mr. O'Regan (senior) avers at paragraph 55 therein that he installed drainage pipes over 30 years ago to manage the accumulation of water in and about the quarry and moreover to divert same into a lagoon on lands ("the Brennan Site", in separate ownership) adjacent to the Quarry.
13. At all material times the natural accumulation of waters has been managed by a piping system. This has further been facilitated by Kilkenny County Council carrying out flood relief works in or about 2010 to deal a confluence of waters emanating from various lands including the Quarry the subject matter of the proceedings.
14. However, Mr. Malone in his Supplemental Affidavit now appears to make a new proposition that:

"the quarrying activities in so far as they are based on the pumping of water from the quarry and the discharge of that water from the site is not authorised by the information submitted by the owner of the quarry in 2005."
15. I say and believe and am advised that such a proposition is simply incorrect and does not in any way effect the planning status of the Quarry.
16. Firstly, I say that the pumping or piping of waters is entirely separate to the quarrying activities. At all material times over the years, your Deponent, the Second Named Respondent, each or either of us, our servants or agents, were required to manage the natural accumulation of water and same has always been managed through a system of piping and where required periodic pumping.
17. Further, I say that regardless of whether any activity takes place on the lands, quarrying or otherwise, the natural accumulation of waters must be managed, otherwise the quarry simply overflows and the inundation of waters flowing from the quarry will cause additional flooding of the Second Named Respondent's lands, including yards and buildings with resultant run-off into the local watercourse.
18. Therefore the piping or pumping of water is a historic means of managing naturally occurring rain-water or spring waters or otherwise referred to as "storm water".

Blockage of piped waters to tailing lagoon by adjacent land owner

19. As averred to in the Affidavit of Donal O'Regan (para. 58) access to the lagoon on the Brennan Site was recently blocked by that landowner. This has led to excess water accumulating on the Lands which your Deponent has been endeavouring to ameliorate.
20. The blocking of access to the lagoon on the Brennan Site required your Deponent to identify other means of draining the storm waters in times of heavy rainfall. Therefore these storm waters were diverted to the land drain adjacent to the quarry entrance which then flows down-stream joining with waters draining from other lands including the Brennan Quarry and the Lismaine Concrete facility (all in separate ownership).
21. Again, I say and believe and am advised that the discharge of storm waters does not concern the planning status of the quarry.
22. For the avoidance of doubt, the quarrying activities themselves do not consume water whether to supply washing facilities or otherwise such that no waste-water is produced.
23. In addition, the excavations process engaged at the Quarry take place above the high-water level, known as "Benching". Therefore even with the management of the water levels on-site, the quarrying activities take place above, what would effectively be the over-flow level of the quarry. This is a further measure to show that the piping or pumping of water on the lands is entirely coincidental to the quarrying activities.

Discharge of Storm waters into the local watercourse

24. The Applicant has sought to categorise the discharge of storm waters from the lands the subject matter of the proceedings as a recent occurrence which, whilst not specified, appears to be alleged to alter the planning status of the quarry.
25. It is important at this juncture to highlight:
 - (i) The Initial approach by the Applicant when initiating these proceedings was that the Quarry was simply unauthorised;
 - (ii) The Applicant has initiated separate proceedings under the Local Government (Water Pollution) Acts alleging that the waters

discharged from the quarry (a) contain a pollutant and (b) requires a discharge licence.

26. Having conceded that the Quarry is in fact registered and the quarrying activities do not require planning permission the Applicant now appears to be attempting to shoe-horn the issues concerning the discharge of waters (alleged infractions of the water pollution legislation) into an application for a planning Injunction (s.160, Act of 2000).

27. As appears from the Affidavits sworn on behalf of the Applicant in July 2021 the only allegation concerns the pumping/piping of waters, and more specifically, with the exception of the vague reference to "*discharging large amounts of water*" and a reference to "*severe flooding of agricultural land*" the focus of the affidavits concern an allegation of water pollution.

Discharging Large amounts of Water /Severe Flooding

28. It goes without saying when one looks to the dates in question i.e. early Spring 2021 the fact that the lands in the locality were flooded is solely a result of heavy rainfall. The waters in question are storm waters caused by the rainfall which flowed from all of the adjacent lands and not just from the lands the subject matter of these proceedings.

29. As averred to above there was nothing new or recent about the piping or pumping of storm-water and the photographs exhibited in the Applicant's affidavits are indicative of the level of storm-water your Deponent had to attempt to manage.

30. I say and believe that regardless of any piping or pumping of waters by your Deponent, my servants or agents, the said storm waters would have flowed downhill and accumulated in the manner as depicted in the said photographs.

31. I say that since the blocking of the pipeline which previously allowed waters from the Lands to enter into the lagoon in the Brennan Site, your Deponent taken interim measures to deal with storm water. This primarily has involved permitting the storm waters to directly enter the watercourse.

32. I say and believe and am advised that the discharge of storm waters into the local watercourse (a land-drain) does not require a discharge licence under the Water Pollution Acts.

33. Further, I say that in the context of the proceedings initiated by the Applicant in respect of the allegations of Water Pollution I retained Mr. Conor McGrath, Consultant Hydrologist, AWN Consulting carry out a report. I beg to refer to a copy of the said report upon which marked with the letters "2DOR-1" I have signed my name prior to the swearing hereof
34. Of note in the said report of Mr. McGrath; the water tests carried out on-site in respect of water accumulating in the Quarry show "full compliance with the appropriate specifications.
35. Moreover, Mr. McGrath notes that the sampling point (ref. "Point A") is not the discharge point from the Lands i.e. is not exclusive to waters emanating from the Lands but is further downstream at a point where the waters discharged from the lands have mixed with waters discharging from the Brennan Site and surrounding lands.
36. I say that I am very familiar with the layout of the drainage route identified by Mr. McGrath. In reply to the Affidavits of Regina Moran and Paul Byrne sworn on behalf of the Applicant, a sample of waters collected at "Point A" will include waters emanating from:
- (i) Brennan Quarry: The Brennan site consumes water in the quarrying process itself and produces wastewater as a result. In addition, silt is transported from the Brennan's washing plant to a lagoon on the Brennan site. In particular, in times of heavy rain, quantities of silt enter the watercourse and flow into Point A.
 - (ii) Lismaine Concrete: Waters discharged from the concrete facility are discharged into this watercourse;
 - (iii) Other local premises. The drain flowing along to "Point A" accommodates run-off and discharge from several premises and agricultural lands before reaching "Point A"

It is clear that where several sources of water (from industrial plants) have merged prior to reaching "Point A" any allegation that waters discharged from the Lands contain pollutants is wholly without merit.

37. I say that subsequent to the complaints raised by, *inter alia*, Mr. Aidan Brophy, and the allegations raised in the various proceedings your Deponent, my servants or agents, created three temporary tailing lagoons on the Lands to stymie the flood

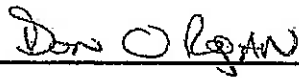
any storm water. These three lagoons will serve to abate any sudden accumulation of storm water and gradually permit it to drain away slowly

38. However, on the 6th day of November 2021 the Applicant served the Second Named Respondent with an Enforcement Notice requiring the Second Named Defendant to *"cease all works on site and return the lands to pre-existing state"*. The Notice further refers to *"Unauthorised Excavation of lands and all associated works"*. I say that, it is most unclear what the Enforcement Notice relates to given that the primary use of the Lands is excavation i.e. the Quarry. One might deduce that it relates to the aforementioned construction of the lagoons but the Notice is not specific. I beg to refer to a copy of the said Enforcement Notice dated 5th November 2021 upon which marked with the letters **"2DOR-2"** I have signed my name prior to the swearing hereof.

39. If the said Enforcement Notice is intended to refer to the three numbered lagoons which will abate the flow of storm water, I say that it is most perplexing that the Applicant now wants the lagoons to be filled in and in times of heavy rain the waters will simply inundate the locality as heretofore.

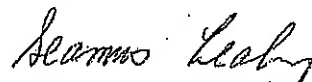
40. I say that the current piping system (if the lagoons are to be removed from the system) takes the storm water from the Quarry to the land drain adjacent to the Quarry entrance. These are pollutant free waters and such a discharge does not require a licence. In this regard I beg to refer to a plan of the lagoon and piping system as prepared by Larkin & Associates, **upon which marked with the letters "2DOR-3" I have signed my name prior to the swearing hereof.**

41. In any event, I say and believe and am advised that the water pollution issues do not in any way concern the issue of the planning status of the Quarry.

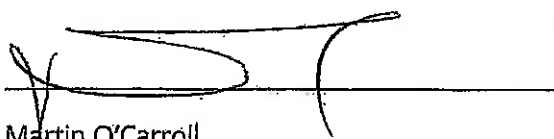


Donal O'Regan

SWORN this 18th day of NOVEMBER 2021
at 21, Patrick Street, Kilkenny in the
County of Kilkenny by the Don O' Regan
before me, a Commissioner for Oaths/
Practicing Solicitor, and the deponent has
been identified to me by Martin O'Carroll
who is personally known to me



Commissioner for Oaths/ Practicing
Solicitor.



Martin O'Carroll

THE CIRCUIT COURT

RECORD NO 2021/

SOUTH EASTERN CIRCUIT

COUNTY OF KILKENNY

IN THE MATTER OF SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000
AND IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACTS 2000 - 2020
BETWEEN

KILKENNY COUNTY COUNCIL

Applicant

And

KILKENNY ASPHALT ROOFING LIMITED AND DONAL O'REGAN

Respondents

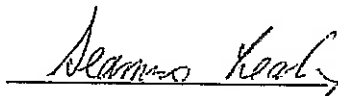
REPLYING AFFIDAVIT OF DONAL O'REGAN

DEFENDANT

EXHIBIT "2DOR-1" REFERRED TO IN WITHIN
REPLYING AFFIDAVIT OF DONAL O'REGAN



DONAL O'REGAN



COMMISSIONER FOR OATHS/

~~PRACTISING SOLICITOR~~



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WATER QUALITY REVIEW

KILKENNY SAND & GRAVEL LTD.

Report Prepared For

Kilkenny Sand and Gravel Ltd.
Lismaine, Jeninstown, Co.
Kilkenny

Prepared By

Conor McGrath CEnv MSc MEnvSc,
Senior Environmental Consultant

Our Reference

CM/21/12430W01

Date of Issue

05 October 2021

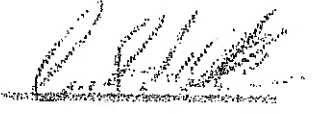
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Document History

Document Reference		Original Issue Date	
CM/21/12430W01		05 October 2021	
Revision Level	Revision Date	Description	Sections Affected

Record of Approval

Details	Written by
Signature	
Name	Conor McGrath
Title	Senior Environmental Consultant
Date	04 October 2021

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APPENDICES

Appendix A	AWN Water Quality Results July 2021
Appendix B	AWN Water Quality Results September 2021
Appendix C	Kilkenny County Council Water Quality Report

1 INTRODUCTION

Kilkenny Sand and Gravel Limited (KSGL) operate a quarry (hereafter referred to as the 'Quarry') in Lismaine, Jenkinstown, Co. Kilkenny and we understand that the Quarry has been operational since the 1950's.

Kilkenny County Council (KCC) have served a Notice under Section 10 and Section 12 of the Local Government (Water Pollution) Act 1977 to 2007 alleging that the Mr O'Regan is in breach of the Act because of an unauthorised discharge from the Quarry to a roadside drain. KCC have also issued District Court summonses against Mr O'Regan alleging that he is in breach of the Local Government (Water Pollution) Acts 1977 to 2007 on the basis that he permitted polluting matter, namely trade effluent from the Quarry, to enter a roadside drain.

AWN Consulting Ltd. (AWN) were requested by Poe Kiely Hogan Lanagan, on behalf of KSGL, to carry out a hydrological assessment at the O'Regan Quarry.

This report has been prepared by Conor McGrath who is a Senior Environmental Consultant with AWN Consulting. He has 10 years of consultancy experience with ongoing roles in assessment, site investigation and environmental compliance. Conor holds a MSc in Hydrogeology and is a Chartered Environmentalist with the Society for the Environment. He is a full member of the Institution of Environmental Sciences and is a full member of the International Association of Hydrogeologists. Conor has extensive experience in project management and co-ordination of sustainability projects, contaminated land site investigations, environmental impact assessments and environmental risk assessments.

1.1 Methodology

Conor McGrath attended site on July 13th and September 30th to review the hydrological regime on site and to take water samples. AWN conducted the site inspection and covered the entire site and examined key offsite locations. Particular attention focused on surface water drainage, the identification of the locations of any natural springs that may be present and identified discharging water as part of the quarrying operations.

The main aim of the assessment was to assess the hydrogeological and hydrological regime and examine any potential impacts on water quality arising from the Quarry.

Available environmental reports, data and relevant background information were reviewed. This included a review of relevant background information sources to establish the site history and environmental conditions in the surrounding area. The sources include Geological Survey of Ireland (GSI) maps. Samples were taken to establish baseline water quality on site.

2 SITE EVALUATION

2.1 Site Location

The site is in Lismaine, Jenkinstown, Co. Kilkenny approximately 5.7 km south of the town of Ballyragget. The site is accessed off L1818-19 which runs to the west of the N77. The Quarry area is 5.3ha in extent.

2.2 Drainage

Surface water accumulates in the Quarry floor sump in the centre of the site. It is intermittently pumped to a drain which is connected to a sump at the access point to the Quarry. This is the final discharge point from the O'Regan Quarry. The pumping frequency is influenced by seasonal factors and ranges from 20 minutes per day in the summer to 2 times hourly/day in the winter. A drainage pipe from the adjacent Brennan's Quarry also drains into this sump (Insert 2.1).



Insert 2.1 Discharge Points

There is evidence of silt build up in the Brennan's Discharge Point draining into this sump (Insert 2.2). There is no such build up at the O'Regan discharge point.



Insert 2.2 Evidence of Silt Build Up

2.3 Site Activities

The working area of the Quarry is excavated into the south of a hill. It is screened by elevated ground which surrounds the site. Limestone is quarried, it is then crushed and stockpiled before being sent off-site.

There is no groundwater abstracted on site. The Quarry is not using water as part of its quarrying operations, there are no washing ponds on site and so no process water is generated.

Irish Water define Trade Effluent "*as any liquid waste (other than domestic wastewater and storm water) that is discharged from a business premises to the public sewers*"¹. The water discharging from the Quarry is essentially storm water as it is spring water that rises to the surface. Therefore, the water discharging from the O'Regan Quarry contains no polluting matter and cannot be considered 'Trade Effluent'.

¹<https://www.water.ie/business/trade-effluent/>

3 ENVIRONMENTAL ASSESSMENT

3.1 Geology

Information on the local and regional geology and hydrogeology was derived from a desk study, which included GSI geology database and the site inspection undertaken by AWN.

3.1.1 Soils and Subsoil

The subsoil in the area comprises shallow well drained mineral limestone sands and gravels derived from mainly calcareous parent materials.

3.1.2 Bedrock Geology

The GSI bedrock geology map shows the site is underlain by medium to dark-grey thick-bedded limestone from the Ballyadams Formation.

3.2 Hydrogeology

The pure nature of the limestone means that the rocks are susceptible to dissolution. Coupled with the probability of extensive fracturing, this means that the aquifer is likely to be karstified.

Flow in the aquifer is likely to be through a diffuse network of conduits. Due to the predominance of conduit flow in karst systems, large fluctuations in watertable levels in the area are expected. These very high annual fluctuations are considered indicative of relatively low groundwater storage potential.

A significant portion of the groundwater discharge from this karstic area, particularly in winter will likely be through conduit flow. Surface water sinks underground where the aquifer is at surface.

3.2.1 Aquifer Classification

The bedrock is classified by the GSI as a Regionally Important Aquifer - Karstified (Rkd).

¹ <https://www.water.ie/business/trade-effluent/>

3.2.2 Groundwater Flooding

Groundwater flooding is common in the locality (Insert 3.1). Groundwater flooding occurs when a natural underground drainage system is incapable of sufficiently draining itself, resulting in the emergence of groundwater at the surface. Groundwater flooding can occur in this area following prolonged rainfall causing water table rise.

The prevalence of groundwater flooding in the area is fundamentally linked to the bedrock geology. As discussed in Section 3.2, karstification, has created a network of water-bearing fractures and conduits. Surface drainage systems are frequently absent within well-developed karst landscapes. Instead, the groundwater flow system acts as the main drainage mechanism for the region.

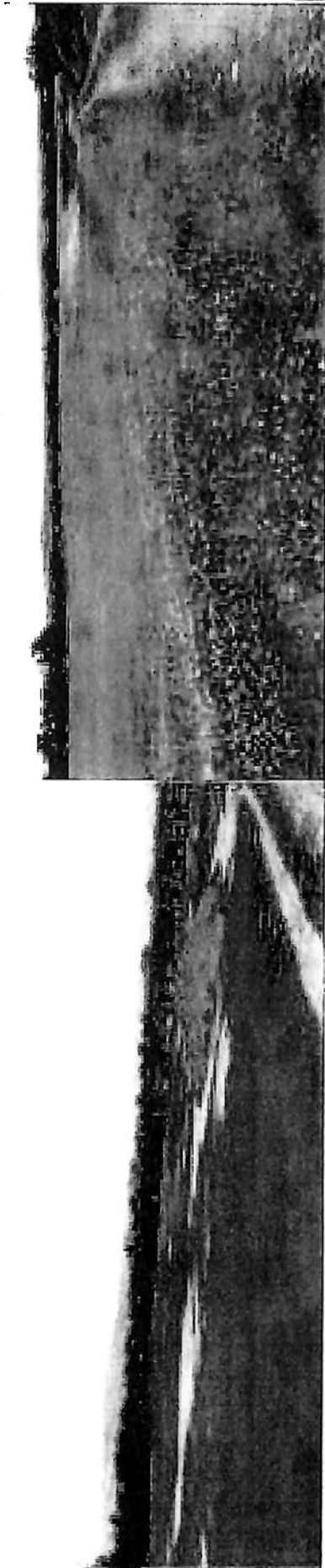
There is very little room within the groundwater system to store excess recharge. This combination of low storativity and shallow depth to groundwater renders this area susceptible to groundwater flooding.

During prolonged rainfall, the groundwater system is unable to drain recharge quickly causing surface flooding in topographic depressions (Insert 3.2). AWN understand that water has been flowing from the site for many years.

¹ <https://www.water.ie/business/trade-effluent/>



Insert 3.1 GSI Groundwater Flooding Map



Insert 3.2 Flooded Land to west of site. No flooding visible in summer as shown on the right

4 WATER QUALITY

4.1 Sample Analysis

AWN have collected water samples from the sump in the Quarry (Insert 4.1).



Insert 4.1 Quarry Sump

The first set of samples were collected on the 13th of July 2021 and the second set were collected on 30th of September 2021, the full laboratory reports are shown in Appendix A and Appendix B respectively. The samples were stored in laboratory prepared bottles and delivered to Element Laboratory, a UKAS accredited Laboratory, in the UK. The water test results show full compliance with the appropriate specifications. The Total Suspended Solids (TSS) concentrations were below detection on each occasion, the results are summarised on Table 4.1.

Parameter	Units	Sump July 2021	Sump Sept 2021	Environmental Quality Standard
Laboratory Measurements				
Total Suspended Solids	mg/l	<10	<10	35

Table 4.1 TSS Concentrations in the Sump

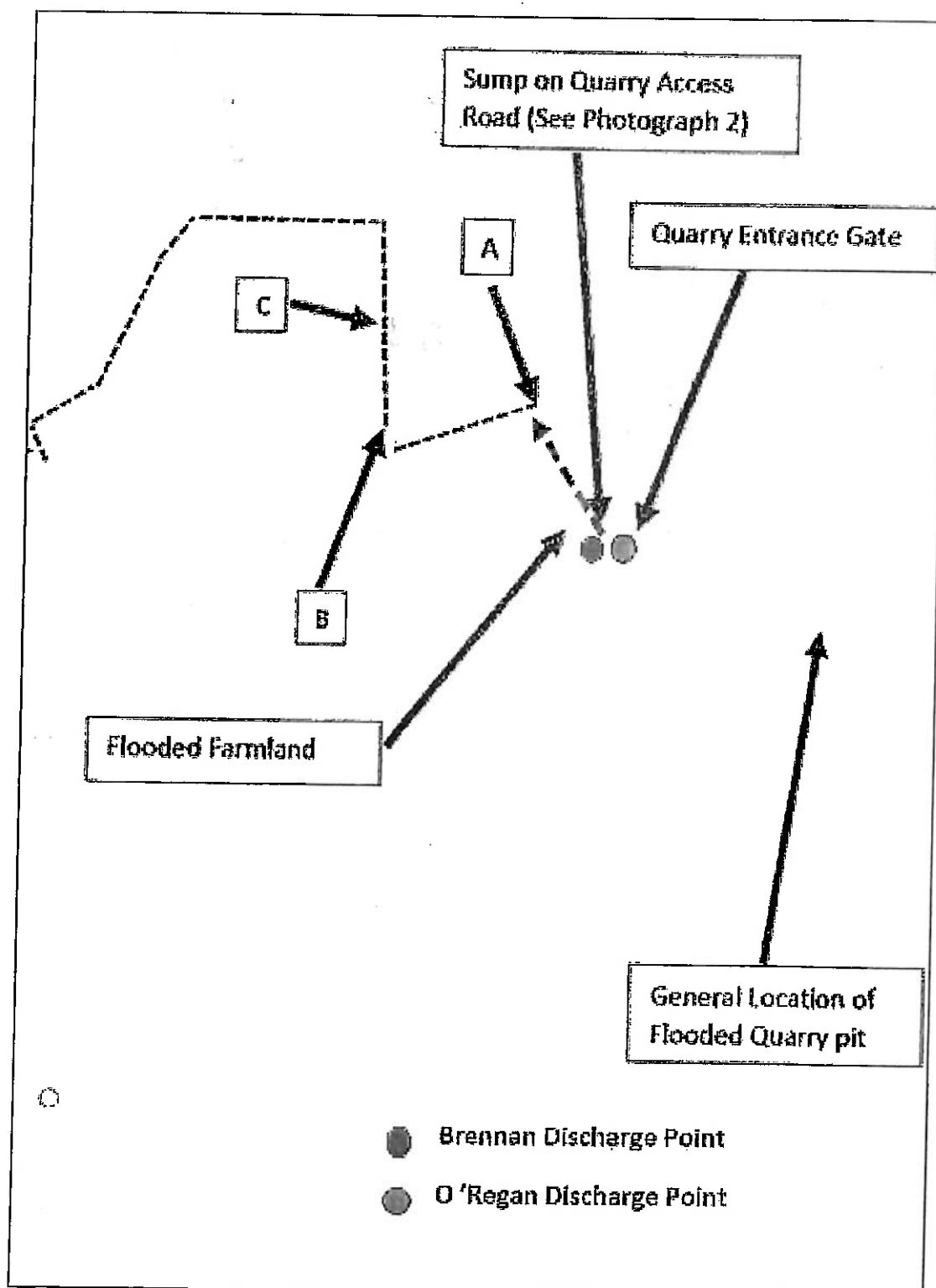
4.2 Kilkenny County Council Sampling Results

KCC wrote a Water Sampling and Testing Report (File Reference ENV-W-21-03) as shown in Appendix C.

KCC took samples from Point A (Insert 4.2) on February 4th and February 18th (The dates on their report are inconsistent. First section of the KCC refers to second sampling round occurring on February 18th and the final section and lab reports refers to samples being taken on March 18th).

The results from Point A on February 4th and (possibly) March 18th show TSS concentrations of 330mg/L and 66 mg/L respectively. KCC noted in their report that these results exceed the TSS limit of 35 mg/l in the Urban Wastewater Treatment Regulations 2001 and the 25mg/l limit in the Salmonoid Waters as stated in the European Communities (Quality of Salmonoid Rivers) Regulations 1988. Awn note that the Irish Concrete Federation environmental code recommend that discharge from a quarry should not exceed a TSS concentration of 35mg/L.

Point A is not the discharge point from the O'Regan Quarry. The O'Regan Quarry discharges at the point shown on Insert 4.2. It then merges with drainage from the Brennan Quarry and surrounding lands, and this accumulated drainage (blue arrow) discharges at Point A. Therefore, the results from Point A, as taken by KCC, are erroneous and do not comprise of discharge arising from the O'Regan Quarry.



Insert 4.2 Offsite Drainage Network (Taken from KCC Report ENV-W-21-03)

5 CONCLUSION

The site is not using water as part of its quarrying operations and is not discharging polluting matters.

The Quarry does not abstract water and does not use water to wash stone on site. The water discharging from the O'Regan Quarry is in effect storm water and cannot be considered 'Trade Effluent'. It is understood that groundwater has been flowing from the Quarry lands for many years and will continue to do so regardless of whether any quarrying activity is being undertaken on the site or not.

It is incorrect to attribute the elevated TSS concentrations detected by KCC at Point A to the Quarry. The samples taken by KCC are erroneous as the samples were taken from a discharge point (Point A) which drains water from numerous sources including from an adjacent Quarry (Brennan's).

APPENDIX A



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Attention : Conor McGrath
Date : 20th July, 2021
Your reference :
Our reference : Test Report 21/10663 Batch 1
Location : KK Quarry
Date samples received : 14th July, 2021
Status : Final report
Issue : 1

One sample was received for analysis on 14th July, 2021 of which one was scheduled for analysis. Please find attached our Test Report which should be read with notes at the end of the report and should include all sections if reproduced. Interpretations and opinions are outside the scope of any accreditation, and all results relate only to samples supplied. All analysis is carried out on as received samples and reported on a dry weight basis unless stated otherwise. Results are not surrogate corrected.

Authorised By:

Phil Sommerton BSc
Senior Project Manager

Please include all sections of this report if it is reproduced

Element Materials Technology

Client Name: AWN Consulting
Reference:
Location: KK Quarry
Contact: Conor McGrath

Notification of Deviating Samples

EMT Job No.	Batch	Sample ID	Depth	EMT Sample No.	Analysis	Reason
No deviating sample report results for job 21/10663						

Please note that only samples that are deviating are mentioned in this report. If no samples are listed it is because none were deviating. Only analyses which are accredited are recorded as deviating if set criteria are not met.

NOTES TO ACCOMPANY ALL SCHEDULES AND REPORTS

EMT Job No.: 21/10663

SOILS

Please note we are only MCERTS accredited (UK soils only) for sand, loam and clay and any other matrix is outside our scope of accreditation.

Where an MCERTS report has been requested, you will be notified within 48 hours of any samples that have been identified as being outside our MCERTS scope. As validation has been performed on clay, sand and loam, only samples that are predominantly these matrices, or combinations of them will be within our MCERTS scope. If samples are not one of a combination of the above matrices they will not be marked as MCERTS accredited.

It is assumed that you have taken representative samples on site and require analysis on a representative subsample. Stones will generally be included unless we are requested to remove them.

All samples will be discarded one month after the date of reporting, unless we are instructed to the contrary.

If you have not already done so, please send us a purchase order if this is required by your company.

Where appropriate please make sure that our detection limits are suitable for your needs, if they are not, please notify us immediately.

All analysis is reported on a dry weight basis unless stated otherwise. Limits of detection for analyses carried out on as received samples are not moisture content corrected. Results are not surrogate corrected. Samples are dried at 35°C ±5°C unless otherwise stated. Moisture content for CEN Leachate tests are dried at 105°C ±5°C.

Where Mineral Oil or Fats, Oils and Grease is quoted, this refers to Total Aliphatics C10-C40.

Where a CEN 10:1 ZERO Headspace VOC test has been carried out, a 10:1 ratio of water to wet (as received) soil has been used.

% Asbestos in Asbestos Containing Materials (ACMs) is determined by reference to HSG 264 The Survey Guide - Appendix 2 : ACMs in buildings listed in order of ease of fibre release.

Sufficient amount of sample must be received to carry out the testing specified. Where an insufficient amount of sample has been received the testing may not meet the requirements of our accredited methods, as such accreditation may be removed.

Negative Neutralization Potential (NP) values are obtained when the volume of NaOH (0.1N) titrated (pH 8.3) is greater than the volume of HCl (1N) to reduce the pH of the sample to 2.0 - 2.5. Any negative NP values are corrected to 0.

The calculation of Pyrite content assumes that all oxidisable sulphides present in the sample are pyrite. This may not be the case. The calculation may be an overestimate when other sulphides such as Barite (Barium Sulphate) are present.

WATERS

Please note we are not a UK Drinking Water Inspectorate (DWI) Approved Laboratory.

ISO17025 accreditation applies to surface water and groundwater and usually one other matrix which is analysis specific, any other liquids are outside our scope of accreditation.

As surface waters require different sample preparation to groundwaters the laboratory must be informed of the water type when submitting samples.

Where Mineral Oil or Fats, Oils and Grease is quoted, this refers to Total Aliphatics C10-C40.

DEVIATING SAMPLES

All samples should be submitted to the laboratory in suitable containers with sufficient ice packs to sustain an appropriate temperature for the requested analysis. The temperature of sample receipt is recorded on the confirmation schedules in order that the client can make an informed decision as to whether testing should still be undertaken.

SURROGATES

Surrogate compounds are added during the preparation process to monitor recovery of analytes. However low recovery in soils is often due to peat, clay or other organic rich matrices. For waters this can be due to oxidants, surfactants, organic rich sediments or remediation fluids. Acceptable limits for most organic methods are 70 - 130% and for VOCs are 50 - 150%. When surrogate recoveries are outside the performance criteria but the associated AQC passes this is assumed to be due to matrix effect. Results are not surrogate corrected.

DILUTIONS

A dilution suffix indicates a dilution has been performed and the reported result takes this into account. No further calculation is required.

BLANKS

Where analytes have been found in the blank, the sample will be treated in accordance with our laboratory procedure for dealing with contaminated blanks.

NOTE

Data is only reported if the laboratory is confident that the data is a true reflection of the samples analysed. Data is only reported as accredited when all the requirements of our Quality System have been met. In certain circumstances where all the requirements of the Quality System have not been met, for instance if the associated AQC has failed, the reason is fully investigated and documented. The sample data is then evaluated alongside the other quality control checks performed during analysis to determine its suitability. Following this evaluation, provided the sample results have not been effected, the data is reported but accreditation is removed. It is a UKAS requirement for data not reported as accredited to be considered indicative only, but this does not mean the data is not valid.

Where possible, and if requested, samples will be re-extracted and a revised report issued with accredited results. Please do not hesitate to contact the laboratory if further details are required of the circumstances which have led to the removal of accreditation.

REPORTS FROM THE SOUTH AFRICA LABORATORY

Any method number not prefixed with SA has been undertaken in our UK laboratory unless reported as subcontracted.

Measurement Uncertainty

Measurement uncertainty defines the range of values that could reasonably be attributed to the measured quantity. This range of values has not been included within the reported results. Uncertainty expressed as a percentage can be provided upon request.

ABBREVIATIONS and ACRONYMS USED

#	ISO17025 (UKAS Ref No. 4225) accredited - UK.
SA	ISO17025 (SANAS Ref No.T0729) accredited - South Africa
B	Indicates analyte found in associated method blank.
DR	Dilution required.
M	MCERTS accredited.
NA	Not applicable
NAD	No Asbestos Detected.
ND	None Detected (usually refers to VOC and/SVOC TICs).
NDP	No Determination Possible
SS	Calibrated against a single substance
SV	Surrogate recovery outside performance criteria. This may be due to a matrix effect.
W	Results expressed on as received basis.
+	AQC failure, accreditation has been removed from this result, if appropriate, see 'Note' on previous page.
>>	Results above calibration range, the result should be considered the minimum value. The actual result could be significantly higher.
*	Analysis subcontracted to an Element Materials Technology approved laboratory.
AD	Samples are dried at 35°C ±5°C
CO	Suspected carry over
LOD/LOR	Limit of Detection (Limit of Reporting) in line with ISO 17025 and MCERTS
ME	Matrix Effect
NFD	No Fibres Detected
BS	AQC Sample
LB	Blank Sample
N	Client Sample
TB	Trip Blank Sample
OC	Outside Calibration Range

HWOL ACRONYMS AND OPERATORS USED

HS	Headspace Analysis.
EH	Extractable Hydrocarbons - i.e. everything extracted by the solvent.
CU	Clean-up - e.g. by florisil, silica gel.
1D	GC - Single coil gas chromatography.
Total	Allphatics & Aromatics.
AL	Allphatics only.
AR	Aromatics only.
2D	GC-GC - Double coil gas chromatography.
#1	EH_Total but with humics mathematically subtracted
#2	EU_Total but with fatty acids mathematically subtracted
_	Operator - underscore to separate acronyms (exception for +).
+	Operator to indicate cumulative e.g. EH+HS_Total or EH_CU+HS_Total
MS	Mass Spectrometry.

Element Materials Technology

EMT Job No: 21/10663

Method Code Appendix

Test Method No.	Description	Prep Method No. (if appropriate)	Description	ISO 17025 (UKAS/AS ANAS)	MCERTS (UK soils only)	Analysis done on As Received (AR) or Dried (AD)	Reported on dry weight basis
TM37	Modified US EPA Method 150.1 (1992) and 9045D Rev. 4 - 2004) and BS1377-3:1990. Determination of pH by Metrohm automated probe analysis.	PM0	No preparation is required.	Yes			
TM38	Modified US EPA method 120.1 (1982). Determination of Specific Conductance by Metrohm automated probe analysis.	PM0	No preparation is required.	Yes			
TM57	Modified US EPA Method 410.4. (Rev. 2.0 1993) Comparable with ISO 15705:2002. Chemical Oxygen Demand is determined by not digestion with Potassium Dichromate and measured spectrophotometrically.	PM0	No preparation is required.	Yes			
TM58	APHA 5210B:1999 22nd Edition. Compatible with ISO 5815:1999. Measurement of Biochemical Oxygen Demand. When cBOD (Carbonaceous BOD) is requested a nitrification inhibitor is added which prevents the oxidation of reduced forms of nitrogen, such as am	PM0	No preparation is required.	Yes			
TM59	APHA 5210B:1999 22nd Edition. Compatible with ISO 5815:1999. Measurement of Biochemical Oxygen Demand. When cBOD (Carbonaceous BOD) is requested a nitrification inhibitor is added which prevents the oxidation of reduced forms of nitrogen, such as am	PM0	No preparation is required.	Yes			
TM60	TCTOC analysis of Waters by High Temperature Combustion followed by NDIR detection. Based on the following modified standard methods: USEPA 9060A (2002), APHA 5310B:1999 22nd Edition, ASTM D 7573, and USEPA 415.1.	PM0	No preparation is required.	Yes			
TM73	Modified US EPA methods 150.1 (1992) and 9045D Rev. 4 - 2004) and BS1377-3:1990. Determination of pH by Metrohm automated probe analysis.	PM0	No preparation is required.	Yes			
TM76	Modified US EPA method 120.1 (1982). Determination of Specific Conductance by Metrohm automated probe analysis.	PM0	No preparation is required.	Yes			

APPENDIX B



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Attention : Conor McGrath
Date : 4th October, 2021
Your reference :
Our reference : Test Report 21/15344 Batch 1 Schedule A
Location :
Date samples received : 1st October, 2021
Status : Final report
Issue : 1

One sample was received for analysis on 1st October, 2021 and was scheduled for analysis. Please find attached our Test Report which should be read with notes at the end of the report and should include all sections if reproduced. Interpretations and opinions are outside the scope of any accreditation, and all results relate only to samples supplied.
All analysis is carried out on as received samples and reported on a dry weight basis unless stated otherwise. Results are not surrogate corrected.

Authorised By:

Bruce Leslie
Project Manager

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532

Element Materials Technology

Client Name: AWN Consulting
Reference:
Location:
Contact: Conor McGrath

Notification of Deviating Samples

EMT Job No.	Batch	Sample ID	Depth	EMT Sample No.	Analysis	Reason
No deviating sample report results for job 21/15344						

Please note that only samples that are deviating are mentioned in this report. If no samples are listed it is because none were deviating. Only analyses which are accredited are recorded as deviating if set criteria are not met.

NOTES TO ACCOMPANY ALL SCHEDULES AND REPORTS

EMT Job No.: 21/15344

SOILS

Please note we are only MCERTS accredited (UK soils only) for sand, loam and clay and any other matrix is outside our scope of accreditation.

Where an MCERTS report has been requested, you will be notified within 48 hours of any samples that have been identified as being outside our MCERTS scope. As validation has been performed on clay, sand and loam, only samples that are predominantly these matrices, or combinations of them will be within our MCERTS scope. If samples are not one of a combination of the above matrices they will not be marked as MCERTS accredited.

It is assumed that you have taken representative samples on site and require analysis on a representative subsample. Stones will generally be included unless we are requested to remove them.

All samples will be discarded one month after the date of reporting, unless we are instructed to the contrary.

If you have not already done so, please send us a purchase order if this is required by your company.

Where appropriate please make sure that our detection limits are suitable for your needs, if they are not, please notify us immediately.

All analysis is reported on a dry weight basis unless stated otherwise. Limits of detection for analyses carried out on as received samples are not moisture content corrected. Results are not surrogate corrected. Samples are dried at $35^{\circ}\text{C} \pm 5^{\circ}\text{C}$ unless otherwise stated. Moisture content for CEN Leachate tests are dried at $105^{\circ}\text{C} \pm 5^{\circ}\text{C}$.

Where Mineral Oil or Fats, Oils and Grease is quoted, this refers to Total Aliphatics C10-C40.

Where a CEN 10:1 ZERO Headspace VOC test has been carried out, a 10:1 ratio of water to wet (as received) soil has been used.

% Asbestos In Asbestos Containing Materials (ACMs) is determined by reference to HSG 264 The Survey Guide - Appendix 2 : ACMs in buildings listed in order of ease of fibre release.

Sufficient amount of sample must be received to carry out the testing specified. Where an insufficient amount of sample has been received the testing may not meet the requirements of our accredited methods, as such accreditation may be removed.

Negative Neutralization Potential (NP) values are obtained when the volume of NaOH (0.1N) titrated (pH 8.3) is greater than the volume of HCl (1N) to reduce the pH of the sample to 2.0 - 2.5. Any negative NP values are corrected to 0.

The calculation of Pyrite content assumes that all oxidisable sulphides present in the sample are pyrite. This may not be the case. The calculation may be an overestimate when other sulphides such as Barite (Barium Sulphate) are present.

WATERS

Please note we are not a UK Drinking Water Inspectorate (DWI) Approved Laboratory.

ISO17025 accreditation applies to surface water and groundwater and usually one other matrix which is analysis specific, any other liquids are outside our scope of accreditation.

As surface waters require different sample preparation to groundwaters the laboratory must be informed of the water type when submitting samples.

Where Mineral Oil or Fats, Oils and Grease is quoted, this refers to Total Aliphatics C10-C40.

DEVIATING SAMPLES

All samples should be submitted to the laboratory in suitable containers with sufficient ice packs to sustain an appropriate temperature for the requested analysis. The temperature of sample receipt is recorded on the confirmation schedules in order that the client can make an informed decision as to whether testing should still be undertaken.

SURROGATES

Surrogate compounds are added during the preparation process to monitor recovery of analytes. However low recovery in soils is often due to peat, clay or other organic rich matrices. For waters this can be due to oxidants, surfactants, organic rich sediments or remediation fluids. Acceptable limits for most organic methods are 70 - 130% and for VOCs are 50 - 150%. When surrogate recoveries are outside the performance criteria but the associated AQC passes this is assumed to be due to matrix effect. Results are not surrogate corrected.

DILUTIONS

A dilution suffix indicates a dilution has been performed and the reported result takes this into account. No further calculation is required.

BLANKS

Where analytes have been found in the blank, the sample will be treated in accordance with our laboratory procedure for dealing with contaminated blanks.

NOTE

Data is only reported if the laboratory is confident that the data is a true reflection of the samples analysed. Data is only reported as accredited when all the requirements of our Quality System have been met. In certain circumstances where all the requirements of the Quality System have not been met, for instance if the associated AQC has failed, the reason is fully investigated and documented. The sample data is then evaluated alongside the other quality control checks performed during analysis to determine its suitability. Following this evaluation, provided the sample results have not been effected, the data is reported but accreditation is removed. It is a UKAS requirement for data not reported as accredited to be considered indicative only, but this does not mean the data is not valid.

Where possible, and if requested, samples will be re-extracted and a revised report issued with accredited results. Please do not hesitate to contact the laboratory if further details are required of the circumstances which have led to the removal of accreditation.

REPORTS FROM THE SOUTH AFRICA LABORATORY

Any method number not prefixed with SA has been undertaken in our UK laboratory unless reported as subcontracted.

Measurement Uncertainty

Measurement uncertainty defines the range of values that could reasonably be attributed to the measured quantity. This range of values has not been included within the reported results. Uncertainty expressed as a percentage can be provided upon request.

ABBREVIATIONS and ACRONYMS USED

#	ISO17025 (UKAS Ref No. 4225) accredited - UK.
SA	ISO17025 (SANAS Ref No.T0729) accredited - South Africa
B	Indicates analyte found in associated method blank.
DR	Dilution required.
M	MCERTS accredited.
NA	Not applicable
NAD	No Asbestos Detected.
ND	None Detected (usually refers to VOC and/SVOC TICs).
NDP	No Determination Possible
SS	Calibrated against a single substance
SV	Surrogate recovery outside performance criteria. This may be due to a matrix effect.
W	Results expressed on as received basis.
+	AQC failure, accreditation has been removed from this result, if appropriate, see 'Note' on previous page.
>>	Results above calibration range, the result should be considered the minimum value. The actual result could be significantly higher.
*	Analysis subcontracted to an Element Materials Technology approved laboratory.
AD	Samples are dried at 35°C ±5°C
CO	Suspected carry over
LOD/LOR	Limit of Detection (Limit of Reporting) in line with ISO 17025 and MCERTS
ME	Matrix Effect
NFD	No Fibres Detected
BS	AQC Sample
LB	Blank Sample
N	Client Sample
TB	Trip Blank Sample
OC	Outside Calibration Range

HWOL ACRONYMS AND OPERATORS USED

HS	Headspace Analysis.
EH	Extractable Hydrocarbons - i.e. everything extracted by the solvent.
CU	Clean-up - e.g. by florisil, silica gel.
1D	GC - Single coil gas chromatography.
Total	Aliphatics & Aromatics.
AL	Aliphatics only.
AR	Aromatics only.
2D	GC-GC - Double coil gas chromatography.
#1	EH_Total but with humics mathematically subtracted
#2	EU_Total but with fatty acids mathematically subtracted
_	Operator - underscore to separate acronyms (exception for +).
+	Operator to indicate cumulative e.g. EH+HS_Total or EH_CU+HS_Total
MS	Mass Spectrometry.

Element Materials Technology

EMT Job No: 21/15344

Method Code Appendix

Test Method No.	Description	Prep Method No. (if appropriate)	Description	ISO 17025 (UKAS/ANAS)	MCERTS (UK only)	Analysis done on As Received (AR) or Dried (AD)	Reported on dry weight basis
TM37	25400:1999 22nd Edition, VSS: USEPA 1654 (Jan 2001), USEPA 160.4 (1971) and SMEWW 2540E:1999 22nd Edition, Gravimetric determination of Total Suspended Solids (TSS) and Volatile Suspended Solids (VSS). Sample is filtered through a 1.5µm pore size glass fibre filter and the resulting residue is dried and weighed at 105°C for 1 hour.	PM0	No preparation is required.				
TM38	Soluble iron analysis using Discrete Analyser. Modified US EPA methods: Chloride 325.2 (1978), Sulfate 374.4 (Rev.2 1993), p-Phosphate 365.2 (Rev.2 1993), TON 353.1 (Rev.2 1993), Nitrate 354.1 (1971), Hex Cr 7196A (1992), NH4+ 350.1 (Rev.2 1993) - All actions comparable to BS ISO 15923-1:2013	PM0	No preparation is required.				
TM57	Modified US EPA Method 410.4, (Rev. 2.0 1993) Comparable with ISO 15705:2002, Chemical Oxygen Demand is determined by not digestion with Potassium Dichromate and measured spectrophotometrically.	PM0	No preparation is required.				
TM58	APHA SMEWW 5210B:1999 22nd Edition, Comparable with ISO 5816:1999. Measurement of Biochemical Oxygen Demand. When COD (Cautiousness BOD) is requested a nitrification inhibitor is added which prevents the oxidation of reduced forms of nitrogen, such as am	PM0	No preparation is required.				
TM60	TC/TOC analysis of Waters by High Temperature Combustion followed by NDIR detection. Based on the following modified standard methods: USEPA 8060A (2002), APHA SMEWW 5310B:1999 22nd Edition, ASTM D 7573, and USEPA 415.1.	PM0	No preparation is required.				
TM73	Modified US EPA methods 150.1 (1992) and 8045D Rev. 4 - 2004) and BS1377-3:1990. Determination of pH by Metrohm automated probe analyser.	PM0	No preparation is required.				
TM76	Modified US EPA method 120.1 (1992). Determination of Specific Conductance by Metrohm automated probe analyser.	PM0	No preparation is required.				

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APPENDIX C



Water Sampling & Testing Report

Lismaine, Jenkintown, Co. Kilkenny

File Ref. ENV-W-21-03

Water Sampling

- Samples were taken to identify primarily the level of Suspended Solids related to the quarrying works and the associated unauthorised discharge of water observed on site as originating from the flooded quarry floor.
- 1 no. sample was taken by Regina Moran Executive Technician Environment Section on 04/02/2021 (Sample Ref: 2133EN13A0205A).
- 3 no. samples were taken by Regina Moran Executive Technician Environment Section on 18/03/2021 (Sample Ref: 2133EN22A0319A, 2133EN23A0319A & 2133EN24A0319A).
- Refer to Figure 1 for Sampling Locations as follows:
 - 04/02/2021 Sample Ref: 2133EN13A0205A – Location A
 - 18/02/2021 Sample Ref: 2133EN22A0319A – Location A
 - 18/02/2021 Sample Ref: 2133EN23A0319A – Location B
 - 18/02/2021 Sample Ref: 2133EN24A0319A – Location C
- Laboratory Address: Kilkenny County Council,
Machinery Yard,
Hebron Road Industrial Estate,
Kilkenny.
- Visual assessment of the sample taken at Location A on the 04/02/2021 indicated that a high level of Suspended Solids was present.
- Visual assessment of the sample taken at Location A on the 18/03/2021 indicated a reduction in the level of Suspended Solids over that taken on the 04/02/2021.
- Sampling on the 18/03/2021 at Locations B and C were taken due to the proximity of River Nore / River Nore SAC and to consider the downstream water quality as a result of the discharge.

Laboratory Testing

- The Laboratory at the Hebron Road Kilkenny is registered with the EPA in accordance with Section 66 of the EPA Act 1992 for the following testing parameters:
 - Suspended Solids;
 - Phosphate;
 - Nitrate;
 - Chemical Oxygen Demand (COD); &


➤ Biochemical Oxygen Demand (BOD).

- Sample Ref: 2133EN13A0205A (Taken 04/02/2021): Testing commenced on the 4/02/2021 and completed on the 09/02/2021
- Sample Ref: 2133EN22A0319A, 2133EN23A0319A & 2133EN24A0319A (Taken 18/03/2021): Testing commenced on the 18/03/2021 and completed on the 23/03/2021.
- The duration required for testing of samples relates to the BOD element of the Water Quality Testing, which takes about 5 days to complete.
- See enclosed results Table 1 to Table 4.
- The following limits were considered for Suspended Solids with the higher limit being used on the test result tables for comparison purposes at this location:
 - 25mg/l for Salmonid Waters as stated in the European Communities (Quality of Salmonid Waters) Regulations, 1988.
 - 35mg/l from the Urban Waste Water Treatment Regulations 2001 (as amended).

Main Findings

- It was noted that the level of Suspended Solids in the samples taken at Location A on the 04/02/2021 and again on the 18/03/2021 was 330mg/l and 66mg/l respectively. The results exceed the higher limit of 35mg/l.
- The level of Suspended Solids from downstream samples taken at Location B and C on the 18/03/2021 (Sample Ref: 2133EN23A0319A & 2133EN24A0319A) were found to be below the higher and lower limits stated above at 5mg/l and 8mg/l respectively. See also Site Inspection report dated 18/03/2021.
- Increased levels of Chemical Oxygen Demand (COD) was noted in the downstream samples at Location B and C. However, this is not considered to be directly related to the discharge associated with the upstream quarry.

Signed by:



Thomas Brennan Executive Engineer

Laboratory Analysis Report

Sample Location : EN-Enforcement

Surface Water, Limestone quarry

Gdd Coordinates : Not Recorded

Sample Details : Reference : 2133EN13A0204A

Template : Surface Water Monitoring

Sampled by : Regina Moran

Sample Date: 04/02/2021 Time: 11:00 Method: Grab

Laboratory : Kilkenny Co Co

Analyst : Adrian Mc Gintley

Sample Notes :

Sample Parameters		Parameter Standards		Results	
Parameter	Unit	Max Limit	Min Limit	Date	Result
Ammonia N	mg/l	0.2	0.01	04/02/21	0.095
Biological Oxygen Demand	mg/l	5	0.1	04/02/21	0.4
Chemical Oxygen Demand	mg/l	25	1	04/02/21	9
Chloride	mg/l	40	1	04/02/21	20
Nitrate N	mg/l	50	0.1	04/02/21	4.214
Nitrite N	mg/l	0.1	0.01	04/02/21	0.008
Ortho-Phosphate P	mg/l	0.075	0.01	04/02/21	0.01
Suspended Solids	mg/l	35	1	04/02/21	32


Approved:  Date: 04/02/2021 Signed: Adrian Mc Gintley, Head of Laboratory, TBA
Checked in accordance with the relevant standards and procedures for water testing

Table 1 – Laboratory Results – Roadside Drain on L1818-19 at Quarry Entrance Location A – Sampled on 04/02/2021

Laboratory Analysis Report

Sample Location : EN-Enforcement

Surface Water, Lismaine Road Drain

Grid Coordinates : Not Recorded

Sample Details : Reference : 2133EN22A0318A

Template : Surface Water Monitoring

Sampled by : Regina Moran

Sample Date: 18/03/2021 Time: 12:00 Method: Grab

Laboratory : Kilkenny Co Co

Analyst: Adrian Mc Ginley

Sample Notes :

Parameter	Sample Parameters	Unit	Max. Limit	Parameter Standards	Min. Limit	Date	Results
Ammonia N		mg/l	0.2		0.01	18/03/21	
Biological Oxygen Demand		mg/l	5		0.1	25/03/21	0.011
Chemical Oxygen Demand		mg/l	25		2.4	18/03/21	2.4
Chloride		mg/l	40		1	18/03/21	24
Nitrate N		mg/l	55		0.1	18/03/21	17.983
Nitrite N		mg/l	0.1		0.01	18/03/21	0.207
Ortho-Phosphate P		mg/l	0.075		0.01	18/03/21	0.031
Sulphate		mg/l	-		0.01	18/03/21	17.191
Suspended Solids		mg/l	25		1	18/03/21	65


Approved:  : Date 27/03/21 : Signed Adrian Mc Ginley, Head of Laboratory. This quality is assured in this report should be acceptable. For information only.

Table 2 - Laboratory Results - Roadside Drain on L1818-19 at Quarry Entrance Location A - Sampled on 18/03/2021

Laboratory Analysis Report

Sample Location : EN-Enforcement
 Surface Water, Drain North Sean Cahill
Grid Coordinates : Not Recorded
Sample Details : Reference : 2193EN23A0318A
 Template : Surface Water Monitoring
 Sampled by : Regina Moran
 Sample Date: 18/03/2021 Time: 11:00 Method: Grab
Laboratory : Kilkenny Co Co
 Analyst : Adrian Mc Ginley
Sample Notes :

Sample Parameters		Parameter Standards		Results	
Parameter	Unit	Max. Limit	Min. Limit	Date	Result
Ammonia N	mg/l	0.2	0.01	18/03/21	0.003
Biological Oxygen Demand	mg/l	5	0.1	18/03/21	5
Chemical Oxygen Demand	mg/l	25	1	18/03/21	125
Chloride	mg/l	40	1	18/03/21	18.43
Nitrate N	mg/l	5.8	0.1	18/03/21	4.19
Nitrite N	mg/l	0.1	0.01	18/03/21	0.012
Ortho-Phosphate P	mg/l	0.075	0.01	18/03/21	0.022
Sulphate	mg/l	-	-	18/03/21	14.066
Suspended Solids	mg/l	35	1	18/03/21	5

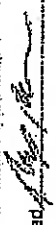
Approved:  Date: 23/3/21
 Signed: Adrian Mc Ginley, Head of Laboratory. Take
 Client Feedback as your report states the highest and lowest laboratory results as

Table 3 - Laboratory Results - Roadside Drain at Road Crossing on L1818-19 Location B - Sampled on 18/03/2021

Laboratory Analysis Report

Sample Location : EN-Enforcement
 Surface Water, US Aidan Brophy
Sample Details : Gild Coordinates : Not Recorded
 Reference : 2133EN24A0318A
 Template : Surface Water Monitoring
 Sampled by : Regina Moran
 Sample Date: 18/03/2021 Time: 12:00 Method: Grab
Laboratory : Kikenry Co Co
 Analyst: Adrian Mc Glinkey
Sample Notes :

Sample Parameters		Parameter Standards		Results	
Parameter	Unit	Max Limit	Min Limit	Date	Page#
Ammonia N	mg/l	0.2	0.1	18/03/21	3.006
Biological Oxygen Demand	mg/l	5	0.1	23/03/21	4
COD Chemical Oxygen Demand	mg/l	20	1	18/03/21	35
Chloride	mg/l	40	1	18/03/21	19.311
Nitrate N	mg/l	5.5	0.1	18/03/21	0.503
Nitrite N	mg/l	0.1	0.01	18/03/21	0.017
Ortho-Phosphate P	mg/l	0.075	0.01	18/03/21	0.006
Sulphate	mg/l	35	1	18/03/21	14.414
Suspended Solids	mg/l	35	1	18/03/21	8

Approved: *[Signature]* : Date: 23/03/21 : Signed: Adrian Mc Glinkey, Head of Laboratory - TMO
 Quality Control of the report issued by laboratory: water@kenry.co.uk

Table 4 – Laboratory Results – Downstream of Road Crossing on L1818-19 Location C – Sampled on 18/03/2021

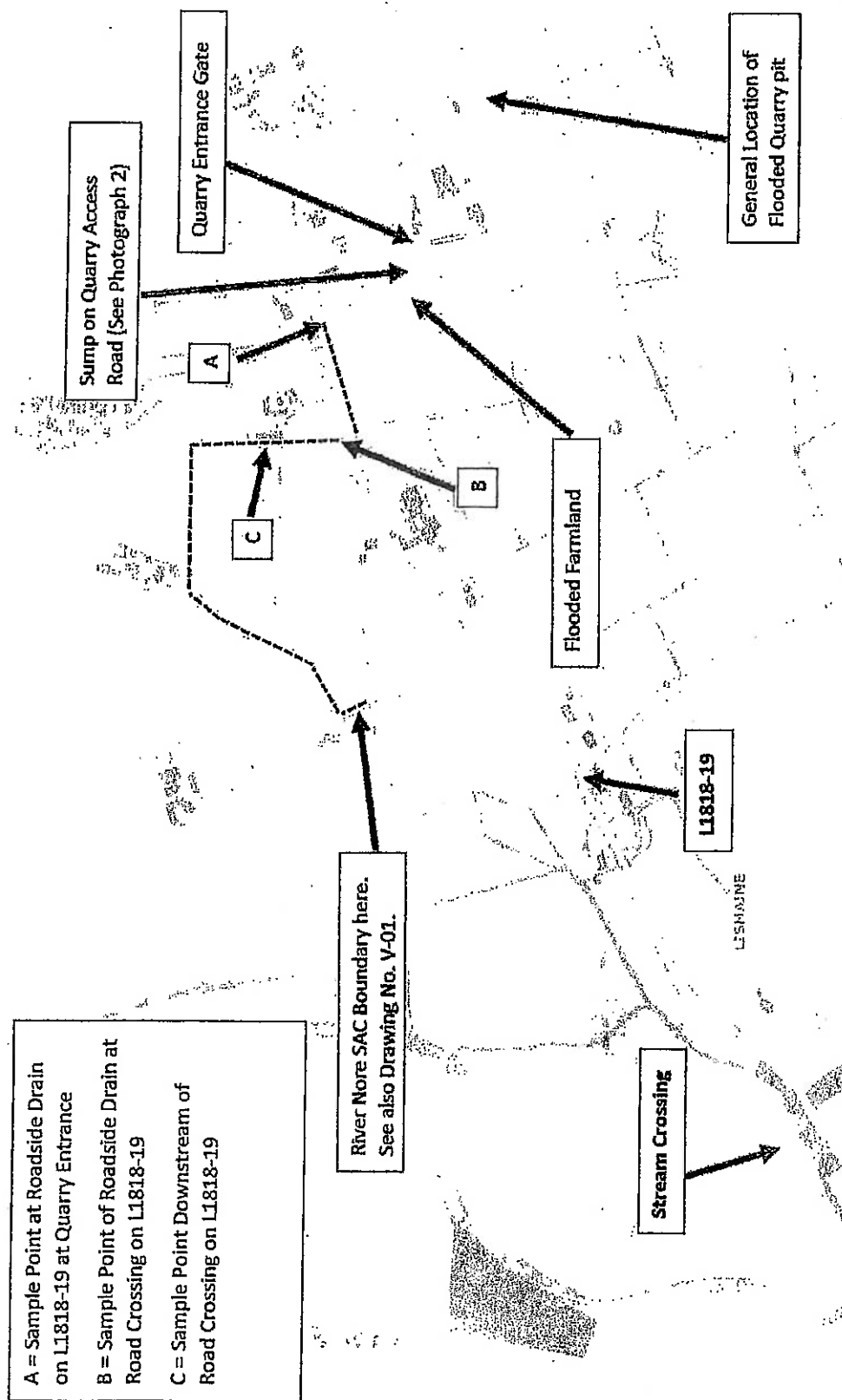


Figure 1 – Sample point locations & Location Sketch

THE CIRCUIT COURT

RECORD NO 2021/

SOUTH EASTERN CIRCUIT

COUNTY OF KILKENNY

IN THE MATTER OF SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000

AND IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACTS 2000 – 2020

BETWEEN

KILKENNY COUNTY COUNCIL

Applicant

And

KILKENNY ASPHALT ROOFING LIMITED -and- DONAL O'REGAN

Respondents

AFFIDAVIT OF MALCOLM LANE

I, **MALCOLM LANE**, BA MRUP MA(UD) MIPI, Planning Consultant of 1 Church Road, Greystones, in the County of Wicklow aged 18 years and upwards MAKE OATH and say as follows: -

1. I am a planning consultant retained on behalf of the Respondents to the aforementioned proceedings. I make this affidavit from facts within my own knowledge save where otherwise appears, and where so appearing I believe the same to be true and accurate.
2. I beg to refer to the proceedings had herein when produced.
3. I say that in arriving at the following conclusions, I have had the opportunity to review the various affidavits sworn on behalf of both the Applicant and the Respondents, and I have taken detailed instructions from the Respondents, their servants or agents, regarding the various allegations and claims advanced by the Applicant.
4. I have been advised that the Applicant no longer asserts that the Quarry was not registered in accordance with the Planning and Development Act 2000 (as amended).

5. I have also been advised that the Applicant is now advancing an argument that due to the absence of an express reference to the pumping of water in the documentation submitted on behalf of the Respondents in April 2005 (as part of the s261 registration process), the pumping of water currently taking place at the Quarry site renders the development unauthorised. I say that I do not believe that there is a basis for such a proposition.
6. Firstly, the description of the Quarry in the registration documentation is neither exhaustive nor conclusive of any level of activity which may have been taking place at the Quarry. The document in question is a very simplified (pro-forma) questionnaire. I say that when assessing the level of development carried out in respect of any type of development, whether it be a quarry or otherwise, one has regard to evidence of the actual activities that takes place at the development site, in particular where the Quarry has been in operation for several decades.
7. In this regard and having had sight of the expert report of Mr. Conor McGrath, I note that groundwater flooding is common in the locality as the natural underground drainage system is incapable of sufficiently draining itself, resulting in emergence of groundwater at the surface and I am advised that groundwater has been flowing through the site for many years. I also note from Mr McGrath's report that the Quarry site is not using water as part of its quarry operations and is not discharging polluting matters and that the water flowing from the Quarry site is in effect storm water and cannot be considered as trade effluent. Further, I say and believe and am advised that the pumping of water from the Quarry site has been taking place for many years and in this regard, I would note that the Applicant was aware of the fact that water was pumped from the site when it carried out a s261A assessment in May 2012 as is evident from the photographs annexed to the Applicant's assessment report. I am advised that the pumping is seasonal in nature and not directly connected to the Quarry process and that the groundwater would continue to flow from the Quarry site regardless of whether any quarrying activity is carried out on the site or not. I believe that the answer of "NA" provided at Question 10 of the 2005 registration application was provided in that context.
8. Moreover and leaving aside the points made above, in my opinion, if the Quarry site is deemed authorised by virtue of its registration (which I understand to be the case) and the management and pumping of water has been taking place for many years (which I also understand to be the case), there can be no *intensification* or *material change of use* as this pumping process has continuously been carried on in tandem with the working of an authorised quarry and consequently, planning permission is not required for this longstanding activity.

Drainage – Exempted Development

9. I have reviewed the enforcement notice issued by the Applicant on 5 November 2021 ("the Notice") in which it is alleged that an unauthorised excavation of land has taken place and I understand (although it is far from clear from the Notice) that this allegation relates to the recent construction of drainage ponds/lagoons at the Quarry site. I have reviewed those works and would highlight that the carrying out of drainage works constitutes an exempted development as provided by the Planning and Development Regulations 2001-2021, Part 3, Article 6, which provides as follows:

"Rural - Minor works and structures - CLASS 3"

Works relating to the construction or maintenance of any gully, drain, pond, trough, pit or culvert, the widening or deepening of watercourses, the removal of obstructions from watercourses and the making or repairing of embankments in connection with any of the foregoing works."

10. It is noteworthy that the foregoing Class of *exempted development* includes the construction or maintenance of any:

- (i) Gully;
- (ii) Drain,
- (iii) Pond;
- (iv) Trough;
- (v) Pit; or
- (vi) Culvert

11. In my opinion, this class of exempted development permits the works carried out by and on behalf of the Respondent to manage the flow of water, including the opening or enlargement of ponds/lagoons.

12. It is important to recognise that in the absence of the drainage mechanisms provided by the Respondent, which control the diversion of groundwater to the local land-drain, there is likely to be a flow of ground water which will naturally flow across the lands, travelling down-hill, accumulating in neighbouring landowners properties. Should this occur, it is entirely caused by the prevailing weather conditions rather than any activities on the part of the Respondents, their servants or agents.

Opening of ponds/lagoons at the Quarry

13. I am instructed that during the operation of the quarry over several decades, a large silt pond was opened up primarily on the adjoining land, but also on land which forms part of the Quarry site. I understand that the Respondents have constructed new tailing ponds/lagoons on their land which was formally part of the silt pond and I say ponds/lagoons are a regular feature of any quarry and the new ponds/lagoons are required by the Respondents to manage the drainage of storm water from the Quarry site.

14. I say that the opening or enlargement of ponds/lagoons is part of the quarrying process. As the excavation of the quarry progresses, the location of a pond/lagoon may have to be altered or a new pond/lagoon constructed. This is ancillary to the quarry process.

15. I understand that the new ponds/lagoons constructed by the Respondents are constructed on their own lands which form part of the original (much larger) existing silt pond site and in my opinion, these works, which are part of the ongoing Quarry operation, are not a new development requiring separate planning permission.

Malcolm Lane
Malcolm Lane

SWORN this 24TH day of November
2021 at GREYSTONES

in the County of WICKLOW

by the Malcolm Lane before me, a
~~Commissioner for Oaths~~/ Practicing Solicitor,
and the deponent who is personally known to
me

Mairead Leyne
~~Commissioner for Oaths~~/ Practicing Solicitor.

Mairead Leyne Solicitor



Kilkenny County Council, County Hall, John Street, Kilkenny
Tel no. 056-7794010 Fax no. 056-7794004

APPLICATION TO KILKENNY COUNTY COUNCIL FOR REGISTRATION OF A QUARRY UNDER
SECTION 261 OF THE PLANNING AND DEVELOPMENT ACT, 2000

Kilkenny County Council, County Hall, John Street, Kilkenny
Tel no. 056-7794010 Fax no. 056-7794004

APPLICATION TO KILKENNY COUNTY COUNCIL FOR REGISTRATION OF A QUARRY UNDER
SECTION 261 OF THE PLANNING AND DEVELOPMENT ACT, 2000

1(a) Name of Owner/operator of quarry(s)

DONALD O'REGAN

In the event of the operator not being the owner please also give details of owner

Address

MOATE ROAD, RALLYRAGLES, CO. KILKENNY

Telephone No. 056-7794010 Email address

1(b) If the Applicant is a Company registered under the Companies Act 1963 to 1994, state:

(i) the name of the Directors of the Company (if this space is insufficient, please use a separate sheet)

N/A

(ii) Registered Address of Company

N/A

(iii) Company Registration No.

N/A

2. Name & Address to which any correspondence is to be sent

DONALD O'REGAN, % ADAM O'CONNELL & ASSOCIATES LTD, 11 LISHARD COURT,
POLYLAND, CO. LAOIS
Tel No. 0502 63244 Fax
No. 0504 63245

3. (a) Location, townland or postal address of quarry concerned

LISHARD

(b) Identify the relevant Ordnance Survey Map Ref. No. and the Grid Reference

U525-6

(c) A site location map to a scale of not less than 1:2500 is to be attached. The map is to define:

- (i) the entire landholding in the locality (in blue)
- (ii) the quarry site (outlined in red)
- (iii) the current working quarry area (hatched in colour)

(d) Clarify whether parts of the total land holding were acquired at different period, if so, then

- (i) identify the relevant portion of land;
- (ii) usage of said lands at time of acquisition,
- (iii) date of acquisition
- (iv) from whom was the land obtained
- (v) evidence as appropriate to substantiate the foregoing

N/A

4. Was planning permission under Part IV of the Local Government (Planning and Development) Act, 1963 granted?

YES ☐ Reference No.

NO ☒

If YES, please quote the reference number of the permission and include a copy of said permission(s) and conditions.

N/A

5. Did the quarry commence operation before 1st October, 1964?

YES ☒

NO ☐

If YES, please supply any available documentary evidence.

6. Total site area of quarry (hectares) 7.57 HA

7. Extraction area of quarry (hectares) 0.793 HA

8. Types of material being extracted: SAND & GRAVEL & STONE

9. Details of processes, if any, within the site: NONE

10. Is pumping carried out at the development? YES ☐ NO ☒

If YES, give details of (a) rate of pumping and (b) identify point of discharge

N/A

Licence Reference under which discharge is being carried out:

N/A

11. (a) Date which quarrying commenced on the land? 1980
(b) Date which quarry operator commenced quarrying? 1980
(c) If operation of the quarry was only periodic, please give details of dates of operation, if known) N/A
(d) Any other details on the history of the working quarry and quarry operator N/A

12. Quarry operating hours:

- (i) Plant operating hours:
(a) Weekdays 8 AM - 7 PM
(b) Saturdays 8 AM - 7 PM
(ii) Loading/Off-site Haulage Hours (if different from above):
(a) Weekdays 10 AM - 4 PM
(b) Saturdays 10 AM - 4 PM
(iii) Hours (outside normal opening hours) required to service exceptional customer requirements.

- (iv) No of employees on site: 4
(v) Sanitary and canteen facilities: TEA MAKING FACILITIES AND READERO. SANITA FACILITIES AT DELIVERY PLANT ON AT ADJACENT WORKS

13. Traffic generated by the operation of the quarry? (Type and frequency of vehicle entering and leaving the quarry and identify traffic routes - To be accompanied by maps as appropriate)

1000 TIRLER LORRIES X 10 TRIPS PER DAY
TO NAW KALLAGHET - KILKENNY ROAD

14. Please give details of emissions (noise, dust, water, etc.) from the quarry where measurements are available

Noise:

Dust:

Water:

N/A

Waste Water:
Other: *N/A*

15. Give details of current depth of excavation relative to the Ordnance Datum:
..... *5.6 M*

16. Give details of the level relative to Ordnance Datum of the winter water table:
..... *Water Table N/A 1.0 M 1.0 M*

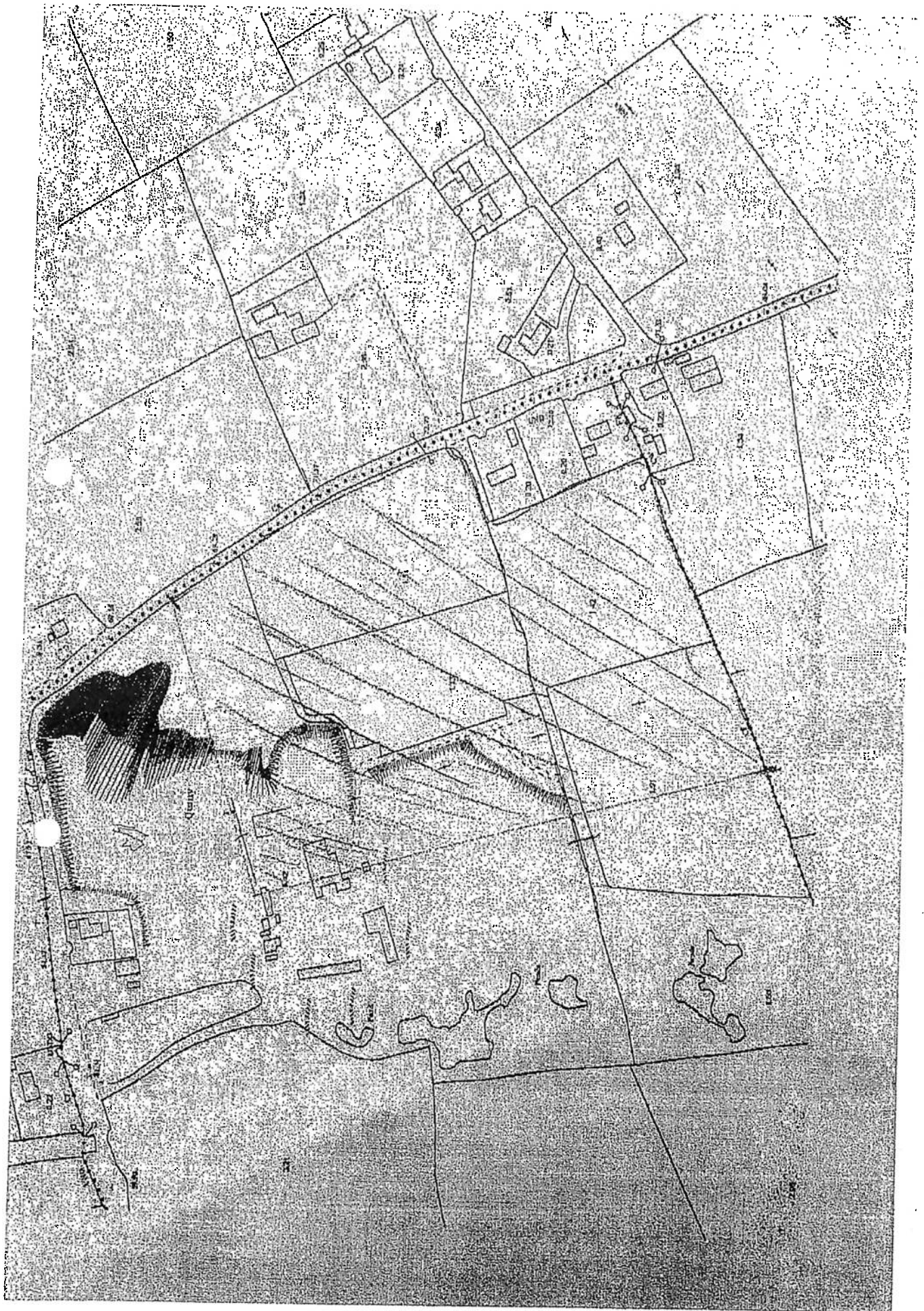
17. Is the existing activity subject to IPC licence: *N/A*
If yes, give details of licence no. *N/A*

18. Is the quarry situated on a European site or any other area prescribed for the purpose of section 10(2)(c), or land to which an order under section 15, 16 or 17 of the Wildlife Act, 1976, applies YES ☐ NO ☒
If YES, give details:
..... *N/A*

19. Give details of any material changes in the particulars referred to above during the period 28th April, 2004 and the date on which the information is provided:
.....
..... *N/A*

Name (BLOCK CAPITALS):	<i>DONIE O'REGAN</i>
Signature:	<i>Don O'Regan</i>
Position with firm/company ¹ :	<i>LAND OWNER</i>
Date:	<i>27/04/2005</i>

¹Where registration is on behalf of a company, the form must be signed by a company director/secretary



Comhairle Chontae Chill Chainnigh
Kilkenny County Council
Planning Report



Planning & Development Act, 2000 - 2010
Planning & Development Regulations, 2001 - 2010

Planning Ref: QR 20
Asphalt Roofing LTD.
Lismaine

Subject: Assessment of Quarries in County Kilkenny under Section 261A of the Planning and Development Act 2000- 2010 to ensure compliance with the provisions of the Environmental Impact Assessment Directive and the Habitats Directive.

-
1. **Site Location & Description:**
The site is located where the N77 and the L1818 meet at Lismaine. The site is on the corner and is part of the original Lismaine site. The site is currently used for crushing and screening and has a concrete batching plant on site.
 2. **Owner/Operator:**
Messrs. Donal O'Regan and John O'Brien.
 3. **Quarry Registration: (Did the quarry fulfil the requirements of registration under Section 261 of the Planning and Development Act 2000?)**

No
 4. **Submissions Received:**

None
 5. **Planning History:**

Enforcement History:

ENF 10046 Unauthorised Quarry at Lismaine.

Planning History pre 1964:

None

Planning History 1964 -1990 (Feb 1):

82/790 – Asphalt processing plant

Planning History 1990 -1997 (26 Feb):

None

Planning History post 1997:

None

Planning History post July 2008

Works commenced on the unauthorised quarry where the storage area for asphalt roofing was granted.

6. Deliberation:

6.1 In accordance with the Environmental Impact Assessment Directive, did any of the works since 1 February 1990 require an EIA or a determination whether an EIA would be required where same was not carried out? If so, please elaborate.

No

6.2 In accordance with the Habitats Directive, did any of the works since 26 February 1997 require an Appropriate Assessment where same was not carried out? If so, please elaborate.

No

6.3 Was any works undertaken post July 2008 that would have required an EIS, a Determination whether an EIS would be required or an Appropriate Assessment, where same was not carried out? If so, please elaborate.

No

7. Determination under section 2(a) of Section 261A:

- Having regard to all relevant information, including submissions and observations, the Planning Authority considers that the quarry did not fulfil the requirements of quarry registration under Section 261 of the Planning and Development Act 2000.

- Having regard to the Planning and Development Act, the Environmental Impact Assessment Directive and all relevant information, including submissions and observations, the Planning Authority considers that:

the quarry is unauthorised by reason of the owners/operators not registering same under Section 261 of the Planning and Development Act.

- No development at the quarry since 1 February 1990 was required to have a determination whether an Environmental Impact Assessment is required or an EIA where same was not carried out.
- Having regard to the Habitats Directive and all relevant information, including submissions and observations, the Planning Authority considers that development since 26 February 1997 did not require an Appropriate Assessment where same was not carried out.
- Having regard to the Habitats Directive and all relevant information, including submissions and observations, the Planning Authority considers that development post July 2008 would not have required and Environmental Impact Assessment, a determination whether an Environmental Impact Assessment is required or An Appropriate Assessment, where same was not carried out

8. Reason for decision:

The quarry started prior to 1964 and aerial photos from the 1970s show the quarry at an advanced stage. The lands in the original ownership of James Treacy in 1964 would have constituted all the lands currently in the ownership and use by both Brenstone (William and Liam Brennan) and Asphalt Roofing (Donal O'Reagan and John O'Brien). This land was sold off in two batches in the 1970s and 1980s, to The Brennan Bros (portions 9 and 14) and to Cornelius Phelan (Portions 18-22). Cornelius Phelan subsequently sold portions 18,19, 20 and 22 to the Brennan Bros and Portion 21 to Donal O'Regan and John O'Brien. The original site of the quarry/sandpit is now no longer in use and used to be where Asphalt Roofing now has their builders yard. This yard was granted permission in 1982. To the South East of Asphalt Roofing's yard is an extension to the yard, which was granted permission under reg. ref 08/1233 for the storage of roofing material. On inspection, it is clear that significant quarrying has taken place to well below the allowed yard level. The yard is now a water filled quarry with solid limestone walls. It would seem as if the future extraction of this resource could be sustainable and therefore a precautionary approach should be taken and although there was no activity on site, this development should not be considered as having ceased operations.

Enforcement Action was taken and an Enforcement Notice was served under Section 157 as the quarry became unauthorised as a result of not registering under section 261. However, the notice was withdrawn as it was considered that a section 160 injunction would be more appropriate and to avoid a High Court Judicial Review.

Since the proceedings were withdrawn, a change to the Planning and Development Act has commenced, which removes the seven year statute of limitations rule from applying to any quarry. Section 47 of the Planning and Development Amendment Act, amending section 157(4) by inserting paragraph "aa", states "... (a) a warning letter or Enforcement Notice may issue, or proceedings may be commenced, at any time in respect of the following development:

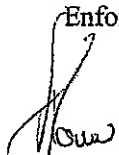
- (i) operation of a quarry
- (ii) extraction of peat.

Due to the nature and size of the quarry, I do not consider that the quarrying activity at this new location would pose a threat to the River Nore SAC. A screening exercise for the need for Appropriate Assessment was carried out and it was concluded that the unauthorised works do not require Appropriate Assessment.

9. Recommendation:

Having regard to the all the relevant information including submissions and observations, where received, it is recommended that although there is no activity on site, a notice be sent to the Quarry operator/owner including the following:

- A Notice that there are no implications for the quarry in accordance with Section 261A, however, any further quarrying would be considered unauthorised without the benefit of planning permission. Cease and desist. Enforcement Notice may be appropriate.



N. Louw

Senior Executive Planner

Date:

14/08/12



A.M. Walsh

Senior Executive Officer

Date

24/7/2012

Habitats Directive Project Screening Assessment

Table 1: Project Details

Development Consent Type	Asphalt Roofing.
Development Location	Lismane, Kilkenny
Planning File Ref	AP 020
Description of the project	Unauthorized Quarry.

Table 2: Identification of Natura 2000 sites (SACs and SPAs) which may be impacted by the proposed development

Please answer the following five questions in order to determine whether there are any Natura 2000 sites which could potentially be impacted by the proposed development. If the answer to all of these questions is no, significant impacts can be ruled out for habitats and bird species. No further assessment is required. Please refer to tables 3 and 4 where the answer to any of these questions is yes.

		Y/N
1	ONE- OFF HOUSE /SMALL EXTENSION/ ALTERATION TO EXISTING BUILDING	
1a	<p>Is the development a one- off house/small extension/alteration to existing building within an SAC/SPA or within 100m of an SAC/SPA and likely to discharge pollutants or nutrients of a significant nature and amount to surface water within catchments of and SAC/ SPA as part of its construction or operational phase (including the installation of waste water treatment systems; percolation areas; septic tanks within SAC/SPA or very close proximity)?</p> <p>If the answer to the above question is:</p> <ul style="list-style-type: none"> - no, then no appropriate assessment required - yes, then an appropriate assessment is required - not sure, then an appropriate assessment is required in accordance with the precautionary principle 	N
2	DEVELOPMENTS OTHER THAN THOSE DESCRIBED IN 1 ABOVE	
2a	<p>Impacts On Freshwater Habitats</p> <p>Is the development within a Special Area of Conservation whose qualifying interests include freshwater habitats, or in the catchment of same and does the development propose to discharge water to or abstract water from the habitat?</p> <p>Sites to consider: Lower River Suir, River Barrow, River Nore.</p> <p>Habitats to consider: Alluvial Wet Woodland, (Lower River Suir), Dry Heath (some steep slopes along River Barrow and its tributaries) Rivers, Streams, Lakes and Lagoons, Old Oak Woodland, floating river vegetation,</p> <p>Species to consider: River Lamprey, Brook Lamprey, Freshwater Pearls Mussel, Nore Freshwater Pearl Mussel, Crayfish, Twait Shad, Atlantic Salmon, Otter, Vertigo Moulinsiana,</p>	N
2b	<p>Impacts On Wetland Habitats</p> <p>Is the development within a Special Area of Conservation whose qualifying interests include wetland habitats, or likely to discharge water to or abstract water from the wetland?</p> <p>Sites to consider: Hugginstown Fen, Galmoy Fen, The Loughans, Flood Plain wetlands</p> <p>Habitats to consider: Bogs, Alkaline Fens (Hugginstown and Galmoy), Turloughs (The Loughans)</p>	N
2c	Impacts on Intertidal and Marine Habitats	

		Y/N
	<p><i>Is the development located within a Special Area of Conservation whose qualifying interests include intertidal and marine habitats and species, or within the catchment of same and likely to discharge water to or abstract water from the habitats.</i></p> <p>Sites to consider: Lower River Suir</p> <p>Habitats to consider: Atlantic Salt meadows, Mudflats, sandflats, saltmarsh, estuary</p> <p>Species to consider: Sea Lamprey, River Lamprey, Brook Lamprey, Freshwater Pearl Mussel, Crayfish, Twaite Shad, Atlantic Salmon, Otter.</p>	N
2d	<p>Impacts On Woodlands And Grasslands <i>Is the development within a Special Area of Conservation whose qualifying habitats include terrestrial habitats, or in close proximity to same with a likely ecological impact?</i></p> <p>Sites to consider: Spa hill and Clomantagh Hill, Cullahil Mountain, River Barrow, River Nore, Lower River Suir</p> <p>Habitats to consider: Alluvial Wet Woodlands (River Nore below Inistoge and River Suir at Fiddown Island and Carrick on Suir), Eutropic tall herb vegetation (River Suir at Fiddown Island and Carrick on Suir), and grasslands (Spa hill and Clomantagh Hill, Cullahil Mountain)</p> <p>Oak Woodlands in old estates next to the Nore and Barrow</p> <p>Species to consider: Greenwinged, Frog and Bee Orchids (Cullahil and Clomantagh Hill), Nettle Leaved Bellflower and Autumn Crocus</p>	N
2a	<p>Impacts On Birds <i>Is the development within a Special Protection Area, or likely to discharge water to same or likely to have another significant impact on the habitats of Birds in same?</i></p> <p>Sites to consider: River Nore</p> <p>Species to consider: River Nore: Kingfisher (Alcedo Atthis) – Nesting in river banks</p>	N

Table 3: Determination of possible impacts on Natura 2000 sites.

Where it has been identified in table 2 that there is a Natura 2000 site within the potential impact zone of the proposed development, it is necessary to try to determine the nature of the possible impacts. Please answer the following questions as appropriate.

1.	<p>Impacts on designated freshwater habitats (rivers, lakes streams and lagoons).</p> <p><i>Please answer the following if the answer to question 2a in table 2 was yes.</i></p> <p><i>Does the development involve any of the following:</i></p>	
1.1	Impacts on watercourses (tributaries, streams, drains) which are remote from the SAC/SPA but may still impact on the SAC/SPA by reason of the nature or quantity of the discharge	N
1.2	Abstraction from surfacewater or groundwater within 1km of SAC/SPA.	Yes, but impact unlikely
1.3	Removal of topsoil within 100 m of watercourses with potential for surface water runoff.	N
1.4	Infilling or raising of ground levels within 100m of watercourses with potential for surface water runoff.	N
1.5	Construction of drainage ditches within 1km of SAC/SPA.	N
1.6	Construction within a floodplain or within an area liable to flood.	N
1.7	Crossing or culverting of rivers or streams within 1km of SAC/SPA.	

1.8	Storage of chemicals hydrocarbons or organic wastes within 100 m of a watercourse.	N
1.9	Development of a large scale which involves the production of an EIS.	N
1.10	Development of quarries, particularly where abstraction is below water table.	N
1.11	Development of windfarms within 1km of an SAC or with the risk of runoff to an SAC/SPA, particularly during construction.	N
1.12	Development of pumped hydro electric stations.	N
2	Impacts on designated wetland habitats (bog, heath, marsh, fen). <i>Please answer the following if the answer to question 2b in table 2 was yes.</i> <i>Does the development involve any of the following:</i>	N
2.1	Impacts on watercourses (tributaries, streams, drains) which are remote from the SAC/SPA but may still impact on the SAC/SPA by reason of the nature or quantity of the discharge.	N
2.2	Construction of roads or other infrastructure on peat habitats within 1km of a Natura 2000 site of which qualifying interests include peat, fen or marsh. (Only Peat habitat at Bruckana -- consider Galmoy fen -- impact unlikely)	N
2.3	Development of a large scale within 1km within a Natura 2000 site, whose qualifying features include fen or marsh, which involves the production of an EIS.	N
3	Impacts on designated intertidal and marine habitats (mudflats, sandflats, estuaries, reefs and sea cliffs). <i>Please answer the following if the answer to question 2c in table 2 was yes.</i> <i>Does the development involve any of the following:</i>	
3.1	Impacts on intertidal and marine habitats from potential development which are remote from the SAC/SPA but may still impact on the SAC/SPA by reason of the nature or quantity of the discharge	N
3.2	Development of piers, slipways, marinas, pontoons or any other infrastructure within 5km of a Natura 2000 site whose qualifying features include intertidal or marine habitats.	N
3.3	Dredging within 5km of a Natura 2000 site whose qualifying features include intertidal or marine habitats.	N
3.4	Impacts on watercourses (tributaries, streams, drains) which are remote from the SAC/SPA but may still impact on the SAC/SPA by reason of the nature or quantity of the discharge.	N
3.5	Removal of topsoil or infilling within 100m of Natura 2000 sites whose qualifying features include intertidal or marine habitats where potential for surface water runoff exists.	N
3.6	Development of a large scale within 1km of Natura 2000 sites whose qualifying features include intertidal or marine habitats, which involves the production of an EIS.	N
4	Impacts on other designated woodlands and grasslands (woodland, upland grassland, lowland grassland, coastal grassland including dunes). <i>Please answer the following if the answer to question 2d in table 2 was yes.</i> <i>Does the development involve any of the following:</i>	
4.1	Works within the boundary of a Special Area of Conservation whose qualifying interests include woodland or grassland habitat types.	N
4.2	Development within 200m of Natura 2000 site with woodland or grassland habitats.	N

Y - No discharge to river except only to tailings pond.

4.3	Development of a large scale within 1km of Natura 2000 site with woodland, grassland or coastal habitats which involves the production of an EIS.	N
5	Impacts on birds in SPAs <i>Please answer the following if the answer to question 2a in table 2 was yes.</i> <i>Does the development involve any of the following:</i>	
5.2	Erection of wind turbines within 1km of an SPA.	N
5.3	All construction works within 100m of SPA (River Nore), including the development of cycle ways or walking routes	N
5.4	Infilling of coastal habitats within 500m of intertidal SPA.	N
5.5	Works within 1km of coastal SPA which will result in discharges to rivers or streams that are directly connected to designated sites.	N
5.6		

Conclusion: If the answer to question 1 and 2a-e are no or n/a, significant impacts on habitats within Natura 2000 sites and on SPAs can be ruled out. No further assessment is required in relation to habitats or birds. If the answer to any question in table 2 is yes, you may require further information, unless you are satisfied that the project proponents have incorporated adequate mitigation into their design to avoid impacts on the Natura 2000 site (eg water pollution protection measures). Such information should be provided in the form of a Natura Impact Statement which should address the particular issues of concern as identified through the above.

Table 4: Consideration of potential impacts on protected species

Many of our Special Areas of Conservation are designated for species as well as for habitats. These are listed below, alongside the sites for which they are designated. Included is a short list of the types of activities which could have an impact on these species. Please tick if you are concerned that the proposed development could have an impact on these species.

Species	Relevant Sites	Activities which could have impacts on species	Possible impacts identified? Y/N
Otter	River Nore River Barrow Lower River Suir Note: Otters are a strictly protected species. All breeding sites and resting places are protected regardless of whether or not they are within or external to Special Areas of Conservation.	Activities that interfere with river banks.	N
Atlantic Salmon	River Barrow River Nore Lower River Suir	Activities that interfere with water quality, levels or the river bed;	N
River Lamprey	River Barrow River Nore Lower River Suir	Activities that interfere with water quality, levels or the river bed;	N
Brook Lamprey	River Barrow River Nore Lower River Suir	Activities that interfere with water quality, levels or the river bed;	N
Sea Lamprey	River Barrow River Nore Lower River Suir	Activities that interfere with water quality or the river bed – estuarine areas;	N

Species	Relevant Sites	Activities which could have impacts on species	Possible Impacts Identified? Y/N
Twaite Shad	Lower River Suir	Activities that interfere with water quality or the river bed – estuarine areas;	N
Crayfish	Lower River Suir	Activities that interfere with water quality or the river bed;	N
Freshwater Pearl Mussel	River Barrow River Nore Lower River Suir	Activities that interfere with water quality, levels or the river bed ;	N
Nore Freshwater Pearl Mussel	River Nore	Activities that interfere with water quality, levels or the river bed ;	N

Conclusion: If the answer to all of the above is no, significant impacts on species can be ruled out. If the answer to any of the above is yes, then further information is likely to be required in relation to potential for impact on that particular species. Where potential impacts are identified on Otters or on Bats outside designated sites, then further information should be sought in the form of a species specific survey. In these cases, appropriate assessment is not required.

Habitats Directive Screening Conclusion Statement

Development Type	Quarry
Development Location	Lismaine, Kilkenny
Natura 2000 sites within impact zone	River Nore.
Planning File Ref	QR20
Description of the project	Unauthorized quarry
Describe how the project or plan (alone or in combination) could affect Natura 2000 site(s).	
If there are potential impacts, explain whether you consider if these are likely to be significant.	
<p>Conclusion of assessment Having regard to the precautionary principle, it is considered that:</p> <p><input type="checkbox"/> Significant impacts can be ruled out or AA not required (if project is directly connected or necessary to Management of Natura 2000 site (determined in consultation with NPWS)).</p> <p>or</p> <p><input checked="" type="checkbox"/> Significant impacts are certain, likely or uncertain (cannot be ruled out), Natura Impact Statement (NIS) is required. Project must be subject to appropriate assessment.</p>	
Documentation reviewed for making of this statement.	
Completed By	JN. Low SEP
Date	14/05/12

KILKENNY COUNTY COUNCIL
PLANNING AND DEVELOPMENT ACTS, 2000 – 2010

COUNTY MANAGER'S ORDER

ORDER NO. 279.

Ref No. QR020

Subject: Section 261A – Quarries – No Further Action

Ref No. QR020

WHEREAS by Manager's Order No. 80 dated 26th June, 2012 Joe Crockett, County Manager for Kilkenny County Council, did, pursuant to powers conferred on him by Section 154 of the Local Government Act 2001, delegate unto me certain powers, functions and duties as set out therein.

Order: NOW THEREFORE pursuant to the delegation of the said powers, functions and duties aforesaid, I, Denis Malone, Acting Director of Services, HEREBY DECIDE, pursuant to Section 261A of the Planning and Development Act 2010 (as amended) and having regard to the Assessment Report dated 14th May, 2012 that No Further Action is Required Pursuant to Section 261A in relation to the quarry as set out hereunder, in accordance with the reasons attached hereto.

NAME OF OPERATOR: Ashpalt Roofing Ltd.

ADDRESS OF OPERATOR: Lismaine, Jenkinstown, Co. Kilkenny.

LOCATION OF QUARRY: Lismaine, Jenkinstown, Co. Kilkenny.

Signed: Denis Malone
A/Director of Services

Date: 27/7/2012



ENFORCEMENT NOTICE

SECTION 154 PLANNING & DEVELOPMENT ACT 2000 (AS AMENDED)

LANDS AT: Lismaire, Co. Kilkenny
(as outlined in red on the attached map)

Ref: ENF20103

WHEREAS an unauthorised development is being carried out by you on the above lands which said unauthorised development consists of:

Unauthorised excavation of land and all associated works at Lands at Lismaire, Jenkinstown, Co. Kilkenny.

Now take notice that The County Council of the County of Kilkenny, under the provisions of Section 154 of the Planning & Development Act 2000 (as amended), requires you to:

Cease all works on-site and restore land to pre-existing state.

Time Period for Compliance with the terms of the Enforcement Notice:

One week from the date of the service of this notice.

(48 hours to cease all works associated with the excavation and one month to restore land to pre-existing state.

In the event that the steps specified herein are not taken within the above-mentioned period(s), the County Council of the County of Kilkenny may enter on the land and take such steps, including the removal, demolition or alteration of any structure and may recover from you any expenses reasonably incurred by them in that behalf.

TAKE NOTICE that the costs and expenses incurred by Kilkenny County Council in relation to the investigation, detection and the issue of this Enforcement Notice amount to €260.78 (Two hundred and six euros & seventy eight cent) which are hereby required to be refunded to the Planning Authority forthwith which said costs and expenses are recoverable by the Planning Authority by virtue of the provisions of the Planning & Development Act 2000 (as amended).

AND FURTHER TAKE NOTICE that in the event that the steps specified in this notice to be taken are not taken within the period specified herein that you may be guilty of an offence under the provisions of the above Act.

Dated this the 5th November, 2021

TO: Mr. Donal (Donie) O'Regan
Moate Road
Ballyragget
Co. Kilkenny

Denis Malone


Senior Planner

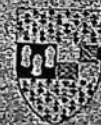


Kilkenny County Council Enforcement Ref: ENF 20-103 O.S. Map 4525-C

Owner/Occuper: Mr Donal O'Regan Site Address: Lismaine, Co. Kilkenny
Owner Address: Moat Road
Ballyragget,
Co. Kilkenny

Date: 05/11/2021

© Ordnance Survey Ireland License No. 2019/27/GCMA/KilkennyCountyCouncil



RECORD OF TIME / MILEAGE

Planning/Enforcement

Developer's Name:

Donal O'Regan / John O'Brien

FILE REF:

ENF20103

Site Address:

Lismaine, Jenkinstown, Co. Kilkenny

Staff Member:	Position:
Denis Malone	Senior Planner
Orlene O'Connor	Snr. Exec. Planner
Lisa McCann	Executive Planner
Eddie O'Reilly	A/Snr. Exec. Technician
DJ Donohoe	Executive Technician
Rita McGarvey	Staff Officer
Tony Parker	Technician Gr.1
Francis Coady	Conservation Officer

NOTES/COMMENTS:

(A) TIME SPENT ON FILE

NAME	TIME: (Hours)	RATE:	AMOUNT:
L. McCann	4	30	120.00
E O'Reilly	2	29.78	59.56
R. McGarvey	1	30.14	30.14
TOTAL:			209.70

(B) MILEAGE

Current Rate 0.83 @ 1.8.18

(C) ADDITIONAL COSTS

DATE:	DISTANCE: (KM)	RATE:	AMOUNT:
EO'R 21.10.2021	28	0.5907	16.54
LMcC 21.10.2021	28	0.5907	16.54
			0.00
TOTAL:			33.08

Please indicate below, the associated costs, if any:

	€
Land Registry	10
Company Search	
Photographs	
Postage	
Other	
Total:	10

TOTAL COSTS : i.e. (A) + (B) + (C) : 260.78

SIGNED:

Rita McGarvey

DATE:

05.11.2021

POSITION:

Staff Officer

Phone (056) 7794010

File No: 67

File No: ENF 20103

05/11/201

INVOICE NO.: 0077

Co Kilkenny

Please let me have early payment of the account detailed hereunder and quote invoice number when paying.

Kita McGarvey

for Director of Service

551



Comhairle Chontae Chill Chainnigh
Halla an Chontae Sraid Eoin Cill Chainnigh

Pobail agus Aiteanna Inbhuanaithe a Chruthú

Kilkenny County Council
County Hall John Street Kilkenny



Creating Sustainable Communities and Places

Ref. ENF20103

25th November 2021

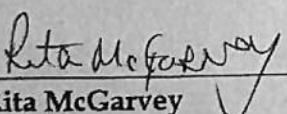
Mr. Donal (Donie) O'Regan
Moate Road
Ballyragget
Co. Kilkenny

RE: Enforcement Notice Withdrawn
Alleged unauthorised quarrying activity
At: Lands at Lismaine, Jenkinstown, Co. Kilkenny

A Chara,

Further to recent correspondence received in connection with the above I now wish to inform you that the Planning Authority has withdrawn the enforcement notices served on 5th November 2021. (Enforcement reference ENF20103).

Mise le meas


Rita McGarvey
Staff Officer
Planning

056 7794010

Poe Kiely Hogan Lanigan Solicitors LLP

Incorporating M J Crotty & Son

Mr John Harte
Harte
Solicitors
39 Parliament Street
Kilkenny
EMAIL ONLY

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DX 27008 KILKENNY

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R95 P276

Town Agents
Pearts
24-26 Upper Ormond Quay
Dublin 7

Our Reference
299978/0002/MOC/CW

Your Reference
1.2267

DATE
7 December 2021

**Re: Kilkenny County Council -v- Kilkenny Asphalt Roofing Limited and Donal O'Regan
Kilkenny Circuit Court Injunctive Proceedings**

Dear Mr. Harte,

We refer to the above-mentioned matter and your telephone call to our office yesterday morning. As you will recall, this matter was listed before Nenagh Circuit Court on 26th November 2022.

We note following discussions, the following "heads of agreement" were reached:

1. That the Respondents would cease pumping any water off the quarry lands i.e. into the roadside drain through a pipe.
2. That the Respondents would be permitted to pump water from the quarry crater into the lagoons and sump pits, however once these became full the pumping would have to stop.
3. That a technical meeting would be arranged between the parties Engineers in order to reduce a final settlement to writing.
4. That the matter would be adjourned to Kilkenny Circuit Court on 25th January 2022 and subject to an agreement being reduced to writing, the matter would be struck out and both parties would bear their own costs.

It now appears to us, following a complaint made by one of the neighbours, that the Kilkenny County Council ("KCC") Planning Officials again attended our clients' site at Lismaine unannounced. This is an issue which we have raised before and given the circumstances of this case, we would again ask that if your client requires an inspection of the Quarry, that appropriate arrangements are made through this office. We do not believe that is appropriate or helpful that your clients arrive unannounced in response to yet another unfounded complaint from a neighbour.

In any event, it appears to us that KCC is now purporting to object to any water emanating from our clients' lands irrespective of whether it is being pumped or not.

Vat No. 1457918R

Partners

Michael Lanigan
Tim Kiely
Martin J. Crotty

John Hickey
Martin O'Carroll
Owen Sweeney

Consultant

Brian Kiely

Senior Associates

Chris Hogan
Annette Hickey
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Solicitors

Tristan Lynas
Rory MacEneaney
Edmund Hennessy

Legal Executives

Louise Ryan
Keith Winick
Ger Fahy
Carol Walsh

Our clients are managing storm water by pumping it into the lagoons . Some quantities of storm water drain into the land-drain from the lagoons in a controlled manner by way of gravity flow. This drainage occurs through a pipe by way of gravity and is directly related to the prevailing conditions. Gravity flow drainage from the site to the roadside drain is a continuation of what has occurred over several decades. If such drainage was now to be blocked, storm water will flow from the site in an uncontrolled manner inevitably causing flooding downhill at certain times of the year.

We are concerned at the close relationship between the KCC's, servants and agents, and our clients' neighbours. It is clear that our clients cannot turn-off the rainfall. Our clients are endeavouring to manage the flow of stormwater and it is very frustrating for them to then be faced with continuous attempts by KCC to block such drainage of storm water following consultation with our clients' neighbours. These attempts, initially related to completely unfounded claims that the storm water that was draining from the site contained pollutants, have now moved to the drainage of storm water more generally. Those claims are equally unfounded as they ignore that the water flowing from the site is storm water that has flowed for decades and also ignore the natural flooding that occurs from adjoining lands.

The KCC has responsibility for the management of storm water and flood prevention in the area. Our clients have set up a water management system which will control the flow of storm water from our clients' lands. In the absence of a controlled flow, there could be significant natural flooding downhill, at certain times, particularly in times of high springs. While we are instructed that the KCC's, servants or agents, have expressed the view that they "*do not care*" where the storm water flows, they, nevertheless, continue to place blame on our clients for the natural occurrence of ground water and any consequential flooding despite our clients' best endeavours to manage same and notwithstanding the flow of storm and other water from adjoining properties.

KCC's *solution* is to allow all water to naturally flood and flow downhill, accumulating at the lowest point without any or any adequate relief mechanism in place, and it would appear, without any consideration for other landowners.

Clearly, if KCC has a difficulty with the manner in which the interim agreement is being implemented, it is appropriate that enquiries are made through this office. In any event, a joint engineering inspection should be arranged in early course. We confirm that the Respondent will be represented by Conor McGrath of AWN Consulting and please confirm if KCC proposes to engage an Independent Hydrologist in respect of this matter.

Yours sincerely,



Martin O'Carroll
POE KIELY HOGAN LANIGAN
mocarroll@pkhl.ie

Vat No. 1457918R

Partners

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Tim Kiely Martin O'Carroll
Martin J. Crotty Owen Sweeney

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Carol Walsh



ENFORCEMENT NOTICE

SECTION 154 PLANNING & DEVELOPMENT ACT 2000 (AS AMENDED)

LANDS AT: Lismaine, Jenkinstown, Co. Kilkenny
(as outlined in red on the attached map)

Ref: ENF20103

WHEREAS an unauthorised development is being carried out by you on the above lands which said unauthorised development consists of:

Unauthorised excavation of land, including associated pipe work, mounding, and all associated site works to facilitate ground water lowering and discharge of water from the quarry at Lands at Lismaine, Jenkinstown, Co. Kilkenny.

Note: The location of the subject area of land is highlighted in red on attached Image Reference ENF20103_Map2 in the interests of clarity.

Now take notice that The County Council of the County of Kilkenny, under the provisions of Section 154 of the Planning & Development Act 2000 (as amended), requires you to:

Cease all works on-site and restore land to pre-existing state.

Time Period for Compliance with the terms of the Enforcement Notice:

48 hours to cease all works associated with the excavation and **one month** to restore land to pre-existing state.

In the event that the steps specified herein are not taken within the above-mentioned period(s), the County Council of the County of Kilkenny may enter on the land and take such steps, including the removal, demolition or alteration of any structure and may recover from you any expenses reasonably incurred by them in that behalf.

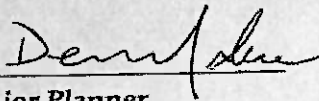
TAKE NOTICE that the costs and expenses incurred by Kilkenny County Council in relation to the investigation, detection and the issue of this Enforcement Notice amount to €385.77 (Three hundred and eighty five euros & seventy seven cent) which are hereby required to be refunded to the Planning Authority forthwith which said costs and expenses are recoverable by the Planning Authority by virtue of the provisions of the Planning & Development Act 2000 (as amended).

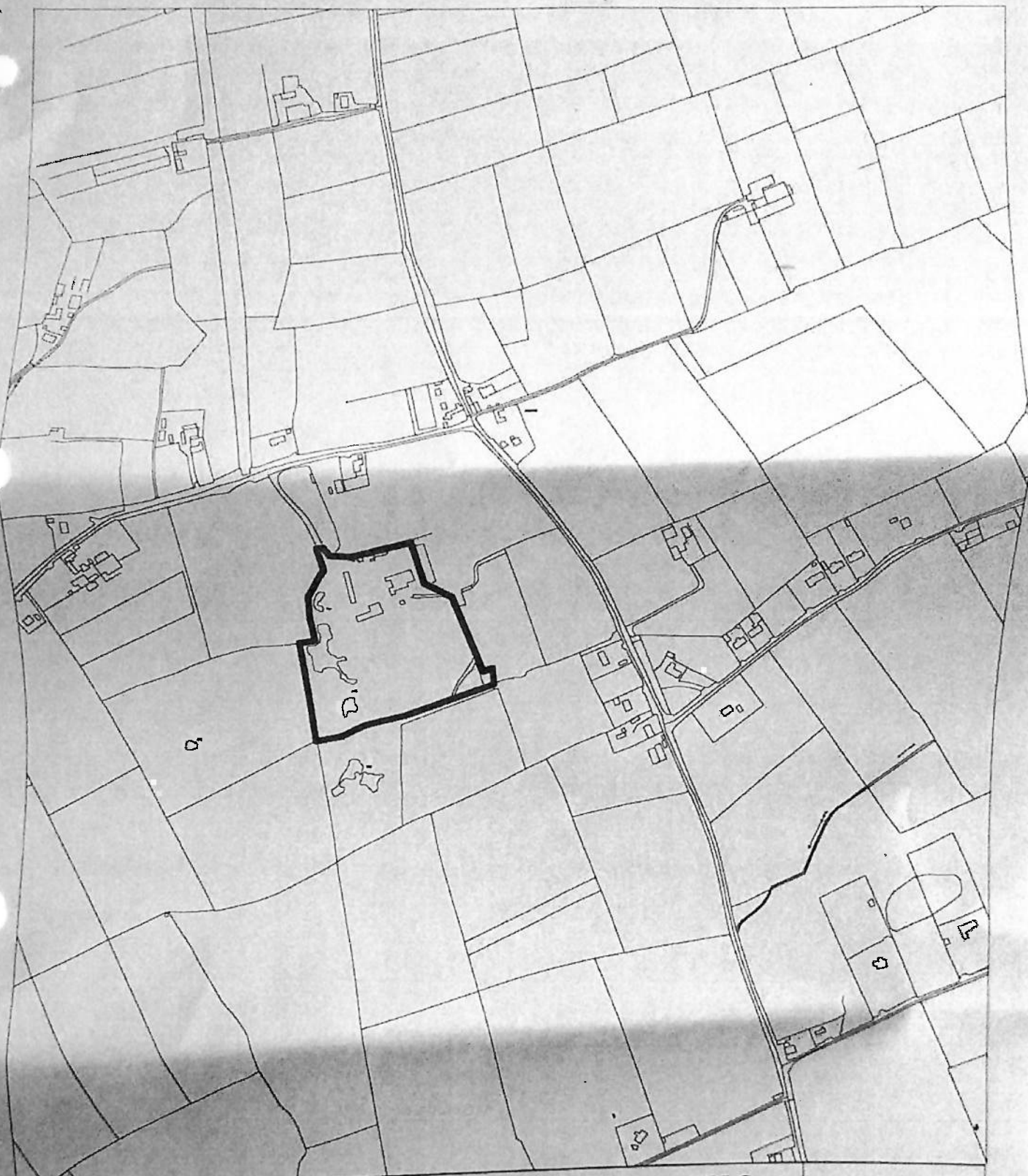
AND FURTHER TAKE NOTICE that in the event that the steps specified in this notice to be taken are not taken within the period specified herein that you may be guilty of an offence under the provisions of the above Act.

Dated this the 10th December, 2021

TO: Mr. Don O'Regan (Jnr)
Moate Road
Ballyragget
Co. Kilkenny

Denis Malone


Senior Planner



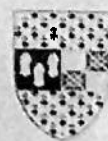
Kilkenny County Council Enforcement Ref:ENF 20-103 O.S. Map 4525-C

Owner/Occuiper : Mr Don (Jnr) O'Regan,
Owner Address: Moat Road, Ballyragget,
Co Kilkenny.

Site Address: Lismaine,
Co Kilkenny

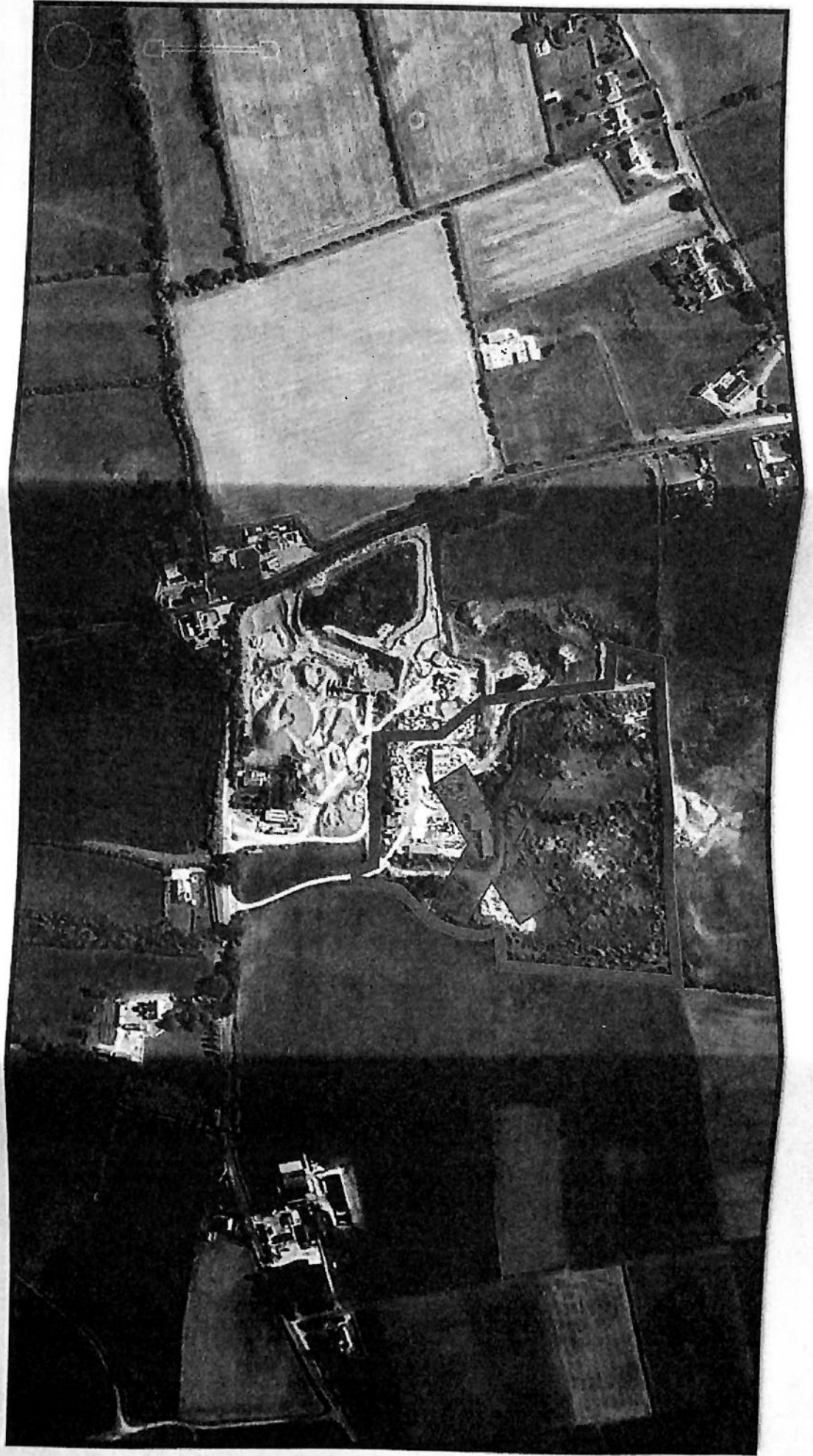
Date: 10/12/2021

© Ordnance Survey Ireland License No. 2019/27/CCMA/KilkennyCountyCouncil



Kilkenny County Council Enforcement Ref: ENF 20-103

Image Reference ENF20103_Map2



Poe Kiely Hogan Lanigan Solicitors LLP

Incorporating M J Crotty & Son

Mr Denis Malone
Planning Office,
Kilkenny County Council,
John Street,
Kilkenny
Email and Post

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Town Agents
Pearts
24-26 Upper Ormond Quay
Dublin 7

Our Reference
299978/0002/MOC/CW

Your Reference
ENF20103

DATE
17 December 2021

Re: Our client: Don O'Regan
Enforcement Notice dated 10th December 2021
Kilkenny County Council-v- Kilkenny Asphalt and others.

Dear Mr. Malone,

We refer to the abovementioned matters and note Kilkenny County Council (KCC) have purported to serve a further Enforcement Notice on our client dated 10 December 2021 ("the 10 December Enforcement Notice"), pursuant to Section 154 of the Planning and Development Act 2000 (as amended).

We also refer you to the Enforcement Notice dated the 5th of November 2021. That Enforcement Notice was vague and was issued without any prior notice or explanation and it was then withdrawn without explanation by letter dated the 25th of November 2021.

Notwithstanding the cavalier manner in which KCC has historically sought to issue numerous Enforcement Notices against our clients which has resulted in multiple Enforcement Notices being withdrawn, we should point out that the Enforcement Notices issued in November and December 2021 are being issued in the context of ongoing planning injunction proceedings, currently before the Circuit Court.

As matters stand, there is uncontested evidence before the Court that the works, that you now complain of, constitute exempted development and/or are not a new development requiring separate require planning permission.

In that regard, we would repeat what Mr. Malcolm Lane of P.D. Lane Associates, states in his Affidavit: -

Vat No. 1457918R

Partners

Michael Lanigan
Tim Kiely
Martin J. Crotty

John Hickey
Martin O'Carroll
Owen Sweeney

Consultant

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11 I have reviewed the enforcement notice issued by the Applicant on 5 November 2021 ("the Notice") in which it is alleged that an unauthorised excavation of land has taken place and I understand (although it is far from clear from the Notice) that this allegation relates to the recent construction of drainage lagoons at the quarry site. I have reviewed those works and would highlight that the carrying out of drainage works constitutes an exempted development as provided by the Planning and Development Regulations 2001-2021, Part 3, Article 6. Which provides as follows:

"Rural - Minor works and structures - CLASS 3"

Works relating to the construction or maintenance of any gully, drain, pond, trough, pit or culvert, the widening or deepening of watercourses, the removal of obstructions from watercourses and the making or repairing of embankments in connection with any of the foregoing works."

10 It is noteworthy that the foregoing Class of exempted development includes the construction or maintenance of any:

- (i) Gully;
- (ii) Drain,
- (iii) Pond;
- (iv) Trough;
- (v) Pit; or
- (vi) Culvert

11. In my opinion, this class of exempted development permits the works carried out by and on behalf of the Respondent to manage the flow of water, including the opening or enlargement of the lagoons.....

14. I say that the opening or enlargement of ponds/lagoons is part of the quarrying process. As the excavation of the quarry progresses, the location of a pond/lagoon may have to be altered or a new pond/lagoon constructed. This is ancillary to the quarry process.

15. I understand that the new ponds/lagoons constructed by the Respondents are constructed on their own lands which form part of the original (much larger) existing silt pond and in my opinion, these works, which are part of the ongoing Quarry operation, are not a new development requiring separate planning permission."

Whilst it appears that this position may not be accepted by KCC, it remains the uncontested position before the Circuit Court, and we would suggest you provide us with any independent expert evidence to the contrary.

Vat No. 1457918R

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In these circumstances, we believe that the 10 December Enforcement Notice ought to be withdrawn.

We look forward to hearing from you.

Yours sincerely,

Martin O'Carroll
POE KIELY HOGAN LANIGAN

Vat No. 1457918R

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DISCHARGE WATER QUALITY

May 2022

KILKENNY SAND & GRAVEL LTD.

Report Prepared For

Kilkenny Sand and Gravel Ltd.
Lismaine,
Jeninstown,
Co. Kilkenny

Prepared By

Conor McGrath
Senior Environmental Consultant

Our Reference

CM/21/12430W03

Date of Issue

18 May 2022


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AWN Consulting Limited
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Document History

Document Reference		Original Issue Date	
CM/21/12430W03		18 May 2022	
Revision Level	Revision Date	Description	Sections Affected

Record of Approval

Details	Written by
Signature	
Name	Conor McGrath
Title	Senior Environmental Consultant
Date	18 May 2022

CONTENTS**Page**

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2	SITE EVALUATION	1
2.1	Site Location	1
2.2	Drainage	1
3	WATER QUALITY	2
4	CONCLUSION	4

INSERTS

Insert 3.1	O'Regan Quarry Sump.....	2
Insert 3.2	O'Regan Discharge Point.....	3

TABLES

Table 3.1	Groundwater Quality	3
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APPENDICES

Appendix A	July 2021
Appendix B	September 2021
Appendix C	November 2021
Appendix D	March 2022

1 INTRODUCTION

Kilkenny Sand and Gravel Limited (KSGL) operate a quarry (hereafter referred to as the 'Quarry') in Lismaine, Jeninstown, Co. Kilkenny.

AWN Consulting Ltd. (AWN) were requested by Poe Kiely Hogan Lanagan, on behalf of KSGL, to carry out a water quality assessment of water discharging from the O'Regan Quarry.

This report has been prepared by Conor McGrath who is a Senior Environmental Consultant with AWN.

2 SITE EVALUATION

2.1 Site Location

The site is in Lismaine, Jeninstown, Co. Kilkenny approximately 5.7 km south of the town of Ballyragget. The site is accessed off L1818-19 which runs to the west of the N77.

2.2 Drainage

Surface water accumulates in the Quarry floor sump in the centre of the site. It is intermittently pumped to settlement ponds and then drains offsite. The pumping frequency is influenced by seasonal factors.

3 WATER QUALITY

AWN collected 2 No. water sample from the O'Regan Quarry Floor Sump on the following dates;

- 13th of July 2021.
- 30th of September 2021

AWN have collected water samples from the sump in the Quarry (Insert 3.1).

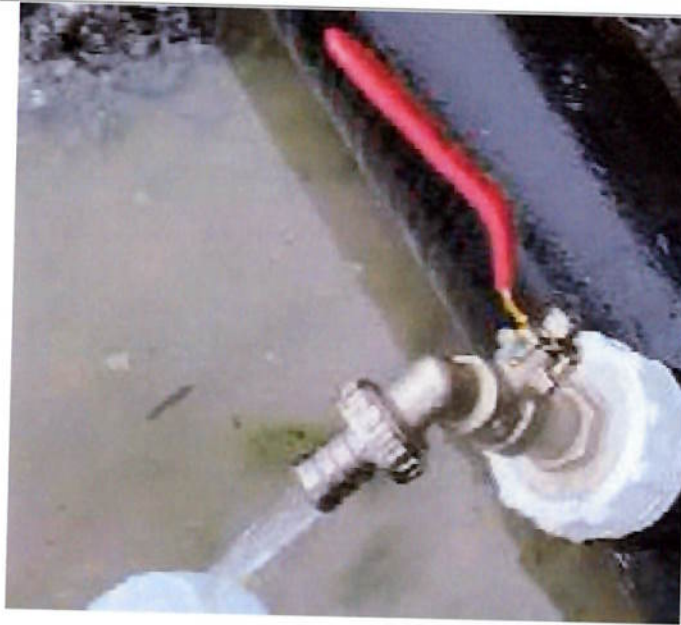


Insert 3.1 Quarry Sump

AWN collected 2 No. water sample from the O'Regan Discharge Point on the following dates;

- 19th of November 2021
- 2nd of March 2022

AWN collected a water sample from the O'Regan Discharge Point as shown on Insert 3.2.



Insert 3.2 O'Regan Sample Point

All samples were stored in laboratory prepared bottles and delivered to Element Laboratory, a UKAS accredited Laboratory, in the UK. The water test results show full compliance with the appropriate specifications. The Total Suspended Solids (TSS) concentration was 22mg/L which is below the Urban Wastewater Treatment Regulations, 2001 limit of 35mg/l. The full results are summarised on Table 3.1. The laboratory reports are shown in Appendix A.

Parameter	Units	O'Regan Quarry Floor Sump	O'Regan Quarry Floor Sump	O'Regan Discharge Point	O'Regan Discharge Point	Environmental Quality Standard
Laboratory Measurements		July 2021	September 2021	November 2021	March 2022	
Total Suspended Solids	mg/l	<10	<10	10	22	35

Table 3.1 TSS Concentrations

The laboratory reports for July 2021 are shown in Appendix A.

The laboratory reports for September 2021 are shown in Appendix B.

The laboratory reports for November 2021 are shown in Appendix C.

The laboratory reports for March 2022 are shown in Appendix D.

4 CONCLUSION

The water discharging from the O'Regan Quarry has a TSS concentrations which are consistently below the relevant Urban Wastewater Treatment Regulations limit of 35mg/l.

APPENDIX A

AWN Consulting
Tecpro Building
Clonshaugh Business & Technology Park
Dublin
Dublin 17
Ireland



Attention : Conor McGrath
Date : 20th July, 2021
Your reference :
Our reference : Test Report 21/10663 Batch 1
Location : KK Quarry
Date samples received : 14th July, 2021
Status : Final report
Issue : 1

One sample was received for analysis on 14th July, 2021 of which one was scheduled for analysis. Please find attached our Test Report which should be read with notes at the end of the report and should include all sections if reproduced. Interpretations and opinions are outside the scope of any accreditation, and all results relate only to samples supplied.
All analysis is carried out on as received samples and reported on a dry weight basis unless stated otherwise. Results are not surrogate corrected.

Authorised By:



Phil Sommerton BSc
Senior Project Manager

Please include all sections of this report if it is reproduced

Client Name: AWN Consulting
Reference:
Location: KK Quarry
Contact: Conor McGrath

EMT Job No.	Batch	Sample ID	Depth	EMT Sample No.	Analysis	Reason
No deviating sample report results for job 21/10663						

Please note that only samples that are deviating are mentioned in this report. If no samples are listed it is because none were deviating. Only analyses which are accredited are recorded as deviating if set criteria are not met.

NOTES TO ACCOMPANY ALL SCHEDULES AND REPORTS

EMT Job No.: 21/10663

SOILS

Please note we are only MCERTS accredited (UK soils only) for sand, loam and clay and any other matrix is outside our scope of accreditation.

Where an MCERTS report has been requested, you will be notified within 48 hours of any samples that have been identified as being outside our MCERTS scope. As validation has been performed on clay, sand and loam, only samples that are predominantly these matrices, or combinations of them will be within our MCERTS scope. If samples are not one of a combination of the above matrices they will not be marked as MCERTS accredited.

It is assumed that you have taken representative samples on site and require analysis on a representative subsample. Stones will generally be included unless we are requested to remove them.

All samples will be discarded one month after the date of reporting, unless we are instructed to the contrary.

If you have not already done so, please send us a purchase order if this is required by your company.

Where appropriate please make sure that our detection limits are suitable for your needs, if they are not, please notify us immediately.

All analysis is reported on a dry weight basis unless stated otherwise. Limits of detection for analyses carried out on as received samples are not moisture content corrected. Results are not surrogate corrected. Samples are dried at 35°C ±5°C unless otherwise stated. Moisture content for CEN Leachate tests are dried at 105°C ±5°C.

Where Mineral Oil or Fats, Oils and Grease is quoted, this refers to Total Aliphatics C10-C40.

Where a CEN 10:1 ZERO Headspace VOC test has been carried out, a 10:1 ratio of water to wet (as received) soil has been used.

% Asbestos in Asbestos Containing Materials (ACMs) is determined by reference to HSG 264 The Survey Guide - Appendix 2 : ACMs in buildings listed in order of ease of fibre release.

Sufficient amount of sample must be received to carry out the testing specified. Where an insufficient amount of sample has been received the testing may not meet the requirements of our accredited methods, as such accreditation may be removed.

Negative Neutralization Potential (NP) values are obtained when the volume of NaOH (0.1N) titrated (pH 8.3) is greater than the volume of HCl (1N) to reduce the pH of the sample to 2.0 - 2.5. Any negative NP values are corrected to 0.

The calculation of Pyrite content assumes that all oxidisable sulphides present in the sample are pyrite. This may not be the case. The calculation may be an overestimate when other sulphides such as Barite (Barium Sulphate) are present.

WATERS

Please note we are not a UK Drinking Water Inspectorate (DWI) Approved Laboratory.

ISO17025 accreditation applies to surface water and groundwater and usually one other matrix which is analysis specific, any other liquids are outside our scope of accreditation.

As surface waters require different sample preparation to groundwaters the laboratory must be informed of the water type when submitting samples.

Where Mineral Oil or Fats, Oils and Grease is quoted, this refers to Total Aliphatics C10-C40.

DEVIATING SAMPLES

All samples should be submitted to the laboratory in suitable containers with sufficient ice packs to sustain an appropriate temperature for the requested analysis. The temperature of sample receipt is recorded on the confirmation schedules in order that the client can make an informed decision as to whether testing should still be undertaken.

SURROGATES

Surrogate compounds are added during the preparation process to monitor recovery of analytes. However low recovery in soils is often due to peat, clay or other organic rich matrices. For waters this can be due to oxidants, surfactants, organic rich sediments or remediation fluids. Acceptable limits for most organic methods are 70 - 130% and for VOCs are 50 - 150%. When surrogate recoveries are outside the performance criteria but the associated AQC passes this is assumed to be due to matrix effect. Results are not surrogate corrected.

DILUTIONS

A dilution suffix indicates a dilution has been performed and the reported result takes this into account. No further calculation is required.

BLANKS

Where analytes have been found in the blank, the sample will be treated in accordance with our laboratory procedure for dealing with contaminated blanks.

NOTE

Data is only reported if the laboratory is confident that the data is a true reflection of the samples analysed. Data is only reported as accredited when all the requirements of our Quality System have been met. In certain circumstances where all the requirements of the Quality System have not been met, for instance if the associated AQC has failed, the reason is fully investigated and documented. The sample data is then evaluated alongside the other quality control checks performed during analysis to determine its suitability. Following this evaluation, provided the sample results have not been effected, the data is reported but accreditation is removed. It is a UKAS requirement for data not reported as accredited to be considered indicative only, but this does not mean the data is not valid.

Where possible, and if requested, samples will be re-extracted and a revised report issued with accredited results. Please do not hesitate to contact the laboratory if further details are required of the circumstances which have led to the removal of accreditation.

REPORTS FROM THE SOUTH AFRICA LABORATORY

Any method number not prefixed with SA has been undertaken in our UK laboratory unless reported as subcontracted.

Measurement Uncertainty

Measurement uncertainty defines the range of values that could reasonably be attributed to the measured quantity. This range of values has not been included within the reported results. Uncertainty expressed as a percentage can be provided upon request.

ABBREVIATIONS and ACRONYMS USED

#	ISO17025 (UKAS Ref No. 4225) accredited - UK.
SA	ISO17025 (SANAS Ref No.T0729) accredited - South Africa
B	Indicates analyte found in associated method blank.
DR	Dilution required.
M	MCERTS accredited.
NA	Not applicable
NAD	No Asbestos Detected.
ND	None Detected (usually refers to VOC and/SVOC TICs).
NDP	No Determination Possible
SS	Calibrated against a single substance
SV	Surrogate recovery outside performance criteria. This may be due to a matrix effect.
W	Results expressed on as received basis.
+	AQC failure, accreditation has been removed from this result, if appropriate, see 'Note' on previous page.
>>	Results above calibration range, the result should be considered the minimum value. The actual result could be significantly higher.
*	Analysis subcontracted to an Element Materials Technology approved laboratory.
AD	Samples are dried at 35°C ±5°C
CO	Suspected carry over
LOD/LOR	Limit of Detection (Limit of Reporting) in line with ISO 17025 and MCERTS
ME	Matrix Effect
NFD	No Fibres Detected
BS	AQC Sample
LB	Blank Sample
N	Client Sample
TB	Trip Blank Sample
OC	Outside Calibration Range

HWOL ACRONYMS AND OPERATORS USED

HS	Headspace Analysis.
EH	Extractable Hydrocarbons - i.e. everything extracted by the solvent.
CU	Clean-up - e.g. by florisil, silica gel.
1D	GC - Single coil gas chromatography.
Total	Aliphatics & Aromatics.
AL	Aliphatics only.
AR	Aromatics only.
2D	GC-GC - Double coil gas chromatography.
#1	EH_Total but with humics mathematically subtracted
#2	EU_Total but with fatty acids mathematically subtracted
-	Operator - underscore to separate acronyms (exception for +).
+	Operator to indicate cumulative e.g. EH+HS_Total or EH_CU+HS_Total
MS	Mass Spectrometry.

Element Materials Technology

Method Code Appendix

EMT Job No: 21/10663

Test Method No.	Description	Prep Method No. (if appropriate)	Description	ISO 17025 (UKAS/AS ANAS)	MCERTS (UK soils only)	Analysis done on As Received (AR) or Dried (AD)	Reported on dry weight basis
TM37	2540D:1999 22nd Edition, VSS: USEPA 1684 (Jan 2001), USEPA 180.4 (1971) and SMEWW 2340E:1999 22nd Edition. Gravimetric determination of Total Suspended Solids (TSS) and Volatile Suspended Solids (VSS). Sample is filtered through a 1.5um pore size glass fibre filter and the resulting residue is dried and weighed at 105°C for 24 hours.	PM0	No preparation is required.	Yes			
TM38	Soluble Ion analysis using Discrete Analyser. Modified US EPA methods: Chloride 325.2 (1976), Sulphate 375.4 (Rev.2 1993), o-Phosphate 365.2 (Rev.2 1993), TON 353.1 (Rev.2 1993), Nitrite 354.1 (1971), Hex Cr 7196A (1992), NH4+ 350.1 (Rev.2 1993) – All anions comparable to BS ISO 15923-1: 2013	PM0	No preparation is required.	Yes			
TM57	Modified US EPA Method 410.4, (Rev. 2.0 1993) Comparable with ISO 15705:2002. Chemical Oxygen Demand is determined by hot digestion with Potassium Dichromate and measured spectrophotometrically.	PM0	No preparation is required.	Yes			
TM58	APHA SMEWW 5210B:1999 22nd Edition. Compatible with ISO 5815:1989. Measurement of Biochemical Oxygen Demand. When cBOD (Carbonaceous BOD) is requested a nitrification inhibitor is added which prevents the oxidation of reduced forms of nitrogen, such as am	PM0	No preparation is required.				
TM58	APHA SMEWW 5210B:1999 22nd Edition. Compatible with ISO 5815:1989. Measurement of Biochemical Oxygen Demand. When cBOD (Carbonaceous BOD) is requested a nitrification inhibitor is added which prevents the oxidation of reduced forms of nitrogen, such as am	PM0	No preparation is required.	Yes			
TM60	TC/TOC analysis of Waters by High Temperature Combustion followed by NDIR detection. Based on the following modified standard methods: USEPA 9060A (2002), APHA SMEWW 5310B:1999 22nd Edition, ASTM D 7573, and USEPA 415.1.	PM0	No preparation is required.	Yes			
TM73	Modified US EPA methods 150.1 (1982) and 90450 Rev. 4 - 2004) and BS1377-3:1990. Determination of pH by Metrohm automated probe analyser.	PM0	No preparation is required.	Yes			
TM76	Modified US EPA method 120.1 (1982). Determination of Specific Conductance by Metrohm automated probe analyser.	PM0	No preparation is required.	Yes			

APPENDIX B

AWN Consulting
Tecpro Building
Clonsilla Business & Technology Park
Dublin
Dublin 17
Ireland

Attention : Conor McGrath
Date : 4th October, 2021
Your reference :
Our reference : Test Report 21/15344 Batch 1 Schedule A
Location :
Date samples received : 1st October, 2021
Status : Final report
Issue : 1

One sample was received for analysis on 1st October, 2021 and was scheduled for analysis. Please find attached our Test Report which should be read with notes at the end of the report and should include all sections if reproduced. Interpretations and opinions are outside the scope of any accreditation, and all results relate only to samples supplied.
All analysis is carried out on as received samples and reported on a dry weight basis unless stated otherwise. Results are not surrogate corrected.

Authorised By:



Bruce Leslie
Project Manager

Please include all sections of this report if it is reproduced

Element Materials Technology

Client Name: AWN Consulting
 Reference:
 Location:
 Contact: Conor McGrath
 EMT Job No: 21/15344

Report : Liquid

Liquids/products: V=40ml vial, G=glass bottle, P=plastic bottle
 H=H₂SO₄, Z=ZnAc, N=NaOH, HN=HN0₃

Please see attached notes for all abbreviations and acronyms

EMT Sample No.	1-7											
Sample ID	SUMP											
Depth												
COC No / misc												
Containers	V H P BOD											
Sample Date	30/08/2021 11:00											
Sample Type	Liquid											
Batch Number	1											
Date of Receipt	01/10/2021											
										LOD/LOR	Units	Method No.
Sulphate as SO ₄	79.8									<0.5	mg/l	TM38/PM0
Chloride	24.4									<0.3	mg/l	TM38/PM0
Nitrate as NO ₃	3.1									<0.2	mg/l	TM38/PM0
Ortho Phosphate as PO ₄	<0.06									<0.06	mg/l	TM38/PM0
Ammoniacal Nitrogen as N	0.03									<0.03	mg/l	TM38/PM0
COD (Settled)	<7									<7	mg/l	TM57/PM0
Dissolved Oxygen	10									<1	mg/l	TM58/PM0
Electrical Conductivity @25C	452									<2	uS/cm	TM76/PM0
pH	8.30									<0.01	pH units	TM73/PM0
Total Organic Carbon	<2									<2	mg/l	TM60/PM0
Total Suspended Solids	<10									<10	mg/l	TM37/PM0

Element Materials Technology

Notification of Deviating Samples

Client Name: AWN Consulting

Reference:

Location:

Contact: Conor McGrath

EMT Job No.	Batch	Sample ID	Depth	EMT Sample No.	Analysis	Reason
No deviating sample report results for job 21/15344						

Please note that only samples that are deviating are mentioned in this report. If no samples are listed it is because none were deviating. Only analyses which are accredited are recorded as deviating if set criteria are not met.

NOTES TO ACCOMPANY ALL SCHEDULES AND REPORTS

EMT Job No.: 21/15344

SOILS

Please note we are only MCERTS accredited (UK soils only) for sand, loam and clay and any other matrix is outside our scope of accreditation.

Where an MCERTS report has been requested, you will be notified within 48 hours of any samples that have been identified as being outside our MCERTS scope. As validation has been performed on clay, sand and loam, only samples that are predominantly these matrices, or combinations of them will be within our MCERTS scope. If samples are not one of a combination of the above matrices they will not be marked as MCERTS accredited.

It is assumed that you have taken representative samples on site and require analysis on a representative subsample. Stones will generally be included unless we are requested to remove them.

All samples will be discarded one month after the date of reporting, unless we are instructed to the contrary.

If you have not already done so, please send us a purchase order if this is required by your company.

Where appropriate please make sure that our detection limits are suitable for your needs, if they are not, please notify us immediately.

All analysis is reported on a dry weight basis unless stated otherwise. Limits of detection for analyses carried out on as received samples are not moisture content corrected. Results are not surrogate corrected. Samples are dried at $35^{\circ}\text{C} \pm 5^{\circ}\text{C}$ unless otherwise stated. Moisture content for CEN Leachate tests are dried at $105^{\circ}\text{C} \pm 5^{\circ}\text{C}$.

Where Mineral Oil or Fats, Oils and Grease is quoted, this refers to Total Aliphatics C10-C40.

Where a CEN 10:1 ZERO Headspace VOC test has been carried out, a 10:1 ratio of water to wet (as received) soil has been used.

% Asbestos in Asbestos Containing Materials (ACMs) is determined by reference to HSG 264 The Survey Guide - Appendix 2 : ACMs in buildings listed in order of ease of fibre release.

Sufficient amount of sample must be received to carry out the testing specified. Where an insufficient amount of sample has been received the testing may not meet the requirements of our accredited methods, as such accreditation may be removed.

Negative Neutralization Potential (NP) values are obtained when the volume of NaOH (0.1N) titrated (pH 8.3) is greater than the volume of HCl (1N) to reduce the pH of the sample to 2.0 - 2.5. Any negative NP values are corrected to 0.

The calculation of Pyrite content assumes that all oxidisable sulphides present in the sample are pyrite. This may not be the case. The calculation may be an overestimate when other sulphides such as Barite (Barium Sulphate) are present.

WATERS

Please note we are not a UK Drinking Water Inspectorate (DWI) Approved Laboratory.

ISO17025 accreditation applies to surface water and groundwater and usually one other matrix which is analysis specific, any other liquids are outside our scope of accreditation.

As surface waters require different sample preparation to groundwaters the laboratory must be informed of the water type when submitting samples.

Where Mineral Oil or Fats, Oils and Grease is quoted, this refers to Total Aliphatics C10-C40.

DEVIATING SAMPLES

All samples should be submitted to the laboratory in suitable containers with sufficient ice packs to sustain an appropriate temperature for the requested analysis. The temperature of sample receipt is recorded on the confirmation schedules in order that the client can make an informed decision as to whether testing should still be undertaken.

SURROGATES

Surrogate compounds are added during the preparation process to monitor recovery of analytes. However low recovery in soils is often due to peat, clay or other organic rich matrices. For waters this can be due to oxidants, surfactants, organic rich sediments or remediation fluids. Acceptable limits for most organic methods are 70 - 130% and for VOCs are 50 - 150%. When surrogate recoveries are outside the performance criteria but the associated AQC passes this is assumed to be due to matrix effect. Results are not surrogate corrected.

DILUTIONS

A dilution suffix indicates a dilution has been performed and the reported result takes this into account. No further calculation is required.

BLANKS

Where analytes have been found in the blank, the sample will be treated in accordance with our laboratory procedure for dealing with contaminated blanks.

NOTE

Data is only reported if the laboratory is confident that the data is a true reflection of the samples analysed. Data is only reported as accredited when all the requirements of our Quality System have been met. In certain circumstances where all the requirements of the Quality System have not been met, for instance if the associated AQC has failed, the reason is fully investigated and documented. The sample data is then evaluated alongside the other quality control checks performed during analysis to determine its suitability. Following this evaluation, provided the sample results have not been effected, the data is reported but accreditation is removed. It is a UKAS requirement for data not reported as accredited to be considered indicative only, but this does not mean the data is not valid.

Where possible, and if requested, samples will be re-extracted and a revised report issued with accredited results. Please do not hesitate to contact the laboratory if further details are required of the circumstances which have led to the removal of accreditation.

REPORTS FROM THE SOUTH AFRICA LABORATORY

Any method number not prefixed with SA has been undertaken in our UK laboratory unless reported as subcontracted.

Measurement Uncertainty

Measurement uncertainty defines the range of values that could reasonably be attributed to the measured quantity. This range of values has not been included within the reported results. Uncertainty expressed as a percentage can be provided upon request.

ABBREVIATIONS and ACRONYMS USED

#	ISO17025 (UKAS Ref No. 4225) accredited - UK.
SA	ISO17025 (SANAS Ref No.T0729) accredited - South Africa
B	Indicates analyte found in associated method blank.
DR	Dilution required.
M	MCERTS accredited.
NA	Not applicable
NAD	No Asbestos Detected.
ND	None Detected (usually refers to VOC and/SVOC TICs).
NDP	No Determination Possible
SS	Calibrated against a single substance
SV	Surrogate recovery outside performance criteria. This may be due to a matrix effect.
W	Results expressed on as received basis.
+	AQC failure, accreditation has been removed from this result, if appropriate, see 'Note' on previous page.
>>	Results above calibration range, the result should be considered the minimum value. The actual result could be significantly higher.
*	Analysis subcontracted to an Element Materials Technology approved laboratory.
AD	Samples are dried at 35°C ±5°C
CO	Suspected carry over
LOD/LOR	Limit of Detection (Limit of Reporting) in line with ISO 17025 and MCERTS
ME	Matrix Effect
NFD	No Fibres Detected
BS	AQC Sample
LB	Blank Sample
N	Client Sample
TB	Trip Blank Sample
OC	Outside Calibration Range

HWOL ACRONYMS AND OPERATORS USED

HS	Headspace Analysis.
EH	Extractable Hydrocarbons - i.e. everything extracted by the solvent.
CU	Clean-up - e.g. by florisil, silica gel.
1D	GC - Single coil gas chromatography.
Total	Aliphatics & Aromatics.
AL	Aliphatics only.
AR	Aromatics only.
2D	GC-GC - Double coil gas chromatography.
#1	EH_Total but with humics mathematically subtracted
#2	EU_Total but with fatty acids mathematically subtracted
_	Operator - underscore to separate acronyms (exception for +).
+	Operator to indicate cumulative e.g. EH+HS_Total or EH_CU+HS_Total
MS	Mass Spectrometry.

Element Materials Technology

EMT Job No: 21/15344

Method Code Appendix

Test Method No.	Description	Prep Method No. (if appropriate)	Description	ISO 17025 (UKAS:IS ANAS)	MCERTS (UK soils only)	Analysis done on As Received (AR) or Dried (AD)	Reported on dry weight basis
TM37	2540D:1999 22nd Edition; VSS: USEPA 160.4 (1971) and SMEWW 2540E:1999 22nd Edition. Gravimetric determination of Total Suspended Solids (TSS) and Volatile Suspended Solids (VSS). Sample is filtered through a 1.5um pore size glass fibre filter and the resulting residue is dried and weighed at 105°C for 16 hours.	PM0	No preparation is required.				
TM38	Soluble Ion analysis using Discrete Analyser. Modified US EPA methods: Chloride 325.2 (1976), Sulphate 375.4 (Rev.2 1993), o-Phosphate 365.2 (Rev.2 1993), TON 353.1 (Rev.2 1993), Nitrite 354.1 (1971), Hex Cr 7156A (1992), NH4+ 350.1 (Rev.2 1993) – All anions comparable to BS ISO 15923-1:2013	PM0	No preparation is required.				
TM57	Modified US EPA Method 410.4. (Rev. 2.0 1993) Comparable with ISO 15705:2002. Chemical Oxygen Demand is determined by hot digestion with Potassium Dichromate and measured spectrophotometrically.	PM0	No preparation is required.				
TM58	APHA SMEWW 5210B:1999 22nd Edition. Comparable with ISO 5815:1989. Measurement of Biochemical Oxygen Demand. When cBOD (Carbonaceous BOD) is requested a nitrification inhibitor is added which prevents the oxidation of reduced forms of nitrogen, such as am	PM0	No preparation is required.				
TM60	TC/TOC analysis of Waters by High Temperature Combustion followed by NDIR detection. Based on the following modified standard methods: USEPA 9060A (2002), APHA SMEWW 5310B:1999 22nd Edition, ASTM D 7573, and USEPA 415.1.	PM0	No preparation is required.				
TM73	Modified US EPA methods 150.1 (1982) and 9045D Rev. 4 - 2004) and BS1377-3:1990. Determination of pH by Metrohm automated probe analyser.	PM0	No preparation is required.				
TM76	Modified US EPA method 120.1 (1982). Determination of Specific Conductance by Metrohm automated probe analyser.	PM0	No preparation is required.				

APPENDIX C

AWN Consulting
Tecpro Building
Clonsillaugh Business & Technology Park
Dublin
Dublin 17
Ireland



Attention : Conor McGrath
Date : 29th November, 2021
Your reference : KK
Our reference : Test Report 21/18459 Batch 1
Location : Kilkenny Quarry
Date samples received : 22nd November, 2021
Status : Final Report
Issue : 1

One sample was received for analysis on 22nd November, 2021 and was scheduled for analysis. Please find attached our Test Report which should be read with notes at the end of the report and should include all sections if reproduced. Interpretations and opinions are outside the scope of any accreditation, and all results relate only to samples supplied.
All analysis is carried out on as received samples and reported on a dry weight basis unless stated otherwise. Results are not surrogate corrected.

Authorised By:



Phil Sommerton BSc
Senior Project Manager

Please include all sections of this report if it is reproduced

Client Name: AWN Consulting
Reference: KK
Location: Kilkenny Quarry
Contact: Conor McGrath
EMT Job No: 21/18459

Report : Liquid

Liquids/products: V=40ml vial, G=glass bottle, P=plastic bottle
H=H₂SO₄, Z=ZnAc, N=NaOH, HN=HNO₃

Please see attached notes for all abbreviations and acronyms

Element Materials Technology

Notification of Deviating Samples

Client Name: AVN Consulting
Reference: KK
Location: Kilkenny Quarry
Contact: Conor McGrath

EMT Job No.	Batch	Sample ID	Depth	EMT Sample No.	Analysis	Reason
No deviating sample report results for job 21/18459						

Please note that only samples that are deviating are mentioned in this report. If no samples are listed it is because none were deviating. Only analyses which are accredited are recorded as deviating if set criteria are not met.

NOTES TO ACCOMPANY ALL SCHEDULES AND REPORTS

EMT Job No.: 21/18459

SOILS

Please note we are only MCERTS accredited (UK soils only) for sand, loam and clay and any other matrix is outside our scope of accreditation.

Where an MCERTS report has been requested, you will be notified within 48 hours of any samples that have been identified as being outside our MCERTS scope. As validation has been performed on clay, sand and loam, only samples that are predominantly these matrices, or combinations of them will be within our MCERTS scope. If samples are not one of a combination of the above matrices they will not be marked as MCERTS accredited.

It is assumed that you have taken representative samples on site and require analysis on a representative subsample. Stones will generally be included unless we are requested to remove them.

All samples will be discarded one month after the date of reporting, unless we are instructed to the contrary.

If you have not already done so, please send us a purchase order if this is required by your company.

Where appropriate please make sure that our detection limits are suitable for your needs, if they are not, please notify us immediately.

All analysis is reported on a dry weight basis unless stated otherwise. Limits of detection for analyses carried out on as received samples are not moisture content corrected. Results are not surrogate corrected. Samples are dried at 35°C ±5°C unless otherwise stated. Moisture content for CEN Leachate tests are dried at 105°C ±5°C.

Where Mineral Oil or Fats, Oils and Grease is quoted, this refers to Total Aliphatics C10-C40.

Where a CEN 10:1 ZERO Headspace VOC test has been carried out, a 10:1 ratio of water to wet (as received) soil has been used.

% Asbestos in Asbestos Containing Materials (ACMs) is determined by reference to HSG 264 The Survey Guide - Appendix 2 : ACMs in buildings listed in order of ease of fibre release.

Sufficient amount of sample must be received to carry out the testing specified. Where an insufficient amount of sample has been received the testing may not meet the requirements of our accredited methods, as such accreditation may be removed.

Negative Neutralization Potential (NP) values are obtained when the volume of NaOH (0.1N) titrated (pH 8.3) is greater than the volume of HCl (1N) to reduce the pH of the sample to 2.0 - 2.5. Any negative NP values are corrected to 0.

The calculation of Pyrite content assumes that all oxidisable sulphides present in the sample are pyrite. This may not be the case. The calculation may be an overestimate when other sulphides such as Barite (Barium Sulphate) are present.

WATERS

Please note we are not a UK Drinking Water Inspectorate (DWI) Approved Laboratory.

ISO17025 accreditation applies to surface water and groundwater and usually one other matrix which is analysis specific, any other liquids are outside our scope of accreditation.

As surface waters require different sample preparation to groundwaters the laboratory must be informed of the water type when submitting samples.

Where Mineral Oil or Fats, Oils and Grease is quoted, this refers to Total Aliphatics C10-C40.

DEVIATING SAMPLES

All samples should be submitted to the laboratory in suitable containers with sufficient ice packs to sustain an appropriate temperature for the requested analysis. The temperature of sample receipt is recorded on the confirmation schedules in order that the client can make an informed decision as to whether testing should still be undertaken.

SURROGATES

Surrogate compounds are added during the preparation process to monitor recovery of analytes. However low recovery in soils is often due to peat, clay or other organic rich matrices. For waters this can be due to oxidants, surfactants, organic rich sediments or remediation fluids. Acceptable limits for most organic methods are 70 - 130% and for VOCs are 50 - 150%. When surrogate recoveries are outside the performance criteria but the associated AQC passes this is assumed to be due to matrix effect. Results are not surrogate corrected.

DILUTIONS

A dilution suffix indicates a dilution has been performed and the reported result takes this into account. No further calculation is required.

BLANKS

Where analytes have been found in the blank, the sample will be treated in accordance with our laboratory procedure for dealing with contaminated blanks.

NOTE

Data is only reported if the laboratory is confident that the data is a true reflection of the samples analysed. Data is only reported as accredited when all the requirements of our Quality System have been met. In certain circumstances where all the requirements of the Quality System have not been met, for instance if the associated AQC has failed, the reason is fully investigated and documented. The sample data is then evaluated alongside the other quality control checks performed during analysis to determine its suitability. Following this evaluation, provided the sample results have not been effected, the data is reported but accreditation is removed. It is a UKAS requirement for data not reported as accredited to be considered indicative only, but this does not mean the data is not valid.

Where possible, and if requested, samples will be re-extracted and a revised report issued with accredited results. Please do not hesitate to contact the laboratory if further details are required of the circumstances which have led to the removal of accreditation.

REPORTS FROM THE SOUTH AFRICA LABORATORY

Any method number not prefixed with SA has been undertaken in our UK laboratory unless reported as subcontracted.

Measurement Uncertainty

Measurement uncertainty defines the range of values that could reasonably be attributed to the measured quantity. This range of values has not been included within the reported results. Uncertainty expressed as a percentage can be provided upon request.

ABBREVIATIONS and ACRONYMS USED

#	ISO17025 (UKAS Ref No. 4225) accredited - UK.
SA	ISO17025 (SANAS Ref No.T0729) accredited - South Africa
B	Indicates analyte found in associated method blank.
DR	Dilution required.
M	MCERTS accredited.
NA	Not applicable
NAD	No Asbestos Detected.
ND	None Detected (usually refers to VOC and/SVOC TICs).
NDP	No Determination Possible
SS	Calibrated against a single substance
SV	Surrogate recovery outside performance criteria. This may be due to a matrix effect.
W	Results expressed on as received basis.
+	AQC failure, accreditation has been removed from this result, if appropriate, see 'Note' on previous page.
>>	Results above calibration range, the result should be considered the minimum value. The actual result could be significantly higher.
*	Analysis subcontracted to an Element Materials Technology approved laboratory.
AD	Samples are dried at 35°C ±5°C
CO	Suspected carry over
LOD/LOR	Limit of Detection (Limit of Reporting) in line with ISO 17025 and MCERTS
ME	Matrix Effect
NFD	No Fibres Detected
BS	AQC Sample
LB	Blank Sample
N	Client Sample
TB	Trip Blank Sample
OC	Outside Calibration Range

HWOL ACRONYMS AND OPERATORS USED

HS	Headspace Analysis.
EH	Extractable Hydrocarbons - i.e. everything extracted by the solvent.
CU	Clean-up - e.g. by florisil, silica gel.
1D	GC - Single coil gas chromatography.
Total	Aliphatics & Aromatics.
AL	Aliphatics only.
AR	Aromatics only.
2D	GC-GC - Double coil gas chromatography.
#1	EH_Total but with humics mathematically subtracted
#2	EU_Total but with fatty acids mathematically subtracted
-	Operator - underscore to separate acronyms (exception for +).
+	Operator to indicate cumulative e.g. EH+HS_Total or EH_CU+HS_Total
MS	Mass Spectrometry.

EMT Job No: 21/18459

Test Method No.	Description	Prep Method No. (if appropriate)	Description	ISO 17025 (UKAS/ANAS)	MCERTS (UK soils only)	Analysis done on As Received (AR) or Dried (AD)	Reported on dry weight basis
TM37	2540D:1999 22nd Edition; VSS: USEPA 1684 (Jan 2001), USEPA 160.4 (1971) and SWEWW 2540E:1999 22nd Edition. Gravimetric determination of Total Suspended Solids (TSS) and Volatile Suspended Solids (VSS). Sample is filtered through a 1.5µm pore size glass fibre filter and the resulting residue is dried and weighed at 105°C for TSS and 550°C for VSS.	PM0	No preparation is required.	Yes			
TM57	Modified US EPA Method 410.4, (Rev. 2.0 1993) Comparable with ISO 15705:2002. Chemical Oxygen Demand is determined by hot digestion with Potassium Dichromate and measured spectrophotometrically.	PM0	No preparation is required.	Yes			
TM58	APHA SWEWW 5210B:1999 22nd Edition. Comparable with ISO 5815:1989. Measurement of Biochemical Oxygen Demand. When cBOD (Carbonaceous BOD) is requested a nitrification inhibitor is added which prevents the oxidation of reduced forms of nitrogen, such as am	PM0	No preparation is required.	Yes			

APPENDIX D

AWN Consulting
Tecpro Building
Clonshaugh Business & Technology Park
Dublin
Dublin 17
Ireland

Attention : Conor McGrath
Date : 14th March, 2022
Your reference :
Our reference : Test Report 22/3473 Batch 1
Location : Kilkenny Quarry
Date samples received : 3rd March, 2022
Status : Final Report
Issue : 1

One sample was received for analysis on 3rd March, 2022 and was scheduled for analysis. Please find attached our Test Report which should be read with notes at the end of the report and should include all sections if reproduced. Interpretations and opinions are outside the scope of any accreditation, and all results relate only to samples supplied.
All analysis is carried out on as received samples and reported on a dry weight basis unless stated otherwise. Results are not surrogate corrected.

Authorised By:



Bruce Leslie
Project Manager

Please include all sections of this report if it is reproduced

Notification of Deviating Samples

Contact: Conor McGrath

Please note that only samples that are deviating are mentioned in this report. If no samples are listed it is because none were deviating. Only analyses which are accredited are recorded as deviating if set criteria are not met.

NOTES TO ACCOMPANY ALL SCHEDULES AND REPORTS

EMT Job No.: 22/3473

SOILS and ASH

Please note we are only MCERTS accredited (UK soils only) for sand, loam and clay and any other matrix is outside our scope of accreditation.

Where an MCERTS report has been requested, you will be notified within 48 hours of any samples that have been identified as being outside our MCERTS scope. As validation has been performed on clay, sand and loam, only samples that are predominantly these matrices, or combinations of them will be within our MCERTS scope. If samples are not one of a combination of the above matrices they will not be marked as MCERTS accredited.

It is assumed that you have taken representative samples on site and require analysis on a representative subsample. Stones will generally be included unless we are requested to remove them.

All samples will be discarded one month after the date of reporting, unless we are instructed to the contrary. Asbestos samples are retained for 6 months.

If you have not already done so, please send us a purchase order if this is required by your company.

Where appropriate please make sure that our detection limits are suitable for your needs, if they are not, please notify us immediately.

All analysis is reported on a dry weight basis unless stated otherwise. Limits of detection for analyses carried out on as received samples are not moisture content corrected. Results are not surrogate corrected. Samples are dried at 35°C ±5°C unless otherwise stated. Moisture content for CEN Leachate tests are dried at 105°C ±5°C. Ash samples are dried at 37°C ±5°C.

Where Mineral Oil or Fats, Oils and Grease is quoted, this refers to Total Aliphatics C10-C40.

Where a CEN 10:1 ZERO Headspace VOC test has been carried out, a 10:1 ratio of water to wet (as received) soil has been used.

% Asbestos in Asbestos Containing Materials (ACMs) is determined by reference to HSG 264 The Survey Guide - Appendix 2 : ACMs in buildings listed in order of ease of fibre release.

Sufficient amount of sample must be received to carry out the testing specified. Where an insufficient amount of sample has been received the testing may not meet the requirements of our accredited methods, as such accreditation may be removed.

Negative Neutralization Potential (NP) values are obtained when the volume of NaOH (0.1N) titrated (pH 8.3) is greater than the volume of HCl (1N) to reduce the pH of the sample to 2.0 - 2.5. Any negative NP values are corrected to 0.

The calculation of Pyrite content assumes that all oxidisable sulphides present in the sample are pyrite. This may not be the case. The calculation may be an overestimate when other sulphides such as Barite (Barium Sulphate) are present.

WATERS

Please note we are not a UK Drinking Water Inspectorate (DWI) Approved Laboratory.

ISO17025 accreditation applies to surface water and groundwater and usually one other matrix which is analysis specific, any other liquids are outside our scope of accreditation.

As surface waters require different sample preparation to groundwaters the laboratory must be informed of the water type when submitting samples.

Where Mineral Oil or Fats, Oils and Grease is quoted, this refers to Total Aliphatics C10-C40.

STACK EMISSIONS

Where an MCERTS report has been requested, you will be notified within 48 hours of any samples that have been identified as being outside our MCERTS scope. As validation for Dioxins and Furans and Dioxin like PCBs has been performed on XAD-2 Resin, only samples which use this resin will be within our MCERTS scope.

Where appropriate please make sure that our detection limits are suitable for your needs, if they are not, please notify us immediately.

DEVIATING SAMPLES

All samples should be submitted to the laboratory in suitable containers with sufficient ice packs to sustain an appropriate temperature for the requested analysis. The temperature of sample receipt is recorded on the confirmation schedules in order that the client can make an informed decision as to whether testing should still be undertaken.

SURROGATES

Surrogate compounds are added during the preparation process to monitor recovery of analytes. However low recovery in soils is often due to peat, clay or other organic rich matrices. For waters this can be due to oxidants, surfactants, organic rich sediments or remediation fluids. Acceptable limits for most organic methods are 70 - 130% and for VOCs are 50 - 150%. When surrogate recoveries are outside the performance criteria but the associated AQC passes this is assumed to be due to matrix effect. Results are not surrogate corrected.

DILUTIONS

A dilution suffix indicates a dilution has been performed and the reported result takes this into account. No further calculation is required.

BLANKS

Where analytes have been found in the blank, the sample will be treated in accordance with our laboratory procedure for dealing with contaminated blanks.

NOTE

Data is only reported if the laboratory is confident that the data is a true reflection of the samples analysed. Data is only reported as accredited when all the requirements of our Quality System have been met. In certain circumstances where all the requirements of the Quality System have not been met, for instance if the associated AQC has failed, the reason is fully investigated and documented. The sample data is then evaluated alongside the other quality control checks performed during analysis to determine its suitability. Following this evaluation, provided the sample results have not been effected, the data is reported but accreditation is removed. It is a UKAS requirement for data not reported as accredited to be considered indicative only, but this does not mean the data is not valid.

Where possible, and if requested, samples will be re-extracted and a revised report issued with accredited results. Please do not hesitate to contact the laboratory if further details are required of the circumstances which have led to the removal of accreditation.

Laboratory records are kept for a period of no less than 6 years.

REPORTS FROM THE SOUTH AFRICA LABORATORY

Any method number not prefixed with SA has been undertaken in our UK laboratory unless reported as subcontracted.

Measurement Uncertainty

Measurement uncertainty defines the range of values that could reasonably be attributed to the measured quantity. This range of values has not been included within the reported results. Uncertainty expressed as a percentage can be provided upon request.

Customer Provided Information

Sample ID and depth is information provided by the customer.

ABBREVIATIONS and ACRONYMS USED

#	ISO17025 (UKAS Ref No. 4225) accredited - UK.
SA	ISO17025 (SANAS Ref No.T0729) accredited - South Africa
B	Indicates analyte found in associated method blank.
DR	Dilution required.
M	MCERTS accredited.
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NAD	No Asbestos Detected.
ND	None Detected (usually refers to VOC and/SVOC TICs).
NDP	No Determination Possible
SS	Calibrated against a single substance
SV	Surrogate recovery outside performance criteria. This may be due to a matrix effect.
W	Results expressed on as received basis.
+	AQC failure, accreditation has been removed from this result, if appropriate, see 'Note' on previous page.
>>	Results above calibration range, the result should be considered the minimum value. The actual result could be significantly higher.
*	Analysis subcontracted to an Element Materials Technology approved laboratory.
AD	Samples are dried at 35°C ±5°C
CO	Suspected carry over
LOD/LOR	Limit of Detection (Limit of Reporting) in line with ISO 17025 and MCERTS
ME	Matrix Effect
NFD	No Fibres Detected
BS	AQC Sample
LB	Blank Sample
N	Client Sample
TB	Trip Blank Sample
OC	Outside Calibration Range

HWOL ACRONYMS AND OPERATORS USED

HS	Headspace Analysis.
EH	Extractable Hydrocarbons - i.e. everything extracted by the solvent.
CU	Clean-up - e.g. by florisil, silica gel.
1D	GC - Single coil gas chromatography.
Total	Aliphatics & Aromatics.
AL	Aliphatics only.
AR	Aromatics only.
2D	GC-GC - Double coil gas chromatography.
#1	EH_Total but with humics mathematically subtracted
#2	EU_Total but with fatty acids mathematically subtracted
-	Operator - underscore to separate acronyms (exception for +).
+	Operator to indicate cumulative e.g. EH+HS_Total or EH_CU+HS_Total
MS	Mass Spectrometry.

Method Code Appendix

QF-PM 3.1.10 v14

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Test Method No.	Description	Prep Method No. (if appropriate)	Description	ISO 17025 (UKAS ANAS)	MCERTS (UK soils only)	Analysis done on As Received (AR) or Dried (AD)	Reported on dry weight basis
TM37	Modified Methods TM37, USEPA 1684 (Jan 2001), USEPA 160.4 (1971) and SMEWW 2540E:1999 22nd Edition. Gravimetric determination of Total Suspended Solids (TSS) and Volatile Suspended Solids (VSS). Sample is filtered through a 1.5um pore size glass fibre filter and the resulting residue is dried and weighed at 105°C for TSS and 550°C for VSS.	PMD	No preparation is required.				
TM57	Modified US EPA Method 410.4, (Rev. 2.0-1993) Comparable with ISO 15705:2002. Chemical Oxygen Demand is determined by hot digestion with Potassium Dichromate and measured spectrophotometrically.	PMD	No preparation is required.				
TM58	APHA SMEWW 5210B:1998 22nd Edition. Compatible with ISO 5815:1989. Measurement of Biochemical Oxygen Demand. When cBOD (Carbonaceous BOD) is requested a nitrification inhibitor is added which prevents the oxidation of reduced forms of nitrogen, such as am	PMD	No preparation is required.				

Mary Ledwith

From: Caitriona Holland
Sent: Friday 20 May 2022 15:08
To: Mary Ledwith
Subject: FW: ABP-313122-22[299978/0002] [Donal ORegan] [Kilkenny County Council -v- Kilkenny Asphalt Roofing Limited and Donal ORegan Kilkenny Circuit Court Injunctive Proceedings]
Attachments: Letter to ABP_ omitted enclosure..pdf; Osi Photographs.pdf

Hi Mary,

I believe this was forwarded to us in error.

Kind regards,

Caitriona

From: Martin O'Carroll <mocarroll@pkhl.ie>
Sent: Friday, May 20, 2022 2:54 PM
To: Bord <bord@pleanala.ie>
Subject: ABP-313122-22[299978/0002] [Donal ORegan] [Kilkenny County Council -v- Kilkenny Asphalt Roofing Limited and Donal ORegan Kilkenny Circuit Court Injunctive Proceedings]

Your reference: ABP-313122-22

Dear Sirs,

Please see attached.

Regards,

Martin O'Carroll
Partner

Phone: +353 (0)56 7721063
Fax: +353 (0)56 7765231
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Leinster Law Firm
Of The Year 2019

Please be alert to the activities of online fraudsters. If you receive a request via email, whether purporting to be from us or not, to make a change to any of your account details and / or to transfer any funds, do not respond to the email and contact us immediately.