Quarry Planning

Impact of ECJ C-215/06, Amending Legislation & Implementation

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***Section** 261 Outcomes*

- ICF expected 600 registrations, 1,550+ registered (1,400 validated and c.200 later failed to complete all requirements); ICF (70-75% of output) had just 250 registrations
- On straw poll, 70% claimed pre ’63 with 80-100 sent for Continuity of Use Permission (S261(7)) on basis of likely significant impact; few had bona fides or abandonment challenged
- 12% claimed previous permission, dealt with under S261(6)(a)(ii)
- 18% (250+ sites) claimed post ’64 without previous permission, some in error, some in knowledge of no provision to deal with this
- Large numbers of small but active sites failed to register despite having an obligation to do so; S261A has had to deal with these in addition to registered and “modern permission” sites
- In totality, S261A required all quarry sites, including old abandoned ones, to be reviewed and provide outcomes on – this brings the number of files to at least **3,000 sites**

EIA & Habitats Regulations Amendments

Part Conclusion & Tidying Process begun under S261 (but different focus and less discretion)

- **Strengthening Existing S261**
- **New LA Assessment Under added S261A (the teeth missing from original S261)**
- **New Section 177 Substitute Consent Process**

"7 Year Rule" Changes

- 2010 - Section 157(4)(aa) added – 7 year rule holds for quarry development prior to commencement of this legislation; effectively a "line in sand" on 7 year status
- 2010 - Section 160(6)(aa) added re making of orders in line with "line in sand" timeframe; no retrospective removal of 7 year status by this route – other route used to get around this – S261A/S177
- Obligation on PAs to initiate S154 following direction from ABP – ability to close working faces by restoration
- 2011 – Environment (Misc. Provisions) Act – allows for court orders against any quarry at any time – head on removal on 7 year rule; presumably third party would have to exhaust the route of planning authority enforcement first?

S261A – Assessment Process

PAs find that one or more assessments, EIA or NIA, possibly required but not done

- **Registered Pre 63 sites with unauthorised ext. directed to apply for S177E substitute consent**
- **S34 Authorised sites, registered if applicable, with unauthorised ext. directed to apply for S177E substitute consent**
- **Post 64 sites without planning, with/without registration, and unregistered sites obliged to register notified as unauthorised**
- **Sites registered as Pre 63 or S34 sites operating within authorised areas -NO FURTHER ACTION (most ICF sites)**

General Application Concerns 1 of 2

- ICF opinion that EIA/NIA only required where consent decision is required; so extraction outside authorised areas impacted by this legislation – position shared with DEHLG and AG's office - most long established sites fall into the "No further action" bracket; if a consent is not needed, then S261A does not apply
- S261 outturn tarnished primarily through non-implementation by one PA only but much good work done too as basis for current review – steps required in S261 have appication in S261A regarding presence of significant environmental impacts
- Planning authorities resources and knowledge in the area
- Abdication of responsibility by unnecessary reliance of referral process
- ABP resources to turn around referrals quickly and indeed to process S177E applications quickly but fairly – includes significant input from PAs in assisting this process

General Application Concerns

- Absolute need for PAs to accept parallel S34 applications where required from S261A(3) applicants to avoid recurrence/closures
- Care required in screening for need for NIA (AA) – AA not automatic by any stretch within 15 km of SAC/SPA, not even if adjacent
- Concerns for over zealous sub-threshold assessment of small unauthorised extensions where a “No” answer is foregone result
- Need for senior PA staff to be involved as most action will involve enforcement, including closure – weighty decisions and source of legal challenges
- Legislation is complex and much EIA theory can be subjective; DECLG Guidelines is clear but PAs only need to “have regard to” them – consistency across regions is required

Section 261A(5)

- Required consideration, in isolation, of the new unauthorised area (not deepening of existing area) developed post 3rd July 2008 in its own right, not cumulatively with pre 3rd July 2008 unauthorised area
- Area considerations are 2.5 ha or possibly 25% of previously authorised area to maximum of 5ha are the relevant criteria again (in isolation from pre 3rd July '08 unauthorised extension)
- The baseline of a previously fully authorised extraction site must be taken into consideration where Section 177E route is otherwise being considered – purposive view needed
- Section makes no difference to totally unauthorised large sites who face closure, having offended EIA or Habitats Directives; even small sites in this category must be closed if offence after 3rd July 2008
- Legislation publication/commencement delays may see some sites normally qualifying for substitute consents closed due to S261A(5) type offence, particularly in the future if parallel S34s not accepted

The "Thorny Issues" 1 of 2

- **Bona Fide Pre 63**

  - Key cases Waterford CC v John A Wood and Kildare v Goode Concrete need to be seen in their contexts

  - John A Wood 3 stage test for an accepted pre 63 operation – reasonable anticipation in 1964, knowledge of ore body, limited by major terminus

  - Goode case included abandonment, lack of anticipation, no claim to authorised use during sale of lands

  - John A Wood decision lacked discussion of intention of owner, as distinct from operator

  - Any land right, lease, agreement to purchase (equitable interests) would affect reasonable anticipation, date of release of lands to operator's ownership not decisive factor

- **Abandonment**

  - Cannot reasonably be claimed after just one year; Tallaght Block Case now being cited, logic to 7/8 years + before abandonment may be alleged

  - 500+ sites registered and conditioned under Section 261(6)(a)(i)

  with little extraction even now after 50 years must surely qualify as abandoned – opportunity to "clean up" these issues collaterally

The "Thorny Issues" 2 of 2

- **Intensification**

  - Normally when dormant pre '63 site starts up significantly; very difficult to prove in other cases of gradual increase/change - intensification of area covered elsewhere in Guidelines

  - Lackagh Quarries 2 Stage Test – (i) Factual intensification must have occurred before considering (ii) Material Planning Matters not present in 1964

  - Sites conditioned under S261(6)(a)(i) on basis of lack of significant environmental impact; intensification issues effectively reviewed in original S261 and significant (material) adverse issues found to be not present or S261(7) was required to have been activated

  - If planning considerations dealt with in S261, there is no basis for Stage 2 of Lackagh test

  - Typically quarries now operating at < 1990 level of activity, with potential for impacts greatly reduced since 2005-7

The Position

November 15th 2011 to late January 2012:	•Commenced – 4 weeks for PAs to advertise; 6 week public consultation phase which generally lasted until late January •Opportunity for operators to make submissions, especially where problems known; little take up from public or operators •DECLG Guidelines published towards end of consultation
July to August 2012:	• DECLG Supplementary Guidelines published clarifying some issues regarding Habitats Regulations •Few early notifications by PAs – decisions by August 24th •3 weeks period for Application for Review – important step; chance to stop clock/seek time extension/address Stage 1 AA •ICF has c.65 adverse decisions, most for review – likely 50 impacting
January 2013:	•Awaiting decisions by ABP – 5 months + delay •300+ Applications for Review to ABP •Info that 700+ Substitute Consent decisions issued by PAs •Likely over 3,000 files created – unknown SS(4)/(5) decisions •Huge pressure on sites S261A(3) sites; 4.5 years since ECJ

Applications for Review

EIA Issues:	Determining post 1990 development as warranting EIA, bona fide pre 63 uses or pre 90 permissions not acknowledged in several counties – review will quash most of these
Habitats Issues:	a. Determining that Habitats Regs issues were present, many PAs did not acknowledge authorised status prior to 1997, especially with pre 63 sites – review should quash these b. Habitats Regs invoked as past EIA not robust – application for review should have included Stage 1 AA screening c. Habitats Regs invoked on foot of poor screening by PA – application for review should have included Stage 1 AA report
EIA Issues:	Ironically, some PA S261A(3) errors on retro application of EIA to entire site has required some operators to highlight actual lesser unauthorised development reducing S177E area
Intensification:	Few enough cases, generally applied to very large sites – hardest to defend, need significant mitigations in place
Reclassification:	Sites thought post 64 allowed to apply for substitute consent upon recognition of old evidence

Area Subject to S177E

- An Bord Pleanala states the application for substitute consent must be “on all fours” with the S261A(3) notifications as issued, or as amended/confirmed by An Bord Pleanala on review
- As ABP to be forensic in analysing the authorised status of any site which it reviews, then its decision will probably be correct regarding area, where queried by the operator
- In many cases, PAs did not include maps or text indicating the area to which the substitute consent notification applied – these should have been sent for review to define the application area, otherwise the entire site is impacted
- In those cases, the entire site should be included in the application area for validation by ABP – failure to have the application validated in the given timeframe results in declaration of unauthorised status and closure (subject to extremely limited “exceptional circumstances” reprieve)
- A planning submission should be included to argue for the authorised status of the folios in question – contributions and available resources implications

Future Reserves Subject to S34

- Notwithstanding the discussions on continued extraction within partially developed areas, all greenfield areas for future extraction are subject to a separate grant of permission under S34
- There is no legal impediment to these being lodged in parallel (slightly delayed) to the S177E applications, subject to PA discretion
- Generally these involve a different but related EIS to that contained in the S177E application – both can be developed at the same time and consultants should be engaged on that basis
- PAs should be sounded out on their willingness to validate a S34 while the S177E under consideration, otherwise there could be a long delay in getting new reserves authorised post S177E grant of substitute consent
- This is even more critical if the resources included in S177E are limited
- There is little or no scope for developing any reserves without permission; an EIA determination post 3rd July 2008 could be fatal to the site's future

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