Comhshaol, Pobal agus Rialtas Áitiúil
Environment, Community and Local Government

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[redacted]

Directorate A: Legal Affairs & Cohesion
Environment Directorate-General
European Commission
B-1049 Brussels
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Implementation of the Court's Judgment in Case C-215/06

Dear [redacted]

I refer to Ms. [redacted] letter of 19 September 2012 regarding the above matter.

In the first instance, the Department of the Environment, Community and Local Government welcomes the opportunity to provide these responses in respect of the issues raised in the very detailed letter under reference. We look forward to discussing the matters raised in relation to the First Ground in greater detail during the direct engagement between the Planning and Housing Division of the Department and DG Environment on a number of planning matters on 19 October 2012.

Ireland's efforts to implement the Court judgment in this case can be categorised under the following headings:

1. Legislative Amendments (First Ground)
    - Retention permission and EIA
    - Substitute consent
    - Quarries
    - Other legislative provisions in relation to EIA and enforcement / penalties

2. Enforcement (First Ground)

3. Derrybrien (Second Ground)

In relation to the First Ground, by way of some preliminary remarks, I feel it is important that some of the main points outlined in our previous correspondence be re-iterated once more.

Legislative Amendments

The specific proposals for amending the planning code to give effect to the Court's judgment evolved by way of an iterative process which involved very close consultation with the Commission. For example, in advance of the introduction of the important changes to the removal of the facility to apply for retention permission in cases which would have required a prior determination as to the need for EIA, prior EIA, or appropriate assessment under the Habitats Directive, Ireland elaborated on the proposals in draft form and invited the Commission to comment on the proposed course. The same is true of other changes in relation to the removal of the statute of limitations in certain cases, and the introduction of the substitute consent process.

At this point, the Department is satisfied that these extensive legislative amendments have given full effect to the letter and spirit of the Court judgment insofar as it imposes a requirement for the Planning Acts to be amended. While we acknowledge that the legislative amendments are complex, we would hope that the clarifications provided in this letter in response to your queries and the meeting on 19th October will address any of the Commission's remaining issues.

Enforcement

In terms of planning enforcement, however, we acknowledge that Ireland has not yet been able to deliver fully on the commitments given previously to the Commission. Although important legislative changes to the enforcement code have been introduced, primarily through the Planning and Development (Amendment) Act 2010, other measures flagged previously to the Commission which are designed to complement these changes have not yet been concluded. For example, in our letter of December 2010, while Ireland gave a commitment to issuing a Ministerial Policy Directive on planning enforcement, this has not yet issued and Ireland recognises that further work remains to be done to deliver on our commitment to ensure that the planning enforcement code is robustly and consistently applied. Similarly, the Department has not yet prepared or consulted on an issues paper on enforcement or commenced the preparation of a Code of Practice for planning authorities in respect of their enforcement function. However, as outlined below, in response to the specific queries raised in the letter under reference in respect of planning enforcement, it is clear that we have delivered on some important commitments (for example, the new enforcement complaints process) and are now well advanced on others, such as a comprehensive guide for the public on the planning enforcement code. We will also have a draft Policy Directive on enforcement prepared for discussion later this month. At the forthcoming meeting, we would also intend to discuss and agree a revised timeframe for delivery of the other planning enforcement commitments mentioned above.

The letter under reference raises a number of significant new issues relating to non-enforcement of the EIA Directive in respect of large-scale peat extraction and invites the Irish authorities to clarify a number of matters. We are happy to engage fully and constructively with the Commission on all of the points raised. However, in light of the nature and complexity of the complaints contained in the petition itself, this process will, of necessity, take some time. We would respectfully submit that this new area might be better dealt with if it is decoupled from the specific issues remaining for conclusion in case C-215/06.

In overall terms, in relation to the First Ground, we note and welcome the fact that the Commission has made a very thorough study of the very comprehensive legislative response and note that the Commission has developed a very good understanding of the provisions in question. We are happy to provide the specific clarifications requested. For convenience we have reproduced the full communication from the Commission in the attached Annex, with the Department's response to each query/request for clarification from the Commission inserted in bold italic at the appropriate place.

As you will appreciate,, while the Department is happy to outline what it generally intended the relevant legal provisions to mean, the interpretation of such provisions is ultimately a matter for the Courts.

Derrybrien (Second Ground)

It is confirmed that the current operator of the Derrybrien windfarm site, ESB International, has objected to submitting the project to the substitute consent process on a number of specific grounds.

It would appear to regard the substitute consent process as very onerous and is concerned regarding its ability to retain planning consent for the windfarm. In applying for substitute consent, there is no guarantee that a consent would be granted. Indeed, with the significant increase in regulatory standards for windfarms over and above those that applied when its existing consents were granted (e.g. designation of proximate Natura site), it is possible that no consent would issue, which would require closure of the windfarm and loss of major infrastructure investment and revenue over the life of the project. This is aside from any remediation requirements that might be imposed, if a consent was granted. Having examined the case law, including relevant case law of the Court of Justice of the European Union, the developer would have appeared to have concluded that it can resist any application to force it to apply for substitute consent.

In summary, the difficulty that arises is as follows. When the Commission initially insisted that the Derrybrien windfarm undergo a substitute consent process, it was understood by the Irish authorities at the time that this could be achieved because it was a Commission requirement for compliance with the judgment of the Court and appeared to be both permitted and necessitated by EU law. If this procedure was permitted and necessitated by EU law, then any constitutional and national legal rights of the developer could be overridden.

However, subsequent examination of EU law appears to reveal that Commission insistence on the developer submitting to the substitute consent procedure or indeed any enforcement proceedings by the Irish State to achieve the same result are neither permitted nor necessitated by EU law. On the basis of EU law as it is currently understood, it would appear that the situation is governed by the EU law principles of legal certainty and non-retroactivity and the case law of the Court to the effect that national procedural rules apply. On that basis, any legal proceedings which might be taken by the Irish State to try and force the developer to submit to a substitute consent process will almost certainly be defeated under national procedural rules and, in particular, the constitutional and ECHR rights of the developer.

Although it is accepted that the developer is a limited liability company which is wholly owned by a semi-state company, it is not accepted that this means that it is an "emanation of the State" to the extent that the State can simply issue a direction to which the windfarm developer would be bound to comply. That simply is not the case in fact or in law. The developer, being a limited liability company, is a distinct legal entity which is totally independent of the State and has its legal rights under company law, property law, the Irish Constitution, ECHR and EU law. The State, likewise, is obliged to act within the law, both national and European. And the law as it is currently understood at both national and EU level recognises that the planning consents which the developer received many years previously are by national procedural rules beyond challenge and are final and certain. There is no legal obligation or requirement on the developer to hand over or open up its development consents to review or re-examination and the State by virtue of the principles of EU law as currently understood simply has no valid legal mechanism to force the developer to apply for substitute consent.

If the State commences proceedings to try and compel the windfarm developer to submit to the substitute consent procedure, it is the view of the State, on its current understanding of EU law, that any such proceedings would be defeated.

The Department had provided previously to the Commission on an informal basis a copy of legal submissions made by lawyers acting on behalf of the windfarm developer explaining why it did not believe it was obliged to apply for substitute consent. It was hoped that the Commission would examine and respond to the arguments presented so as to provide some enlightenment on the legal issues arising, but the legal submission appears, somewhat disappointingly, to have been summarily rejected without any comment, input or observations from the Commission. This has left the Irish authorities no wiser as to the legal arguments that the Commission seems to believe exist that would compel the developer to submit to the substitute consent process.

In order to provide further consideration and response to the points raised, albeit on an informal basis, we would welcome the Commission's reflection on the points raised, acknowledging that the Commission too has a legal duty of co-operation with Member States to achieve Treaty objectives.

The Department accepts that the legal submissions which were furnished were those of the windfarm developer and accordingly could not be considered to constitute the position of an entirely disinterested party. We can therefore understand that on this account there may have been a reluctance on the part of the Commission to engage with it. To get around this problem, the Department proposes to shortly provide the Commission with a legal submission prepared from the State's perspective which will set out the legal issues that arise. It is hoped that an exchange on the basis of that paper will clarify the issues and assist in resolving the matter.

Turning specifically to the three queries which are set out at the end of the letter of the 19 September 2012, the position is as follows:

Assessment of Impacts

The assessment of the impacts of Derrybrien is to a large extent dependent upon resolving the problem referred to above. If a means can be found of requiring the developer to submit to the substitute consent process, then the impacts will be assessed and with the benefit of public participation. If, however, the legal position is as described above, then any outstanding issues can only be resolved by voluntary co-operation of and with the developer.

Reliability of Substitute Consent System

With regard to the second point raised, the difficulty that is arising with the Derrybrien project, assuming that the analysis summarised above is not displaced, arises from the fact that the development consents had achieved finality and certainty and were beyond challenge. They were beyond challenge at the time of the judgment of the Court and of course that judgment, which was given in a procedure which did not permit the affected party to be present and heard, was not addressed to those particular consents but was addressed to an entirely different issue, i.e., the resolution of a dispute between the Commission and the State. Any attempt to re-open those consents now is regarded as a retrospective or retroactive attempt to overturn vested property rights and is a breach of the principles of legal certainty and national procedural autonomy.

However, this does not have implications for the substitute consent system as currently provided for in the Planning and Development Act.

- Firstly, that Act has abolished the possibility of obtaining retention permission in any development that requires EIA or habitats assessment.

- Secondly, it should be remembered that the substitute consent system operates to regularise development which may have no planning consent. The original retention permission system which the Court struck down was a system which was utilised to regularise development which had no consent. The substitute consent system replaces that but with the very significant limitation that it can be granted only in exceptional circumstances or only when a final judgment of a court declares the consent that has been given to be invalid or otherwise defective in a material respect.

- Thirdly, it operates where the developer chooses to apply to regularise the development and can get himself under the exceptional circumstances criteria. While there is also powers for a planning authority to issue a notice directing a developer to submit to the substitute consent process, this must accord with other relevant national and EU laws.

- Fourthly, the substitute consent system is primarily designed to operate prospectively and will thus be applicable to all new planning consents decided since the introduction of the substitute consent amendments. Any planning consent granted since then is subject to the operation of the substitute consent requirements. In addition, any existing planning consents to the extent that they were or are the subject matter of court proceedings or to the extent that procedurally they are not beyond challenge would be or are also subject to the substitute consent procedures.

It is, of course, the case that the substitute consent system cannot and never could have applied in respect of consents which were legally beyond challenge. It simply is not possible in Irish law to reopen consents which are beyond legal challenge since any attempt to do so would be regarded as an attack on vested property rights which are protected by the Constitution. It is submitted that such consents are also protected under EU law by the principle of legal certainty and national procedural autonomy.

In those circumstances, the substitute consent system which only operates in limited circumstances is not affected by the fact that the Derrybrien windfarm may not be obliged to submit to the substitute consent process.

Duty of Loyal Co-operation

With regard to the duty of loyal co-operation, the Commission should note that the State has fully complied with its duty of loyal co-operation and considers that it has fully complied with the judgment of the Court in case C-215/06.

The Derrybrien windfarm developer is in independent legal entity not under the control of the State and as an independent legal entity, it has rights and obligation under EU law. Similarly, the State has rights and obligations under EU law. It would appear that because the substitute consent process is an onerous one, the developer will not consent to voluntarily submitting to it. As currently understood, it does not appear that there is any legal mechanism open to the State to oblige the windfarm developer to submit to the substitute consent process. Indeed, the application of EU law obliges the State not to interfere with a consent that is beyond challenge. If there is no legal mechanism available to the State to compel the developer to submit to the substitute consent process, it cannot be said that the State has failed in its duty of loyal co-operation.

With regard to another aspect of loyal co-operation, the State has been engaging with the Commission in trying to see if there is a valid legal mechanism available to compel the developer to submit to a substitute consent process. To date, the Commission has not engaged in that task. In seeking to resolve this problem, the State proposes to submit to the Commission very shortly its own legal analysis of the situation in the hope that the legal arguments and precedents will provide clarity for all concerned.

As always, further to your consideration of these points raised in this letter and the discussions to take place on some elements of the case on 19th October, we are happy and available to engage again with the Commission in seeking final resolution and closure of this case.

Yours sincerely,

[redacted]

[redacted]

Assistant Secretary

ANNEX

The Commission services' observations and questions on the measures put in place by the Irish authorities are presented following the structure of the Court's judgment, first, addressing the non-conformity of the national legislation and the enforcement measures and, second, the case of Derrybrien.

First ground

Legislation

The Commission services note the adoption of the following legislative measures:

- Planning and Development (Amendment) Act 2010 of 26 July 2010 amending the Planning and Development Act 2000 (hereafter, "the Act"), commenced by SI No 405 of 2010, SI No 451 of 2010, SI No 477 of 2010, SI No 132 of 010 2011, SI No 475 of 2011 and SI No 582 of 20ll.

- Environment (Miscellaneous provisions) Act 2011 commenced by SI No 583 of 2011.

- SI No 476 of 2011 Planning and Development (Amendment) (No. 3) Regulations 2011.

- SI No 246 of 2012 European Union (Environmental impact assessment and habitats) Regulations 2012 amending the Planning and Development Act 2000.

The Commission services also note the publication of the *Guidelines for Planning Authorities on Section 261A of the Planning and Development Act, 2000* and related acts on January 2012 by the Environment, Community and Local Government.

These provisions, among other amendments, introduce a "substitute consent" procedure, subject to fulfilling the condition of "exceptional circumstances".

With regard to quarries, according to the newly adopted Section 26lA of the Act, all local planning authorities had to undertake an examination of all quarries in their territory. According to Section 261A(2)(a) that examination must be finalised no later than 9 months after the entry into force of Section 261 A (15 November 2011) and result in a determination of the status of all quarries for the purpose of directing them for the application for a substitute consent or cessation of operation. This assessment therefore should have been finalised by the end of summer 2012. Following the assessment, the planning authorities will direct quarry operators/owners to either apply for substitute consent or will issue a notice stating their intention to issue an enforcement notice requiring cessation of the operation of the quarry.

In order to finalise the assessment of Ireland's measures put in place to implement the first ground of the Court's judgment in case C-215/06, the Commission would be grateful for the Irish authorities' input on a number of issues set forth below. The questions raised below are based on the Commission's understanding of a complex legislative framework. Comments on our understanding of the provisions are also welcome. We look forward to receiving a

consolidated text of the Planning and Development Regulations 2001-2012 as soon as possible.

A. Substitute consent

It might be argued that if a development project that ought to have been subject to an EIA or an ELA screening but was not, is, in exceptional circumstances, subject to a substitute consent procedure, that procedure should follow the environmental protection standards of the EIA Directive as closely as possible. Considering that such a project has already been executed, the screening and *ex post* EIA must be carried out by the competent authorities seeking and assessing not only the likely effects but also the effects on the environment that have already taken place.

1. Sub-threshold projects

Section 34(12) requires the planning authority to reject an application to retain an unauthorised development which, before it began, would have required a determination as to whether an environmental impact assessment was required. According to Section 177C, such a development can be subject to substitute consent, provided the Board grants leave to apply for substitute consent

The Irish authorities are invited to clarify what rules require the planning authority or the Board as the case may be to apply the requirements of Annex III to the Directive in screening whether the development required an environmental impact assessment.

Response
Articles 103 and 109 of the Planning and Development Regulations 2001, as substituted by articles 14 and 17 respectively of S.I. No. 476 of 2011 are the relevant provisions here. These set out the law in relation to the screening of planning applications (article 103) and appeals (article 109) for environmental impact assessment. It might be noted that article 103(3) and article 109(3) specifically state that, in determining whether a proposed development would or would not be likely to have significant effects on the environment, planning authorities must have regard to the criteria set out in Schedule 7, which is the equivalent of Annex III of the Directive. Accordingly when an application for retention permission for sub-threshold development is made, these provisions must be applied.

2. “Exceptional circumstances”

The 2010 Amendment to the Planning and Development Act 2000 introduced Part XA, which provides for a substitute consent system whereby development projects that ought to have been subject to an EIA or an EIA screening but were not, can be in **exceptional circumstances** regularized.

The Irish authorities are invited to confirm whether this procedure is introduced based on paragraphs 57 and 61 of the judgment which state that national rules may allow in exceptional circumstances, and subject to the condition that this does not circumvents the EU rules, the regularisation of projects which are unlawful under the EU law.

Response
Yes, we confirm this.

Section 177D(2)(a)-(f) of the Act as amended, identifies the elements that must be taken into account in considering whether exceptional circumstances exist. However, it would appear that some of the elements provided in Section 177D(2)(a)-(f), as addressed below, are too vague, unclear or even irrelevant.

a. With regard to Section 177D(2)(a), this would appear to be the rationale and scope of Part XA of the Act rather than a criterion of exceptional circumstances. It is not clear how this can be used as a criterion in assessment of individual developments.

b. With regard to Section 177D(2)(b) and (f) these appear rather to be excluding elements and therefore invites the Irish authorities to clarify which party has the burden of proof.

Response
S.177D(2)(b) refers to the possibility of a genuine mistake by the applicant, i.e. he/she genuinely believed that the development he/she carried out did not require permission/did not require EIA: where such a mistake is alleged, it would be a matter for the applicant to convince the Board in this regard and therefore the burden of proof is on the applicant. In relation to S.177(2)(f), which refers to the past behaviour of the applicant, this is a matter which the Board would seek information on from the relevant planning authority (i.e. as to any previous complaints/enforcements actions against the applicant).

c. The Commission seeks information on the meaning of Section 177D(2)(e), in particular, of the term “remediated”.

Response
S.177D(2)(e) was intended to mean that the Board would take into account whether, if adverse environmental effects have been caused by the unauthorised development, it is, or is not, now possible to provide a remedy for those effects.

d. The Commission also seeks information on the scope of Section 177D(2)(g), in particular, whether that may also cover aspects that are not relevant under the EIA Directive, in particular, socio-economic reasons, such as, job losses.

Response
The ECJ judgment did not give any guidance on what might be considered exceptional circumstances and in drafting the 2010 provisions, the Department found that in the absence of concrete extant cases, it was difficult to outline in advance what circumstances might be deemed exceptional. The Board are experts in planning matters, and will make their decisions in accordance with the principles of proper planning and sustainable development. Accordingly the Department proposes to monitor with the Board the applications for leave to apply for substitute consent on the basis of “exceptional circumstances”,

and the Board's decisions on these cases, over a period of 18 months to two years, following which the law could be amended, or statutory guidance issued to the Board, if necessary. Such guidance would, obviously, be shared with the Commission and any guidance the Commission may wish to give on this matter at this point would be welcome.

e. The Irish authorities are invited to confirm that applications for substitute consent submitted under Section 177E following a notice under Section 261A of the Act (quarry sunset clause) are not subject to an assessment by the Board of the existence of exceptional circumstances under Section 177D of the Act, as amended. This is also clear from Section 177M(2).

Response
It is correct that the issue of exceptional circumstances does not arise in the case of an application for substitute consent made pursuant to a notice issued under section 261A. The issue of "exceptional circumstances" arises only when a person (not having been required to make an application for substitute consent under section 177B or section 261A) makes an application to the Board under section 177D for leave to apply for substitute consent.

3. Application for substitute consent

Section 177E(2)(f) of the Act, Article 225 of the Planning and Development (Amendment) (No. 3) Regulations 2011 (SI 476 of 2011) and Form No 6 of Schedule 3 of these Regulations deal with the Form for the application for substitute consent. Article 227 of SI No 476 contains further requirements. As raised above, in• light of Article 5(1)(a) and (b) of the Directive, the required scope of information depends on the given stage of the consent procedure, current knowledge and the specific characteristics and type of a project. Therefore it could be argued that the application for substitute consent should at least reflect the requirements of Annex IV to the EIA Directive (with the exception of point 2 of Annex IV). Furthermore, as the development has already taken place, the application should require (beyond point 4 of Annex IV of the Directive) information on the effects on the environment and human health that have taken place or are likely to occur and measures aimed at remedying those effects. The Irish authorities are invited to confirm the following observations:

a. Point 1 of Annex IV does not appear to be fully reflected in the Application form (point 7 or other points) because it does not appear to require a description of the project in the detail required by point 1, Annex IV of the Directive as far as these are already carried out.[1]

b. Point 9 of the Application Form refers to the area of site to which the application relates in hectares. Article 227(2)(b)(i) of SI No 476 requires a copy of a location map identifying the land or structure to which the application relates and the boundaries thereof. It is not clear whether the substitute consent procedure applies only with

[1] Not planned, because for planned it should follow the regular EIA procedure.

regard to an area of an existing development and not to an area of planned activity where works have not yet commenced, in particular, in the context of quarry activities. The Irish authorities are invited to clarify whether this is addressed in the national legislation and in the functions of the local authorities, such as on-site inspection plan, verification mechanisms (aerial photos and maps to verify progress of the development over the years) and guidelines.

c. It also appears that the Application form does not require a description of significant effects that have already taken place and likely significant effects on the environment as a result of the development as provided in points 3 and 4 of Annex IV.

d. It also appears that the Application form does not require the developer to provide a description of the methods used to assess existing and future effects on the environment and measures already taken or envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment as provided in point 5 and 6 of Annex IV.

e. Point 7 of Annex TV on a non-technical summary also appears not to be included. This, however, is essential to ensure effective public participation.

f. Article 227(4) of SI No 476 provides that an application for substitute consent can be returned if, following an inspection of the land, the Board considers that the application is not correct. The Irish authorities are invited to clarify whether all applications for substitute consent are subject to an on-site inspection.

The Commission notes that some of the aspects, for example, points 4 — 6 of Annex IV are required to be included in a remedial EIS (Section 177F(l)(a)-(c) of the Act). However, in situations where the EIS is not required (as the case may be for an application under Section 261A), it appears that the information on the effects on the environment likely to occur or already occurred and measures aimed at remedying those effects are not addressed at all.

Response

A remedial EIS is required in all cases where an application for substitute consent is being made pursuant to section 261A[2]). The 2010 Act as originally enacted contained an error in this regard, and it appeared to leave open the possibility that an application for substitute consent could be made pursuant to section 261A without either a remedial EIS or NIS being submitted. However, this error was picked up and corrected in Regulation 16(c), (d) and (e) of the S.I. No. 473 of 2011 which amend section 261A(3)(c), (10) and (12), respectively, to make it clear that an application to the Board for substitute consent made pursuant to section 261A must be accompanied by a remedial EIS, NIS, or both, as appropriate.

[2] unless of course the quarry is found to have required an appropriate assessment, rather than an environmental impact assessment, in which a remedial Natura impact statement will be required.

4. Remedial environmental impact statement

Section 177E(2) provides that an application to the Board for substitute consent shall be accompanied by a remedial environmental impact statement (EIS) as required under Sections I77B(2) and 177D(7).

a. The Commission notes that Section 177E(2) of the Act, as amended, does not provide that a remedial EIS is required with an application based on Section 261A of the Act,
as amended, (quarry activities). The Irish authorities are invited to provide comments on why the law makes a distinction in the obligation to provide a remedial EIS between applications under Sections 177B(2) and 177D(7) on the one hand and an application under Section 261A on the other.

Response
See response directly above: this was an error which was corrected in S.I. No. 473 of 2011.

b. The Irish authorities are also invited to clarify whether there is a defined Form for a remedial EIS or other requirements as foreseen by the 177F(1)(c) of the Act and required by Section 177N(2)(i) of the Act.

Response
Section 177F(1) sets out the requirements for a remedial EIS. There is a power – section 177F(1)(c) and section 177N(2)(i) – to make regulations prescribing additional requirements in relation to a remedial EIS. No such regulations have been made to date.

5. Role of environmental authorities.

Section 177I(1) of the Act provide that after receipt of a copy of an application for substitute consent and a remedial EIS, a planning authority must submit a report to the Board and the Board must consider the report. The 2012 Guidelines on Section 261A, at page 4, indicate that the report will include information about the development, including relevant development plan provisions and details of any enforcement history. Section 177K provides that the Board makes a decision to grant the substitute consent having regard to the remedial EIS and significant effects on the environment which have occurred or which are occurring or could reasonably be expected to occur because the development concerned was carried out.

a. The Irish authorities are invited to clarify at what stage the competent authorities assess and verify the information submitted by the operator and submissions provided by the public and other authorities and carry out ex post EIA. The Commission notes that Section 172 of the Act, as amended, refers to the requirement to carry out an environmental impact assessment under the substitute consent However, Part XA of the Act neither refers to the requirement to carry out a remedial environmental impact assessment, nor it identifies an authority responsible for carrying it out. The Regulations implementing the Act do not clarify this either.

There appear to be no Guidelines to the competent authorities on the specific considerations under an ex post EIA.

Response
The Board is required to carry out an EIA in relation to any application for substitute consent in case where EIA is required by the Directive: this is clearly set out in section 172(1) and (1A) of the Act. Section 177K(2) sets out the matters to which the Board must have regard when making a decision on an application to apply for substitute consent and these matters include the EIS: this provision does not in any way detract from the requirement under section 172 for the Board, as the competent authority in this case, to carry out an EIA. The Department has recently prepared draft Guidelines on the carrying of EIA: a copy of the draft has been given to the Commission and any comments are welcome.

b. The Irish authorities are invited to clarify whether the scope and content of the report required under Section 1771(I) of the Act is established elsewhere but in these Guidelines.

Response
The report to be made to the Board by a planning authority in relation to an application to the Board for substitute consent is dealt with under section 177I: subsection(2)(a) to (e) sets out matters which the report must contain. No Guidelines have been issued in relation to S.177I generally. The Section 261A Guidelines, (which obviously deal with quarries only, not substitute consent applications in general) at the top of page 4, make reference to the report required under S.177I, stating that the report must provide "information about the development, including relevant development plan provisions and details of any enforcement history."

c. The authorities are also invited to clarify whether the development file and the report include any relevant complaints and other submissions received before the adoption of the 2010 Amendments to the Act.

Response
We are unclear what is meant by the "development file". In relation to the report, under section 177I(2)(b), the report to be made by a planning authority must include information in relation to any warning letters, enforcement notices or enforcement proceedings in relation to the development in question – this provision applies to all such letters, proceedings, whether before or after the 2010 amendments to the Planning Acts. The report is not required to include details of complaints made about the development (although is not prohibited from including such): however under section 151 of the Act, warning letters are required to be issued in relation to complaints received, and, as stated above, information about warning letters is required to be included in the report.

Therefore the report will include information in relation to complaints received.

6. Direction to cease activity at the stage of application

Under Section 177J of the Act, the Board, when considering the application for substitute consent, may issue a direction to cease activity or operations if it considers that the continuation of all or part of the activity or operations is likely to cause significant adverse effects on the environment. It would appear that the current wording means that the Board is not obliged to issue a direction to cease activity even if it considers that the continuation of all or part of the activity or operations is likely to cause significant adverse effects on the environment. The Irish authorities are invited to provide their observations on whether it would not be more appropriate to require cessation of all activities subject to a substitute consent procedure unless it is proved that the effect on the environment is minor and that the continuation of the activity is not likely have a significant effect on the environment. An inspection could be appropriate for this determination. In this regard, the Commission refers to paragraph 59 of the case C-215-06 Commission v Ireland in which the Court stated that an obligation to remedy the failure to comply with the EIA Directive should entail, where possible under national law, revocation or suspension of a development consent pending an assessment of the development's environmental effects.

Response

Yes, it is correct to state that the Board is given a discretion as to whether to issue a direction to cease activity when, in the course of considering an application for substitute consent, it concludes that the continuation of all or part of the activity or operations would be likely to cause significant adverse effects on the environment. ***In such a case the Board might well conclude that rather than, as envisaged by S.177J, issue a draft direction to cease, wait 2 weeks for a submission, consider the submission and then decide whether to confirm the draft direction, it would be quicker, where it intends to refuse consent, to go ahead and make the decision to refuse. When a refusal of substitute consent is given the planning authority is then required to issue an enforcement notice (S.177O(5)). It is considered that it would not be appropriate therefore to remove the Board's discretion and require them to issue a direction to cease in all such cases, as this could have the effect of delaying the actual decision in certain cases.***

7. Public participation

Public participation in the substitute consent procedure is ensured by informing the public about the application for substitute consent through publications and site notices (SI No 476 of 2011), allowing anybody to make a submission or observation in relation to the application and remedial EIS (Section 177H of the Act and Article 231 of the SI No 476 of 2011), by obliging the Board to have regard to any such submissions in making the decision on the application for substitute consent (Section 1 77K(2)(f)) and communicating the final decision (Section 177K(5)).

The Irish authorities are invited to clarify Section 177K(2)(j), which requires the Board to have regard to certain policies and objectives under Section 143 of the Act.

Response

This provision requires the Board in exercising its functions to have regard to Government policies, the national interest, the National Spatial Strategy, etc. This is of course in addition to all the other matters set out in S.177K, including submissions received, the provisions of the development plan, etc. We are not entirely clear what clarification you require further on this point.

The Irish authorities are invited to clarify the applicable access to review procedure that would reflect the requirements of Article 10a of the Directive (applicable to projects after 25 June 2005) within the substitute consent procedure.

Response
Section 50 of the Planning Act allows a person to question the validity of a decision made by the Board by means of an application for judicial review. Section 50A and 50B are also relevant here.

8. Decisions by the Board

The Board takes the decision on an application for substitute consent according to Section 177K of the Act. The Board may also impose remedial measures (Section 177K(3)). According to Section 177L(8) of the Act such remedial measures may be required in relation to a development that was carried out at any time, but not more than 7 years prior to the date on which this section comes into operation (5 November 2010). The Irish authorities are invited to clarify this rule, in particular how the damage to the environment is linked with past unauthorised activities, and who has the burden of proof.

Response
Irish planning law provides for a statute of limitations on enforcement action whereby, generally speaking, enforcement action may not be taken in relation to a development operating without the requisite planning permission after more than 7 years have passed since the commencement of the development. Accordingly section 177L(8) provides for a similar cut off point of 7 years in respect of the taking of remedial measures in relation to unauthorised development. This is in line with legal advice obtained by the Attorney General's Office in relation to constitutional difficulties about tampering with legal immunities already gained. If it decided to require remedial measures under S.177L the Board could only require such measures in relation to development which took place after 21 September 2004 (Section 177L came into operation on 21 September 2011): it would be a matter for the Board to decide which development could be subject to a requirement to remediate, i.e. which development took place after that date.

9. Enforcement and monitoring

Failure to comply with a direction of the Board to cease activity or take remedial measures is an offence. In case of non-compliance with the Board's directions, the planning authority is required, as soon as may be, to issue an enforcement notice under Section 154.

Where an application for substitute consent is not submitted or is refused, or a development does not comply with the substitute consent or its conditions it shall be regarded as

unauthorised development (Section 177O(2),(3),(5)). In these cases the planning authority shall, as soon as may be, issue an enforcement notice under Section 154 of the Act requiring cessation of activity.

With regard to the 7 year rule, according to Section 157(4) of the ***[Planning Act, as substituted by section 28 of the]*** Environment (Miscellaneous Provisions) Act 2011, enforcement action can be taken against a ***[quarry or peat extraction]*** development which commenced, or whose permission expired, not more than 7 years before 15 November 2011.

The Irish authorities are invited to clarify the applicable rules in respect of a quarry development or peat extraction which had achieved immunity before commencement of Section 157(4) of the Act, as amended, and, for example, a development that started more than 7 years before 15 November 2011 and is operating without a permit. It appears that the quarry owner/operator can be issued with an enforcement notice requiring the cessation of operations and that failure to comply with such a notice is an offence. The Irish authorities are also invited to clarify the meaning of the term "commenced" in the context of Section 154. In addition, which party has the burden of proving that a quarrying or peat extraction activity commenced at a particular time.

Response

Yes, it is correct that (following the amendments to section 157 and 160 made in sections and respectively of the Environment (Miscellaneous Provisions) Act 2011) the operator of an unauthorised quarry or peat extraction operation that commenced prior to 15 November 2004, and that under the old provisions would have gained immunity from enforcement action after 7 years from commencement, may now be subject to an enforcement notice requiring cessation of operations. In the case of an unauthorised quarry or peat extraction development which commenced after 15 November 2004, and was in operation less than 7 years when the amendment became law, the 7 year limit is entirely abolished and the operator remains liable, as long as the development continues, to criminal prosecution for unauthorised development and/or to a requirement to remediate the site, in addition to being required to cease operations. The provisions are based on legal advice received, which was essentially to the effect that –

- ***where the development was in existence less than 7 years, and immunity had not been gained under the former provisions, that immunity could be abolished entirely.***

- ***where the development was in existence more than 7 years, and immunity had been gained under the former provisions, it would be permissible constitutionally to provide that such developments would be required to cease, but not permissible to provide that an operator who had gained immunity would be subject to criminal penal sanction or a requirement to remediate (as per response under heading 8 above). .***

By commenced we intended the ordinary meaning i.e. "started".

Where a planning authority is taking action against an unauthorised quarry peat extraction to require it to cease, the matter of when the operation commenced will not be relevant – by virtue of S.157(4)(aa) and (ab)[3], it will be possible to require an unauthorised quarry/peat extraction development to cease no matter when it commenced.

Where a planning authority wishes to take action to prosecute a quarry/peat extraction operatory for the (criminal) offence of unauthorised development and/or require the remediation of the site, it would have to be satisfied that the operation commenced after 15 November 2004: if the operator wished to challenge the planning authority's evidence on that ground he/she would have to show his/her own evidence that the development commenced prior to 15 November 2004: it would be a matter for the court to weigh the evidence and make its decision.

Furthermore, with respect to the 7 year rule (no warning letter or enforcement notice and no proceedings for an offence can commence in respect of a development where no permission has been granted after 7 years form the date of the commencement of the development), the Commission observes that it is not abolished for other activities than the operation of a quarry and extraction of peat. However, the judgment is not limited to these two project categories. The Irish authorities are invited to comment on this.

Response
It is correct that the judgment is not limited to quarries and peat extraction, however it is not considered that the judgment requires the abolition of a statute of limitations for enforcement action against all unauthorised development which requires EIA. In fact, the judgment does not make any criticism of the 7-year enforcement limit. The Department's initiative to abolish (insofar as constitutionally possible) the 7-year statute of limitations for enforcement against unauthorised quarries and peat extraction was taken because of the ever-expanding nature of such activities. In relation to developments which have been "completed" however, e.g. developments where a building or a structure has been erected, it is considered reasonable that there be a cut-off point beyond which enforcement action cannot be take requiring the removal of the such building/structure. It is worth noting that in many communications and discussions with the Commission (including in a presentation given at last November's package meeting) reference was made to the abolition/amendment of the 7-year enforcement limitation, for quarries and peat extraction.

The Irish authorities are also invited to clarify the guidelines and strategy to enforce the failure to comply with an enforcement notice and stop unauthorised development. It appears that under the Act, as amended, the planning authorities are not obliged to enforce the failure to comply with an enforcement notice and to do that in a way as it is required under the law with respect to issuing an enforcement notice under Section 154.

[3] and also S.160(4)(aa) and (ab).

Response

Following the amendments to section 153 of the Act effected by section 45 of the Planning and Development Act (Amendment) Act 2010, there is now a strong obligation on a planning authority to issue an enforcement notice where it establishes that unauthorised development (other than development that is of a trivial or minor nature) has been or is being carried out and the person who has carried out or is carrying out the development has not proceeded to remedy the position: it is provided in such cases that the planning authority must issue an enforcement notice or apply for a court injunction unless there are compelling reasons for not doing so.

It is correct that there is not a requirement on the planning authority to institute court proceedings in all cases of failure to comply with an enforcement notice. It is clear however that planning authorities have a duty to prosecute those who do not comply with enforcement notices where this is practical or feasible and in fact the Department's Development Management Guidelines (June 2007) state (at Section 10.3.9) that "It is recommended that persons who do not comply with enforcement orders should be prosecuted in all cases." However it is considered that it would not be feasible to place a legal requirement on planning authorities to institute court proceedings for all failures to comply with enforcement notices. Such a requirement would not allow planning authorities to prioritise, having regard to available resources, the more serious cases of non-compliance, in particular cases where the EIA or Habitats Directive had been breached. Neither would it allow them to prioritise their strongest cases, e.g. where they have the strongest evidence. Such a requirement would also require them to prosecute cases where the non-compliance with an enforcement notice was minor in the same way as they would prosecute where there was total non-compliance. It is considered therefore that a legal requirement to prosecute in all cases would actually impede successful prosecution of the more important cases. This is relevant also in the context of the content and objectives of the proposed ministerial policy Directive.

With regard to monitoring and inspections, Section 177L(9) of the Act provides that the Board may require the planning authority to monitor and inspect compliance with remedial measures required under a Direction (Section 177L(4)(d)). The Irish authorities are invited to comment on how it is implementing or how it plans to implement this and, in particular, the estimated number of inspections and available funding.

Response

There have as yet been no applications for substitute consent made and there have been no directions issued by the Board either to cease activity or take remedial measures. The Department will monitor the position in relation to substitute consent applications dealt with by the Board and will issue further advice/take further steps if appropriate. This advice would be shared with the Commission.

It should be noted however, that once the section 261A process is over, and the quarries required to apply for substitute consent have done so, it is expected that there will be very few applications for substitute consent. In the future, substitute consent will only arise in cases where a person is required to apply to regularise a permission that has been found to be defective by a court in relation to EIA/AA

(section 177B) or the Board has, because of exceptional circumstances, given leave to apply for substitute consent (section 177D). Therefore, it is not expected that there would be an issue in relation to resources for monitoring a direction given under section 177L.

B: Section 261A on quarries

The Planning and Development (Amendment) Act 2010 of 26 July 2010 introduces Section 26lA into the Act. It requires all planning authorities to identify all quarries in their territory and make a determination about their status. They must then either direct the quarry operators
to apply for a substitute consent or issue an enforcement notice requiring the cessation of the quarrying activities.

1. Scope

The European Union (Environmental impact assessment and habitats) Regulations 2012 (SI No 246 of 2012) introduces Section 261A(16) — (19) to the Act. The Irish authorities are invited to:

a. confirm whether Section 261A(17) of the Act means that after 15 August 2012 the Board may consider applications for leave to apply for substitute consent under Section 177C of the Act with regard to an unauthorised quarry.

Response

Yes, that is confirmed. It might be noted that the Board is required to consider the outcome of the section 261A process in deciding on any such application for leave to apply for substitute consent. Therefore, in the case of a quarry which was not permitted to apply for substitute consent under section 261A, the Board will have regard to the fact that such a quarry e.g. was found to have commenced after 1 October 1964 and never obtained permission, or failed to register in 2004, i.e. that there has been serious non-compliance with the law in this case. Having regard to all the matters set out in section 177D, it is considered most unlikely that the Board would grant an application for leave to apply for substitute consent to a quarry not permitted to make such application under section 261A, unless there were the most exceptional of exceptional circumstances.

b. confirm whether Section 261A(16) — (19) of the Act covers unauthorised quarries that were not identified under Section 261A(1) of the Act by the planning authorities.

Response

Yes. Section 261A(18) and (19) will not of course be relevant to the extent that enquires by the Board with the planning authority will receive the response that the planning authority did not identify the quarries under section 261A.

It might be noted that we do not expect that there will be quarries which will not have been identified under the section 261A process: section 261A was enacted in July 2010 but not commenced until November 2011, most planning authorities had begun their examination of quarries long before the

commencement of the provision, and they had a further 9 months following commencement to complete the examination. Therefore given that planning authorities had over 2 years to consider this question, we don't expect that there will be quarries which planning authorities failed to identify.

c. clarify what situations are referred to in Section 261A(18)(a)(i) of the Act, namely in what situations the planning authority may decide not to issue a notice under Section 261A.

Response
Where a planning authority decide that subsection 2(a) of section 261A does not apply, that is

- ***development did not take place after 1/2/1990 which would have required environmental impact assessment, but environmental impact assessment was not carried out, or***

- ***development did not take place after 26/2/1997 which would have required appropriate assessment, but appropriate assessment was not carried out***

no notice is required to be issued under section 261A.

d. clarify whether the Board is required to make enquiries by requesting information from the respective planning authority following receipt of an application for leave to apply for substitute consent. It appears from the wording of Section 261A(18)(a) of the Act that this is not the case and that it may be sufficient to contact the applicant.

Response
This was not intended: it will not be sufficient to merely contact the applicant. The Department has confirmed with the Board that it (i.e. the Board) fully intends to contact the planning authority anyway, but in any case the Department will formally advise the Board that it should do so in all such cases.

2. Verification of the data

The Commission invites the Irish authorities to clarify a number of issues with regard to the process for determining the status of quarries carried out by all planning authorities under Section 26lA(2) of the Act.

a. The determination of the status of the quarries requires the planning authorities to decide whether a determination as to whether EIA was required (screening) and whether it would have required the submission of an EIS. The Commission notes that neither the Act nor the Guidelines on Section 26lA provide the requirement to make this screening assessment in light of Annex III to the Directive. The Guidelines (point 3.2.6.) in this regard suggest that planning authorities decide whether the need for EIA could be ruled out without any substantial screening.

Response
The Directive requires that, in screening for EIA, regard be had to the matters in Annex III of the Directive, the Guidelines at Section 3.2.5 make clear that in screening for EIA regard must be had to the matters in Schedule 7 to the Planning Regulations (the same matters as in Annex III). Section 3.2.6 of the Guidelines deals with the matter of determining whether a screening for EIA is required in the first place i.e. the decision as to whether screening is required.

This is an issue which arises from the central plank of the Ireland's response to the judgment in C-215/06, i.e. the abolition of the facility to apply for retention of unauthorised development which would have required EIA. Ireland's view was that it was sufficient to comply with the judgment to abolish retention permission for development which would have required environmental impact assessment: however, the Commission was adamant that retention permission should also be abolished for development which would have required a screening for environmental impact assessment. However it is of course the case, and the Commission accepted this point, that there could be projects which, although coming within one of the categories referred to in Annex II, are so minor that they should not automatically be debarred from applying for retention. That is to say, there are projects which come within an Annex II category which by nature of their size, location etc, can be excluded from the need for EIA by a desk exercise and so would not be deemed to require a screening for EIA such as to prohibit an application for retention. Para 3.2.6 reflects this position.

b. Clarify the term "development took place/was carried out" used in Section 261A and which party has the burden of proving that a quarry commenced operation prior to a certain date or continued activity throughout a certain period. The Commission notes that the Section 261A Guidelines do not provide a methodology for assessing pre-64 status or changes in the quarrying activities over a time or the burden of proof aspects, but rather suggests reliance on previously existing files established within the 2004-2005 registration process, during which the planning authorities were not advised to make use of the database of aerial photos and maps available to the Irish authorities.

Response
We are not clear as to the clarification required in relation to "development took place" or "development was carried out".

Section 261A(2)(b), (3)(b) and (4)(b) require the planning authority to consider all relevant information and the Guidelines (page 6) state that in amassing information about quarries <u>every</u> (our emphasis) available source of data should be used by the planning authority, including

- ***The planning register, in relation to permissions granted,***

- ***The section 261 register (showing the position as of 2004/2005),***
- ***Planning enforcement records,***
- ***Information from members of the public, including any submissions received in response to the public notice,***
- ***Rateable valuation records,***
- ***Aerial photos or maps (where available), and***
- ***Local knowledge from planning authority staff, particularly staff dealing with specific areas within a county.***

c. Explain whether this procedure is limited to the territory that is already under quarrying operations and whether any new quarrying activities or ones not yet carried out, such as extension of the development, should be addressed through the normal procedure of environmental impact assessment under Section 32 ***(34?)*** of the Act.

Response
Applications for substitute consent made pursuant to section 261A relate only to unauthorised development that has already been carried out. See section 261A(14) which provides that where an application for substitute consent is required to be made under section 261A it shall be made in relation to that development in respect of which the planning authority has made a determination under subsection (2)(a) - i.e. development that has taken place.

A quarry owner-operator who applies for and obtains substitute consent has only regularised development already carried out. If he/she wishes to proceed with future development this will require a new planning permission.

The Irish authorities are invited to provide information on the responsibilities and instruments available to the local Planning authorities to verify the information submitted by the quarry operators/owners. In particular, are the planning authorities obliged to carry out on-site inspections to prevent curtailment of the EIA rules by addressing any future works under Section 26lA and substitute consent rather than the normal EIA procedure? For example, whether the planning authorities are required and equipped to verify that the reported scale of the quarrying activities corresponds to the situation on the ground.

Response
We are a little unclear on this last query. Firstly, under the section 261A process, it was not a matter of quarry owners/operators submitting information: the planning authority was required to examine all quarries and, as stated in a response above, in doing so to use all available information available to it, including aerial photography. Also, as stated above where a substitute consent is given, it will only legitimise development already carried out and the extent of the development covered by the substitute consent should be clear from the terms of the consent.

Any future development will require a normal planning permission under section 34 of the Act.

d. It is not clear from the legislation or the Guidelines what is the determination in situations of a post 1990 quarry (1) which commenced operation prior to 1/10/1964 and did not fulfil Section 261 registration requirements and (2) of a quarry which commenced operation after 1/10/1964 and fulfilled Section 261 registration requirements.

Response

(1) Where a planning authority makes the section 261A(2)(a) determination (i.e. EIA/screening/appropriate assessment were required but not carried out) in respect of a quarry which commenced operation prior to 1/10/1964 and did not fulfil section 261 registration requirements, the planning authority must issue a notice of intent to issue an enforcement notice – see section 261A(4)(a)(ii): a notice of intent to issue an enforcement notice must issue in the case any quarry which did not fulfil the registration requirements under section 261.

(2) Where a planning authority makes the section 261A(2)(a) determination (i.e. EIA/screening/appropriate assessment were required but not carried out) in respect of a quarry which commenced operation after 1/10/1964 and fulfilled section 261 registration, a notice of intent to issue an enforcement notice must issue if the quarry never obtained planning permission at any stage – see section 261A(4)(a)(i). Where such a quarry obtained permission at some stage, section 261A(3)(a)(i) applies and a notice requiring a substitute consent application must issue.

e. Whether the planning authorities are required to take into account all the information available to them at the time of the determination, including existing complaints submitted to the authorities prior to the entry into operation of Section 261A of the Act.

Response

Yes, as set out above, planning authorities must consider <u>all</u> relevant information available to them and specifically must consider information on enforcement files, which will include complaints.

3. No exceptional circumstances

According to Section 261A, the planning authority issues a notice to the owner or operator of a quarry to apply to the Board for substitute consent. According to Section 177E, this application is not subject to an assessment by the Board as to whether exceptional circumstances exist. Consequently, with regard to quarry operations, the Board may issue substitute consent without exceptional circumstances being proved. Point 2.3 of the Guidelines on Section 261A clarify that quarries are permitted to apply for substitute consent without having to prove exceptional circumstances. It would appear that the new legislation introduces a system of registration similar to Section 261 and a retention permit procedure under substitute consent procedure which was condemned by the Court in case C-215/06 because unauthorised quarries are legalised even where no exception circumstances are proved and therefore circumventing the Directive requirements (case C-21 5/06, paragraph 61). The Irish authorities are invited to comment on this.

Response

Yes it is correct that section 261A provides a time-limited exception from the requirement for quarries to prove exceptional circumstances in order to apply for substitute consent. The section 261A scheme was agreed with the Commission: in fact, the Commission requested inclusion of the provision at subsection (5)(a) i.e. that where the unauthorised development requiring EIA took place after 3 July 2008, the owner/operator should not be permitted to apply for substitute consent in any circumstances. It might be further noted that -

- ***Section 261A provision provides that only <u>certain</u> quarries (those which commenced prior to the inception of the planning system or which once had a planning permission) not compliant with the Directive would be permitted to apply for substitute consent (provided that they fulfilled the registration requirements under section 261). Those who do not fulfil these conditions are not permitted to apply for substitute consent and an enforcement notice must be issued.***

- ***Section 261A is an exceptional, <u>once-off</u> provision: once section 261A is spent, no development requiring EIA, including a quarry, will be permitted to apply for substitute consent other than under section 177B (permission found defective by a court) or section 177D (leave to apply for substitute consent granted by Board because of exceptional circumstances).***

- ***In relation to the reference above to unauthorised quarries being legalised, it should be noted the most that section 261A does for any quarry is to allow an application to be made for substitute consent and there is no implication or guarantee that any quarry permitted to apply for substitute consent will obtain it.***

4. Remedial EIS

It is not clear from Section 261A and Section 177E(2) whether the developer is required to submit a remedial EIS together with an application for substitute consent. While Section 261A(1)(b) provides that an application is to be accompanied by a remedial EIS, the provisions determining the content of the notice requiring the quarry operator to apply for a substitute consent (Section 261A(3)(c), (10) and (12)) do not explicitly require that it be accompanied by a remedial EIS. Section 177E(2) on applications for substitute consent only requires that applications for substitute consent resulting from a direction under Sections 177B and 177D of the Act be accompanied by a remedial EIS. This is not the case for applications resulting from a notice under Section 261A. The Irish authorities are invited to explain these inconsistencies and whether an application for substitute consent required under a notice given under Section 261A is required to be accompanied by a remedial EIS.

Response

As stated in an earlier response an error in the 2010 Act in this regard was corrected by Regulation 16(c), (d) and (e) of the SI 473 of 2011.

5. Public participation

The Irish authorities are invited to clarify the applicable access to review procedure designed to reflect the requirements of Article 10a of the Directive (applicable to projects after 25 June 2005) with regard to the decisions issued by the planning authorities under Section 261A of the Act.

Response
Under section 261A(6), any person who made a submission in relation to a quarry in accordance with section 261A may seek a review of a notice issued by the planning authority under subsection (3), (4) or (5). Accordingly, any such person may seek a review of a notice requiring a person to apply for substitute consent, or a notice of intent to issue an enforcement notice.

Also section 50 of the Act provides that an application may be made for judicial review.

6. Notice by the planning authority

According to Section 261A the planning authority issues a notice stating its intention to issue an enforcement notice under Section 154 requiring the cessation of the operation of a quarry (Section 261A(4)(a), (5)(a)) and the taking of such steps as the authority considers appropriate. The Commission notes that neither the Act nor the Guidelines on Section 26lA provide considerations with regard to the other steps that the authorities may consider to be required following the cessation of quarrying operations, such as bringing the territory to its former state. The Irish authorities are invited to comment on this.

Response
In their role as planning and environmental authorities and drawing on the expertise of other relevant national agencies (e.g. EPA), the Department would consider that local authorities are best placed to know what steps may be appropriate and accessible to be take in protecting the environment.

7. Enforcement

Following a determination, the planning authority issues a notice informing of its intention to issue an enforcement notice under Section 154 requiring the cessation of the operation of the quarry (Section 26lA(4)(a), (5)(a)). Where this is not challenged or overturned under a review by the Board, the planning authority is required, as soon as may be, to issue an enforcement notice (Section 261A(8), (9), (11) and (13)). In these cases the planning authority shall, as soon as may be, issue an enforcement notice under Section 154 of the Act requiring cessation of activity and taking such steps as the authority deems necessary.

The Irish authorities are invited to clarify the guidelines and strategy to identify and enforce the failure to comply with an enforcement notice and stop unauthorised development. It appears that under the Act, as amended, the planning authorities are not obliged to enforce

the failure to comply with an enforcement notice and to do that as soon as may be as it is required with regard to the requirement to issue an enforcement notice under Section 154.

Response
This point has been addressed above. While there is a clear duty on planning authorities to follow up all non-compliance with enforcement notices, it would not be feasible or practical to place a legal requirement on planning authorities to institute court proceedings in all cases of non-compliance with enforcement notices.

C. Implementation of Section 261A on quarries

1. State of play of assessment under Section 261A

According to Section 261A(2)(a) of the Act, the examination and determination in respect of all quarries must be finalised within nine months from 15 November 2011. The Irish authorities are invited to provide information on the results of this assessment, including the information on the total number of quarries examined, the number of determinations that have resulted in issuing a notice either requesting to apply for a substitute consent or informing of the intention to issue an enforcement notice including the conditions, enforcement notices issued.

Response
We have requested information from planning authorities on the outcome of the section 261A process and will forward it to the Commission as soon as it is available.

2. Specific questions

Following the judgment, the Commission continues to receive complaints from Irish citizens raising grievances that unauthorised quarries in their locality are still operating after the judgment in case C-2 15/06. Therefore, the Commission invites the Irish authorities to provide specific information on the Section 261A results in respect of the following unauthorised quarries in:

- Liscuillew Upper, County Leitrim (with a previous reference number QRO1) with regard to which an enforcement notice issued in 2009 following a Circuit Court judgment in 2007 determining its unauthorised quarry status because of an abandonment.

- Killintown, Multyfarnham, County Westmeath with regard to which a planning permission was issued on 15 July 2009 (PL25.22217lM (06/5362)) one year after the judgment in case C-215/06.

- Townland of Kilskeagh, County Galway with regard to which an enforcement notice was issued in 2009.

- Whelans, Ennis, County Clare with regard to which an enforcement notice was issued before 2007 but was followed up by an application for permission retention on 13/10/2009 in case C-215/06 and grant of a retention permission on 17/11/2009. The

application for permission retention was submitted and treated by the planning authority after the judgment contrary to the judgment and the Circular PD 6/08. The Commission notes that is has previously objected to the legal basis of Circular PD 6/08 and its effectiveness in preventing applications for retention of unauthorised development.

- Quarry under reference QY/25 in Clomnelsh, Carlow County with regard to which an application for a permit retention was submitted in 2010, after the judgment in ease C-215/06.

- Cahernieole West, The Neale, County Mayo with regard to which a settlement was reached between the developer and the County Mayo after the judgment in case C-215/06 and was endorsed by the Circuit Court in July 2010 requiring the quarry to cease quarrying operations in July 2012 and all operations by July 2013. The Irish authorities are invited to comment on how this is followed up.

- Clonmoney North, Bunratty, Newmarket-on-Fergus, County Clare recently followed-up under retention permission extension under Planning Ref: P06/2560 and P06/2561. The Irish authorities are invited to clarify whether any modifications to existing authorised or unauthorised quarries are processed under the normal EIA procedure rather than substitute consent.

Response
We have requested this specific information from the planning authorities in question and will supply it to the Commission as soon as it is available.

Enforcement

The above section addressed enforcement in light of the latest amendments to the Planning and Development Act 2000.

1. General measures for enforcement

In this regard, on 30 May 2012, the Irish authorities informed the Commission that a high-level Working Group on Planning Enforcement had been established to co-ordinate the development of enforcement policies. The Irish authorities are invited to provide information on the latest developments in relation to:

- the organisation and co-ordination of enforcement action at national and local level;
- what resources, skills and tools are (or are planned to be) dedicated to enforcement; have aerial surveys been considered as an enforcement tool;
- any planned legislative and regulatory reforms and/or policy changes to improve enforcement;
- the new Enforcement Complaints Process — is it up and running? If yes, and how does it work;
- what progress has been made in terms of preparation of guidance on enforcement.

Response

<u>Organisation and Coordination</u>

Under the Planning Acts 2000 – 2012, the Minister for the Environment, Community and Local Government is responsible for developing planning policy and legislation. The planning system in Ireland is operated on the ground by 88 local planning authorities: 29 County Councils, 5 City Councils, 5 Borough Councils and 49 Town Councils. Planning authorities are therefore responsible for operating Ireland's planning enforcement regime.

However, the Department is considering, in conjunction with the City and County Managers Association, the possibility of consolidating resources and expertise by moving towards a regionalised approach to planning enforcement. Similar structures are being adopted in respect of certain aspects of Ireland's building code.

<u>Resources/skills/tools</u>

In the first instance, it is important to note that in terms of the overall quantum of resources available, total staffing levels in the local government sector in Ireland have been reduced by over 23% since June 2008. Within this global figure, anecdotal evidence from the City and County Managers Association is that planning departments have seen their staffing resources reduced to an even greater extent.

Financial resources are also under extreme pressures. Significant reductions in the central funding of local government have occurred in recent years (in excess of 20% over the last 3 years). Overall, in the period 2008-2012, revenue expenditure has been reduced by €736m (14%) across all local authorities.

This is not intended as a defence – merely to provide some context for the extremely difficult circumstances which currently pertain for all aspects of the local government sector in Ireland at present.

In terms of the skills at the disposal of planning authorities, this varies significantly depending on the size / location of the planning authority. For example, the smaller authorities will have fewer specialist resources available. This variation in skills sets is something that could potentially be addressed through greater use of regionalised approaches to enforcement. A proper audit of skills could also potentially be progressed by the network of senior officers to be established by way of policy directive (see below).

<u>Legislative / Policy Reforms</u>

As the Commission is aware, Ireland has, through the Planning and Development (Amendment) Act 2010, introduced a number of important refinements to the enforcement code including:

- ***The removal of the 7-year time-limit for taking enforcement proceedings against unauthorised extractive industry developments (i.e. both quarrying and peat extraction), and generally strengthening the scope to control unauthorised quarries by reforming the operation of section 261 of the Planning and Development Act 2000;***

- ***Substantial curtailment of the scope for seeking retention permission to regulate unauthorised development;***
- ***Increases in the minimum fines for persons convicted under section 156 of the 2000 Act (the fine has been increased to €5,000 which is the maximum that the rules/laws concerning the courts allows for District Court fines) and,***
- ***Requirement to be placed on planning authorities to issue an enforcement notice or seek an injunction where unauthorised development has taken place and the developer has not responded in a manner acceptable to the planning authority to previous communications/warning notices.***

In our letter of December 2010, Ireland also gave a commitment to issue a Ministerial Policy Directive on enforcement under section 29 of the Planning and Development Acts. However, this commitment has not yet been delivered on. A draft has now been prepared and will be circulated in advance of the meeting on 19 October for discussion.

The policy directive will, it is proposed, have 3 main objectives, namely:

- ***To remind planning authorities of their statutory obligations with regard to enforcement of the planning code, as set out under the Planning Acts 2000 – 2012;***
- ***To instruct planning authorities to establish in conjunction with the Department and service at a senior level a network of officers responsible for planning enforcement to:***
  - ***develop and share best practice generally,***
  - ***disseminate information on successful enforcement actions taken or reasons why particular cases were unsuccessful,***
  - ***develop a basic tool-kit to be used for all judicial proceedings brought under the planning enforcement code,***
  - ***identify existing weaknesses in the overall planning enforcement system (e.g. possible lack of requisite expertise within planning authorities, common obstacles to successful litigation, possible need for further amendment to planning legislation etc) and make recommendations to address weaknesses,***
- ***To instruct planning authorities, in carrying out their enforcement role, to prioritise large-scale cases (e.g. projects / developments which have / are likely to have significant effects on the environment).***

Further detail on these will be elaborated at the meeting of 19 October.

2. Bogs

Petition 755/2010 before the European Parliament alleges that, outside of protected sites (i.e. sites of Community importance under Directive 92/43/EEC and Natural Heritage Areas under Irish domestic legislation), the Irish authorities are not enforcing environmental impact assessment rules in respect of large-scale peat extraction. In particular, it is alleged that local authorities do not keep any or any adequate records of industrial peat extraction and that such extraction has been allowed to exceed the threshold for mandatory environmental

impact assessment (EIA) without the competent authorities ever having required any peat extraction operator to undertake an environmental impact assessment pursuant to Directive 85/337/EEC. Particular attention is drawn to peat extraction in Coole, County Westmeath.

In light of this, the Irish authorities are asked to:

• Clarify whether all industrial scale peat extraction operations — in particular, peat extraction operations that exceed the current lowest threshold for mandatory impact assessment or mandatory impact assessment screening - are currently identified and inventoried at either local authority and/or national level, providing a list;

• Clarify whether, in respect of any peat extraction currently taking place at a scale that reaches or exceeds the threshold for mandatory EIA, any EIAs have ever been required or undertaken pursuant to Directive 85/337/EEC, giving details;

• If not, clarify whether the local authorities in whose functional areas the industrial scale peat extraction operations are taking place have systematically ascertained if any relevant EIA threshold was reached through initial establishment, extension or other form of intensification after the threshold was set in law (the threshold having previously not been reached);

• If there has been a process of systematic ascertainment, provide details of the methods used, in particular clarifying whether either local authorities or peat extraction operators are required to demonstrate the existence and intensity of peat extraction operations prior to a threshold having been fixed in law and if so whether the means of doing so including historic records such as aerial photography, rate and employment records etc;

• For any peat extraction operations occurring in breach of EIA requirements, clarify the enforcement action taken;

• Clarify how the Statute of Limitations operates in respect of peat extraction operations, in particular whether any historic failure of enforcement entitles a peat extraction operator to continue to extract peat from an area where he commenced peat extraction prior to the 7 year statute of limitations but after the establishment of an EIA threshold, indicating the extent of pre-statute of limitations activity that entitles the operator to continue to extract indefinitely within the same area;

Taking account of responses to previous questions, please comment on how the overall position in relation to industrial peat extraction can be considered compliant with Directive 85/337/EEC, especially in light of judgment in Case C-215/06.

Response

The Department is investigating the position in relation to industrial scale peat extraction and has been in contact with Friends of the Irish Environment (FIE) in this regard. In fact, the Department in 2009 grant-aided (€5,000) FIE in relation to a project for mapping such peat extraction: FIE has recently sent a report to the Department on the outcome of that exercise. The Department is considering this and will look at the

potential for building on this and possibly using myplan in this regard. It is intended to meet with FIE shortly with a view to cooperating to advance this project.

The Department also intends to pursue with planning authorities the planning status of industrial scale peat extraction in their areas, i.e. whether it is operating under a permission, and whether a permission is required. The Commission refer in particular to peat extraction at Coole, Co. Meath: it is understood that the Board are about to decide on a reference to it under section 5 of the Act as to whether this extraction is exempted development or requires permission: this decision of the Board (and any subsequent judicial review of the decision, in the event such review were to be sought) will hopefully provide a useful clarification of the law in this area..

In relation to the last bullet point of the Commission's queries, as has been explained in detail above, the amendment of the 7-year limitation on enforcement for quarries and peat extraction means that if a peat extraction operation is established to be unauthorised, it can be required to cease, no matter when it commenced.

In summary, the Department accepts that information needs to be collated on the matter of industrial scale peat extraction and is proceeding to obtain this information. When this information has been obtained the Department will consider whether any steps are required, by way of legislation or Guidelines, to ensure full compliance with the EIA Directive. The Department is happy to report to the Commission as this matter progresses.

However, as stated in the covering letter, it is not considered appropriate that this issue should in any way prejudice the possible closure of C215-06.