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BORDEREAU D'ENVOI DU COURRIER

En attribution:	**MME DAY CATHERINE + [redacted] (DG ENVIRONNEMENT)**
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Reference:

Daté du: **08/03/2005**

Objet: **INFRACTION A 2000/4384 NATURE - DIR 92/43 & 85/337, EIA FOR PROJECTS IN OR LIKELY TO AFFECT NATURA 2000 SITES - REPONSE A AM**

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8 March 2005

Mr David O'Sullivan
Secretary-General
Secretariat-General
Commission of the European Communities
Rue de la Loi, 200
1049 Bruxelles

Dear Secretary-General,

My authorities have asked me to refer to the Commission's letter of 5 January 2005 [reference SG-Greffe (2004)D/200093] enclosing a Reasoned Opinion (ref. 2000/4384) concerning Ireland's implementation of Council Directive 85/337/EEC (as amended by Council Directive 97//11/EC) on the assessment of the effects of certain public and private projects on the environment - commonly known as the EIA Directive.

Ireland's response to the Reasoned Opinion is attached.

In their response of 6 December 2004 to the Commission's letter of formal notice in this case, my authorities requested a meeting with Commission officials to further elaborate on the detail of that response. My authorities reiterated their request for a meeting in a further letter of 18 January 2005. I would again respectfully request the Commission to agree to these requests in order to constructively explore the scope for agreeing any supplementary national measures which would meet the Commission's concerns.

Yours sincerely,

[redacted]

pp.
Counsellor

c.c. [redacted] Legal Service, DG Environment)

IRELAND'S RESPONSE TO REASONED OPINION

OF 22 DECEMBER 2004 (REF. 2000/4384)

Paragraphs 3.1 – 3.3 of Reasoned Opinion

1) Ireland would accept that the principle underlying the EIA Directive is that projects which are likely to have significant effects on the environment (in accordance with the criteria set out in Annex III of the Directive) should normally be subject to an assessment of those effects prior to a decision being taken as to whether or not a project should proceed. My authorities would emphasise that this principle is respected in how EIA has been transposed and implemented in Ireland and they would not accept that the Irish EIA system in any way facilitates or encourages the execution of projects in whole or in part before they development consent is sought.

2) However, my authorities would not accept that the wording of the Directive explicitly requires that EIA can only ever be carried out before the execution of a project. The system of retention permission is there to address the situation where, despite all reasonable and practical steps having been taken, a development proceeds without consent having been obtained. It is considered that a grant of retention permission, while not representing the ideal, is not necessarily inimical to the objectives of the Directive. It seems that Member States should be afforded the opportunity to require, albeit belatedly, an environmental impact assessment with a view to deciding whether it should be allowed remain, rather than automatically having to order the discontinuance of a project and the removal of a development in its entirety.

3) As stated in our letter of 6 December 2004, the fundamental principle of Irish planning law (which incorporates EIA requirements) is that anyone proposing to carry out development must get prior planning permission; and the fundamental objective of the enforcement provisions of the planning code is to ensure that this principle is adhered to.

4) The Planning and Development Act 2000 Act imposes a statutory obligation on developers to obtain planning permission for development and not to carry out development except under and in accordance with a planning permission granted under the Act. Failure to comply with these requirements is, unlike in other jurisdictions, a criminal offence. Fines in respect of such offences were substantially increased, with a maximum penalty on conviction on indictment now €12.7 million and 2 years imprisonment.

5) A clear objective of the 2000 Act was, therefore, to promote a culture of compliance with planning and EIA law, backed by a considerably strengthened enforcement regime. Details of this strengthened enforcement regime were provided in our letter

of 6 December 2004. The changes which were introduced to the enforcement regime had the twin effect of simplifying existing statutory procedures and strengthening the powers available to planning authorities. A summary of these changes (which were included in our letter of 6 December 2004) are repeated below in order to emphasise the significance and extent of the strengthened provisions which are now contained in planning and EIA law:

- Planning authorities must take action in response to well-founded complaints about unauthorised development (unless it appears to the planning authority that the development in question is of a trivial or minor nature)
- There were previously many types of enforcement notice – in the 2000 Act there is only one. This provides for a more streamlined procedure.
- Fines were greatly increased, with a maximum penalty on conviction on indictment now €12.7 million and 2 years imprisonment.
- Planning authorities now charge for the cost of taking enforcement action and are entitled to retain fines imposed by Courts for planning offences to help finance more active planning control
- Planning authorities can refuse to grant planning permission, subject to the consent of the High Court, to any developer who has seriously failed to comply with a previous permission
- The period within which enforcement action can be taken was extended from 5 to 7 years.
- An application for retention, or even a grant of retention permission, is no longer a valid defence to enforcement action.
- Fees for an application for retention permission were increased.
- If people attempt to hide behind a corporate identity, this can be prevented.

6) It should be clear, therefore, that the enforcement regime introduced under the 2000 Planning Act is designed as a deterrent against anyone contemplating a breach of planning including EIA law.

7) The inclusion of a provision in Irish legislation for retention permission must be considered in the context of the principles outlined above. In addition, within the EU, retention permission is not unique to the Irish planning system. It is viewed by my authorities as a sensible "fall back" provision, to be invoked in exceptional circumstances only. Ireland does not allow projects to be executed in whole or in part before they receive development consent. On the contrary, Ireland expressly prohibits the execution of projects without the necessary development consent. The vast majority of development proposals in Ireland are the subject of prior authorisation (as is required by law). While precise statistics are not available, recourse to retention permission would represent a very small proportion of overall planning applications.

8) Despite the prohibition on unauthorised development, i.e. despite the fact that, to be very clear, unauthorised development is not "allowed", the situation may and does

arise where people break the law, and proceed with development without consent. When this happens it must be addressed and, in this situation, Irish law permits the developer to apply for retrospective permission. The system of retention permission allows a development to be assessed to determine whether it meets the criteria for development consent. Allowing applications for retention permission is not, of course, to ignore the fact that developer has committed an offence. As stated above, an application for retention permission is no longer a defence to a prosecution for unauthorised development. As stated in the letter of 6 December 2004, the only alternative to allowing applications for retention permission is to require that all unauthorised development automatically be removed, without any consideration of the particular circumstances of the case, and whether the development would, in fact, have received development consent, had the required planning application been made in advance of carrying out the development. My authorities consider this to be unreasonable and impractical and contrary to the principle of sustainable development. The fact that there has been a regulatory breach in the sense of a failure to obtain prior authorisation cannot be said to require in every case the demolition and removal of buildings and structures.

9) For the reasons given in our letter of 6 December 2004, as further elaborated in this letter, my authorities do not accept that the provision for retention permission in Irish legislation provides a facility for avoiding EIA.

Paragraph 3.4 of Reasoned Opinion

10) The Commission suggests that Ireland "effectively argues that an EIA carried out as part of a retention application fulfils the same requirements as an EIA carried out as part of a normal planning application". Ireland does not accept that it made any such argument. What was stated in the letter of 6 December 2004 was "where an application for retention permission is in respect of development requiring EIA, an EIA must be carried out on the same basis as would have applied had an application for planning permission been made prior to the commencement of development". That is, the same procedures apply and the same criteria are used in deciding whether a project will be allowed to remain as would have been used in deciding whether it would have been allowed to proceed in the first instance. It was certainly not our contention that "there is no material difference between the situation involved in a retention application and the situation involved in a normal planning application", as alleged by the Commission.

Paragraph 3.7 of Reasoned Opinion

11) In paragraph 3.7, the Commission states it "is not convinced that this information discloses a satisfactory situation" and outlines the basis for its position in paragraphs 3.8 to 3.12 of the Reasoned Opinion.

Paragraph 3.8 of Reasoned Opinion

12) My authorities wish to repeat a key point made above i.e. a fundamental principle of Irish planning and EIA law is that anyone proposing to carry out development must get prior planning permission: and the fundamental objective of the enforcement provisions of the planning code is to ensure that this principle is adhered to. As stated earlier, Ireland does not allow "projects to be executed in whole or in part before they receive development consent", but expressly prohibits this. It is not correct to say that "where the person responsible for an illegal development puts forward an application for its retention, the objective of any previous enforcement action will be considered as satisfied". An important amendment which was introduced in the Planning and Development Act 2000 (section 162(2)) was that an application for retention permission is not a defence to a prosecution for unauthorised development. In addition, section 162(3) stipulates that no enforcement action shall be stayed or withdrawn by reason of an application for retention permission or the grant of that permission. These provisions clearly envisage the situation where a developer might apply for retention permission, while simultaneously being prosecuted in the courts for a breach of the law i.e. for carrying out development without the necessary development consent.

13) The enforcement provisions under the 2000 Planning Act enable a planning authority, in an enforcement notice, to "require such steps as may be specified to be taken within a specified period, including, where appropriate, the removal, demolition or alteration of any structure and the discontinuance of any use and, in so far as is practicable, the restoration of the land to its condition prior to the commencement of the development". If the steps specified in the notice to be taken are not taken, the planning authority may enter on the land and take such steps, including the demolition of any structure and the restoration of land, and may recover any expenses reasonably incurred by it in that behalf. Any person who fails to comply with an enforcement notice shall be guilty of an offence.

Paragraph 3.9 of Reasoned Opinion

14) Paragraph 3.9 states that it is "not evident that Ireland has an appropriately coherent approach to effective enforcement". It further suggests that the enforcement powers in domestic legislation are "discretionary in character". Ireland refutes both of these allegations. Section 152 of the Planning and Development Act 2000 provides that where a representation is made to a planning authority, or it otherwise appears to the authority that unauthorised development may have been, or is being, carried out, the planning authority must issue a warning letter to the developer, unless the development in question is of a trivial or minor nature. Section 153(1) of the Act provides that, following the issue of the warning letter, the planning authority must "make such investigation as it considers necessary to enable it to make a decision on whether to issue an enforcement notice". Section 153(2) places a duty on planning authorities to take a decision, as expeditiously as possible, on whether to issue an enforcement notice. In deciding whether to issue an enforcement notice, the planning

authority must consider any representations made to it regarding the unauthorised development, any representations made by the person(s) to whom the warning letter was issued and any other material considerations. Accordingly, the issuing of a warning letter and the carrying out of follow-up investigations, in relation to any unauthorised development (unless it is trivial or minor) is mandatory on a planning authority.

15) While the decision as to whether to issue an enforcement notice is discretionary, the planning authority is statutorily obliged to take into account all representations made to it and any other material considerations when making its decision. Such considerations would obviously include the size, nature and location of the development and its environmental and other impacts. Any significant environmental effects would strongly influence the issuing of an enforcement notice. My authorities would add that section 155 of the Planning and Development Act 2000 allows a planning authority to by-pass the issuing of a warning notice and immediately initiate enforcement proceedings where, in the opinion of the planning authority, it is necessary to take urgent action with regard to unauthorised development due to the nature of the unauthorised development and to any other material considerations.

16) In addition, it should be noted that the right to take injunction proceedings in respect of unauthorised development (under section 160 of the 200 Act) is not confined to planning authorities. Irish planning law is unusual in an EU context, in permitting any person whether or not that person has an interest in lands to seek an injunction. This open door locus standi (standing) ensures that members of the public have rights in respect of unauthorised development. A court order in this context can ensure that

- unauthorised development is not carried out or continued,
- that land is restored to its condition prior to the commencement of unauthorised development,
- that any development is carried out in conformity with a permission pertaining to the development or any condition to which the permission is subject.

17) My authorities wish to emphasise the importance of the participative role which Irish enforcement law gives to the public. As referred to above, any member of the public can make a complaint to a planning authority under section 152 of the Planning and Development Act 2000 while any member of the public can take injunction proceedings under section 160. The availability of such powers to the general public further highlight public participation in the EIA process. In addition, any person may, under section 5 of the Act, seek a declaration from a planning authority as to whether or not development has taken place (for example, an intensification of use). If a person is dissatisfied with a declaration from the planning authority, they may ask An Bord Pleanála to review the matter. These provisions emphasise the point that, if a member of the public considers that he/she has been denied rights of participation because there has not been an environmental impact assessment, he/she is perfectly

entitled to redress that situation by employing any of the various mechanisms referred to above i.e. the complaint procedure, injunction procedure, or Section 5 procedure.

18) Paragraph 3.9 of the Reasoned Opinion also suggests that Ireland "has not presented evidence of a convincing effort at national level – such as the adoption of clear guidelines and performance criteria for local authorities and an effective supervisory mechanism". In this regard, my authorities wish to make a number of points. The first point is that the Department of the Environment, Heritage and Local Government is currently updating its "Advice and Guidelines" to planning authorities on the operation of the planning system. The new "Development Management Guidelines" are designed to promote best practice by planning authorities in implementing the requirements of the Planning and Development Act 2000 and in providing a high quality of service to users of the planning system. These Guidelines, which will be issued in draft form for public consultation shortly, will include a Chapter on enforcement and will promote an enhanced culture of compliance with planning law. A copy of the Draft Guidelines will be forwarded to the Commission as soon as they are published. Once the Guidelines have been finalised following the consultation process, they will be issued under section 28 of the Planning and Development Act 2000. Planning authorities will be obliged to have regard to the Guidelines in the performance of their functions.

19) In relation to performance criteria and an effective supervisory regime, the Department of the Environment, Heritage and Local Government collects information from planning authorities on a annual basis, including information on enforcement – a copy of the 2003 statistics is enclosed: Tables 22 to 27 give information on enforcement, including the number of notices issued, the number of notices complied with, the number of prosecutions initiated and the number of convictions. These statistics are published in hard copy at present and will be published on the Department's website from 2005 onwards.

20) This year, for the first time, local authorities will report on their performance against 42 service indicators, published in 2004, covering the full range of local government services including indicators regarding enforcement of planning control. These are:

- total number of cases subject to complaints that are investigated, and number dismissed
- number of enforcement procedures taken through warning letters
- number of enforcement procedures taken through enforcement notices
- number of prosecutions.

21) The 2004 information is currently being collected by the Department of the Environment, Heritage and Local Government and it is intended that this information will be published by the middle of this year. The indicators will allow members of the public and elected representatives to compare the performance of their authority vis-à-vis other local authorities and how their local authority is improving year on

year. This process is intended to facilitate the identification of good practice and to encourage all local authorities towards improved performance.

22) It is alleged by the Commission that the Environmental Protection Agency (EPA) has "shown itself willing to grant an operating license to an activity that had been refused planning permission, effectively facilitating illegal development". This is simply incorrect. The grant of an IPPC licence does not per se authorise development: it is still necessary to obtain all other necessary consents and permits, including planning permission. The position is that the system of IPPC licensing operated by the EPA is a separate statutory consent procedure to the statutory development consent procedure. Certain activities may require more than one statutory consent. Section 83 of the EPA Act 1992 Act makes it clear that having an IPPC license, of itself, does not entitle any person to allow an emission into the environment. In this way, it recognises that the requirements of other enactments must also be respected. Simply put, all necessary statutory approvals, including planning permission, must be in place in addition to an IPPC license, to enable an IPPC licensable facility to operate within the law. Similarly, section 34(13) of the Planning and Development Act 2000 specifically provides that a planning permission granted under the Act does not, of itself, entitle a person to carry out any development. In summary, it is clear that where separate consents are required, these systems do not operate to "effectively facilitate illegal development".

Paragraph 3.10 of Reasoned Opinion

23) The Commission refers to "examples of non-existent or ineffective enforcement in practice which Ireland has not disputed" and suggests that "the inadequacy of enforcement efforts has several inter-related dimensions". In the first place, the Commission alleges that there is a lack of timely intervention. This matter is dealt with at paragraphs 14 and 15 above and will be addressed in the Draft Development Management Guidelines referred to at paragraph 18 above. This allegation does not stand up to scrutiny when set against the time specific provisions contained in sections 152 to 155 of the Planning and Development Act 2000. With regard to the timeframe for bringing enforcement action, the Commission will be aware that the period within which enforcement action can be taken was extended from 5 to 7 years in the 2000 Planning Act. In addition, my authorities refute any suggestion that "Irish enforcement authorities sometimes allow enforcement action to become statute-barred". This allegation is unfounded and unsubstantiated.

24) In the second place, the Commission alleges (i) that "enforcement action generally has very limited aims and scope" and (ii) that "it is discontinued once an application for retention permission is submitted". These allegations are unfounded and unsubstantiated and my authorities refute them on the grounds that, firstly, as outlined above, the enforcement provisions of the Planning and Development Act 2000 have a very specific purpose i.e. to ensure full compliance with the requirements of the Act, including the requirement to get development consent in advance of carrying out a project, and secondly, the making of an application for retention permission is no

longer a defence against prosecution. Reference is again made to the provisions of Section 162(3) of the Planning and Development Act 2000 (no enforcement action shall be stayed or withdrawn by reason of an application for retention permission or the grant of that permission). A specific example in response to point (ii) above arises in the case of complaint P2003/4298 (which is mentioned in paragraph 3.14 of the Reasoned Opinion) where the planning authority served an enforcement notice on the owner of the quarry seeking discontinuance of the unauthorised development and restoration of the land while the planning authority was considering a planning application in respect of the unauthorised development. My authorities would add that the quarry in question was a small-scale operation, covering an area of 0.6 hectares. When the planning application was submitted, the planning authority considered that an EIS was not warranted.

25) The allegation, in paragraph 3.10 of the Reasoned Opinion, that there has been a "failure to ever require any cessation of on-going unauthorised activities such as quarrying or pig-rearing where these are detected" is unfounded and does not stand up to scrutiny. In the case of Offaly County Council (which is specifically mentioned in paragraph 3.14 of the Reasoned Opinion), examples of enforcement action taken in recent years are:

- **Aghancon** Injunction proceedings were taken by the Council under Section 160 of the Planning & Development Act 2000 against a quarry and, by Court Order, the quarry ceased operation in 2003. Enforcement proceedings were taken by the Council, to the District Court, against another quarry in the area in 2004, with the result that these operations have also ceased

- **Ballyfarrell, Blueball** Injunction proceedings were taken by the Council under Section 160 of the Planning & Development Act 2000. By Court Order of December 2004, extraction of sand and gravel has ceased.

- **Edenderry** Following proceedings by the Council in the High Court, a quarry owner gave an undertaking in July 2001 to cease operations.

- **Lahinch, Clara** A quarry ceased operations following a Circuit Court Order in July 2003.

- **Ballynakill, Ballydonagh and Cloughjordan** 3 quarries ceased operation following enforcement action by the Council in May 2003.

26) The examples given above in relation to County Offaly clearly indicate that the allegation in complaint reference P2004/4045 (referred to in paragraph 3.14 of the Reasoned Opinion) that "there is a wider lack of effective enforcement against unlawful quarrying in County Offaly" is unfounded. In addition, I am advised by my authorities that Offaly County Council issued a total of 87 warning letters and 41 enforcement notices in 2004, illustrating a very active engagement by the Council in tackling breaches of planning law. My authorities would emphasise that these

examples (included in bullet points in paragraph 25 above), while taken from one county only, are indicative of a national trend of positive and proactive enforcement.

27) The third allegation made by the Commission in paragraph 3.10 of the Reasoned Opinion is that "enforcement action is not aimed at deterring illegal development but at regularising it". This is not correct. As stated earlier, the Planning and Development Act 2000 imposes a statutory obligation on developers to obtain planning permission for development and not to carry out development except under and in accordance with a planning permission granted under the Act. A clear objective of the 2000 Act was to promote a culture of compliance with planning and EIA law, backed by a considerably strengthened enforcement regime. As stated earlier, failure to comply with these requirements is a criminal offence with fines substantially increased to a maximum of €12.7 million plus a maximum 2 years imprisonment.

28) With regard to the provision in the 2000 Act whereby a planning authority can refuse planning permission, subject to the consent of the High Court, to any developer who has seriously failed to comply with a previous permission, national statistics are not yet available on the extent to which this provision has been used to date. My authorities will, however, monitor the provision in consultation with planning authorities. It should be noted that this provision is primarily designed as a support mechanism to the wide-ranging enforcement provisions available to planning authorities under the 2000 Act. The primary focus of planning authorities is to make effective use of their enforcement powers.

29) With regard to the case quoted by the Commission i.e. pig-rearing installation at Ballyglasson, Edgeworthstown, County Longford, my authorities have made enquiries of the relevant planning authority. The installation in question has been in operation for many years and has been operated to high standards at all times. An application was made to Longford County Council on 12 May 2004 for a single-storey meal (animal feed) store at the installation. In the course of the site inspection, the Council's planner noted that there were a number of buildings which may not have been the subject of a planning application and were not exempted development. The buildings included some office facilities which (i) did not have any effect on the capacity of the main production business of the operation and (ii) could not be considered to have any significant effect on the environment. It is worth noting that these minor infringements were noted by the planning authority and were not the subject of a complaint by any member of the public. It is also worth noting that they were not breaches of the retention permission as alleged in the Reasoned Opinion, so that this was not a case of failure, of any description, to comply with a previous permission. The planning application for the meal store was processed accordingly.

30) The operator of the installation was advised to make a planning application in respect of the office facilities referred to above in order to regularise the situation. An application was subsequently lodged on 23 December 2004 and is under consideration at present. It is the view of the planning authority that the office

facilities in question do not have any significant effect on the environment and, as a consequence, the question of EIA does not arise.

31) The fourth allegation made by the Commission in paragraph 3.10 of the Reasoned Opinion is that "no attempt is made to physically make good the harm resulting from the undertaking of projects without prior development consent or EIA". Again, this allegation is unfounded and does not stand up to scrutiny. Please see the examples referred to in paragraph 25 above in relation to County Offaly. A further example is given in Appendix 1 in response to complaint reference P2000/4502 in relation to quarrying in Glencar Valley, County Sligo.

32) The fifth point raised by the Commission relates to the taking of enforcement action in the lower courts. It is proposed to cover this matter in the Draft Development Management Guidelines referred to earlier. On the question of the use of injunction proceedings, Table 27 of the Planning Statistics 2003, enclosed, shows that in 2003, planning authorities made 199 applications for injunctions and that 67 were granted. The appropriate use of injunctions will also be dealt with in the Draft Development Management Guidelines.

33) The sixth point raised by the Commission refers to the sourcing by local authorities of materials from unauthorised quarry developments. The Department of the Environment, Heritage and Local Government has reminded local authorities on a number of occasions that there should be full compliance with the planning laws in relation to any proposed use of land as temporary quarries for the duration of any works.

Paragraph 3.11 of Reasoned Opinion

34) At paragraph 3.11 of the Reasoned Opinion, the Commission suggest that "the undertaking or significant intensification of projects without development consent would appear to be common for certain categories of activity coming within the scope of the Directive". This is without foundation and has not been substantiated by the Commission. In addition, my authorities would not accept that "developments undertaken without prior consent are more likely to be environmentally significant because they will not be subject to the specific conditions set in advance for regularly executed projects". The fact of the matter is that, in the event of unauthorised development being carried out, projects which are likely to have significant effects on the environment are more likely to come to the notice of planning authorities or be brought to their attention. In that event, enforcement action should ensure that such projects do not proceed without the necessary development consent.

Paragraph 3.12 of Reasoned Opinion

35) The Commission's point, at paragraph 3.12 of the Reasoned Opinion, regarding a "level playing field" for economic operators is noted. However, my authorities do not accept the point, against the background of the substantial strengthening of the

enforcement regime which has been introduced under Planning and Development Act 2000.

36) My authorities would add that any Commission analysis in relation to the EIA Directive should be considered against the background of very robust transposition and implementation of the Directive in Ireland.

37) Irish EIA legislation has transposed the mandatory EIA thresholds set out in Annex I of the Directive. In addition, Ireland has adopted a proactive approach to the application of EIA to Annex II project categories. This has manifested itself in the setting of mandatory EIA thresholds for all project types listed in Annex II. These Annex II thresholds are substantially below any comparable thresholds in Annex I.

38) While it is generally accepted that the need for EIA below these national thresholds (sub-threshold development) should be fairly limited, Irish implementing legislation addresses the possible need for EIA below the Annex II thresholds. In summary, there is a requirement to carry out EIA where the competent (consent) authority considers that a development would be likely to have significant effects on the environment, by reference to the criteria in Annex III in the Directive. Specifically in the case of sub-threshold development on specified conservation sites (e.g. an SAC or proposed SAC) the competent (consent) authority is required formally to decide whether or not a project would or would not be likely to have significant effects on the environment. These sub-threshold provisions were introduced to address key requirements in relation to "nature" and "location" in article 2 of the Directive.

39) The guidance document Environmental Impact Assessment (EIA) – Guidance for Consent Authorities regarding Sub-threshold Development (August 2003) was specifically developed by my authorities to assist consent authorities in making screening decisions in respect of sub-threshold development proposals.

40) In summary, Irish transposition of the Directive involves a combination of mandatory thresholds for each of the project types listed in the Directive and a requirement that sub-threshold projects likely to have significant effects on the environment must also be subject to EIA. The consequence of this approach is that Ireland carries out a large number of EIAs each year, representing a high level of EIA activity relative to other EU Member States - especially when allowance is made for differences in population, national income, and so on. As a result, my authorities would suggest that a "level playing field" does not apply as between different Member States and that "economic operators" in Ireland operate at a disadvantage to economic operators in many other Member States.

Paragraphs 3.14 and 3.15 of Reasoned Opinion

41) With regard to the Commission's somewhat dismissive response to the new control regime for quarries, my authorities wish to make the following points. The enactment of section 261 of the Planning and Development Act 2000 means that, following the

registration of quarries, planning authorities may restate, modify or add to conditions on the operation of a quarry which has received planning permission more than 5 years ago. Such quarries are, therefore, in the unusual position of being the only development type in respect of which, planning permission having been given with no conditions or with specified conditions, planning conditions may subsequently be added or altered.

42) In addition, the new regime will allow planning authorities to impose conditions on the operation of a pre-October 1964 quarry or, in certain circumstances, to require that an application for planning permission, together with an EIS, be submitted in respect of such a quarry. The circumstances in which a planning application, and EIS, must be submitted are where a quarry involves an area of 5 hectares or more, or is situated on an SAC, NHA, etc., and would be likely to have significant effects on the environment by reference to the criteria set out in Annex III of the EIA Directive. The effect of this provision is that the EIA Directive is being applied to quarries which were in existence well before the coming into effect of the Directive. In addition, the 5 hectare threshold is substantially below the 25 hectare threshold specified in Annex I of the Directive while a "locational" provision applies by reference to a quarry of any size being located in an SAC, NHA, etc. In the circumstances, my authorities fail to understand the basis for the Commission claim that the new controls on quarrying will not "address the circumvention of EIA" when in fact they go significantly beyond the requirements of the Directive. ,n,n

43) The Guidelines on Quarries on Ancillary Activities, issued by this Department under section 28 of the Planning Act in April 2004, give specific advice to planning authorities on dealing with applications for planning permission for quarries, particularly those requiring Environmental Impact Assessment. The Guidelines deal with the environmental impacts of quarrying, for example, noise and vibration, dust deposition and traffic impact and set out, in each case, best practice/possible mitigation measures and suggest possible appropriate planning conditions.

Paragraph 3.16 of Reasoned Opinion

44) In referring to water quality issues in the Lough Sheelin catchment, the Commission alleges "a failure to systematically require prior EIA for pig-rearing installations in accordance with the Directive in cases of both retention and normal planning permission" and "a failure to take any effective enforcement action". My authorities are finalising a response to these allegations which will be forwarded to the Commission very shortly. Paragraph 3.16 refers to a recent complaint in relation to a "retention application (ref.04/176)" in respect of a major piggery at Greenan, Kilmacthomas, County Waterford. My authorities wish to clarify that the application in question was not a retention application but an application to continue operation of the piggery which had previously been granted permission for a 10 year period.

Paragraph 3.17 of Reasoned Opinion

45) Paragraph 3.17 refers to an alleged "lack of any effective enforcement action against several unauthorised peat extraction projects". Ireland refutes this allegation on the basis that it is unfounded and unsubstantiated. Commercial peat production, both authorised and unauthorised, has ceased on all designated bogs, both SACs and NHAs. My authorities will ensure that this continues to be the position. Specifically in the case of Mouds Bog, my authorities do not accept that the case "exemplifies a failure to take any timely and effective enforcement action against substantial unauthorised peat extraction". In my authorities' letters of 11 December 2002 and 18 February 2003, the Commission was advised in detail of the complex legal issues involved in the case. In a further letter of 12 May 2003, the Commission was advised of significant progress towards the conservation of Mouds Bog. In particular, my authorities advised that the bog was designated as a proposed Special Area of Conservation (pSAC) in December 2002 under the European Communities (Natural Habitats) Regulations, 1997.

46) The letter of 12 May 2003 further advised that landowners within the designated area had been issued with details in relation to restrictions which would apply in order to maintain the conservation status of the bog, most notably that turf-cutting and other peat extraction must be phased out. In the case of commercial peat extraction, operators were advised that they could continue operations in 2003, on condition that they would not deepen existing drains or open new drains. However, their operations would not be allowed to continue in 2004 or in subsequent years. I can confirm that commercial production ceased at the end of the 2003 cutting season, did not take place in 2004 and will not take place in 2005 or any subsequent year.

47) In the case of domestic turf-cutting, whereby families cut turf for their own annual requirement, the letter of 12 May 2003 advised that a study would be carried out to ascertain the most sensitive areas of the bog. The study on domestic turf-cutting has been completed. No areas of extreme sensitivity on Mouds Bog have been identified which would necessitate an immediate cessation of such cutting. Cessation of domestic cutting will, however, continue to be phased out over the coming years. The new, more attractive, rates of compensation for cessation of turf-cutting is helping to achieve this.

Derrybrien Wind-Farm Project

48) With regard to the applicability of the EIA Directive to the windfarm project, my authorities wish to repeat the point made in our letter of 6 December 2004 that the first two phases of the project were not covered by the terms of the Directive because 'windfarms' was not included as a project category in Directive 85/337/EEC; this project category was introduced under Directive 97/11/EC which came into effect on 14 March 1999. My authorities do not accept the proposition suggested in paragraph 3.25 of the Reasoned Opinion that activities which were ancillary to the windfarm

project should have triggered EIA simply to cover the fact that 'windfarms' were not included under the terms of Directive 85/337/EEC.

49) Notwithstanding the fact that the first two phases of the windfarm project were outside the terms of Directive 85/337/EEC, both planning applications were accompanied by EISs. In addressing the environmental implications of the respective phases of the windfarm project, these EISs, and the EIS submitted with the planning application for the third phase of the windfarm project, considered the environmental implications of the deforestation associated with the project. My authorities would point out that the deforestation was an integral component of the project and, as a consequence, it was appropriate that consideration of the environmental implications of the deforestation should be integrated with the environmental assessment of the overall project. To carry out a separate environmental assessment during consideration of the tree felling licence in 2003 would be contrary to the principle of integrated assessment which is fundamental to the EIA Directive and could be subject to a charge of project splitting.

50) My authorities would add that the criteria governing consideration of tree felling licences are primarily concerned with maintaining the integrity of forest cover in Ireland. In this particular case, a felling licence was issued on 20 May 2003. The licence contained re-planting conditions under section 41(7) of the Forestry Act 1946, to ensure that there is no net loss of forestry. The licensee was obliged to plant an area of 119.3 hectares which equates to an equivalent yield class factor to the lands at Derrybrien (yield class is a silvicultural measure that refers to the annual increment of timber in terms of cubic metres per hectare). The lands to be planted are in Counties Roscommon and Tipperary, and the licensee was given 3 years, from the date of the licence, to carry out the necessary planting.

51) Paragraph 3.26 of the Reasoned Opinion suggests that the first two phases of the project were subject to significant modifications which came within the scope of Directive 97/11/EC. My authorities reject this suggestion. The proposed modifications did not fundamentally alter the development to such a degree as to require EIA. The modifications involved a reduction in hub height of 3 metres and an increase in blade length of 3 metres, resulting in the same overall height of 73 metres above ground. My authorities would not accept that these modifications involved an "increased impact on the unstable peatland terrain" as alleged, because the turbines are not founded on peat but on solid substrate beneath the excavated peat.

52) At paragraph 3.27 of the Reasoned Opinion, it is suggested that a decision to grant an extension of a planning permission represents a "development consent" for the purposes of the Directive. My authorities do not accept this line of argument. What is involved is an extension of the period for completing a development, a development for which planning consent would have already been given. Consideration by a planning authority of an application for an extension under section 42 of the Planning and Development Act 2000 does not extend to consideration of planning and environmental issues. The function of a planning authority in relation to

the grant of an extension is a very narrow one. In particular, the planning authority is not entitled to reconsider the planning merits of a development, but must instead confine itself to a consideration of whether the statutory criteria (in terms of ensuring that the development had commenced before the expiration of the period initially granted, "substantial works" were carried out and the development would be completed within a reasonable time) has been observed. See McDowell-v-Roscommon County Council, unreported. HC 21 December 2004.

53) With regard to the allegation at paragraph 3.29 of the Reasoned Opinion that the studies undertaken for the development were deficient, my authorities would reiterate a number of points made in our letter of 6 December 2004. Firstly, responsibility for ensuring the adequacy of an Environmental Impact Statement (EIS) submitted with a planning application rests with the planning authority, and in the event of an appeal, with An Bord Pleanala. Secondly, in the case of the EISs submitted in respect of the Derrybrien windfarm project, the planning authority, and An Bord Pleanala on appeal, clearly considered the EISs not to be deficient in the context of the respective grants of planning permission for the developments in question.

Appendix 1

Complaint P2000/4502 – Quarrying in Glencar Valley, County Sligo

Quarrying activity in Glencar was brought to the attention of Sligo County Council in early April 2002. Following a site visit on 10 April, the County Council issued a warning letter under section 152 of the Planning and Development Act 2000 on 30 April 2002. On 24 July 2002, the Council issued an Enforcement Notice under Section 154 of the 2000 Act requiring restoration of the land to its condition prior to the commencement of development.

The County Council subsequently instituted injunction proceedings, as a result of which the site was fully reinstated by May 2003 and all costs incurred by the Council were recovered from the owners of the quarry.

In early September 2004, a verbal complaint was made to the Council that some small scale excavation work was taking place. On 3 September 2004, the County Council issued a warning letter under section 152 of the 2000 Act. During a site visit on 17 September, the Council noted that works had ceased but the site had not been reinstated. On the 18 October 2004, the Council wrote to the owners' Solicitors requiring restoration of the land to its condition prior to the commencement of development.

Throughout these proceedings, the owners of the quarry have claimed that quarrying activity has taken place on the site for some considerable time. At a meeting with the County Council on 27 November 2004, the owners promised to submit evidence to support this claim. On 25 February 2005, the County Council wrote to the owners giving them one month to produce this evidence and threatened enforcement proceedings in the event of the deadline not being met. At the time of that letter, no work was being carried out on the site.