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DIRECTORATE-GENERAL
ENVIRONMENT
Directorate A - Legal Affairs and Cohesion
ENV.A - The Director

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Brussels,
DG ENV./AIS/db/Ares (2012) 1087026

[redacted]
Deputy Permanent Representative
Permanent Representation of Ireland to
the European Union
Rue Froissart, 50
1040 BRUXELLES

Subject: Implementation of the Court's judgment in case C-215/06

Dear Mr [redacted]

I refer to the judgment of 8 July 2008 of the Court of Justice in case C-215/06 *Commission v Ireland*. I note that in 2010 - 2012 the Irish authorities have put in place a number of measures aimed at implementing parts of the judgment. In view of assessing Ireland's compliance with the judgment, I would like to invite the Irish authorities to provide clarification on a number of issues with regard to the legislative measures that were recently adopted and any planned measures to fully implement the judgment (see Annex).

I would be grateful if the Irish authorities could provide a response to this letter in advance of the package meeting in Dublin on 9 October 2012.

[redacted]

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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 2011, SI No 475 of 2011 and SI No 582 of 2011.
- 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 261A 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 261A (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 EIA 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.

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.

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.

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

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.

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).

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]

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

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 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 IV 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(1)(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.

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 177B(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.

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.

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.

b. The Irish authorities are invited to clarify whether the scope and content of the report required under Section 177I(1) of the Act is established elsewhere but in these Guidelines.

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.

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.

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 177K(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.

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.

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.

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 Environment (Miscellaneous Provisions) Act 2011, enforcement action can be taken against a 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.

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.

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.

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.

B. Section 261A on quarries

The Planning and Development (Amendment) Act 2010 of 26 July 2010 introduces Section 261A 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.

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.

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.

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.

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 261A(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 261A 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.

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.

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 of the Act. 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 261A 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.

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.

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.

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-215/06, paragraph 61). The Irish authorities are invited to comment on this.

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.

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.

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 261A 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.

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 261A(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.

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.

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-215/06. 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 QR.01) 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 (PL25.222171M (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 Clonmelsh, Carlow County with regard to which an application for a permit retention was submitted in 2010, after the judgment in case C-215/06.

- Cahernicole 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.

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.

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.

Second ground - Derrybrien

It is understood that, in the case of Derrybrien, the developer is objecting to submitting the project to a substitute consent process under the new legislation. Until recently, the Irish authorities did not appear to be in any doubt as to whether this step would be necessary to comply with the Court's judgment. It is noted that the developer is entirely state-owned and thus an emanation of the Irish state.

Your authorities are asked to confirm the latest position and in particular whether the competent authority has started the substitute consent process and, if not, whether it intends to do so, giving the expected time-frame.

If it is not intended to submit the Derrybrien wind-farm to the substitute consent process, your authorities are asked to:

- explain how the failure to assess the likely impacts of the Derrybrien wind-farm in accordance with Directive 85/337/EEC will otherwise be addressed inter alia in terms of the entitlement of the public and other consultees to express an opinion and to have these opinions taken into consideration;

- comment on why the failure to submit the Derrybrien wind-farm project to the substitute consent process should not be considered as putting into doubt the reliability of the substitute consent system itself;

- comment in respect for the duty of loyal cooperation, having regard to the fact that the developer is an emanation of the Irish state.