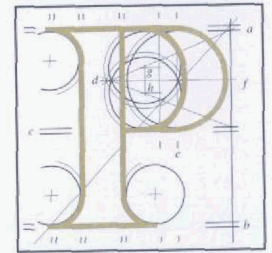


Our Ref: QV 26.QV0239
P.A.Reg.Ref: Q019

An Bord Pleanála



The Secretary,
Planning Section,
Wexford County Council
County Hall,
Carricklawn,
Wexford.

10 JAN 2014

Re: Quarry.
Ballyrooan, Screen, Co. Wexford.

Dear Sir/Madam,

An order has been made by An Bord Pleanála determining the above-mentioned matter under the Planning and Development Acts 2000 to 2013. A copy of the order is enclosed.

In accordance with section 146(5) of the Planning and Development Act 2000, as amended, the Board will make available for inspection and purchase at its offices the documents relating to any matter falling to be determined by it, within 3 days following the making of its decision. The documents referred to shall be made available for a period of 5 years, beginning on the day that they are required to be made available. In addition, the Board will also make available the Inspector's Report, the Board Direction and Board Order in respect of the matter on the Board's website (www.pleanala.ie). This information is normally made available on the list of decided cases on the website on the Wednesday following the week in which the decision is made.

The Public Access Service for the purpose of inspection/purchase of file documentation is available on weekdays from 9.15am to 5.30pm (including lunchtime) except on public holidays and other days on which the office of the Board is closed.

Yours faithfully,

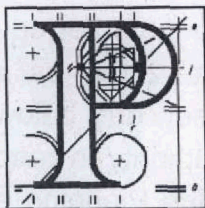
Myriam O'Neill
Executive Officer

Encl:

Board Direction Attached

BP 100n.ltr

An Bord Pleanála



PLANNING AND DEVELOPMENT ACTS 2000 TO 2013

Wexford County

Planning Authority Register Reference Number: Q019

An Bord Pleanála Reference Number: 26.QV.0239

LOCATION OF QUARRY: Ballyrooaun, Screen, County Wexford.

REVIEW REQUESTED by Sean Kelly, in the name of Tom Phillips and Associates of 2-3 Roger's Lane, Lower Baggot Street, Dublin in respect of;

the determination by Wexford County Council on the 16th day of August, 2012, under (2)(a)(ii) of section 261A of the Planning and Development Act, 2000, as amended by the insertion of section 75 of the Planning and Development (Amendment) Act 2010 and as further amended by the European Union (Environmental Impact Assessment and Habitats) Regulations 2011 and European Union (Environmental Impact Assessment and Habitats) Regulations 2012, that;

development was carried out after the 26th day of February, 1997, which development would have required, having regard to the Habitats Directive, an Appropriate Assessment, but that such assessment was not carried out.

BOARD DECISION

The Board in exercise of its powers, conferred on it under section 261A of the Planning and Development Act, 2000, as amended, and based on the Reasons and Considerations set out below, decided to **set aside** the determination of the planning authority in respect of this development made under section 261A (2)(a)(ii) of the Planning and Development Act 2000, as amended.

MATTERS CONSIDERED

In making its decision, the Board had regard to those matters to which, by virtue of the Planning and Development Acts and Regulations made thereunder, it was required to have regard. Such matters included any submissions and observations received by it in accordance with statutory provisions.

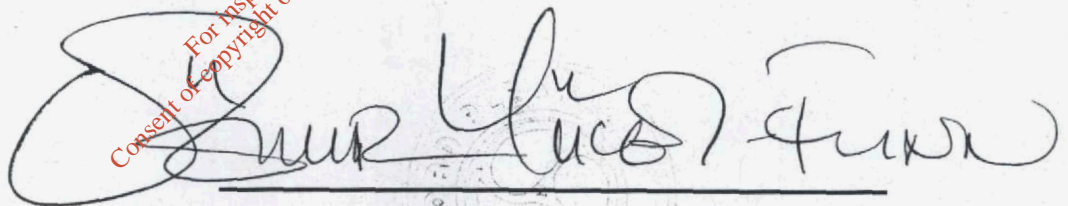
REASONS AND CONSIDERATIONS

- (a) the provisions of the Planning and Development Acts, 2000 to 2013, and in particular Part XA and section 261A,
- (b) Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora, as amended,
- (c) the 'Appropriate Assessment of Plans and Projects in Ireland - Guidance for Planning Authorities' issued by the Department of the Environment, Heritage and Local Government , 2009/2010,
- (d) the submissions on file, including documentation on the registration file (planning authority register reference number Q019),
- (e) the planning history of the site, including planning application register reference number 2008/2323, which was accompanied by an environmental report and ecology report which were revised in response to a further information request,

- (f) the submissions received by the planning authority from National Parks and Wildlife Service during the course of the said application, providing comments on the adequacy of the ecology report and revised ecology report, which contributed to the Appropriate Assessment process,
- (g) the qualifying interests of the Screen Hills candidate Special Area of Conservation (Site Code 000708) located adjacent to the subject quarry site and conservation status of same, the date of designation of the European site and to the nature of hydrological connections of the quarry site to same,
- (h) the limited scale and nature of the works undertaken since 2008 outside the scope of the planning permission, and
- (i) the report of the Inspector,

it is considered that, by itself, and in combination with other plans or projects, the development on this site after the 26th day of February 1997 would not have been likely to have had a significant effect on any European Site, in view of the conservation objectives of those sites.

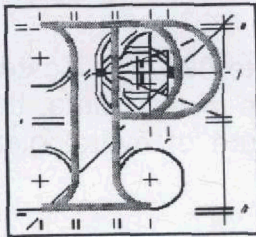
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**Member of An Bord Pleanála
duly authorised to authenticate
the seal of the Board.**

Dated this 9th day of JAN 2014.

An Bord Pleanála



Board Direction

Ref: QV 26. QV 0239

The submissions on this file and the Inspector's report were considered at a Board meeting held on 8th Jan, 2014. The Board decided to:

Set aside the planning authority's determination under Section 261A(2)(a)(ii) in accordance with the reasons and considerations set out below

REASONS AND CONSIDERATIONS

Having regard to:

- (a) the provisions of the Planning and Development Acts, 2000 to 2013, and in particular Part XA and section 261A,
- (b) Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora, as amended,
- (c) the "Appropriate Assessment of Plans and Projects in Ireland - Guidance for Planning Authorities" issued by the Department of the Environment, Heritage and Local Government (2010),
- (d) the submissions on file, including documentation on the registration file (planning authority register reference number Q019)
- (e) the planning history of the site, including planning application planning reference number 2008/2323, which was accompanied by an environmental report and ecology report which were revised in response to further information request
- (f) The submissions received by the planning authority from NPWS during the course of the said application, providing comments on the adequacy of the

ecology report and revised ecology report, which contributed to the Appropriate Assessment process

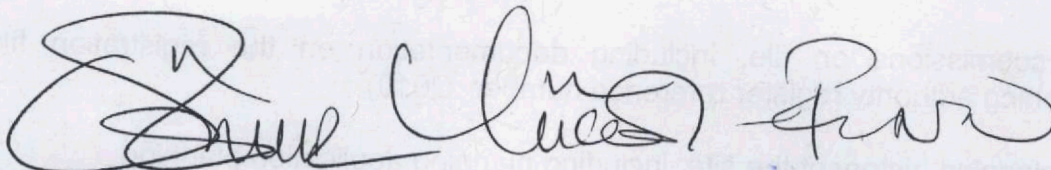
- (g) The qualifying interests of the Screen Hills cSAC (Site Code 000708) located adjacent to the subject quarry site and conservation status of the same, the date of designation of the European site and to the nature of hydrological connections of the quarry site to the same,
- (h) The limited scale and nature of the works undertaken since 2008 outside the scope of the planning permission, and,
- (i) the report of the Inspector,

it is considered that, by itself, and in combination with other plans or projects, the development on this site after 26th February 1997 would not have been likely to have had a significant effect on any European Site, in view of the conservation objectives of those sites.

In deciding not to accept the inspector's recommendation to confirm determination under s261A(2a)(ii), the Board considered that (a) the size of the restored area was relatively modest and the restoration was carried out in consultation with the NPWS, and (b) provision of a compensatory habitat as required by the condition no3 was unlikely to lead to significant effects on the SAC. The Board therefore did not consider that those two elements of development would not require additional Appropriate Assessment to be carried out.

Note:

Having regard to the provisions of the 261A(6)(h), of Planning and Development Act, 2000 (as amended), the effect of the Board's determination is that the Notice served by the planning authority under Section 261A (3)(a) ceases to have effect.

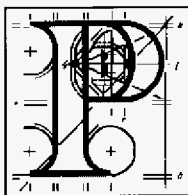


Board Member: _____

Date: 8th Jan, 2014

Öznur Yücel-Finn

An Bord Pleanála



Inspector's Report

Development: Quarrying at Ballyrooan, Screen, Co. Wexford

Application for Review under Section 261A(6)

Planning Authority: Wexford County Council
Planning Authority Quarry Ref.: Q0019
Owner: Sean/John Kelly
Operator: Michael Kelly
PA Determination & Decision: Section 261A(2)(a) and (3)(a)

Review

Party/Parties Seeking Review: Sean Kelly
Observer/s: No observer to review
Type of Review: Section 261A(3)

Date of site inspection 18th February 2013

Inspector: **Sarah Moran**

1.0 SITE LOCATION AND DESCRIPTION

- 1.1 The site is located in the townland of Ballinrooaun, approximately 2 km north of Curracloe, Co. Wexford and nearby to the north of the settlement of Screen. The surrounding area is relatively elevated with extensive views in all directions. It is undulating and has a scattering of small pools of water characteristic of the 'kettle and kame' glacial landscape. There is a moderate density of one off houses in the area, see aerial photographs. The quarry is located on the side of a hill, a locally elevated location with extensive views in all directions. The excavated area is clearly visible from the Screen/Blackwater road to the north west.
- 1.2 The quarry is accessed from the L-7003-1 Screen/Blackwater road over a narrow, unsurfaced laneway serving agricultural lands. Sightlines are very restricted at the junction between the laneway and the public road. There are two no. houses and a farm yard immediately adjacent to the junction. There is a bath type wheel wash inside the junction, presumably for trucks exiting the quarry. There is a small kettle lake and wetland on the southern side of the laneway from the road junction. This wetland is characteristic of the 'kettle and kame' landscape. There is an opening half way along the laneway that appears to have been used for truck turning and some storage of materials, with several truck bays.
- 1.3 The quarry itself has an existing extracted area, which was measured by the planning authority as 2.29 ha on 28th March 2012. The same survey measured the level of extraction for the majority of the excavated area as 59 above Ordinance Datum (OD) with a small area measuring 57.09 above OD. There are mounds around the extraction area that have become overgrown, these provide some visual screening in the area immediately around the quarry. An area to the immediate south west of the extracted area, indicated as part of the quarry in historic aerial photographs, is now vegetated or restored. There is an area of deposition to the west of the excavated area with piles of extracted material, which are partially overgrown. Within the existing excavated area, there is an access track that winds down to the quarry floor. The quarry was being worked on the day of site inspection. Machinery present at the site comprised an excavator working the eastern quarry face, a screening/processing machine on the quarry floor and a digger. The quarry floor was dry on the day of inspection, i.e. there was no ponding. There were a small number of piles of stockpiled material.
- 1.4 The quarry is adjacent to the Screen Hills Special Area of Conservation (SAC), Site Code 000708. It is also within the proposed Screen Hills Natural Heritage Area (pNHA), ref. NHA-WX-36

2.0 PLANNING HISTORY AND REGISTRATION UNDER SECTION 261

2.1 Enforcement Action 2005 to 2009

2.1.1 The planning authority carried out enforcement action relating to development at the site during the period 2005 to 2009. The enforcement action commenced after the National Parks and Wildlife Service (NPWS) submitted a complaint to the planning authority on 28th September 2005, relating to an unauthorised quarry operation within the Screen Hills cSAC on lands belonging to Sean Kelly. The planning authority served an enforcement notice on Sean Kelly on the 2nd May 2006 in relation to the operation of an unauthorised sand quarry at the site. A warning letter was issued on 29th November 2007. An enforcement notice was served on the 5th February 2008. The site owner gave an undertaking on court on 22nd September 2008 not to quarry on lands within the Screen Hills cSAC. The site owner was convicted and fined at Wexford District Court on 22nd June 2009 for unauthorised development at the site up to the date of planning permission of 2008/2323 (see below).

2.2 Section 261 Registration

2.2.1 The site owner/operator Sean Kelly applied to Wexford County Council to register a sand quarry at the site under section 261 on 26th April 2005. The total site area and the extraction area were both stated as 4.5 ha. Pre 1964 use was claimed. The planning authority noted that the site was located within the Screen Hills pNHA and adjoined the Screen Hills SAC. A site inspection by the planning authority on 20th December 2005 found that the 4.5 ha area to be registered had already been extracted, also that storage of sand and backfilling had taken place outside the site. The section 261 planning report recommended a further information request. It appears that the planning authority did not register the quarry as it was considered to be unauthorised development.

2.3 Retention Planning Application 2008/2323

2.3.1 Planning application lodged on 19th September 2008. The site owner Sean Kelly sought permission for retention, continued operation and extension of the existing sand and gravel pit on a site of 5.52 ha, to provide a final extracted area of 3.45 ha and to a depth of 60 m above OD. Retention was sought for an existing mobile sand and gravel screening plant, loading areas and vehicle parking areas. Site to be served by the existing haul route from county road L-7003-1, a proposed extension to the route and a new egress point to the L-7003-1. The development included a wheelwash, areas of stockpiling, landscaping, other site development works above and below ground and restoration of the final pit void. The

application site was adjacent to but not within the Screen Hills cSAC. The application did not include the retention of works carried out within the Screen Hills cSAC on lands to the immediate south of the site. These were outside the site boundary and it was proposed to restore the lands separately in consultation with the NPWS. A 'Planning and Environmental Report' was lodged with the application but not a full EIS.

- 2.3.2 Further information was submitted on 23rd March 2009. Additional further information was submitted on 21st May 2009. The further information submitted did not significantly amend the proposed development or development to be retained. Permission was granted subject to 34 no. conditions on 24th July 2009. Condition no. 2 limited the extraction period to a maximum of 7 years from the date of permission with an additional period of 6 months to carry out a closure plan. Condition no. 3 required the site owner to enter into a section 47 agreement to contain an undertaking to dedicate and maintain an area on the applicant's landholding as a 'compensation area' as part of a long term management and restoration plan for the quarry. Condition no. 11 specified a maximum extraction depth of 60m above OD. Condition no. 12 required works to the county road and access lane serving the site. Condition no. 26 required the submission of a closure plan. Condition no. 27 required environmental monitoring.

2.4 Enforcement Action Since 2009

- 2.4.1 The planning authority carried out enforcement action relating to non-compliance with conditions of 2008/2323. A warning letter was served on Sean Kelly on 31st August 2009 relating to non-compliance with conditions nos. 5, 6, 7, 8, 9 and 17 of the permission. A warning letter was issued on 11th June 2010 to Sean Kelly relating to non-compliance with conditions nos. 1, 9, 12, 13, 19(a), 19(c), 22 and 23 of 2003/2323. The planning authority served an enforcement notice on 24th February 2011 to Michael Kelly and Sean Kelly requiring them to cease unauthorised storage of materials and removed unauthorised concrete storage bays within six weeks. A separate enforcement notice was served on the same individuals on the same day requiring compliance with conditions of 2008/2323 within six weeks. The planning authority commenced legal proceedings on 31st January 2012.

3.0 MATTERS CONSIDERED BY PLANNING AUTHORITY IN ASSESSMENT

3.1 Submission by Site Owner/Operator

3.1.1 A submission was made by Tom Phillips Associates Planning Consultants on behalf of the site owner. The main points made may be summarised as follows:

- The subject quarry commenced in 2005.
- The site owner sought to register the quarry under section 261 in April 2005, however the planning authority determined that the development was unauthorised.
- The site owner sought and was granted retention permission under 2008/2323.
- The quarry was commenced after 1st February 1990. It was sub threshold and did not require EIA. Also EIA was not required with the retention application, this issue was considered in the planning report of 2008/2323 dated 4th November 2008. The planning authority did not seek EIA as part of the further information request.
- The quarry commenced after 26th January 1997. The planning authority requested Appropriate Assessment (AA) to examine potential impacts on the adjacent SAC as part of the further information request. This report was submitted and subsequently augmented on foot of a clarification of further information request. Permission was subsequently granted.
- There has been no subsequent development at the quarry that was not authorised under 2008/2323.
- The site passes all tests under section 261A and no further action is required.

3.2 Stage 1 Screening for AA

3.2.1 An AA screening report for the site was commissioned by the planning authority for section 261A purposes. The report on file by Natura Environmental Consultants, dated July 2012, notes the following main points:

- The report considers potential impacts on the following Natura 2000 sites:
 - Screen Hills cSAC(Site Code 000708)
 - The Raven SPA (Site Code 004019)
- Part of the quarry is located approximately 50m from the boundary of the Screen Hills cSAC.
- The Raven SPA is located approximately 2.3 km to the east.
- The report states that lowering of the quarry floor could give rise to the following effects on the Natura 2000 sites:
 - Potential adverse effects on surface and ground water quality draining to the Natura 2000 sites resulting from contaminated surface water run-off during operational quarrying activities (including such pollutants as diesel, oils and hydraulic fluids and from silt laden run-off or pump discharges from the site).

- Potential adverse effects on ground water quantity supplying the oligotrophic lakes within Screen Hills cSAC.
- Potential impacts on Screen Hills cSAC resulting from dust levels during operational quarrying activities.
- The site has no surface water connection with Screen Hills cSAC or any other Natura 2000 site and as such there is no surface water pathway by which the quarry development could affect any of the Annex I habitats for which the cSAC is selected.
- A report by BMA GeoServices submitted as further information on 2008/2323 found that the winter water table lies at 32-33 m above OD, which is approximately 27 m below the quarry floor of that planning application at 60m OD; that groundwater flow in the area is to the north-east (away from the cSAC) and that those lakes located downstream (i.e. to the north east) of the sand pit are all perched water features and therefore there are no potential risks of impacts from sand pit activities.
- It is considered that the lowering of a portion of the quarry floor by 3m (which would still leave a buffer of 24m to the winter ground water level) would not result in any significant risk of adverse effects on the Annex I habitats for which the Screen Hills cSAC is selected, to that predicted for the originally quarry development and as such will not have any adverse effects on the conservation objectives of the cSAC.
- AA was carried out for 2008/2323, which considered the potential for dust and wind blown sand associated with quarrying activities to adversely effect habitats within the cSAC. The AA considered that any such materials would be deposited within 20m of the quarry boundary and lighten existing soils and improve the habitat for most of the specialised sites for which the site is designated. It is therefore considered that the lowering of the quarry floor by approximately 3m would not result in any adverse effects on any of the Annex I habitats for which the cSAC is selected.
- It is considered that there are no other plans or planning permissions in the area likely to have significant 'in combination' effects with the quarry.
- The AA screening concludes that there will be no risk of significant negative effects on Screen Hills cSAC or The Raven SPA, either alone or in combination with other plans or projects and therefore no adverse effect on the integrity of these Natura 2000 sites as a result of the lowering of the quarry floor to 57 above OD. Therefore, Stage 2 AA is not required.

3.3 Planning Report

3.3.1 The planning report on file dates to 16th August 2012. The report considers that there is no evidence to support pre 1964 commencement

with regard to historic maps and to a 1974 aerial photograph. In addition, the site has intensified since any pre 1964 operation to an extent that would require planning permission. The report divides the quarry into four areas for the purposes of section 261A assessment. The conclusions for each section are as follows:

3.3.2 Area A – Restored Area

Located on the southern side of the site, to the east of the access track. The portion of the site formerly extracted within the Screen Hills cSAC during the period 1995 to 2009. This area has no planning history. It measured 0.42 ha at its maximum extent in 2007 and 2008 and was restored to agricultural use by April 2009. The applicants gave an undertaking in court on 22nd September 2008 that there would no longer be a quarry in this area. It is no longer deemed to be a quarry having regard to the definition of a 'quarry' set out in the *European Union (EIA and Habitats) Regulations 2011* and as such section 261A does not apply to this area.

3.3.3 Area B - Restored Area

To the south of the existing extracted area. This includes a small section of the cSAC which was restored in late 2011/early 2012. There is no planning application history for this area. Aerial photographs from January and March 2012 show this area in the process of restoration. A site inspection on 16th July 2012 found this area regraded and restored. This area is no longer deemed to be a quarry on the same basis as Area A.

3.3.4 Area C – Permitted Quarry

The extracted area of the quarry as permitted under 2008/2323. Approximately 2.29 ha of this had been extracted to date, leaving c. 1.16 ha yet to be extracted. This area is located within a pNHA and adjoins a cSAC. The excavation area was sub threshold for EIA. Environmental issues were given detailed consideration in the course of the planning application, i.e. EIA determination was carried out, and the application was deemed not to require an EIS. An AA was submitted with the application. Therefore section 261A(2)(a) does not apply to this part of the site.

3.3.5 Area D – Unauthorised Excavation

The lowest part of the quarry floor. An area measuring 0.187 ha. A Lidar data commissioned by the planning authority on 28th March 2012 and a Digital Terrain Model (DTM) survey carried out by the planning authority on 1st August 2012 indicate quarrying below the 60 m OD maximum floor level permitted under 2008/2323. EIA determination and AA of the site were carried out as part of 2008/2323. The planning report concludes, with regard to the limited size and area of the site and to the AA screening report on file:

While the sensitivity of the site is noted and its importance recognised it is considered that the impacts of the deepening on the designated site have been dealt with through Appropriate Assessment (which would have to address the hydrological links/impacts) and that this unauthorised element of the quarry site would not have required Environmental Impact Assessment.

Also:

... having regard to the screening conclusion of the Appropriate Assessment screening report carried out by Natura, that there will be no risk of significant negative effects on the Screen Hills SAC or the Raven SPA and therefore Stage 2 AA is not required.

It is noted that development has taken place at this part of the site since 3rd July 2008 but considers that EIA/EIA determination would not be required with regard to the limited size and depth, also AA not required with regard to the screening report on file.

- 3.3.6 The report concludes that the quarry as a unit in combination with the unauthorised modification requires a revised AA for the entire quarry to take account of the modification and therefore substitute consent is required with a remedial AA.

4.0 DETERMINATION/DECISION OF PLANNING AUTHORITY

- 4.1 The planning authority **determined** pursuant to section 261A(2)(a)(ii) that:

Development has been carried out after 26 February 1997, which modifies the original permitted project, which now requires a modified Appropriate Assessment.

The stated **reasons for the determination** are as follows:

Having regard to the nature of the development at the site and the unauthorised deepening of the quarry floor and the requirements Habitats Directive 1997.

- 4.2 The planning authority **decided** pursuant to section 261A(3) to direct the applicant to apply for substitute consent with a remedial Natura Impact Statement. The stated **reasons for the decision** were as follows:

Having regard to all the available information it is concluded that quarry development has taken place since 2005 in Ballinrooan, Castle Ellis, to which a determination under section 2(a) applies. It is further determined

that the development did not commence before 1964 and was granted permission under Plan Reg: 20082323, which had a determination that EIA was not required and an Appropriate Assessment was carried out. It is also determined that the requirements of Section 261 were substantially fulfilled. Development has been carried out after 26 February 1997, which modifies the original permitted project, which now requires a modified Appropriate Assessment.

5.0 REVIEW TO BOARD

5.1 The review is submitted by Tom Phillips & Associates on behalf of the site owner Sean Kelly. The main points made may be summarised as follows.

- The application seeks a review of the planning authority determination under section 261A(2)(a) only.
- In accordance with the provisions of subsection (6)(h), should the Board decide to set aside the subsection (2)(a) determination, then the direction to apply for substitute consent shall cease to have effect.
- The Board cannot modify a determination under subsection (2)(a) as per subsection (6)(e), e.g. it cannot determine that an EIS is required.
- Subsection (2)(a)(i). Development was carried out at the site after 1 February 1990 but was below the mandatory threshold for EIA. EIA determination was required by was carried out by Wexford County Council in their consideration of 2008/2323.
- Subsection (2)(a)(ii) Development was carried out at the site after 26 February 1997 and an AA was required and undertaken as part of the planning application 2008/2323.
- The key aspect of the planning authority determination under subsection (2)(a) relates to a small confined area within the quarry floor that was excavated to a level below the permitted quarry floor. The submission describes this area as 'a quarry sump'.
- The relevant part of the development is not material. Both of the surveys used by the planning authority to identify the relevant area show a small area measuring c. 0.18 ha below the permitted quarry floor level of 60m above OD. There is an error in the description of the quarry levels in the planning report on file. The majority of the pit was not at 59m above OD but at 60m above OD and above. Area D was dug as a water sump following numerous incidents of significant surface water ponding within the pit. This ponding was caused as a result of the sand at the base of the quarry having become compacted with the heavy loading shovel traversing across the pit. A localised sump was dug to drain the ponding to uncompacted layers below allowing the surface water to percolate to the ground. The problem repeated itself following heavy rain. The quarry operator decided to dig a localised sump at Area D, to allow surface water to drain to this area

- of the pit and percolate through uncompacted sand. It was necessary to dig the sump to a depth of 3m to allow the water to easily percolate.
- Sumps are a normal part of quarry development and are always dug below the lowest floor level permitted. Sumps in sand and gravel pits tend to be temporary and may be relocated around the site depending on operational requirements. Unlike rock quarries, these sumps are easily dug and filled in as the same material exists in the same form at the quarry face. In this regard, they are generally considered as being part of the construction phase of a quarry and as such should be deemed exempted development under Class 16 of Schedule 2 of the *Planning and Development Regulations 2001-2012* save in the event that AA is required.
 - It is submitted that the alleged unauthorised development has been regularised. The sump was filled in using sands from the working face of the quarry prior to the issuing of the planning authority determination. This was confirmed by a recent levels survey. A sand quarry can easily be restored using the same materials at the site unlike a rock quarry. Filling the sump was not a significant undertaking due to the limited size and depth. The surface water problem at the site is now being dealt with by directing the surface water to the base of the working quarry face where the sand is uncompacted and where the surface water can easily percolate.
 - It is submitted that AA is not required. An AA was undertaken for the quarry as permitted. The Natura consultants report on file concludes that stage 2 NIS is not required for the 'unauthorised area of the quarry'. The planning authority opinion that a revised AA is needed for the quarry as a unit is based on a statement in section 2.1 of the DoEHLG guidelines on AA. When taken in context it is clear that the planning authority has misread the guidelines and is inferring a meaning on this section that was unintended.

6.0 OBSERVATIONS

- 6.1 There are no third party submissions/observations on file.

7.0 PLANNING AUTHORITY RESPONSE

- 7.1 The planning authority response is summarised as follows:
- Having regard to the LIDAR and GPS surveys of the site and to the site visit it was evident that there was an area (c. 0.18 ha) that was excavated below the permitted quarry floor level of 60m above OD. The reason for its existence is irrelevant, the fact is that the deepening of the quarry floor was verified by two surveys and this deepening is considered material and is contrary to conditions nos. 1 and 11 of

2008/2323, ref. article 9 of the *Planning and Development Regulations 2001*, as amended.

- The development must be considered as material having regard to impacts and taking into account the very permeable nature of the subsoil material.
- The unauthorised development existed during the time frame for section 261A. The planning authority cannot confirm at present whether any infilling had taken place or not and if so what material has been used in the unauthorised infilling. These works in themselves would require AA screening and possibly AA having regard to the importance of hydrological impacts in the assessment of the planning application and EIA.
- A modified development requires a modified AA in accordance with the DoEHLG guidelines on AA. This is highlighted by the Natura consultants report. The unauthorised deepening of the quarry floor is considered development and is considered a material modification of the overall development. The existing AA included in 2008/2323 does not assess the effects of the permitted but yet to be extracted area in combination with this new modification. A modified AA is needed so all likely significant effects can be appropriately assessed, in particular hydrological links and potential impacts.

8.0 STATUTORY CONSIDERATIONS

8.1 Section 261A of Planning and Development Act 2000 (as amended)

8.1.1 Section 261A as amended by Regulation 16 of the European Union (Environmental Impact Assessment and Habitats) Regulations 2011 and Regulation 3 of the European Union (Environmental Impact Assessment and Habitats) Regulations 2012.

8.1.2 **Section 261A(2)(a)**. Planning authorities are to make a **determination** as to whether:

(i) *development was carried out after 1 February 1990 which development would have required, having regard to the Environmental Impact Assessment Directive, an environmental impact assessment or a determination as to whether an environmental impact assessment was required, but that such an assessment or determination was not carried out or made, or-*

(ii) *development was carried out after 26 February 1997, which development would have required, having regard to the Habitats Directive, an appropriate assessment, but that such an assessment was not carried out.*

If the planning authority determines that section 261A(2)(a) applies, then the following sections are relevant.

8.1.3 Section 261A(3)(a). Planning authority also **decides** that:

- (i) either the quarry commenced operation before 1 October 1964 or permission was granted in respect of the quarry under Part III of this Act or part IV of the Act of 1963, AND*
- (ii) if applicable, the requirements in relation to registration under Section 261 were fulfilled,*

Then the planning authority directs the quarry owner/operator to apply for substitute consent.

8.1.4 Section 261A(6)(a) provides for applications to the Board for review of planning authority determinations under subsection (2)(a) and decisions under subsections (3)(a), (4)(a) or (5)(a). Review applications may be made by quarry owners/operators or by observers who made submissions to the planning authority. Parties may apply to the Board for review of one, or more of the following, referred to in the notice:

- (i) a determination under subsection (2)(a);*
- (ii) a decision of the planning authority under subsection (3)(a);*
- (iii) a decision of the planning authority under subsection (4)(a);*
- (iv) a determination of the planning authority under subsection (5)(a) that subparagraph (i) or (ii) or both, if applicable, or subsection (2)(a) apply to the development which took place after 3 July 2008;*
- (v) a decision of the planning authority under subsection (5)(a).*

Subsection (6)(d) states:

The Board shall make a decision as soon as may be whether to confirm or set aside the determination or decision of the planning authority to which the application for review refers.

8.1.5 Section 261A(6)(h) states:

Where the decision of the Board is to set aside a determination under subsection (2)(a) a direction to apply for substitute consent contained in a notice issued under subsection (3)(a) shall cease to have effect.

9.0 ASSESSMENT

9.1 Introduction and Scope of Review

- 9.1.1 I have visited the site, examined the documentation on file and have had regard to the DoECLG *Section 261A Guidelines for Planning Authorities*, January 2012 and the *Supplementary Guidelines* issued in July 2012.
- 9.1.2 By reference to subsection (6), the role of the Board in the review process is to confirm or set aside the determination or decision of the planning authority to which the review refers. The scope of the review by the Board, therefore, is confined to the terms of the review as specified by the applicant for the review, being either or both the determination and/or the decision, and to the terms of the determination and/or decision as stated by the planning authority in the notice. In this case, the site operator has applied to the Board for a review of the planning authority determination under section 261A(2)(a) only and does not seek a review of the subsequent decision to direct the site owner to apply for substitute consent pursuant to subsection (3)(a). It is noted that, as per subsection (6)(h), where the Board decides to set aside a determination under subsection (2)(a), a direction to apply for substitute consent contained in a notice issued under subsection (3)(a) shall cease to have effect. In addition, the terms of the planning authority determination relate to the issue of Appropriate Assessment (AA) only, i.e. subsection (2)(a)(ii) and not to the issue of Environmental Impact Assessment (EIA) or EIA determination, i.e. subsection (2)(a)(i).
- 9.1.3 The issues before the Board for review are therefore confined to the following:

Section 261A(2)(a)(ii) Whether there was development carried out at the site after 26 February 1997 which would have required, having regard to the Habitats Directive, AA, but that such assessment was not carried out or made.

In view of this and to facilitate an assessment which is as reasonable as possible I consider it appropriate to set out, as far as is practicable, the timelines and extent of development on the site in question, based on the information at my disposal.

9.2 Historical Development and Planning Status of the Quarry

- 9.2.1 The following points are noted with regard to the documentation on file, to historic mapping and to aerial photography:
- Historic Ordnance Survey maps on file do not indicate any quarry at the site.
 - A 1973 aerial photograph of the site does not indicate any development or quarry activity.

- A small area of extraction is visible to the south of the site in aerial photographs dating to 1995, 2000 and 2005.
- The site owner/operator Sean Kelly applied to register a quarry at the site under section 261 on 26th April 2005. The application stated the total quarry area and extraction area as both being 4.5 ha. The planning authority refused to register the quarry under section 261 on the basis that it constituted unauthorised development.
- The National Parks and Wildlife Service (NPWS) noted unauthorised work at the site on 28th September 2005, within the Screen Hills cSAC. These were described as significant quarrying works that were impacting negatively on the favourable conservation status of the site. A complaint was made to the planning authority. Photographs were submitted which indicated that a substantial quarry was operational at the site by 2005.
- A site inspection by the NPWS on the 24th October 2005 again found 'damaging' works at the site.
- A planning authority site inspection on 20th December 2005 confirmed that the excavated area measured 4.5 ha and found that storage of sand and backfilling had taken place outside the excavated area.
- An inspection by the NPWS on 4th April 2006 found extensive machinery extracting large quantities of sand aggregate.
- A site inspection by the planning authority on 20th April 2006 on foot of enforcement action found that the extracted area had an average depth of c. 24m. The operation involved the excavation of sand and deposition of same c. 1 mile away for collection by lorries.
- The planning authority served an enforcement notice on site owner Sean Kelly on the 2nd May 2006 in relation to the operation of an unauthorised sand quarry at the site.
- A site inspection by the planning authority on 30th May 2006 found works had ceased at the site.
- Aerial photography from 2007 onwards indicates an area of extraction at the site. Site inspections by the planning authority on 7th November 2007, 14th January 2008, 9th April 2008 and 13th August 2008 found work ongoing at the site.
- Wexford County Council continued enforcement action against the site owner. A warning letter was issued on 29th November 2007. An enforcement notice was served on the 5th February 2008. The site owner gave an undertaking on court on 22nd September 2008 not to quarry on lands within the Screen Hills cSAC. The site owner was convicted and fined at Wexford District Court on 22nd June 2009 for unauthorised development at the site up to the date of planning permission of 2008/2323.
- A survey of the site on 3rd September 2008 by BMA Geoservices for the application 2008/2323 found that the sand pit had a total excavated

- area of c. 1.57 ha with a depth between 16-35 m from ground level. The quarry floor had a depth of c. 60m OD.
- The planning authority granted retention permission under 2008/2323 on 24th July 2009. The stated total site area was 5.52 ha with a final extraction area of 3.45 ha and to a depth of 60 m above OD. The application was deemed not to require EIA and included AA.
 - The planning authority carried out enforcement action relating to non compliance with conditions of 2008/2323. A warning letter was served on Sean Kelly on 31st August 2009 relating to non-compliance with conditions nos. 5, 6, 7 and 8, 9 and 17 of the permission.
 - Site inspections carried out on 22nd March 2010 and 21st July 2010 found non continuing non-compliance with conditions of 2008/2323.
 - A warning letter was issued on 11th June 2010 to Sean Kelly relating to non-compliance with conditions nos. 1, 9, 12, 13, 19(a), 19(c), 22 and 23 of 2003/2323.
 - The planning authority served an enforcement notice on 24th February 2011 to Michael Kelly and Sean Kelly requiring them to cease unauthorised storage of materials and removed unauthorised concrete storage bays within six weeks. A separate enforcement notice was served on the same individuals on the same day requiring compliance with conditions of 2008/2323 within six weeks
 - A site inspection on 27th September 2011 found further non compliance with conditions. The planning authority commenced legal proceedings on 31st January 2012. A site inspection on 11th April 2012 found work ongoing at the site and further non compliance with conditions.
 - Both a Lidar survey commissioned by the planning authority and carried out on 28th March 2012 and a technical survey by the planning authority on 1st August 2012 found an area within the site measuring 0.18 ha had been excavated to a depth 3 m below the permitted quarry floor of 60m above OD. The existing extracted area was measured by the planning authority as 2.29 ha on 28th March 2012.
 - Excavation work continues at the site and was underway when the site was inspected on 18th February 2013.

9.2.2 There is no evidence of the presence of a quarry at the site in 1964 that would confer pre 1964 'authorisation'. It appears that small scale quarry development began at the site in the late 1990s and continued into the early 2000s. There was a rapid period of expansion circa 2005-2007, after which retention permission was lodged and granted. Unauthorised development was carried out at the site from the commencement of quarrying operation in the late 1990s up to the permission of 2008/2323 on 24th July 2008. Some of these works took place within the Screen Hills cSAC, on lands owned by the current site owner Sean Kelly. Permission was granted for a quarry on lands outside the cSAC only under 2008/2323. There was some restoration works on lands within the cSAC

that were outside the scope of 2008/2323. In addition, there has been a small area of unauthorised work below the permitted quarry floor level of 2008/2323. On this basis, it is considered that quarry development at the site may be classified as follows:

- Unauthorised development at the site prior to the permission of 2008/2323.
- Development granted permission or retention permission under 2008/2323.
- Unauthorised development at the site outside the scope of 2008/2323.

9.2.3 With regard to section 261A(2)(a)(ii), it is confirmed that development took place at the site after 26th February 1997, which may have required Appropriate Assessment.

9.3 Appropriate Assessment

9.3.1 Wexford County Council commissioned an AA Screening Report for the site which was completed in August 2012 by Natura Environmental Consultants. The report notes that the site is not located within any designated site but identifies potential for adverse impacts on the following Natura 2000 sites:

- Screen Hills cSAC (Site Code 000781)
- The Raven SPA (Site Code 004076)

The existing excavated area is situated to the immediate north of the Screen Hills cSAC. Having regard to the historic aerial photographs and to the documentation on file, it is considered that excavation was carried out in an area to the south of the existing quarry within the Screen Hills cSAC during the period prior to the permission of 2008/2323. The Raven SPA is located approximately 2.3 km to the east of the site, at the coastline. Details of the site synopsis and conservation for the relevant Natura sites are as follows.

9.3.2 The Screen Hills cSAC was first proposed as eligible as a Site of Community Importance (SCI) in 1998 and was advertised as a candidate SAC in July 1999. The site is characterised by the glacial landscape known as "kettle and kame". This term refers to kettlehole lakes in hollows between hills. The site contains two habitats listed on Annex I of the EU Habitats Directive: oligotrophic lakes and dry heath formations. The many lake basins mark the positions of former ice blocks in an acidic, sandy moraine. The lakes in the site are of two types: those which are more low-lying and in contact with groundwater are influenced by what is occurring over a wide area. Other lakes are suspended at a height above the regional water-table and are influenced by the area immediately

surrounding them. These lakes can usually be considered oligotrophic although nutrient input from the adjacent land may change this. The lakes vary in size, most being pond-sized, and have widely different plant and animal communities. Many plant species which are rare in south-east Ireland are currently found in these lakes. Dry heath at the site is extensive and species-rich. The heath vegetation at the site differs from most heaths elsewhere in the virtual absence of Heather, and in the presence of a diverse range of annual species. Substantial populations of the following Red Data Book species have been found at this very important and complex site and in other localities on and adjoining the moraine: Slender Cudweed (*Logfia minima*), Heath Cudweed (*Omalotheca sylvatica*), Hairy Bird's-foot-trefoil (*Lotus subbiflorus*) and Bird's-foot (*Ornithopus perpusillus*). Musk Thistle (*Carduus nutans*), another Red Data Book species, is also present in large numbers. The presence of several Red Data Book plant species adds further importance to this site. There are no site specific conservation objectives for the Screen Hills cSAC. There is a generic conservation objective to maintain or restore the favourable conservation condition of the Annex I habitats which the cSAC has been selected.

- 9.3.3 The Raven was first classified as an SPA in 1990. The SPA is situated on the north side of Wexford Harbour, incorporating the dynamic sand dune system of Raven Point and the coastal strip running north to Blackwater Head. The seaward boundary of the site extends a distance of 2 km from the shoreline. The Raven sand dune system comprises a suite of coastal habitats listed on Annex I of the EU Habitats Directive. The dynamic nature of the system is best seen at the southern end of the site where sand flats, lagoons, driftlines and small dune slacks develop and are being continuously transformed by the activity of the sea and the wind. Dune ridges with Marram Grass (*Ammophila arenaria*) occur in a more or less continuous band as far as Blackwater Head. A number of rare and protected plants have also been recorded from this dune system. A small, though good example of Atlantic salt meadow occurs below the fixed dunes at the more sheltered western side of Raven Point. The sheltered intertidal shore to the west of Raven Point supports communities of bivalves and worms. The steeper shore to the north-east of the Point, which is predominantly sandy sediment, supports a sparser fauna, but with one notable species *Pseudorchestoidea brito* - a sandhopper which is known from only one other location in Ireland. The Raven has important bird interests, being part of the Wexford Slobs and Harbour complex. Of critical significance is that it forms the principal night roost for the internationally important Wexford Harbour population of Greenland Whitefronted Geese. A range of other waterfowl species are attracted to the site during winter, both for feeding and roosting purposes. Of particular significance is that six of the wintering species are listed on Annex I of the

E.U. Birds Directive, i.e. Red-throated Diver, Great Northern Diver, Slavonian Grebe, Golden Plover, Bar-tailed Godwit and Greenland White-fronted Goose. Little Tern, a species breeding in the site, is also listed on Annex I of the E.U. Birds Directive. There is a conservation objective to maintain the favourable conservation condition of the wetland habitat in the SPA as a resource for the regularly-occurring migratory waterbirds that utilize it. There are detailed conservation objectives for all of the Annex II species for which the SPA is selected.

9.3.4 AA became a legal requirement when the *European Communities (Natural Habitats) Regulations* come into force on 26th February 1997, which transposed the EU Habitats Directive into Irish law. AA screening is required in this instance to determine on the basis of a preliminary assessment and objective criteria whether the subject development alone and in combination with other plans or projects could have significant effects on a Natura 2000 site in view of the site's conservation objectives. Unlike EIA there are no applicable thresholds. There is a need for AA screening for potential significant impacts on the above designated sites and possibly a Stage 2 NIS. This aspect of the case has been assessed with regard to the DoEHLG guidance document *Appropriate Assessment of Plans and Projects in Ireland Guidance for Planning Authorities* (2009). The issue of AA may be considered separately for (i) the new and retained development as permitted under 2008/2323 (ii) subsequent development at the site outside the scope of 2008/2323.

9.4 New and Retained Development Permitted Under 2008/2323

9.4.1 A 'Planning and Environment Report' was submitted with the application lodged under 2008/2323. The report considered environmental impacts at the site as a result of the development to date and of the proposed extension. Issues relating to flora and fauna (by Roger Goodwillie & Associates); soils, hydrology and hydrogeology (by BMA Geoservices); air quality, noise and vibration, landscape and visual impacts waste management and archaeology (all by Environmental Efficiency Consultants) and traffic and transportation (by Transportation Planning Services) are considered. It is also noted that the southern portion of the quarry is located within the Screen Hills cSAC, this area is estimated as measuring c. 0.4 ha. There is a proposal to restore the area in consultation with the NPWS. Section 13 of the report considers potential impacts on the Screen Hills cSAC but does not assess any impacts associated with the restoration of the excavated lands outside the site, located within the cSAC. The 'Planning and Environment Report' did not constitute an EIS or an NIS as part of AA. The DoEHLG made a

submission to the planning authority in relation to 2008/2323, dated 30th October 2008, which stated the following:

"The quarry works to date have impacted on a dry heath habitat, a qualifying interest of the cSAC. Such works have proceeded after notification of and contact with the developer by this Department.

The existing and proposed works have the potential to impact on oligotrophic lakes, also a qualifying interest of the cSAC and vulnerable to impacts on hydrology and water quality. The proposed development does not have an Appropriate Assessment, as is required under Article 27 of the E.U. (Natural Habitats) Regulations, 1997."

The comment goes on to recommend refusal for the development on grounds relating to impacts through groundwater abstraction, groundwater contamination and impacts on Red Data Book plant species.

9.4.2 The planning authority requested further information to include AA of the site with analysis of both development at the site to date and potential impacts as a result of the proposed expansion of the extracted area. Particular details were requested relating to hydrogeological impacts; habitats impacts; the geomorphological characteristics of the site and the pNHA; revised visual impact assessment to consider the special character and sensitivity of the 'kettle and kame' landscape and a revised restoration plan prepared in consultation with the NPWS. The applicant's response, submitted to the planning authority on 23rd March 2009, included:

- Revised 'Ecology Report' by Roger Goodwillie & Associates
- Groundwater Assessment by BMA Geoservices Ltd
- Revised Landscape and Visual Impact Assessment by Environmental Efficiency Consultants (Ire) Ltd, which considers impacts on the 'kettle and kame' landscape of the Screen Hills cSAC.
- Additional landscape and visual assessment by Park Hood Landscape Architects
- Revised site restoration proposals for existing excavated area.
- Revised Traffic Impact Assessment by Transportation Planning Services Ltd.
- Additional noise monitoring results by Environmental Efficiency Consultants (Ire.) Ltd.

9.4.3 No formal NIS was submitted with the response. The revised 'Ecology Report' examines potential impacts on the Screen Hills cSAC in view of the site's conservation objectives. The report considers potential impacts associated with the existing quarry operation in the light of the findings of the groundwater report by BMA Associates. Potential impacts on flora and fauna associated with the quarry works and the restoration proposals are

considered. The report concludes that the proposals will not have any detrimental influence on the conservation objectives for the cSAC and there will be no loss of or negative impacts on the Annex I habitats for which the cSAC is selected. It does not examine potential impacts associated with the restoration works already carried out within the cSAC. Potential impacts on the 'kettle and lame' landscape of the cSAC are considered in the revised visual impact assessment, which includes the restoration works carried out to date. The BMA Associates report provides information on soil conditions, geology and the groundwater regime in the vicinity of the site. It assesses potential impacts associated with the existing and proposed excavations but not those associated with the excavation and restoration works inside the cSAC. A DoEHLG submission relating to the response, dated 16th April 2009, states:

"The proposed development is within a landform and ecosystem that is extremely rare, being kame and kettle topography in sand, and requires extreme caution in consideration of any development ...

...the documents submitted do not form a normal Appropriate Assessment as per Article 6 of the Habitats Directive in relation to the adjacent Screen Hills candidate Special Area of Conservation (cSAC Site Code 000708)."

The submission identifies the following particular issues that are not addressed in relation to the qualifying interests of the cSAC:

- 1. The Groundwater Assessment does not demonstrate an examination of whether there are further groundwater-fed oligotrophic lakes downstream of the proposed development, which could be impacted by deterioration in groundwater quality.*
- 2. The Ecological Report does not assess whether there will be any localised impact on dry heath habitat by the proposed alteration of the adjacent localised topography, potentially altering the localised soil processes.*

The submission also notes several concerns relating to the restoration of the previously quarried lands within the cSAC, beyond the site boundary, these are discussed below. There is also comment on file from the NPWS, dated April 28th 2009, which states:

"The development application significantly does not adequately address the manageability of the site for the conservation interests in the long term, or the risk and avoidance measures for potentially damaging actions, e.g. dumping, high density out-wintering etc, that could pose a threat both at this location and to water quality in the cSAC oligotrophic lakes."

- 9.4.4 The planning authority requested clarification of further information, to include the submission of AA, in consultation with the NPWS, also clarifying information to support claims that the development would not impact negatively on the SAC/pNHA; applicant advised that the restoration plan is inadequate with regard to the comments of the DoEHLG; clarifying information regarding impacts on the geomorphological feature; revised restoration proposals for regrading the face of the quarry in keeping with the 'kettle and kame' landscape; clarification of supporting measures for restored pit face; revised groundwater assessment to address issue of further groundwater fed oligotrophic lakes downstream of the development; revised proposals to address roads issues.
- 9.4.5 The applicant submitted clarification of further information to the planning authority on 21st May 2009, including a revised ecology report by Roger Goodwillie and Associates and a response to landscape and groundwater issues by BMA Geoservices Ltd. A revised restoration plan by Park Hood Landscape Architects in consultation with Roger Goodwillie & Associates was also submitted. The revised ecology report identifies the conservation objectives for the Screen Hills cSAC and considers potential effects on groundwater, vegetation, fauna and soils. Potential ecological impacts of the proposed restoration scheme are discussed. The report only considers potential effects associated with development within the site boundary of 2008/2323, i.e. there is no consideration of the restoration works on lands within the cSAC. The BMA Geoservices submission addresses specific issues raised by the planning authority in the request for clarification of further information, i.e. significance of the 'kettle and kame' geomorphological feature and potential impacts on same; assessment of restoration proposals for the existing/proposed extracted area and hydrogeological assessment of lakes downstream from the quarry. The documentation on file indicates that the applicant consulted with the NPWS in the preparation of the response. A comment by the NPWS on file dated 20th May 2009 states general satisfaction with the response subject to several specific issues it states could be addressed by way of condition. The planning authority granted permission subject to a total of 34 no. conditions.
- 9.4.6 There was no formal screening for AA in the documentation on file. However, with regard to the precautionary principle and to the location of the quarry partially within and immediately adjacent to a cSAC, the need for AA seems to have been accepted by all parties. The issue arises as to whether the various environmental reports submitted in the course of the planning application 2008/2323 constitute AA. The DoEHLG document *Appropriate Assessment of Plans and Projects in Ireland* (2009) describes AA as follows:

AA is a focused and detailed assessment of the implications of a plan or project, along and in combination with other plans and projects, on the integrity of a Natura 2000 site in view of its conservation objectives.

Although there is no prescribed method for undertaking AA, case law has established that assessments should be undertaken on the basis of the best scientific evidence and methods. The AA process comprises two main elements. Accordingly, data and information on the site and an analysis of potential effects on the site must be obtained and presented in a Natura Impact Statement (NIS). Section 2.4 of the DoEHLG document describes the NIS as follows:

This comprises a comprehensive ecological impact assessment of a plan or project; it examines the direct and indirect impacts that the plan or project might have on its own or in combination with other plans and projects, on one or more Natura 2000 sites in view of the sites' conservation objectives.

The NIS must be prepared by a person or persons with the requisite knowledge and experience and produced in a scientifically complete, professional and objective manner. The competent authority then carries out the AA, based on the NIS and any other information it may consider necessary, as the second stage of the process. Further guidance on the AA process is provided in section 3.3 of the DoEHLG document.

- 9.4.7 It is accepted that the final ecology report on file by Roger Goodwillie & Associates, dated May 2009, gives detailed consideration of potential impacts associated with the development 2008/2323, with regard to the conservation objectives of the Screen Hills cSAC. However, there is no consideration of potential impacts that might occur as a result of the quarry development in combination with other plans or projects such as other quarries or substantial developments in the vicinity. Moreover, the environmental analysis on file generally considers only the quarry development within the site boundary of 2008/2323. That boundary did not include the area within the cSAC that had previously been quarried and subsequently restored. It appears that the restoration works had been carried out by the time the applicant lodged a response to the further information request in April 2009. The accompanying documentation states that:

"... the extracted area of the cSAC has now been restored following consultation between Mr Roger Goodwillie and the National Parks and Wildlife Service."

It is noted that the submission on file by the DoEHLG, dated 16th April 2009, relating to the further information submitted by the applicant on the 23rd March 2009, refers to a restoration proposal for that area. The submission makes the following general comments in relation to restoration works at the site:

- *The nature of any impact on rare plants is not clarified in terms of duration, probability of success in retaining population, significance in terms of local population*
- *There is no plan for removal or transplanting of rare plants from the development site during operation*
- *The restoration proposal for the damaged lands does not contain any soil analysis to examine the specific features of dry heath soil at local level (topsoil depth, nutrient status, base status), thus to ensure restoration of habitat with similar processes.*
- *There is no reference to exclusive use of topsoil harvested on-site*
- *There is no differentiation made in the use of topsoil that has been subjected to nutrient enrichment by fertilising and topsoil that retains the natural nutrient status*
- *There is no reference to feasibility or any form of suitable habitat management (grazing, mowing, control of invasive scrub) on the restored lands*
- *Beech is proposed for use in landscaping but is not a native species and should not be used.*

The NPWS also commented on the further information submission of 23rd March 2008 and noted the following in relation to works on lands within the cSAC outside the site boundary of 2008/2323:

"The fact that prior development without permission has occurred in the cSAC and has damaged qualifying interest dry heath habitat must be taken into consideration...

The developer has already submitted restoration proposals and has proceeded with same. These have not been formally commented on by the NPWS. There is some concern that the restoration measures are limited in scope. Furthermore, were this damaging activity to have been properly assessed prior to action, compensatory actions elsewhere would have been required at a minimum. Hence the restoration measures presented to date are deemed inadequate."

With regard to the precautionary principle, it is considered that the works within the cSAC would undoubtedly have required AA and that same was not carried out, i.e. section 261A(2)(a)(ii) applies.

9.4.8 A separate issue arises in relation to condition no. 3 of the permission of 2008/2323. This condition requires the applicant to enter into an agreement with the planning authority under section 47 of the Act to undertake to dedicate and maintain an area of land as a 'compensation habitat' or compensation area. Condition no. 3(b) specifies that the compensation area is to be equal or greater than the combined area of impact on the existing cSAC and pNHA and shall be outside the cSAC. Condition no. 3 also sets out further detailed provisions relating to the management of the restoration works and states:

References to the extracted area in this condition include both the areas extracted to date (including the SAC) and those proposed.

This matter appears to have been agreed between the site owner and the NPWS prior to the grant of permission, ref. the NPWS comment of 20th May 2009. Given that the entire landholding is adjacent to the cSAC, it is considered that such an arrangement should itself have been the subject of AA screening as the planning authority would not have been able to determine conclusively that there would not have been any significant impacts on the cSAC as a result of this arrangement. The condition is therefore contrary to the precautionary principle. It is noted that section 2.4 of the DoEHLG guidance document on AA states:

The timing of AA is critical and it must predate the decision to authorise, adopt or proceed with a plan or project (i.e the formal or legal consent stage where that exists) and must inform the overall decision made.

A copy on file of subsequent correspondence between the planning authority and the NPWS, dated 15th September 2009, indicates that agreement was reached regarding a field to the south of the subject site, which also adjoined the boundary of the cSAC. An ecological report by Roger Goodwillie & Associates was included in the compliance submission. This considers the restoration area located within the cSAC and the proposed compensation area but does not constitute AA. Later correspondence submitted by the site owner to the planning authority in July 2010 indicates lands to the immediate south of the excavated area (marked 'X'), located within the cSAC. It appears that the proposed area was not satisfactory to Wexford County Council. A compliance report on file dated 9th September 2011 states that the planning authority is not satisfied with the size and location of the proposed compensation area and requires further details of restoration and management proposals. In a comment dated 22nd September 2011, the NPWS notes that the area marked 'X' is not satisfactory to the planning authority. AA should have been carried out prior to any grant of permission contingent on this agreement.

9.4.9 To conclude, it is considered that the quarrying activity at the site that occurred between the late 1990s and the permission of 2008/2323 on 17th June 2009 would have required AA, having regard to the Habitats Directive, and that same was not carried out due to the following:

- The ecological reports on the file of 2008/2323, which considered both the proposed development and the development to be retained, did not include potential impacts that the quarry might have in combination with other plans and projects. In particular, there was no appropriate assessment of the quarrying and subsequent restoration works that took place within the Screen Hills cSAC, outside the site boundary of 2008/2323.
- Condition no. 3 of the permission 2008/2323 provides for a compensatory area. Such work would of itself have required AA or AA screening.

Therefore, section 261A(2)(a)(ii) applies.

9.5 Subsequent Development Outside the Scope of 2008/2323

9.5.1 Under 2008/2323, permission was granted for excavation to a depth of 60 m above O.D. As noted above, site investigations by BMA Geoservices Ltd. comprising the drilling and logging of 4 wells at the site found that the winter water table is located between 32m a.OD and 33m above O.D, (i.e. circa 27 m to 28m below the deepest sandpit level of 60 m above O.D). Both a Lidar survey commissioned by the planning authority and carried out on 28th March 2012 and a technical survey by the planning authority on 1st August 2012 found an area within the site measuring 0.18 ha had been excavated to a depth 3 m below the permitted quarry floor of 60m above OD.

9.5.2 The AA screening report by Natura Consultants for the planning authority considers this element of the development. The following issues are identified:

- Potential adverse impacts on the relevant Natura 2000 sites relate to effects on surface and ground water quality draining to the sites resulting from contaminated surface water run-off during operational quarrying activities (including such pollutants as diesel, oils and hydraulic fluids and from silt laden run-off or pump discharges from the site).
- Potential for adverse effects on ground water quantity supplying the oligotrophic lakes within Screen Hills cSAC.
- Potential impacts on Screen Hills cSAC resulting from dust levels during operational quarrying activities.

The following points are noted in the AA screening report:

- The site has no surface water connection with the Screen Hills cSAC or any other Natura 2000 site and as such there is no surface water

- pathway by which the quarry development could affect any of the Annex I habitats for which the cSAC is selected.
- The BMA GeoServices report submitted as further information on 2008/2323 finds that the winter water table lies approximately 27 m below the quarry floor of that planning application at 60m OD. Therefore, the lowering of a portion of the quarry floor by 3m would still leave a buffer of 24m to the winter ground water level.
 - Groundwater flow in the area is to the north-east (away from the cSAC).
 - The oligotrophic lakes located downstream (i.e. to the north east) of the subject site are all perched water features and therefore there are no potential risks of impacts from sand pit activities.
 - AA was carried out for 2008/2323, which considered the potential for dust and wind blown sand associated with quarrying activities to adversely effect habitats within the cSAC. The AA considered that any such materials would be deposited within 20m of the quarry boundary and lighten existing soils and improve the habitat for most of the specialised sites for which the site is designated.
 - It is considered that there are no other plans or planning permissions in the area likely to have significant 'in combination' effects with the quarry.

On this basis, the report concludes that this element of the quarry development would not result in any significant additional risk of adverse effects on the Annex I habitats for which the Screen Hills cSAC is selected, to that predicted for the originally quarry development and as such will not have any adverse effects on the conservation objectives of the cSAC. Therefore, Stage 2 AA is not required.

- 9.5.3 The planning authority considers that this element of the development warrants a revised AA for the overall site with regard to the following comment in section 2.1 the DoEHLG guidance on AA:

2.1 Definition of Plan and Project

'Plan' and 'project' are not defined in the Habitats Directive but European Commission guidance and ECJ case law indicate that both should be given a very broad interpretation. The Waddenzee judgement has been critical in defining the concept of plan or project so that, in addition to new plans and projects, existing plans and projects that are modified or undergo new or periodic consents or authorisations, are captured by AA requirements. For example, an existing operational wastewater treatment plant requires AA when applying for a wastewater discharge licence under the Waste Water Discharge (Authorisation) Regulations, 2007. In addition, where projects require more than one authorisation (e.g. planning permission, waste permit and foreshore lease/licence), each consent authority must treat the separate applications as projects. It should be

noted also that an assessment made at plan level does not exempt specific projects from AA requirements.

The underlined phrase is that quoted in the planning report on file. In addition, there is a report on file of an environmental technician of the planning authority, dated 27th June 2012, which considers that both EIA and AA screening are necessary due to the location of the site adjacent to a cSAC. The review application submits that the planning authority has misinterpreted the statement. It is submitted that an AA has been undertaken for the quarry as permitted and that the AA screening for the unauthorised area found that stage 2 AA was not required. The review submission also states that the area was dug as a water sump following incidents of surface water ponding within the quarry pit. It is noted that the planning authority observed run-off to the south eastern corner of the site during its assessment of 2008/2323, which would substantiate this contention.

- 9.5.4 The AA screening report on file is noted and having regard to its findings, it is accepted that stage 2 of the AA process, i.e. a NIS, is not required for this unauthorised part of the overall quarry development. On this basis, it is considered that AA screening has taken place. The point of the planning authority is noted, however it is considered that the unauthorised lowering of the quarry floor does not modify the overall quarry development to an extent that would warrant a new AA for the entire site. It does not, for example, breach the water table, or break ground outside of the permitted site boundary. Given the very small scale of the unauthorised excavation (a depth of 3m over an area of 0.18 ha), it would not have resulted in a significant increase in dust deposition, traffic generation or water run off. Section 261A(3)(a) caters for this eventuality, whereby permission has been granted for a development that would have required AA but the existing quarry does not fully comply with the permission granted. Section 3.3 of the DoECLG guidance on section 261A notes that the planning authority will already have determined whether the quarry obtained a permission or commenced prior to 1st October 1964. Section 3.3 states in relation to planning permission:

“... the requirement is just that a planning permission was granted at some stage, the requirement is not for the permission to be current, or for the development to be in accordance with that permission.”

With regard to these issues, it is considered that section 261A(2)(a)(ii) does not apply to this aspect of the development.

9.6 Conclusion

9.6.1 With regard to the above analysis, it is considered that section 261(2)(a)(ii) applies to the development for the reasons set out above. It is therefore recommended that the Board uphold the section 261A(2)(a)(ii) determination of the planning authority. It is not open to the Board to review the subsequent planning authority decision pursuant to subsection (3)(a) as the review submission specifically requests a review of the subsection (2)(a)(ii) part of the planning authority decision only. However, section 261A(7) provides for this eventuality:

(7) Where in relation to a quarry in respect of which a notice has been issued under subsection (3)(a)-

- (a) Either no application has been made to the Board for a review of a determination under subsection (2)(a) or the Board in making a decision in relation to such a review has confirmed the determination of the planning authority, and*
- (b) Either no application has been made to the Board for a review of a decision of the planning authority under subsection (3)(a) or the Board in making a decision in relation to such a review has confirmed the decision of the planning authority,*

The person to whom the notice was issued under subsection (3)(a) shall apply to the Board for substitute consent ...

In this case, the Board may uphold the planning authority determination under section 261A(2)(a)(ii) and there is no application for a review of the subsection (3)(a) decision. The outcome would therefore be an application to the Board for substitute consent.

10.0 RECOMMENDATION

10.1 I recommend that the Board **confirm** the Determination of Wexford County Council made under section 261A(2)(a)(ii) of the Planning & Development Act 2000 (as amended) for the Reasons and Considerations set out below.

REASONS AND CONSIDERATIONS

Having regard to-

- (a) The planning history of the site;
- (b) The nature, scale and location of quarrying activity at the site since 26th February 1997 with regard to the provisions of Habitats Directive and to

the recommendations of the DoEHLG *Guidance for Planning Authorities on Appropriate Assessment of Plans and Projects in Ireland*, December 2009, in particular the extent of quarry development and subsequent restoration works that took place to the south of the site, within the Screen Hills candidate Special Area of Conservation and outside the site boundary of reg. ref. 2008/2323. These works were not included in the Appropriate Assessment of 2008/2323.

- (c) Condition no. 3 of reg. ref. 2008/2323 requires the applicant to enter into an agreement with the planning authority under section 47 of the Planning and Development Act 2000 (as amended), to undertake to dedicate and maintain an area of land within the applicant's landholding as a 'compensation habitat', to be equal or greater than the existing area of impact on the existing Screen Hills candidate Special Area of Conservation and to be located outside the candidate Special Area of Conservation. With regard to the precautionary principle and to the recommendations of section 2.4 of the DoEHLG *Guidance for Planning Authorities on Appropriate Assessment of Plans and Projects in Ireland*, December 2009, it is considered that Appropriate Assessment should have been carried out prior to any grant of permission contingent on this agreement.

It is the decision of the Board to confirm the Determination of Wexford County Council made under section 261A(2)(a)(ii) of the Planning and Development Act 2000 (as amended) in relation to this quarry site.

Sarah Moran,
Senior Planning Inspector
13th May 2013