

**Communication to the  
Aarhus Convention's Compliance Committee**

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**I. Information on correspondents submitting the communication**

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ClientEarth, MCS and Robert Latimer together are referred to as the ‘Claimants’ throughout this Communication.

ClientEarth is also MCS’s and Robert Latimer’s legal representative in this Communication and is therefore to be treated as the **main contact** for the purposes of further correspondence between the Aarhus Compliance Committee and the Claimants.

*ClientEarth is a non-profit environmental law, science and policy group working in the European Union and beyond. We act for people and the planet, using the legal system allied with current scientific knowledge to meet the environmental challenges facing the earth.*

*The Marine Conservation Society (MCS) is the charity dedicated to the protection of UK seas, shores and marine wildlife. MCS has campaigned since 1987 to improve coastal and estuarine water quality in the UK, to stop the degradation of the marine environment from pollution, and to protect vulnerable marine species and habitats.*

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**II. State concerned:** The United Kingdom of Great Britain and Northern Ireland (the 'UK'), and more particularly in this Communication: England & Wales ('E&W')

**III. Facts of the communication:** See also IX. **Summary** and X. **Facts and legal arguments** below.

1. The UK approved the Aarhus Convention in February 2005 on the basis that the UK was *'compliant with the Convention by virtue of [its] existing Community obligations, national legislation, and systems of access to justice'*<sup>1</sup>.
2. At the time of the UK's ratification the Government's view was that its *'existing domestic legislation enables the UK to ensure that members of the public and organisations thereof, can have sufficient involvement in environmental matters according to [Article 3 (General Provisions)]'*<sup>2</sup>.
3. Indeed, the Foreign & Commonwealth Office in its up-dated explanatory memorandum reporting to Parliament in January 2005, just months before the UK finally ratified the Aarhus Convention, stated:  
  
*'The Government is satisfied that the obligations in the areas of the Convention which are not covered by ... EC Directives, and therefore for which the UK is the responsible Party, are already met by existing legislation'*<sup>3</sup>.

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<sup>1</sup> *Extended Partial Regulatory Impact Assessment – Further European Community (EC) Proposals in Relation to the Aarhus Convention*, <http://www.defra.gov.uk/environment/internat/aarhus/pdf/ria.pdf>; para 5.2, p. 9, relying on the 'Aarhus' Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Foreign & Commonwealth Office Report to Parliament, Revised Explanatory Memorandum, CM 4736, January 2005, see <http://www.fco.gov.uk/en/about-the-fco/publications/treaty-command-papers-ems/explanatory-memoranda/explanatory-memoranda-2005/aarhus>; and on the explanatory table in relation to the implementation of the Aarhus Convention 'Implementing Measures to Achieve UK Compliance with the UNECE Aarhus Convention', Defra, see <http://www.defra.gov.uk/Environment/internat/aarhus/pdf/compliance-summary.pdf>.

<sup>2</sup> See 'Implementing Measures to Achieve UK Compliance with the UNECE Aarhus Convention' (see FN1) at p. 1, 'Article 3 (General Provisions), see also statements that the UK is fully compliant with Articles 9(1) and 9(3) on pp. 3 and 4, although it would appear that no similar statement is made in relation to Article 9(2), because at the time of ratification of the Aarhus Convention some changes were still required to the Scottish justice system.

<sup>3</sup> The 'Aarhus' Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (see FN1), at para. 18. It should be noted that in its April 2008 Aarhus Convention Implementation Report, Defra does not make any general statements on compliance. Instead, it focuses on standing issues, which, at least in England & Wales, are not generally perceived as an obstacle to access to justice. The only potential issue that the Implementation Report does address in slightly more detail relates to costs, which, it is argued in this Communication, is a major area of non-compliance by the UK with the Aarhus Convention. The issues surrounding the costs of access to justice in England & Wales are discussed in detail below.

4. Contrary to these assertions, this Communication identifies four areas in which E&W does not comply with the access to justice provisions under Article 9 of the Aarhus Convention (see below).
5. It also sets out the facts of one specific case, the 'Port of Tyne' case, a trial project to dispose of contaminated dredging waste in the Port of Tyne (see below), in relation to which three of the general areas of non-compliance have led to an inability for MCS and Robert Latimer to review potential breaches of environmental laws.
6. Therefore, this Communication:
  - describes the facts surrounding the trial project to dispose of contaminated dredging waste from the Port of Tyne in breach, it is alleged, of a number of environmental laws and of licence conditions, including the lack of an adequate environmental impact assessment having been carried out;
  - sets out the four areas in relation to which the Claimants argue that E&W is not complying with the access to justice provisions (i.e. the third pillar) of the Aarhus Convention in the form of Claims 1 – 4;
  - examines how these areas of non-compliance have affected the Port of Tyne case specifically; and
  - suggests ways in which the relevant issues may be dealt with.
7. As much of the supporting documentation referred to throughout this Communication in relation to the four claims is the same, and the facts of the Port of Tyne case are applied to three of the four claims, only one Communication is being sub-mitted.

<b>IV. Nature of alleged non-compliance:</b>
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8. This Communication asserts
  - i. a **general failure** by E&W to implement correctly Article 9 of the Aarhus Convention. The law in E&W falls foul of the access to justice provisions in Article 9(2) and (3) of the Aarhus Convention in a number of areas:
    - a. Review of substantive legality: Article 9(2) of the Aarhus Convention gives an express right to the review of the '*substantive*', as well as the '*procedural*' legality of a public authority's decision,

act or omission. Article 9(3) is even more general and provides for a right simply to challenge any acts and omissions by a private person or a public authority which contravene provisions of national environmental law. This must necessarily involve the material facts underlying the case. However, the jurisprudence of the English courts in relation to judicial review at the present time does not in practice allow courts to review the substantive legality of a case.

- b. Prohibitive expense – costs: This is one of *the* fundamental stumbling blocks to access to justice in the UK. As already mentioned, Article 9(4) of the Aarhus Convention obliges parties to make sure that access to justice is not ‘prohibitively expensive’ or unfair, and that there are adequate and effective remedies, including injunctive relief: The UK Government claims it complies with this requirement, but it fails to consider the true costs of court cases to potential claimants in E&W.
  - c. Rights of action against private individuals for breaches of environmental laws: In England, the main route for the public to take action in this regard is the law of judicial review, which only relates to public authorities and cannot be used against private individuals. However, it is not generally possible for the public to challenge a private person’s breach of an environmental law. The exceptions to this rule are where a private right has been infringed and it is possible to bring a civil action in tort law, or by way of private criminal prosecutions, which are allowed, but are rare and difficult to mount.
  - d. Restrictive and unfair rules on timing: The time limits set by the courts within which an action for judicial review can be brought under English law are uncertain, unfair and overly restrictive. They prevent the public from taking action.
- ii. a **specific failure** of E&W to allow MCS and Robert Latimer to gain access to justice in relation to the Port of Tyne case on grounds (a), (b) and (d) set out above.

**V. Provisions of the Convention relevant for the communication:**

9. Although the UK has ratified the Aarhus Convention, we submit that the UK is not complying fully with the requirements of Article 9(2), 9(3), 9(4) and 9(5) of the Aarhus Convention, thereby making access to justice for citizens and environmental groups very difficult, if not impossible:

Article 9 (emphasis added, to underline the issues raised in this Communication)

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

- a. having a sufficient interest or, alternatively,
- b. maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the **substantive and procedural legality** of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention. What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by **private persons** and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide **adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive**. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the **establishment of appropriate assistance mechanisms** to remove or reduce financial and other barriers to access to justice.

## **VI. Use of domestic remedies or other international procedures**

### **In relation to the general case:**

10. In recent years, there have been numerous reports in E&W on the lack of proper access to justice rights with regard to particular aspects, for example the excessive costs of actions for judicial review in E&W. These reports are listed in Annex VI. Perhaps the most influential of these is the Sullivan Report (published in May 2008, over three years after the UK Government ratified the Aarhus Convention).
11. Other aspects, including the inability to review the decisions of public authorities on their substantive legality, including in relation to the material facts of a case, the ability to bring actions against private individuals for breaches of environmental laws and issues in relation to timing, are similarly prohibitive in their effects on the public's potential to gain access to justice in E&W.
12. Moreover, because this part of this Communication is of a general nature, no obvious domestic or international procedures are available, other than through this Communication itself. Therefore, the Claimants submit this Communication to the Compliance Committee of the Aarhus Convention in accordance with Article 15 of the Convention and section VI of Decision I/7 on Review of Compliance of the First Meeting of the Parties. This Communication complies with all the requirements provided in Decision I/7 and should therefore be considered as admissible.

### **In relation to the specific case:**

13. MCS and Robert Latimer have been in close contact with the relevant public authorities making requests for information and making their concerns known, for example with the Marine Consents & Environment Unit (MCEU), which is part of the Department for Environment Food and Rural Affairs (Defra) in England and the Centre for Environment, Fisheries & Aquaculture Science (CEFAS), another Government agency. They have also been in contact with the relevant bodies of the OSPAR Convention and the European Commission. However, they have not been able to access any domestic procedures in the courts precisely because the UK has not implemented the relevant provisions of the Aarhus Convention properly.

## **VII. Confidentiality**

14. The information contained in this Communication is not confidential.

## **VIII. Supporting documentation**

15. In Annex VIII, we attach a bundle of documents containing the correspondence and reports referred to in the Port of Tyne case description, as these documents are not otherwise publicly available.
16. A list of cases used has also been included in Annex VII for ease of reference.
17. In addition, a list of some of the most important documents reviewing access to justice in the UK has been included at Annex VI. This list also contains relevant quotes on costs issues which are made in those reports.
18. All other documents referred to are in the public domain and we have not attached them to this Communication. We felt that this would have added unnecessarily to the length of this Communication. However, if any member of the Committee wishes to obtain a copy of any of the documents referred to, we will, of course, supply one immediately.
19. The other annexes contain background information explaining various points of law or fact in more detail, but which it is not necessary or helpful to include in the body of this Communication.

## **IX. Summary**

### **The specific case - the Port of Tyne case**

20. The Port of Tyne case concerns a government licence issued to the Port of Tyne in Northern England that allows for the disposal and protective capping of highly contaminated port dredgings at an existing marine disposal site called 'Souter Point' approximately four miles off the coast.
21. The dredged materials are contaminated with a substance called tributyltin (TBT), as well as heavy metals, such as arsenic, mercury and lead (amongst others). Both TBT and the heavy metals are toxic and have significant negative impacts on the marine environment (and up the food-chain). Because they are so dangerous, they are regulated under OSPAR and the Dangerous Substances Directive.



22. The North Sea, where the site is located, is one of the most energetic seas in the world and is subject to enormous amounts of wave energy. There are a number of storms each year. This means that any material deposited on the sea floor, including in particular the protective capping material meant to isolate the contaminated dredging from the marine environment, is subject to huge forces causing the erosion of those materials. Consequently there is a grave environmental threat of the toxic substances in the dredging materials escaping into the marine environment, outside the disposal site, and causing damage to the environment, for instance to fish and shell-fish, porpoises and dolphins and nearby seagrass beds and sabellaria reefs protected under local biodiversity action plans.
23. No full environmental impact assessment was carried out by the public authorities before the licence was granted, despite the UK Government's stated intention to treat the operation as trial to establish best practice, and the potential environmental impacts of the disposal action were never fully explored. In addition, it is the Claimants' opinion that the authorities also failed to follow other legal requirements (e.g. applying a precautionary approach or complying with the obligation to use best environmental practice and to consider the practical availability of alternative methods).
24. However, for the reasons set out in Claims 1, 2 and 4, MCS and Robert Latimer have not been able to bring an action for judicial review against the relevant authorities and have therefore been denied access to justice under Article 9(3) of the Aarhus Convention.

### **The Claims**

25. Because the Aarhus Convention is an integral part of EU law, and because EU law is directly applicable in the UK, in theory Article 9 of the Aarhus Convention is already a part of English law and ought to be appropriately enforced through the law of judicial review. Moreover, in theory also, the law of judicial review in E&W provides the court with enough flexibility to properly enforce the Aarhus Convention. Indeed, the UK Government, in part at least, relies on this fact in order to claim that the UK is fully compliant with the Aarhus Convention.
26. However, this claim is misleading, as the theoretical possibility of compliance with the Aarhus Convention is completely undermined by the jurisprudence

of the courts, procedural rules and government guidance on judicial review cases.

27. This is particularly true both in relation to the issues surrounding the potential to review authority decisions on the material facts of a case, and the judicial practice on costs orders. It is also relevant to the application of rules limiting the time during which it is possible to make a claim for judicial review.

### **Claim 1**

28. It is true that, in theory at least, the courts in E&W enjoy a broad discretion to allow appropriate review actions in relation to reviewing the substantive legality, including the material facts, of a public authority act or decision. Thus, there are cases where, under the existing law of judicial review, a review of public authority decisions has been allowed in relation to a material error of fact. Similarly, where the decision or act in question is based on human rights, EU law or more generally fundamental rights, the introduction of the principle of proportionality into English law has enabled courts to allow the review of public authority acts or decisions based on the merits, i.e. the material facts of the case.
29. **However, these broad principles are not generally applied by the courts in practice.** Instead, they are only applied in very limited circumstances, and not usually to the more general judicial review actions or environmental cases. Thus, the courts' jurisprudence applies very restrictive rules and only allows judicial review of public authority acts and decisions in cases of procedural impropriety, illegality or irrationality.
30. In many environmental cases, the public authorities' decisions on the facts of the case are particularly important. Material errors of fact in environmental cases can have devastating consequences for the environment. In the Port of Tyne case, for example, a failure to fully consider the potential consequences of using a new method in the UK for disposing heavily contaminated dredging material at a marine disposal site, has led to a situation where there is a real long-term threat to the marine environment.
31. Because of the courts' and the Government's restrictive approach on the grounds allowed for judicial review, members of the public are generally not permitted to challenge a public authority's acts or decisions in such a case. In

the Port of Tyne case, for example, the Claimants have not been able to legally challenge the public authorities' actions and decisions. **They have been denied access to justice in breach of Article 9(2) and 9(3) of the Aarhus Convention. In fact, the courts' restrictive jurisprudence on the allowable grounds for judicial review in environmental cases is a general denial of the public's rights of access to justice under Article 9(2) and 9(3) of the Aarhus Convention.**

## Claim 2

32. The situation in relation to the prohibitive costs of judicial review action is similar in that, again, the courts have the relevant wide discretionary powers to interpret the law and to apply costs rules in a way that would not impose prohibitive costs on potential claimants. For example, they could order that a claimant in a case falling under Article 9 of the Aarhus Convention did not have to bear the opposing side's (or even its own) costs in the event that the claimant lost the case, which is the general presumption in English law (the 'loser pays' rule). This would be extremely important, as defendants' legal and experts' costs are frequently extremely high (in the 'Ghost Ships' case an interested party served a schedule of costs of £100,000 for a one-day hearing on a preliminary issue).
33. However, the courts have very rarely applied costs orders completely eliminating the loser pays rule. In a number of more recent cases, courts have been making orders capping the extent of the defendants' costs that the claimant would be obliged to pay if the claimant lost. However, even these 'protective' orders have been made subject to very restrictive qualifying criteria by the courts' jurisprudence. Instead, there is now a situation of complete uncertainty for potential claimants, where it is impossible to know at the outset of a case what costs a claimant is likely to incur. The threat of having to pay to the defendant huge amounts in costs has a 'chilling' effect on potential claimants because they cannot afford or cannot justify running the risk of having to pay such high costs.
34. The Port of Tyne case would involve very complex legal and factual arguments and would probably make a complex court case, even if it were possible to make an application for judicial review (on the substantive legality). However, MCS and the individual claimant, Robert Latimer, do not have the funds to be able to absorb the costs of such a case, should they

ultimately lose. In fact, they would quite possibly not be able to afford their own legal costs and would probably have to rely on pro bono legal representation.

35. In addition, another costs issue arises where it is important to act quickly in order to protect the relevant environmental interest that is sought to be protected in the main judicial review action. In such cases it is possible for courts to make an order prohibiting the public authority from carrying on with the approved action. In the Port of Tyne case, for example, this might have been an order stopping the disposal of the contaminated materials while the case was being decided. However, to enable such an order to be made, the Claimants would have had to give a 'cross-undertaking in damages'. This would have meant that if they lost the case, they would have been obliged to pay for the commercial losses the defendants had incurred as a result of having to wait to dispose of the contaminated materials. If the harbour which was to be dredged had, for example, been ear-marked for commercial development, then such costs could have been enormous.
36. **Again, the way the costs rules have been applied in E&W has prevented the Claimants from challenging the public authorities' acts and decisions. They have been denied access to justice in breach of Article 9(4) and 9(5) of the Aarhus Convention.**

### **Claim 3**

37. A third area in which E&W is in breach of the Aarhus Convention is the right to challenge breaches of environmental laws by private individuals under Article 9(3). In England, the main route for the public to take action in this regard is the law of judicial review, which only relates to public authorities and cannot be used against private individuals. Private criminal prosecutions are allowed, but are rare and difficult to mount and are dependent on a criminal offence having been committed (see more detailed arguments below). Also, the state can intervene and take over such prosecutions.
38. **Therefore, except in the very restricted circumstances relating to private prosecutions, there are currently no effective means under the law of E&W with which members of the public can challenge breaches of environmental laws by private individuals. Therefore, the public is being denied access to justice in breach of Article 9(3) of the Aarhus Convention.**

#### Claim 4

39. Actions for judicial review in E&W have to be brought '*promptly*' and in any event within three months after the grounds to make the claim first arose. The inclusion of the word '*promptly*' has led the courts to hold that in some cases claims for judicial review will not be allowed even though they have been brought within the three month time limit. Even more worryingly the UK Government is now trying to reduce this time period even further in some cases. The Planning Bill currently going through UK Parliament only allows a court to entertain proceedings for questioning a national policy statement if the claim is filed within 6 weeks (Section 13 of the Planning Bill).
40. In human rights cases, claims have to be brought within a year of the cause of the claim arising. This is a much more reasonable and fair time period to allow potential claimants to consider a potential challenge, although it is of course necessary to allow for an amount of discretion in such cases in order to provide legal certainty also for potential defendants, for example in planning cases.
41. Due to the inherent latent and contingent nature of environmental liability three months is a very short period for environmental matters. The fact that potential claimants can never be sure that their claim will be allowed, even if they bring it within the three month period, makes this rule manifestly unfair.
42. In the Port of Tyne case, the relevant licence was first issued in 2004. MCS and Robert Latimer were in constant contact with the relevant authorities, but given the factual complexities of this case, preparing a judicial review action within three months (or potentially even less) of the licence being granted, would have been impossible.
43. Claimants are being denied access to justice because the rules on timing in E&W impose an unreasonably short time period for bringing review actions in many circumstances, and the requirement for '*promptness*' introduces an element of complete uncertainty which makes the rule manifestly unfair. **Therefore, the public is being denied access to justice in breach of Article 9(4) of the Aarhus Convention.**

### Summary of recommendations

The way judicial review rules are applied in England & Wales needs to be reviewed. We urge the Aarhus Compliance Committee to make the following recommendations:

#### **Claim 1 (merits review):**

1. Environmental cases falling under the Aarhus Convention ('Aarhus cases') need to be treated as an extension of accepted grounds for judicial review challenges relating to fundamental rights, human rights, EU law and material error of fact. Aarhus cases should be an additional separate ground for judicial review.
2. Passing a new 'Aarhus Act' will help to establish such a separate ground.

#### **Claim 2 (excessive costs):**

1. The UK Government needs to amend the Civil Procedure Rules in E&W to provide a presumption that in environmental cases falling under the Aarhus Convention (which are by definition in the public interest), as long as the claimant has not acted in bad faith, the claimant should never have to pay for the defendant's costs. Instead, the defendant should pay for the claimant's costs.
2. If an Aarhus Act is passed, then that Act should include special procedural rules for judicial review on the above lines which apply to Aarhus cases and form an exception to the general costs rules.
3. Environmental NGOs should receive automatic public funding in Aarhus cases.

#### **Claim 3 (claims against private individuals):**

1. The UK needs to introduce an effective mechanism through which the public challenge private individuals who have breached environmental laws either through court or administrative procedures. This could be achieved, for example, by extending the new Regulatory Enforcement and Sanctions Act 2008 to provide for such NGO rights.

#### **Claim 4: (timing):**

1. The time limits in E&W in relation to the judicial review of Aarhus cases need to be extended to be the same as those contained in the Human Rights Act 1998: a general one year time limit and possibly a 6 month time limit for matters which are predominantly of a planning nature and require to be dealt with more quickly in the public interest, but in both cases with a judicial discretion to extend the time limit if that is equitable having regard to all the circumstances.

## X. Facts and legal arguments

### PART I: THE PORT OF TYNE CASE

#### **Background**

44. A much more detailed summary of the Port of Tyne case and an analysis of the relevant facts and documents are contained in Annex I of this Communication. Such a detailed summary has been included to help to show that there are very strong prima facie theoretical grounds for a potential judicial review action, and to demonstrate that despite the UK's claims that it has fully implemented the Aarhus Convention, it is in fact extremely difficult to bring such an action in practice.
45. The Port of Tyne is a port in the North East of England. In October 2004, Defra's Marine Consents & Environment Unit (MCEU)<sup>4</sup> issued a licence to the Port of Tyne Authority '*for a trial to assess the effectiveness of a methodology for capping contaminated dredged material from the Port of Tyne on the Souter Point disposal site*' (the 'Licence')<sup>5</sup>.
46. The Licence allowed waste sediments heavily contaminated with TBT and heavy metals<sup>6</sup> to be dredged from disused docks in the Port of Tyne and disposed of at an existing disposal site called Souter Point in the North Sea. *Contaminants were above those levels that the UK would normally allow for disposal to sea*<sup>7</sup>.

#### **The nature of the surrounding environment**

47. The North Sea, where the site is located, is one the most energetic seas in the world, and subject to enormous amounts of wave energy. Major and moderate storms are guaranteed, which will erode some of the capping material. Further storms are inevitable and, unless the contaminated dredging material ('CDM') is re-capped every time some of the capping

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<sup>4</sup> Now the Marine & Fisheries Agency (MFA).

<sup>5</sup> Licence 31995/04/1: *For a trial to assess the effectiveness of a methodology for capping contaminated dredged material from the Port of Tyne on the Souter Point disposal site*, issued on behalf of the Marine Consents and Environment Unit for and on behalf of the Licensing Authority on 6 October 2004.

<sup>6</sup> The CDM is contaminated with arsenic, cadmium, chromium, copper, mercury, nickel, lead and zinc, most of them exceeding the contamination levels at which sea disposal is usually allowed – see Port of Tyne Authority, Report 1740 *Sea Disposal Trials of Contaminated Tyne Estuary Sediment*, Part I: *Assessment of Contaminated Sediments and Capping Materials*, para 5.1, pp. 9 and 10 and Appendix I.

<sup>7</sup> UK Report to the Meeting of the Working Group on the Environmental Impact of Human Activities of the OSPAR Convention for the Protection of the Marine Environment of the North East Atlantic (the 'OSPAR Convention'): *Capping of Contaminated Dredged Material Case Study Port of Tyne UK* (the 'UK OSPAR Report') at p. 3., 'Disposal Application'.

material has been removed by the sea, it is only a matter of time before the original and any additional capping material is swept away, creating a real danger that the toxicity of the CDM will be released into the environment.

### **The nature of the threat to the marine environment**

48. The Licence was issued despite initial doubts on the part of CEFAS and Defra that this type of CDM should be deposited at sea. Indeed, both CEFAS and Defra letters and other documents repeatedly said that the material in question was not suitable for sea disposal<sup>8</sup>.
49. TBT is toxic, it bio-accumulates and is persistent in the environment<sup>9</sup>. TBT has been found to adversely affect benthic organisms and biodiversity on the seafloor, as well as being an endocrine disruptor causing female gastropods, dogwhelks, for example, to acquire male characteristics (imposex) and suffer impaired reproductive function<sup>10</sup>.
50. The toxic and damaging effects of heavy metals on the marine eco-system are well known, which is why they are regulated under the OSPAR Convention<sup>11</sup>, the Dangerous Substances Directive<sup>12</sup> and its various daughter directives<sup>13</sup> which set quality objectives for many heavy metals.

### **The lack of a full environmental impact assessment**

51. In spite of the known dangers of this type of contaminated dredging material and concerns about potential threats to the marine environment, *'no single, formal environmental impact assessment was carried out'*<sup>14</sup>.

### **The integrity and safety of the cap and the dispersiveness of the site**

52. The Licence was designed to ensure that the deposited material should be adequately covered with a 1.5m thick cap of silt and sand<sup>15</sup>, so as to isolate the

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<sup>8</sup> See for example, Memorandum from Dr C. Vivian (CEFAS) to Mr G Boyes (Defra): *Port of Tyne Application DC 6742*, BLR 7570, DAS 31995/030222, DC 6742, dated 18 June 2003: *'The material proposed for sea disposal that has been characterised is categorically unsuitable for sea disposal due to the very high levels of TBT, cadmium, mercury, lead and zinc in the sediments'* (at para 45, first bullet point); or letter of 9 September 2003 from Graham Boyes (Defra) to Mr Keith Wilson (Port of Tyne Authority), ref DC 6742 at para 1: *'...the material covered by your application IS NOT SUITABLE FOR SEA DISPOSAL.'*

<sup>9</sup> *'FEPA Monitoring at Dredged material Disposal Sites off the Tyne'*; March 2003; Executive Summary 5<sup>th</sup> and 7<sup>th</sup> bullet points; see also Annex I.

<sup>10</sup> See Defra Research and Development, Final Project Report, *The fate of TBT in spoil and feasibility of remediation to eliminate environmental impact*, CSG 15, 30/04/2002, parts 7 and 8.

<sup>11</sup> The Convention for the protection of the Marine Environment of the North-East Atlantic 1992.

<sup>12</sup> Directive 76/464/EC.

<sup>13</sup> E.g. Directive 82/176/EEC, 83/513/EEC and 84/145/EEC.

<sup>14</sup> See letter from John Maslin, Head of Marine Environment Branch 2, Defra to Thomas Bell, MCS, dated 3 February 2005.



contaminated material from the environment, to protect it from erosion<sup>16</sup> and to ensure the long-term maintenance, integrity and efficacy of the cap<sup>17</sup>.

53. In addition, one of the fundamental assertions made by the Port of Tyne to justify Souter Point as a suitable disposal site was that it was a non-dispersive site, i.e. a site not subject to strong wave action, so that both the contaminated and capping material would be certain to stay in place once deposited on the sea floor<sup>18</sup>. However, because of the highly energetic nature of the North Sea, the site is necessarily dispersive. The authorities have since accepted that this non-dispersive statement was wrong and that the site does have a dispersive hydrography<sup>19</sup>.
54. This is a direct contradiction not only of the fundamental assertions made to justify the choice of disposal site (i.e. that the site was non-dispersive), but also of the entire purpose and nature of the trial (i.e. guaranteeing the integrity of the cap to prevent dispersal of the material). For a more detailed description of these points, please refer to Annex I.

#### **Breach of the Licence in relation to requirements relating to cap thickness**

55. The initial capping that took place under the Licence required over 60% more silt and sand than originally specified (a breach of the Licence), but even then the cap was '*very patchy*' and much thinner than originally planned (with a maximum thickness of 1m, but the average thickness of the total cap being a mere 0.45m)<sup>20</sup> (in breach of the Licence).
56. More capping material was added in June/July 2006 without consulting Defra or CEFAS and under a different dredging licence, i.e. in breach of conditions of the Licence. Moreover, the new capping material was potentially '*unsuitable*'<sup>21</sup> material, partially consisting of silt that may have been dredged from locations where TBT and heavy metal concentrations were higher than

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<sup>15</sup> At section 9.2, paras.2-3. See also Annex I of the Licence: *The Report No. 1613 Work Plan for Sea Disposal Trials of Contaminated Tyne Estuary Sediment*, Final Work Plan – Revision 3, EnviroCentre, Port of Tyne Authority; and cond. 1.6.1 and suppl. cond. 9.8, which make it a condition of the Licence to follow the methods set out in Annex I and Annex II.

<sup>16</sup> At section 9.1, p. 28.

<sup>17</sup> Suppl. Cond. 9.15 of the Licence. See also UK OSPAR Report, p. 3, 'Design Rationale'.

<sup>18</sup> At para 8.2, p. 23, Report No. 1613 *Work Plan for Sea Disposal Trials of Contaminated Tyne Estuary Sediment*, Final Work Plan – Revision 3, EnviroCentre, Port of Tyne Authority, attached to the Licence.

<sup>19</sup> Memorandum from Chris Vivian and Sylvia Blake, CEFAS to Geoff Bowles, MEU and others dated 26 January 2007 Minute setting out Defra's comment on MCS letter to Defra dated 20 December 2007 regarding Licence 31995/04/1, p. 1, Q1.; and also Letter from Andy Dixon, MCEU to Robert Latimer, dated 30 August 2006, Point 8, and.

<sup>20</sup> UK OSPAR Report, p.11, 'Cap risk assessment'.

<sup>21</sup> See note on *Review Meeting at EnviroCentre with Port of Tyne Regarding the Placement of Contaminated Dredge Material Offshore*, from Sylvia Blake, CEFAS addressed to Andy Dixon, MCEU, dated 14 September 2006, at para. 9.

allowed for the capping material permitted by the Licence<sup>22</sup>, although a subsequent report claims that these additional capping materials were '*fit for purpose*'<sup>23</sup>. Whatever the case, this was another breach of conditions of the Licence.

57. A recent report refers to an average cap thickness now of only 37cm, with a maximum thickness of 61cm at the centre of the site<sup>24</sup>. In spite of this it is claimed that '*the cap has maintained its function... the cap has met the agreed specification and therefore no replenishment works are deemed necessary at this time.*' One page later in the same report, it is said that '*additional replenishment works will be required in near future to provide additional comfort over the medium term ...*'<sup>25</sup>.

58. Clearly, there have been a series of breaches of Licence conditions. So far, the authorities have not taken any enforcement action that the Claimants are aware of.

### **Misleading information in relation to additional capping actions**

59. Initial concerns (before the re-capping) were that '*a major storm could remove up to 0.66 metres of sediment which would seriously compromise the integrity of the cap and the confined contaminated material underneath.... also ... a series of moderate storms removing 0.15m of material per storm would remove the cap in 3 years*'<sup>26</sup>.

60. The authorities have argued that this is a worst case assessment<sup>27</sup> and that '*following twelve months of monitoring data it was revealed that the cap remained intact...*'<sup>28</sup>.

61. However, there is a considerable degree of confusion regarding how often and how much additional capping material has been added to the cap before and after June/July 2006 (see discussion in Annex I). This is very important, as claims by the authorities that the cap thickness has not changed

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<sup>22</sup> See note on *Review Meeting at EnviroCentre with Port of Tyne Regarding the Placement of Contaminated Dredge Material Offshore*, from Sylvia Blake, CEFAS addressed to Andy Dixon, MCEU, dated 14 September 2006, at paras. 9 and 13.

<sup>23</sup> UK OSPAR Report, p. 13 'Additional Capping'.

<sup>24</sup> Report No. 3308, *Port of Tyne – Sea Disposal Trials of Contaminated Tyne Estuary Sediment: Post Placement Monitoring – Tier 1 Second Annual Monitoring*, EnviroCentre, June 2008, at p. 37.

<sup>25</sup> Report No. 3308, *Port of Tyne – Sea Disposal Trials of Contaminated Tyne Estuary Sediment: Post Placement Monitoring – Tier 1 Second Annual Monitoring*, EnviroCentre, June 2008, at pp. 37 and 38.

<sup>26</sup> Minutes of the Meeting Held to Discuss the Trial Capping Project of Contaminated Dredged Material from the Port of Tyne Disposal held on 10 May 2006' at para. 3.

<sup>27</sup> Minute by Geoff Bowles (MEU) to Mike Waldock (CEFAS), Andy Greaves (MCEU) and Jon Rees (CEFAS), dated 26 January 2007 setting out Defra's comment on MCS letter to Defra dated 20 December 2007 regarding Licence 31995/04/1, p. 2. Q3.

<sup>28</sup> Report No. 3040, *Port of Tyne – Sea Disposal Trials of Contaminated Estuary Sediment: Required Cap Thickness*, EnviroCentre, February 2007, at p. 1, para. 3.

significantly would be extremely misleading, if additional capping material has actually been added in the meantime and has not been taken into account in those statements.

### **The Claimants' concerns**

62. It is clear from the evidence that a number of breaches of the original Licence conditions have occurred that have led to a situation that has put the marine environment at peril to a much greater extent than would have occurred if the Licence conditions had been complied with, and that may not have occurred at all, had an appropriate environmental impact assessment been carried out.
63. MCS and Robert Latimer are concerned that:
- Even if this has not happened yet, it is only a matter of time until substantial parts of the cap are driven off through storms and wave movement, dispersing contaminated dredging material into the sea above and beyond the boundaries of the disposal site, particularly as the CDM and capping material are actually spreading as they settle. Considering also that even the capping layers may be contaminated with TBT and heavy metals (but to a lesser extent than the CDM itself), this would pose an immediate threat to the environment, for example to fish and shell-fish, as acknowledged by CEFAS in 2003<sup>29</sup>, or to protected species under the Habitats Directive<sup>30</sup>, e.g. porpoises and dolphins<sup>31</sup>. Inshore seagrass beds and sabellaria reefs protected under local biodiversity action plans could also be damaged by downstream drifts of contaminated sediment<sup>32</sup>.
  - The CDM will effectively need to be re-capped on an ongoing basis, but that is not within the ambit of the current trial.
  - As this is a trial disposal to establish UK best practice, the flawed nature of this trial may be used as a faulty basis for carrying out similar disposal projects in future (potentially without adequate environmental impact assessments), replicating the same type of threat to the marine environment.

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<sup>29</sup> Memorandum from Dr C Vivian (CEFAS) to Mr G Boyes (Defra), dated 1 April 2003: *Current Status of Tyne TBT Disposal Issues*, para 1, bullet point 6.

<sup>30</sup> Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora.

<sup>31</sup> Memorandum from Dr C. Vivian (CEFAS) to Mr G Boyes (Defra): *Port of Tyne Application DC 6742*, BLR 7570, DAS 31995/030222, DC 6742, dated 18 June 2003 at para 42.

<sup>32</sup> See Solandt, J-L. 2008 *Marine Local Biodiversity Action Plan Guidance Manual for England*; Marine Conservation Society (MCS) UK, at pp. 23, 24, 26, 44 and 45.

## Conclusion

64. It is clear that this is a case where there is a potentially grave threat to the marine environment and there are strong grounds for assuming that a number of environmental laws have been broken, or may be broken in future:
- No full environmental impact assessment was carried out by the Port of Tyne Authority or requested by Defra, and in the limited impact assessments that were carried out, important factors, such as the potential damage to marine biodiversity, for example through heavy metal contamination, were not fully considered<sup>33</sup>. In particular, the dangers of the CDM drifting from the disposal site and damaging wildlife beyond the dump site boundaries do not appear to have been explored, even though some initial concerns were expressed.
  - The Port of Tyne Authority failed to comply with Licence conditions in relation to the thickness of the protective cap (the average cap thickness is now 37cm, instead of the originally licensed and scientifically supported 150cm thickness) or the type of capping material used, which, prima facie, are criminal offences<sup>34</sup>.
  - It is doubtful that the current cap thickness can guarantee the integrity of the cap, which is a fundamental condition not only of the Licence, but of the whole trial as such.
  - Neither the Port of Tyne Authority, Defra nor the agencies relied upon for statutory advice appear to have maintained a precautionary approach, and appear at times to have discounted the 'best available techniques' or 'best environmental practice' required by the OSPAR Convention<sup>35</sup>, or the '*practical availability of any alternative methods*', as required by the Food and Environment Protection Act 1985<sup>36</sup>. A CEFAS presentation in June 2005 noted:

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<sup>33</sup> This may potentially be in breach of the Environmental Impact Assessment Directive 85/337, as amended; the SEA Directive 2001/42/EC (on the assessment of the effects of certain plans and programmes on the environment), as well as the Harbour Works (Environmental Impact Assessment) Regulations 1999 and the authority's duties under section 8(1) – (3) of the Food and Environment Protection Act 1985.

<sup>34</sup> Under Section 9(1), Food and Environment Protection Act 1985.

<sup>35</sup> Article 2(3)(a) and Article 2(3)(b) of the OSPAR Convention, see also OSPAR Hazardous Substances Strategy 2003, Article 2.1 and OSPAR Sintra Statement on Hazardous Substances, paragraph 10.

<sup>36</sup> Section 8(2). Also, Defra's own Waste Strategy 2007 explains in Annex C7, Figure C7.1 that 'unacceptable' material should not be disposed of at sea. Unacceptable material is material '*contaminated to a level unacceptable for sea disposal*'. The CDM is such material, as without the protective cap it is toxic and hazardous to the marine environment. Instead the Government (at para. 10ff) says that a strategy for managing contaminated marine sediments is being developed.

*'For the Tyne - policy decision to trial a capping exercise at the disposal site – not the best scientific option but compromise on cost. Await results'<sup>37</sup>.*

In fact, earlier in the same presentation, a statement is made saying that:

*'The Tyne disposal site is "full" – not possible to conventionally dispose more highly contaminated waste at the site'<sup>38</sup>.*

- Other rules of the OSPAR and London Conventions may have been breached or undermined both by the Port of Tyne Authority and by Defra and its agencies, for example, the UK's duty to:

*'take all possible steps to prevent and eliminate pollution and ... the necessary measures to protect the maritime area against the adverse effects of human activities so as to safeguard human health and to conserve marine ecosystems...'<sup>39</sup>;*

and its objective of avoiding and

*'prevent[ing] pollution of the maritime area by continuously reducing discharges, emissions and losses of hazardous substances ... with the ultimate aim of achieving concentrations in the marine environment near background values for naturally occurring substances and close to zero for man-made synthetic substances'<sup>40</sup>.*

65. As already seen, MCS and Robert Latimer have been very concerned about the dangers to the environment posed by the disposal method used in this case and the possible threat to the marine environment posed by the wider adoption of this disposal method without a thorough independent review of a trial intended to establish best practice in the UK.
66. Yet, other than direct communications with the relevant authorities in relation to their concerns, they have been completely unable to gain any kind of access to justice in this case. Because of the restrictions that English law places on the grounds for bringing actions for judicial review of the decisions and actions of public authorities, because of restrictions on timing and the excessive costs of potential court action, MCS and Robert Latimer have not

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<sup>37</sup> Presentation by Mike Waldock on behalf of Kevin Thomas, Jackie Reed, Rebekah Owens, Jan Balaam and Steve Brooks Cefas Burnham, Jim Readman, PML and John Zhou, University of Sussex, *Contaminated Dredged Material*, FEPA Topic Review 23<sup>rd</sup> June 2005, slide 26, 'Summary and Further work'.

<sup>38</sup> Ibid. slide 25 'Implications for Defra'.

<sup>39</sup> Article 2(1), OSPAR Convention, although under Annex II the authorised dumping of dredged materials is allowed (Article 3.2(a)). However, arguably, the general obligations under Article 2 of OSPAR itself still apply.

<sup>40</sup> Articles 1 and 2 of OSPAR's Hazardous Substances Strategy and paragraph 10 of the OSPAR Sintra Statement.

been able to legally challenge the Port of Tyne's, Defra's or CEFAS's decision-making and actions.

67. The following paragraphs set out the general arguments why E&W fails to comply with the provisions of Article 9(2) to (4) of the Aarhus Convention. Where these arguments are relevant to the Port of Tyne case, a description of how the particular issue affects the Port of Tyne case has been added at the end of the discussion of each of the issues.

## **PART II: THE CLAIMS AGAINST E&W**

### **CLAIM 1 – claims relating to the substantive legality of a case:**

**Article 9(2) gives the public concerned a right to challenge the ‘substantive’, not just the ‘procedural’, legality of an authority’s decision, act or omission. In addition, Article 9(3) provides a general right to challenge acts and omissions which contravene provisions of national environmental laws.**

#### *Background*

68. Two points need to be made here.

- Article 9(3) contains a very general right. Neither procedure nor substance are mentioned, just a right to challenge acts and omissions. Therefore, if a public authority acts in breach of a national law, by wrongly applying the law to the particular facts of a case or by making a material error of fact, then it follows that this should be caught by Article 9(3), i.e. decisions on the merits of the case must also be subject to review under Article 9(3).
- Article 9(2) refers to ‘substantive’ legality. Substantive law governs the actual rights and obligations of those who are subject to it, the substance of the law, including all the duties and obligations laid out in Article 6(1), (2), (6), (7), (8) of the Aarhus Convention.

69. According to the UK Environmental Law Association, ‘substantive’ legality in this case *‘must mean this extends to a merits review’*<sup>41</sup>. Article 6 of the Aarhus Convention, in particular in the paragraphs listed above, sets out very precisely the factors that the public authorities need to consider, including the underlying factual and legal considerations. Indeed, the Aarhus Implementation Guide explains that there is a public right of challenge if *‘the substance of the law has been violated’* and it refers to the possibility of mixed procedural/substantive cases, such as *‘failure to properly take comments into account’*<sup>42</sup>. This example is one that goes both to the procedure (failure to take comments into account where there is a duty to do so) and the merits (failure to **properly** take account of comments, i.e. to properly consider the facts). Therefore, it follows that by applying Article 9(2) a review of those factual and legal considerations must be possible. In addition, as already mentioned, the much more general wording in Article 9(3) also guarantees this.

<sup>41</sup> See para. 1.1.1 UKELA Implementation Report

<sup>42</sup> See *The Aarhus Convention: An Implementation Guide*, p. 128.

70. Because the UK has ratified the Aarhus Convention and because the Convention now is an integral part of EU law (and therefore also of UK law), the Aarhus Convention is actually already part of English law, including of course Article 9(2) and 9(3)<sup>43</sup>. Therefore, it should theoretically be possible for citizens to legally review the actions and decisions of public authorities in relation to their procedural and **substantive (factual) legality** (Article 9(2)) and to challenge acts and omissions by private persons and public authorities which contravene national environmental laws (Article 9(3)), irrespective of whether the EU has passed implementing legislation in this regard or not.
71. The main way in which a member of the public in E&W can challenge the acts or decisions of public authorities is by bringing an action for judicial review against the relevant authority. Appeals do not generally exist in this context<sup>44</sup>. The law of judicial review in E&W (and in the rest of the UK) is not codified, it is governed by common law rules, i.e. by case law - the jurisprudence of the courts.
72. The Aarhus Convention Compliance Committee has already shown that the Aarhus Convention can be applied with regard to the jurisprudence of national courts<sup>45</sup>. The same principle needs to be applied in this context.
73. Theoretically it should be relatively easy for the courts to comply with Articles 9(2) and 9(3) of the Aarhus Convention, as courts can exercise broad discretion in judicial review cases in E&W. Thus, there are judicial review cases where it has been held entirely acceptable to review the facts of a case where the public authority has reached a decision on a '*material error of fact*'<sup>46</sup>. Indeed, in a recent judicial review case, the court allowed a claim that the UK Government was not complying with EU pesticides laws, causing a risk to human health<sup>47</sup>. This claim was allowed on the basis of '*solid evidence*' advanced by the claimant, and the court held that there had been '*both a*

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<sup>43</sup> A more detailed explanation of this paragraph is found in Annex III.

<sup>44</sup> Appellants are usually persons with an interest in the process, not members of the public, see UCL Report, Annex A.

<sup>45</sup> See findings and recommendations of the Compliance Committee with regard to compliance by Belgium with its obligations under the Aarhus Convention in relation to the rights of environmental organizations to have access to justice, ECE/MP.PP/C.1/2006/Add.2, 28 July 2006.

<sup>46</sup> See judgment of Lord Slynn of Hadley in *Alconbury* [2001] UKHL 23 at 52 – 54, citing his own judgment in *R v Criminal Injuries Compensation Board, Ex p A* [1999] 2 AC 330, at 344, as well as *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, at 1030, and Wade & Forsyth *Administrative Law*, 7<sup>th</sup> ed (1994), pp. 316 – 318 (discussing '*mere factual mistake*' as a ground for judicial review) and de Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 5<sup>th</sup> ed (1995), p. 288 (discussing judicial review where mistaken facts have been taken into account).

<sup>47</sup> *Georgina Downs v Secretary of State for Environment, Food and Rural Affairs* [2008] EWHC 2666 (Admin).



*failure to have regard to material considerations and a failure to apply the Directive properly'* (emphasis added)<sup>48</sup>.

74. Moreover, human rights law, through the European Convention on Human Rights 1950 (the 'ECHR') and the UK Human Rights Act 1998, as well as EU law in general, have introduced the principle of proportionality into English law. This is now an established ground for judicial review in relation to human rights and EU cases<sup>49</sup>, and permits an appropriate review of the facts of the case<sup>50</sup>.
75. A study of academic opinion and the general jurisprudence of the courts though, quickly shows that, in practice, the grounds on which judicial review actions are permitted are applied very restrictively, and that the courts in E&W have generally chosen not to apply the precedents referred to above in environmental cases<sup>51</sup>. Instead the law is generally applied in a way that does not allow members of the public to challenge the decision of a public authority that is wrong on the facts (the merits or the substance of the case)<sup>52</sup>.
76. However, particularly in relation to environmental cases, it is usually the substance/facts that are at issue. In such cases, it is sometimes possible to challenge the legality of a public authority decision on procedural grounds, but even then, a judgment in the claimant's favour will not necessarily stop the authority making the same substantively wrong decision again, providing it complies with all relevant procedural and legal requirements (see for example *Peace Close* case study in the Environmental Justice Project Report<sup>53</sup>).

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<sup>48</sup> At paras. 40 and 47. Mr Justice Collins also cited May LJ in *R (Campaign to End All Animal Experiments) v Secretary of State for the Home Department* [2008] EWCA Civ 417 in para 1: 'The scientific judgment is not immune from lawyers' analysis. But the court must be careful not to substitute its own inexpert view of the science for a tenable expert opinion.'

<sup>49</sup> See Annex II.

<sup>50</sup> There are different approaches to the exact circumstances in which a high-intensity factual review is possible. One view is that this will be most appropriate in narrow circumstances, when the facts of the case are 'discrete and limited', and far less so in cases that raise general policy issues and affect the wider public. See for example *R v Secretary of State for Education and Employment ex p Begbie* [2000] 1 WLR 1115 at 1130-1131, or *Edore v Secretary of State for the Home Department* [2003] EWCA Civ 716, or for less restrictive views see the following articles: Richard Clayton, 'Proportionality and the HRA 1998: Implications for Substantive Review' [2002] JR 124; or Maik Martin and Alexander Horne 'Proportionality: Principles and Pitfalls – Some Lessons from Germany' [2008] JR 169.

<sup>51</sup> See for example Stuart Bell and Donald McGillivray, *Environmental Law*, 7<sup>th</sup> edition, 2008, p. 314 or *Judicial Review: A short guide to claims in the Administrative Court*, House of Commons Library Research Paper 06/44; Treasury Solicitors; *The Judge Over Your Shoulder*, ed. 4: January 2006; Michael Beloff, 'How Green is Judicial Review' [2005] JR at 110 (Merits review would disturb the 'relationship between the administrator and the judicial arms of government in an area which is rooted in constitutional propriety as well as calculated pragmatism); or Richard Macrory 'Environmental Public Law and Judicial Review' [2008] JR at 68 (The Aarhus Convention endorses wider access to environmental justice and is an important tool for achieving better environmental protection, 'yet it is equally important that the courts, in embracing the new approaches that Aarhus implies, equally remain sensitive to the constitutionally appropriate role they should play in handling such cases').

<sup>52</sup> A short summary of the generally applied rules on judicial review is contained in Annex II.

<sup>53</sup> *Environmental Justice Project Report*, p. 34.

77. In short, except in the exceptional cases described above, judicial review actions on the merits of a case are generally not allowed in practice. This is clearly also the view of the UK Government, which - in its Aarhus Convention Implementation Report - goes so far as to say that the right of review under Article 9(2) is restricted to:

*'review the legality of an authority's application of law but not to challenge the merits or substance of a case'.<sup>54</sup>*

78. This statement and the underlying judicial practice whereby judicial review actions on the substantive legality/facts of the case are not allowed, show clearly that the UK is in breach of Articles 9(2) and 9(3) of the Aarhus Convention.

79. In this context, it is also useful to look to experience in other Parties of the Aarhus Convention. In Chapter 2 of the *Handbook on Access to Justice under the Aarhus Convention*, the authors say:

*'In some countries in the UNECE region, EIA legislation allows for the review both of compliance with EIA procedures and of the substantive merits of the decision through the administrative review process. For instance, in Bulgaria Case 1 (the Pirin Mountain Case), six environmental NGOs appealed the substantive legality as well as the procedural legality of an EIA decision. In EECCA countries, the environmental expertise process brings substantive legality even more to the forefront in judicial challenges'.<sup>55</sup>*

80. Similarly, it is possible in both Spain and France to challenge the substantive and procedural legality of decisions, including a review of the merits. In Spain, claimants can request a declaration of non-conformity with the law as well as restitution and the adoption of adequate measures or an order for public authorities to meet their obligations<sup>56</sup>. In France, as long as they satisfy the relevant standing requirements, associations can bring criminal and civil claims against authorities and private individuals in relation to any breaches of environmental laws, irrespective of whether these breaches are procedural or substantive in nature<sup>57</sup>. In Germany, in the limited circumstances where

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<sup>54</sup> *Aarhus Convention Implementation Report*, Defra, April 2008, at p. 27, para 2.

<sup>55</sup> Chapter 2, *Access to justice in cases involving public participation in decision-making*, Svitlana Kravchenko, Dmitry Skrylnikov and John E. Bonine, at p. 30.

<sup>56</sup> See Article 31 of Law 29/1998 of 13 July regulating the Administrative Judicial Procedure.

<sup>57</sup> See Articles L. 142-1 and 142-2 of the '*Code de l'environnement*'. Examples include a case involving a legally obtained permit for a house that had been built in an area where no houses were supposed to be built – the permit was rescinded, the house ordered to be torn down and damages were awarded (Cour de Cassation, 29 September 2007, no. 0420636); or the annulment of

environmental protection associations do have standing, claims are allowed on the merits<sup>58</sup>.

81. In New Zealand, the general public has a general right to public participation in policy, planning and enforcement processes, and can appeal to the Environment Court against any decisions reached by a public authority in such processes. The public can also apply to the Environment Court for an enforcement order in relation to various environmental offences. In addition, the Environment Court hears appeals on a de novo basis and can even hear new evidence in any appeal. It is not limited by the decision or reasons of the public authority at the earlier stages of the process. Therefore, appeals can be decided on the merits of proposed policies or planning documents<sup>59</sup>.

### *The Port of Tyne case and merits review*

82. Alongside costs issues (discussed in Claim 2 below), this has been **the** most important stumbling block regarding access to justice in the Port of Tyne case. There have been so many obvious issues relating to the substantive merits in this case, for example:

- the lack of a full environmental impact assessment throughout;
- the failure to observe a precautionary approach;
- the failure to provide evidence to support the elected disposal method as following best available techniques or best environmental practice;
- the failure to provide evidence which properly discounted the practical availability of alternative methods;
- the potentially misleading statements made in relation to the physical nature of the disposal site and frequency of additional capping actions and capping materials; and
- the consequent danger posed to the marine environment, should contaminated material escape from the site and affect the marine environment surrounding the site (including potentially valuable habitats protected by Biodiversity Action Plans).

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fishing permits authorizing illegal driftnets (Conseil d'Etat, 10 August 2005, no. 265034 and Conseil d'Etat, 2 July 2007, no 285974).

<sup>58</sup> See Milieu Study, *Country report for Germany*, point 1.2, p. 12-11. In fact, in Germany the criticism is made that it is not possible to challenge the procedural illegality of public authority acts and decisions.

<sup>59</sup> All governed by the provisions of the Resource Management Act 1991.

83. However obvious the merits of a potential case seem, under the tests currently used for allowing judicial review actions it would be virtually impossible for the Claimants to bring a successful challenge, as Defra and its agencies appear not to have breached any procedural requirements (even in relation to the lack of an environmental impact assessment it is not obvious whether any procedural obligations have actually been breached). Neither have they acted beyond their powers, or made decisions so completely irrational or unreasonable that they would satisfy the relevant restrictive judicial review tests that the Aarhus Convention was designed to remove.
84. Moreover, even if one of these tests could be met, for example because an environmental impact assessment should have been carried out, the underlying facts of the decision to permit contaminated material to be deposited on the sea floor could not be reviewed. The judicial review could not stop the same decision being made again, with further hazardous and unsafe deposits of contaminated materials being permitted in future. Neither would any actual damage done necessarily be rectified, even if the authorities had acted improperly.
85. In addition to these apparently hopeless prospects of success under the current jurisprudence of the court and the Government's interpretation of the law, there are issues of excessive costs and timing (described below in Claims 2 and 3). The combined effect is that the Claimants have not even been in the position to attempt to judicially review the decisions of the public authorities concerned.

### **Conclusion and recommendations**

86. In theory, the Aarhus Convention is already part of English law and the courts have the discretion to review the decisions of a public authority in relation to the merits of a case. In practice, however, the jurisprudence of the courts and the way the Government interprets the rules on judicial review are in breach of Article 9(2) and 9(3) of the Aarhus Convention.
87. A review of the law is needed in this regard. New laws could be more akin to the appeals process, in which it is possible to examine whether the law has been misapplied in relation to the facts of the case. In criminal law it is even possible to re-open the facts of a case if there is new evidence.

88. However, the most obvious way to make the law compliant with Articles 9(2) and 9(3) of the Aarhus Convention would be to apply the existing more flexible approaches in relation to material mistake of fact and the use of the proportionality principle in EU and fundamental and human rights cases. After all, the Aarhus Convention is also EU law, its provisions are very much in the public interest, and, arguably, it deals with fundamental rights in relation to the environment. Cases that fall within the Aarhus Convention could be added to human rights cases as a separate ground for judicial review.
89. Using this approach would mean that the general law on judicial review would remain unchanged. There would merely be an extension and systematisation of the more flexible rules which already exist in relation to EU cases, the ECHR and fundamental rights. The floodgates would not be opened and no radical change would be needed to the law on judicial review.
90. A new enactment, an 'Aarhus Act', akin to the Human Rights Act 1998, could be passed to clearly enshrine in legislation the specific rights of the public under the Aarhus Convention and reinforce environmental cases that fall within the Aarhus Convention as a separate ground for judicial review like human rights cases.
91. Any of these changes will help to enable the Claimants to challenge any future decision based on the results of the current Port of Tyne capping trial. They may even enable the Claimants to seek judicial review in relation to the Port of Tyne case itself, if there are ongoing legal issues.

**Summary of recommendations:**

The way judicial review rules are applied in England & Wales needs to be reviewed. We urge the Aarhus Compliance Committee to make the following recommendations:

1. Environmental cases falling under the Aarhus Convention ('Aarhus cases') need to be treated as an extension of accepted grounds for judicial review challenges relating to fundamental rights, human rights, EU law and material error of fact. Aarhus cases should be an additional separate ground for judicial review.
2. Passing a new 'Aarhus Act' would establish such a separate ground.

## THE CLAIMS AGAINST E & W

### CLAIM 2 - Costs:

**Access to justice procedures under the Aarhus Convention ‘shall ... not be ... prohibitively expensive’. Article 9(4)**

**Each Party must consider ‘the establishment of appropriate assistance mechanisms to remove or reduce financial ...barriers to access to justice’. Article 9(5)**

### **General background**

92. The Aarhus Convention Implementation Guide says:

*‘The cost of bringing a challenge under the Convention or to enforce national environmental law may not be so expensive that it prevents the public, whether individuals or NGOs, from seeking review in appropriate cases. Various mechanisms, including waivers and cost-recovery mechanisms, are available to Parties to meet this obligation’<sup>60</sup>.*

93. Court fees alone do not generally make up the bulk of the costs of a legal review case. Indeed, in some countries, such as France, Luxembourg and Sweden, court fees are actually free<sup>61</sup>, and in most countries they are not significant<sup>62</sup>.

94. However, as the Aarhus Convention Implementation Guide makes clear, Article 9(4) does not merely refer to court fees. It goes on to set out various types of costs associated with going to court, including attorney’s fees, witness transport costs and expert fees, before suggesting ways to control these costs, including a reference to the US system which does not allow defendants to recover their costs from claimants if the claimants are unsuccessful<sup>63</sup>.

95. Clearly, this shows that when the Aarhus Convention asks for costs not to be prohibitively expensive, it is necessary to look at the costs which claimants face in their entirety, not just court fees.

96. However, it would seem from the UK’s Aarhus Convention Implementation Report and a Defra table entitled ‘*Implementing Measures to Achieve UK*

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<sup>60</sup> At p. 134.

<sup>61</sup> See para. 2.4.1 General overview of the Summary Report of the Milieu Study at p. 13.

<sup>62</sup> Ibid. at p. 14, para 2.

<sup>63</sup> At p. 134, see also paras 141-143 below.

*Compliance with the UNECE Aarhus Convention'* that the issue which the UK considers most relevant for deciding whether it has complied with Article 9(4) is court fees. Thus it says:

*'Court fees are reasonable. Certain applicants will be exempted from court fees, others will have court fees remitted on grounds of hardship, or will receive public funding.'*<sup>64</sup>

*'The government's firm view is that while it is right that there should be access to the courts, there is no automatic right of free access to the courts. Those who can afford to pay fees should be expected to do so. It would not be appropriate for taxpayers to bear the full cost of civil proceedings when those who bring these proceedings can afford to pay.'*<sup>65</sup>

97. However, the real reason why litigation costs in E&W are prohibitively expensive lies not in high court fees, but in the additional costs of litigation. Such additional costs include lawyers' and experts' costs, which can often be considerable, as legal aid is only available in very restricted circumstances. It is also not possible, and would not be right, to rely on lawyers working pro bono in every case.
98. According to estimates by the 'Public Law Project'<sup>66</sup> and others<sup>67</sup>, lawyers' fees can amount to £10,000 - £20,000 in a straightforward case and more in more complex cases. Lawyers' fees are usually around £200-300 per hour. Instructing Counsel in relation to a simple one-day hearing can cost between £5,000 and £15,000.
99. IN E&W, these costs alone are prohibitively expensive for most members of the public and (usually non-profit making) environmental organisations. In many cases they are higher than in other EU Member States, although lawyers' and experts' fees can be high in other countries also<sup>68</sup>.

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<sup>64</sup> *'Implementing Measures to Achieve UK Compliance with the UNECE Aarhus Convention'*, Defra, p. 5, Article 9, para 4.

<sup>65</sup> *Aarhus Convention Implementation Report*, Defra, April 2008, pp. 27-28.

<sup>66</sup> *'Public Law Project Information Leaflets for Practitioners 2'*, Public Law Project 2007, para 1.

<sup>67</sup> For example: *'The Environmental Justice Project Report'*, para. 87, p.47.

<sup>68</sup> *Milieu Study* at p. 14 under heading *'Lawyers' and experts' fees'*.



100. However, the **two single biggest cost problems** that parties face in E&W arise out of:

- the rule set out in rule 44.3(2)(a) of the Civil Procedure Rules ('CPR') that '*costs follow the event*', i.e. that the loser must pay the winner's costs<sup>69</sup>; and
- the fact that, in relation to interim relief, claimants are at risk of having to pay the defendants' costs suffered through the granting of the interim relief, if the defendant wins.

Both of these sets of costs can be extremely high.

101. The UK's Implementation Report does mention the costs rules in civil proceedings in E&W, but says that English courts have enough flexibility and discretion to guarantee that there should be no excessive costs in individual cases, and that in any case, there are a number of completely free avenues of complaint to public authorities in certain cases, which do not involve the court process<sup>70</sup>.

102. This statement by the UK Government is extremely misleading.

103. It is true that Rule 44(3)(2)(a) has to be read in the context of section 51 of the Supreme Court Act 1981, which gives the courts full discretion to determine by whom and to what extent costs are to be paid, and of CPR 1, which stipulates that the case must be dealt with justly and fairly and CPR 44(3)(1), which allows the courts to make different costs rulings.

104. It follows that, as in the case of merits review, the courts enjoy a wide discretion. They could easily apply the rules so as to be fully compliant with Article 9(4). However, again as in the case of merits review, it is the uncertainty created by these wide discretionary powers and the ways the courts' jurisprudence has applied them, which means that the UK is in breach of the Aarhus Convention.

### **The rule that the loser should pay the winner's costs**

105. It has already been shown that a party's own legal costs in judicial review cases are very high in themselves. However, defendants can often engage senior and very expensive lawyers and involve costly expert evidence. In

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<sup>69</sup> CPR 44.3(2)(a) states that 'if the court decides to make an order about costs... the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party'.

<sup>70</sup> See p. 28-29 of the *Aarhus Convention Implementation Report*, Defra, April 2008.

addition, other interested parties may join the defendant and also incur costs, which will all have to be paid by the claimant if the loser pays rule is applied in the event that the claimant is not successful.

106. For example, in the 'Ghost Ships' case<sup>71</sup>, a case brought by Friends of the Earth in 2003 in the High Court in E&W, the company at the heart of the action, who was an interested party in the case, served a schedule of costs on Friends of the Earth amounting to over £100,000 for a one day judicial review hearing on a preliminary issue<sup>72</sup>. Friends of the Earth won the case and did not have to pay for these costs, but not many organisations could afford to take the risk of a costs order of this kind of magnitude made against them.
107. Similarly, in the so-called 'Anti-Vivisection' case<sup>73</sup> the defendants' costs were predicted to be around £100,000 to £120,000. In the event, the claimants were granted a protective costs order capped at £40,000, still an amount that many members of the public, including environmental organisations, would not be able to absorb<sup>74</sup>.
108. It follows that because the presumption in CPR 44(3)(2)(a) is that the loser should pay the winner's costs and because it is not possible to know at the outset of a case how the court will exercise its discretion and what order for costs it will make, it is impossible for claimants to assess their costs exposure before they decide to bring a case for judicial review<sup>75</sup>. Moreover, it is very unusual for the rule not to be applied at least to some degree. In most of the other EU Member States which also have the 'loser pays' rule, the rule is not really applied to NGOs<sup>76</sup>.
109. The risk of incurring these kinds of costs if a case is lost has a 'chilling' effect on claims for judicial review because claimants cannot afford or cannot justify running the risk of having to pay such high costs. Even if claimants have these kinds of funds available, they are normally already committed to other important objects for the public benefit (e.g. other programme areas of an environmental NGO). This point is especially important in environmental

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<sup>71</sup> R (*Friends of the Earth Ltd*) v *Environment Agency* [2003] EWHC 3193 (Admin).

<sup>72</sup> See 'CAJE Briefing 07/04, p.2 and 'Environmental Law, What environmental problems do we face today? Problem with the costs rule', Leigh Day & Co.

<sup>73</sup> R(*British Union for the Abolition of Vivisection v the Secretary of State for the Home Department* [2006] EWHC 250 (Admin)

<sup>74</sup> See Liberty Report, para 61, p. 25.

<sup>75</sup> There are important issues surrounding 'protective costs orders', which can be made by judges. These are summarised below and explained in more detail in Annex IV.

<sup>76</sup> See Summary Report of Milieu Study at pp. 14 -15 under "'Loser pays" principle'.

cases, as claimants are generally acting in the public interest and do not stand to gain financially by bringing the case.

110. Indeed, out of the 12 reports on access to justice listed in Annex VI, 11 recognise that the costs of bringing an action for judicial review in E&W are prohibitively expensive and constitute an obstacle to access to justice – Annex VI sets out some of the relevant extracts from the reports showing this. The 12<sup>th</sup> report has a different focus and does not directly consider the costs issue.
111. A good general over-view of relevant costs cases is contained in the Liberty Report.

### **Protective costs orders**

112. Courts in E&W have the discretionary power to make protective costs orders ('PCOs') to ease the cost burden on claimants. Such orders can take a variety of forms: A PCO may say that:
  - an unsuccessful applicant does not have to pay for the defendant's costs, and remains responsible for his own costs;
  - an unsuccessful applicant has to pay capped costs to the defendant and remains responsible for his own costs;
  - an unsuccessful applicant need not pay the defendant's or his own costs (and the defendant has to pay costs in any case);
  - in return a successful applicant will have his costs paid for in full by the defendant or the costs the successful claimant can claim are also capped.
113. The guiding case of *R (Corner House Research) v Secretary of State for Trade and Industry*<sup>77</sup> (discussed in more detail in Annex IV) sets down guiding principles on PCOs. Some of these are very restrictive, for example, the way in which the courts have interpreted the need to show that a case is of public importance and it is in the public interest for the issues to be resolved, or the requirement that the claimant should have no private interest in the outcome of the case, as well as restrictions on the quantity, quality and costs of legal advice to the claimants (all explained in more detail in Annex IV).
114. Again, the courts are given flexibility and could relatively easily change their jurisprudence so as to comply with Article 9(4) of the Aarhus Convention.

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<sup>77</sup> [2005] EWCA Civ 192.

The main problem with the courts' current approach is that it is **very uncertain** whether an application for a PCO is going to be successful, and if it is, to what extent it will be successful (i.e. what form the PCO will take and how much the claimant will still need to pay in terms of the other party's and its own costs). Again, this has a strong 'chilling' effect on potential claims, because the risk of bearing excessive costs still exists.

115. CAJE reports that: *'A number of large NGOs, such as WWF, Greenpeace and the RSPB do not apply for PCOs on the basis that the level of their turnover and/or unrestricted income would result in a limit on liability that would not, in practice, be very different from that which might arise from the normal application of the costs rules. Although the payment of costs in that order would not cause the organisation to cease operating, it would require the NGO to re-direct significant resources away from other planned activities (for which the NGO is accountable to its members and trustees)...'*<sup>78</sup>.
116. Moreover, the costs of an application for a PCO can themselves be prohibitive for many organisations. Under the *Corner House* rules an unsuccessful claimant must bear the costs of the application for the PCO (a liability of up to £7,000). Again, this has a chilling effect and deters potential claims<sup>79</sup>.
117. **Therefore, in spite of the theoretical benefits of PCOs, PCOs have three substantial problems:**
  - **first, the fact that even if a PCO is granted, the claimant can still be left with substantial costs, has a strong chilling effect on potential judicial review claims**<sup>80</sup>;
  - **secondly, the restrictive conditions imposed in order to obtain PCOs, in relation to establishing the 'public importance' of the issue, the exclusion of claimants with a private interest and the restrictions on quality, quantity and cost of legal advice (see Annex IV); and**
  - **lastly, the uncertainty created by the current system, which generally has a chilling effect on claimants because the threat of facing prohibitive costs is always there.**

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<sup>78</sup> See CAJE UK Implementation Report, para. 17, p. 11.

<sup>79</sup> See Liberty Report, para 99, p.33.

<sup>80</sup> A good list of examples of the range of different PCOs and discussion of the detailed cases can be found Liberty Report, paras 45 – 64; p.20-26.

118. Indeed, some of these points could be viewed as indirect, second tier restrictions on standing in E&W, even though prima facie the standing laws in E&W are compliant with the Aarhus Convention.

### **Injunctive relief**

119. As well as all the costs already identified and the uncertainty surrounding PCOs, another costs issue arises where it is important to act quickly in order to protect the relevant environmental interest at issue and interim relief is needed. The costs of obtaining interim relief in such cases are also prohibitively high.
120. In its Aarhus Implementation Report referred to above, the UK Government says:
- 'Adequate and effective remedies, including injunctive relief in appropriate cases, are available'*<sup>81</sup>.
121. Once again, this statement is misleading in the same way as the UK's general statements on PCOs are misleading. Although the right to injunctive relief exists, English law generally requires claimants of injunctive relief to give a 'cross-undertaking' in damages, meaning that if the claimant loses, he, she or it will pay any costs/economic losses that have arisen out of the injunctive relief to the defendant. The only other EU Member State identified by the Milieu Study with a similar approach is Spain. All other EU Member States do not ask for cross-undertakings in damages<sup>82</sup>.
122. In the Lappel Bank case in 1995<sup>83</sup>, the RSPB applied for injunctive relief in relation to the development of an important protected area of estuary, in relation to which they were bringing a judicial review action. They were worried the area would be destroyed before the case was decided. However, they were refused interim relief because the RSPB was not prepared to give a cross-undertaking in damages (because this would have covered an uncertain, but potentially large, commercial loss). The development went ahead, and by the time the RSPB won the case, the protected area in question had been destroyed.

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<sup>81</sup> 'Aarhus Convention Implementation Report', Defra, April 2008 at p. 26.

<sup>82</sup> See Summary Report of Milieu Study at p. 15 under 'Other costs'.

<sup>83</sup> *R v Secretary of State for the Environment ex parte the Royal Society for the Protection of Birds (1997)* Env. L.R. 431.

## Public funding

123. Article 9(5) of the Aarhus Convention also requires *'the establishment of appropriate assistance mechanisms to reduce financial ... barriers to justice'*.
124. In E&W, a means-tested system of public funding exists for private individuals. As already seen above, the Government claims that public funding is available to certain applicants<sup>84</sup>.
125. However, such public funding is only available to a limited number of parties because it applies a stringent means test<sup>85</sup>. In addition, although it is now theoretically available in public interest cases, it is particularly difficult to obtain in such cases, because funding will be refused *'if there are other persons or bodies who might benefit from the proceedings who can reasonably be expected to bring or fund the case.'*<sup>86</sup> Parties applying for funding in such circumstances have to *'provide an explanation for why the proceedings cannot be funded privately by other means.'*<sup>87</sup> This means that in examining what alternative funding may be available, the Legal Service Commission will *'will need to consider whether any funding should be provided by those members of the public who stand to benefit from the outcome of the case, for example by all those affected getting together a fighting fund to finance the litigation.'*<sup>88</sup>
126. Added to this must be the consideration that public funding is not available to environmental organisations, only individuals<sup>89</sup>. Moreover, there are a number of other issues surrounding public funding, for example in relation to uncertainty and costs orders<sup>90</sup>. Useful discussions of these issues are contained in the Sullivan and Liberty Reports<sup>91</sup>, but in summary it is true to say that in most environmental cases at the moment there are no appropriate assistance mechanisms to reduce financial barriers to access to justice.

## Floodgates arguments

127. It is often said that making more equitable costs rules in environmental cases in the E&W legal system would open the floodgates to litigation, overwhelming the courts with the number of actions. No evidence supports

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<sup>84</sup> Above at para 96.

<sup>85</sup> See Sullivan Report, para 28, Footnote 33 for details of financial means testing as at October 2007).

<sup>86</sup> See Sullivan Report, Appendix 2, p. 38, at para 5.5(1).

<sup>87</sup> Ibid.

<sup>88</sup> Ibid., at para. 5.5(5).

<sup>89</sup> See Sullivan Report at p. 15, para 28.

<sup>90</sup> Ibid, pp. 16-17, paras 30-35.

<sup>91</sup> See Sullivan Report, pp. 15-17 and Appendix 2; and Liberty Report, pp. 34-35, paras 100-108.

such predictions.

128. It is possible, however, to show evidence to the contrary. Such evidence demonstrates that a fairer costs regime is not only possible but will not burden the judicial system. A discussion of this evidence is contained in Annex V.
129. We believe strongly that there is no evidence that greater access to justice will over-burden the legal system in the UK. This view is shared in the Sullivan Report (see Annex V).

### **The Port of Tyne case and excessive costs rules**

130. As already seen above, the Claimants believe that environmental laws may have been violated in relation to the deposit and capping of contaminated dredging material by the Port of Tyne at various stages of the capping trial, and indeed, may still be breached now or in future.
131. MCS and Robert Latimer have been in constant contact with the authorities, monitoring their actions as far as possible and asking to be kept informed and involved in the stakeholder process. They have also been in contact with both OSPAR and the European Commission. Collectively, they have exhausted the non-judicial means available to them. From the start the only alternative has been to bring an action for judicial review, although it has already been shown that the courts' jurisprudence on merits review would itself have made this difficult.
132. In any case, none of the entities/persons in question are big organisations with large financial resources, but, based on the evidence shown above on the costs of judicial review actions, the potential costs of losing an action against Defra, CEFAS and the Port of Tyne would be devastating for the Claimants, particularly as there would be more than one defendant and/or interested party.
133. As seen above, the jurisprudence in relation to granting Protective Costs Orders is too uncertain to take the risk of bringing an action and losing. The costs of the preliminary hearings alone would be prohibitive.
134. Also, had the Claimants brought a judicial review action towards the start of the case, then it would have made sense to apply for an injunction to stop the dumping of the contaminated material in the sea, but the fact that cross-

undertakings in damages are usually required in such circumstances would have exposed them to huge commercial costs, which they would not have had the resources to cover.

135. Therefore, it has not been, and still is not, possible for any of the organisations to make a rational and sensible decision to bring a judicial review action in this case.
136. Therefore, any future capping operations based on this trial could be based on misleading evidence gained from the Port of Tyne trial capping exercise, but, unless the application of judicial review rules is changed in E&W, the Claimants will not be able to afford to challenge the follow-on operations either.
137. All of this clearly amounts to a denial of the Claimants' rights to access to justice under Article 9(4) and 9(5) of the Aarhus Convention.

### **Conclusion and proposed recommendations**

138. The over-all costs of access to justice in environmental cases in E&W are excessive and therefore in breach of Article 9(4) of the Aarhus Convention. In addition, there are no appropriate funding mechanisms to remove or reduce the excessive costs barriers that exist as required by Article 9(5). Therefore, the Claimants allege that the laws and/or jurisprudence of the UK (or E&W at least) breach both Article 9(4) and 9(5) of the Aarhus Convention.
139. Were the UK to argue that the rule prohibiting unreasonable costs did not catch the E&W situation because it only covered court fees (which are not excessive) and no other costs, this would clearly be a faulty and misleading argument, as is made clear in the relevant paragraphs of the Aarhus Convention Implementation Guide<sup>92</sup>.
140. The costs rules in E&W need to change so that costs are no longer prohibitively expensive, which can be done without opening the floodgates to claims. Although many of the other EU Member States also have problems with excessive costs, the UK seems to suffer from this problem more than any other. It is important to note that countries where costs rules are more relaxed and it is cheaper to bring judicial review actions are not inundated with environmental cases. Indeed, it is possible to show evidence to the contrary.

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<sup>92</sup> See pp. 134 and 135 and paras 92-95 above.



141. A good example in this context is the American system, in which there is a fundamental presumption that both parties bear their own costs<sup>93</sup>. However, even more beneficially for potential claimants, in environmental public interest cases this rule is frequently changed in favour of the claimant acting in the public interest through so-called '*fee-shifting*' provisions in legislative acts. According to the Handbook on Access to Justice under the Aarhus Convention<sup>94</sup>,

*'[t]here are approximately 150 federal fee-shifting statutes, including 16 major federal environmental statutes'*<sup>95</sup>.

142. The Handbook also says:

*'In all these fee-shifting provisions, the stated goal of the US Congress was to encourage citizen lawsuits in order to achieve compliance with federal statutory policies. The statutes seek to create an incentive for commercial and public interest lawyers to represent citizens pro bono by providing a structure where lawyers can be reimbursed for their legal services if victorious ... the American system has fostered public interest litigation and many public interest law organisations have come to rely on fee shifting to sustain their organisations. Fee shifting has been liberally allowed by most courts in public interest litigation, granting fee and cost recovery in cases where the parties settle in a manner favourable to the plaintiff and in cases where the plaintiff has partially prevailed'*.<sup>96</sup>

143. The fee-shifting approach will generally enable a successful claimant to recoup his costs from the defendant, as long as he has 'some degree of success on the merits'<sup>97</sup> (and/or has not acted in bad faith<sup>98</sup>). It is important to note that this fee-shifting regime goes only one way: successful plaintiffs can recover, but defendants cannot, even when successful.

144. Even in E&W itself, the 'loser pays' rule is not always applied. The Family Act 1986, for instance, abolishes the 'loser pays' rule in relation to family

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<sup>93</sup> This is called the 'American Rule' of civil litigation – as set out in *Alyeska Pipeline Serv. Co. v Wilderness Soc'y*, 421 U.S. 240, 247 (1975).

<sup>94</sup> Edited by Stephen Stec; Szentendre, Regional Environmental Center for Central and Eastern Europe (REC) Hungary, March 2003 .

<sup>95</sup> Chapter 7; Financial and other barriers; Lynn Sferrazza, p.57. In addition, '*[m]ost of the environmental fee-shifting statutes provide as follows: "The court may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing party or substantially prevailing party, whenever the court determines such an award is appropriate'*, Ibid.

<sup>96</sup> Ibid, p. 57.

<sup>97</sup> see *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), at 686, see also discussion in *Loggerhead Turtle v. County Council*, 307 F.3d 1318 (11th Cir. 2002), at II, para. 11 – 13.

<sup>98</sup> *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247, 259, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975) (recognizing the bad faith exception as an "assertion of inherent power in the courts").

proceedings<sup>99</sup>. This precedent should be followed, but, even then, this is not enough, as there will still be a substantial amount of uncertainty at the outset of a case in relation to the precise nature of any costs order at the end of the case, or as determined in interim proceedings.

145. In E&W, the easiest way to change the costs rules would be to amend the Civil Procedure Rules on Judicial Review<sup>100</sup> to create a presumption that a claimant with a viable environmental law case (environmental cases being cases that should be brought because they are by their nature in the public interest – see Aarhus Convention) should never have to bear the defendant's costs, irrespective of the success of the claim. At the same time, there should be a presumption that if the claimant wins, the defendant should pay the claimant's costs.
146. Such a relatively simple amendment of the rules of procedure would eliminate many of the problems faced by the British public in relation to the restrictive costs of judicial review actions in environmental cases. It would also cut through all the 'standing-type' problems that have been identified in relation to Protective Costs Orders (PCO) in Annex IV and would eliminate the need for an interim hearing on the PCO, thereby removing another layer of expense.
147. Another approach to this issue is used in Spain, where environmental NGOs that meet certain national qualifying requirements<sup>101</sup>, will automatically receive legal aid irrespective of their annual income or turnover (unlike other applicants for legal aid)<sup>102</sup>. This would also deal with some of the problems identified in relation to the lack of public funding for NGOs in particular, and rectify at least part of the UK's breach of Article 9(5) in relation to providing an appropriate assistance mechanism to remove or reduce financial barriers to access to justice.
148. Again, this is a relatively simple approach that could be followed in E&W. Possibly, it could even be extended to include individuals or smaller, newer environmental organisations to help them pursue public interest claims in relation to the environment.

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<sup>99</sup> See Family Proceedings Rules (FPR) 10.27(1)(b).

<sup>100</sup> This can be done easily by the Civil Procedure Rule Committee by introducing a relevant statutory instrument.

<sup>101</sup> Article 23 of Law 27/2006 18 July regulating the rights to access to information, public participation and access to justice in environmental matters, which is the Spanish instrument implementing the Aarhus Convention and incorporating Directives 2003/4EC and 2003/35/EC.

<sup>102</sup> Ibid. Art 23(1) and (2).

149. Alternatively, if there was to be a codification of the Aarhus Convention provisions in E&W in the form of an Aarhus Act, then the costs issues could be dealt with by special procedure rules made under that act (similar to the Family Proceedings Rules ('FPRs') made under the Family Act 1986).

**Summary of recommendations:**

The way judicial review rules are applied in England & Wales needs to be reviewed. We urge the Aarhus Compliance Committee to make the following recommendations:

1. The UK Government needs to amend the Civil Procedure Rules in E&W to provide a presumption that in environmental cases falling under the Aarhus Convention (which are by definition in the public interest), as long as the claimant has not acted in bad faith, the claimant should never have to pay for the defendant's costs. Instead, the defendant should pay for the claimant's costs.
2. If an Aarhus Act is passed, then that Act should include special procedural rules for judicial review on the above lines which apply to Aarhus cases and form an exception to the general costs rules.
3. Environmental NGOs should receive automatic public funding in Aarhus cases.

## THE CLAIMS AGAINST E&W

### CLAIM 3 - Challenges against individuals

**Members of the public must have access to *'administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment*'. (Article 9(3)) – emphasis added**

#### **Background**

150. In E&W, breaches of environmental law can be breaches of administrative and civil rules not subject to criminal sanctions, or they can be criminal offences, which have traditionally been enforced through criminal prosecution, fines and prison, but can now also be enforced by way of certain civil sanctions<sup>103</sup>.
151. If a criminal offence has been committed, English law allows citizens to bring a private prosecution (see for example *R v Anglian Water Services Ltd*<sup>104</sup>). However, there are limitations on the use and the usefulness of this right. Examples of environmental criminal offences are breaches of water discharge permits or waste licences, or intentionally or recklessly killing or disturbing protected animals. However, not all environmental laws amount to a criminal offence if they are broken.
152. Moreover, even in the event of a private prosecution, the state prosecutor can take over the prosecution and then subsequently decide to drop it, and in some cases consent for the prosecution must be obtained first. In addition, for a private person or organisation to prepare a criminal prosecution is not easy. Prosecutors and state authorities have powers to gather evidence that private individuals do not have. Finally, the burden of proof in criminal prosecutions is a high one (proof beyond reasonable doubt, rather than on the balance of probability), so bringing private prosecutions is very difficult and not very common.

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<sup>103</sup> Through the Regulatory Enforcement and Sanctions Act 2008.

<sup>104</sup> [2003]EWCA Crim 2243.

153. Also, in many cases the breach of an environmental law is not a criminal offence, rather it leads to further administrative processes, such as enforcement notices. Failure to comply with such notices may eventually lead to a criminal offence being committed, but if the relevant authority does not issue such notices, there is generally no mechanism by which a member of the public can bring any kind of action directly against the ‘perpetrator’ of the breach. Even if it does, it is extremely unlikely that a member of the public would issue a private prosecution to enforce enforcement notices<sup>105</sup>.
154. In any case, the main route of review in England is (and will remain) the law of judicial review, which in E&W aims to hold public bodies (or bodies carrying out public functions) accountable. *‘Judicial review is the procedure by which you can seek to challenge the decision, action or failure to act of a public body such as a government department or a local authority or other body exercising a public law function’*<sup>106</sup>. Judicial review is not therefore intended to be used against private individuals<sup>107</sup>.
155. Article 9(3) allows the right of action against private individuals to take the form of administrative or judicial procedures, so that it does not necessarily have to be a court process through which parties comply with this Article. Thus, the Aarhus Implementation Guide states that Article 9(3) is to *‘provide standing to certain members of the public to enforce environmental law directly or indirectly. In direct citizen enforcement, citizens are given standing to go to court or other review bodies to enforce the law rather than simply to redress personal harm. Indirect citizen enforcement means that citizens can participate in the enforcement process through, for example, citizen complaints. However, for indirect enforcement to satisfy this provision of the Convention, it must provide for clear administrative or judicial procedures in which the particular member of the public has official status. Otherwise it could not be*

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<sup>105</sup> The only other possible avenue in English law to bring an action against an individual is in tort. The main types of claims here are in negligence or nuisance. Other torts are based for example on trespass, or the special rules imposing strict liability in relation to damage caused by non-natural, dangerous activities on neighbouring land under the rule of *Rylands v Fletcher* (1868) LR 3 HL 330. However, tort claims are generally based on the fact that the plaintiffs’ personal rights or interests have been impaired, for example in the form of property damage, personal injury or an effect on health. They are not intended to be used by plaintiffs who have not suffered such damage and are acting in the public interest. Also, in negligence for example, the plaintiff has to establish that the defendant owes him a duty of care, which is much more difficult to establish once cases go beyond individual rights and interests, see *Caparo Industries v. Dickman* [1990] 2 AC 605. Moreover, they are primarily aimed at protecting the rights of individuals and not organisations. This means that in environmental cases which fall within the ambit of the Aarhus Convention, where it is generally public rights and interests (e.g. damage to wildlife) which are at stake, tort law is of little assistance.

<sup>106</sup> *Administrative Court Guidance - Notes for guidance on applying for judicial review*, January 2005, section 2.1.

<sup>107</sup> See *Judicial Review: A short guide to claims in the Administrative Court*, Alexander Home, Research Paper 06/44, Home Affairs Section, House of Commons Library, 28 September 2006, p.7.

said that the member of the public has access to such procedures'<sup>108</sup>. (Emphasis added).

Indeed, in the simplified guide to the Aarhus Convention, it is said that

*'members of the public should in principle be able to challenge any violation of national law relating to the environment. If public authorities or private persons have broken such a law, citizens should be able to challenge the acts or omissions in court, even if they have not suffered personal harm'*<sup>109</sup>. (Emphasis added)

In this context, the Handbook on Access to Justice under the Aarhus Conventions says:

*'A party must ensure that members of the public can file challenges to actions of private persons as well as public authorities that are alleged to contravene national environmental law, or have official status in administrative procedures leading to enforcement "where they meet the criteria, if any, laid down in its national law." The provision does not state that members of the public can file lawsuits if permitted by national law. Instead, it grants the right to sue or complain and then permits parties to lay down "criteria" if they wish to do so. If specific criteria are not laid down in national law, the logical interpretation would be that members of the public should be deemed to have the right to go to court or to an administrative body'*<sup>110</sup>. (Emphasis added)

However, no specific criteria, as referred to in the quote above, have been laid down in E&W. According to the Handbook, if specific criteria are not laid down, then the public should be deemed to have a right to go to court or to an administrative body.

156. However, E&W simply does not provide a sufficiently clear and comprehensive judicial or administrative appeals or review system in order to comply with these conditions, and no access to the courts to challenge many types of breaches of environmental law, which lead, for example, to enforcement notices rather than criminal breaches. Therefore, the UK is clearly in breach of Article 9(3).

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<sup>108</sup> At p. 130.

<sup>109</sup> 'Your right to a healthy environment: A simplified guide to the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice', June 2006; [http://www.unece.org/env/documents/2006/pp/ece%20mp%20pp%205\\_E.pdf](http://www.unece.org/env/documents/2006/pp/ece%20mp%20pp%205_E.pdf).

<sup>110</sup> Chapter 3; *The public's right to enforce environmental law*; John E. Bonine; at p.32.

157. It is difficult to find examples in this context, as potential cases which have not been brought would not have come to the public attention, precisely because of the reasons for which they were not pursued in the first place. Therefore, the basis of this Claim 3 must necessarily be of a general nature.
158. In other EU Member States it is quite common to allow the acts and omissions of private persons to be challenged. For example, in France, registered environmental associations may act as a plaintiff in criminal proceedings and bring civil claims against private persons where environmental laws have been violated, on the condition that the action brought is to protect collective interests which are protected in the association's statutory objectives<sup>111</sup>.

### **The Port of Tyne case and claims against private individuals**

159. There are no private individuals involved in the Port of Tyne case as potential defendants. However, the Port of Tyne itself is almost in the role of a private party in this context, as it is the party subject to Licence conditions. It might be possible for a private prosecution to be brought against the Port of Tyne to enforce the relevant Licence conditions. However, the case is not at all clear, as Defra was under no obligation to take criminal proceedings in relation to any breaches of the Licence. Also, much of the evidence that is needed to satisfy the high criminal burden of proof has not been provided to the potential claimants for reasons of commercial confidentiality. Costs issues in such a case are also uncertain. Therefore, once again, it would not be a rational decision for the entities in question to mount a private prosecution in this context. In any case, the acts and decisions of the relevant licensing authorities would still remain un-reviewed.

### **Conclusion and recommendations**

160. E&W is, at least partly, in breach of Article 9(3) of the Aarhus Convention in not providing sufficient access to courts in order to bring cases against private individuals. The example set by other countries should be followed and the possibility of challenges against private individuals by environmental organisations acting in the public interest should be provided for in a civil, as well as criminal law context, possibly by a change to the law of judicial review or by an extension of the new Regulatory Enforcement and Sanctions Act 2008 to include NGO rights of enforcement in public interest cases.

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<sup>111</sup> See Case of the Cour Cass., SCI Les Chênes, 26 September 2007.

**Summary of recommendations:**

The way judicial review rules are applied in England & Wales needs to be reviewed. We urge the Aarhus Compliance Committee to make the following recommendation:

The UK needs to introduce an effective mechanism through which the public challenge private individuals who have breached environmental laws either through court or administrative procedures. This could be achieved, for example, by extending the new Regulatory Enforcement and Sanctions Act 2008 to provide for such NGO rights.



## THE CLAIMS AGAINST E&W

### CLAIM 4 - Rules on Timing

**All access to justice procedures which fall within the Aarhus Convention must be fair, equitable and timely and provide adequate and effective remedies (Article 9(4), Aarhus Convention)**

#### **Background**

161. The procedure which deals with bringing judicial review claims is set out in CPR 54. CPR 54.5 stipulates that the claim form in relation to the judicial review action must be filed '*promptly; and ... in any event not later than three months after the grounds to make the claim first arose*'. A three month time-span is not a long time to identify the need for and prepare and action for judicial review, but the added requirement for acting '*promptly*' means that claimants cannot rely on having three months to make their claim. The over-riding duty is to act '*promptly*'. Therefore, a court could hold the claimant to a shorter time period<sup>112</sup>.
162. Thus, in *Andrew Finn-Kelcey v Milton Keynes Council and others*<sup>113</sup>, one of the reasons why an action for judicial review of the grant of planning permission for a local wind farm was refused was because the application for judicial review was not made '*promptly*' within the meaning of CPR 54.5(1), even though the application was made within the three month period.
163. The reasons given for finding that the application was not made promptly were that
- the claimants already knew of the authority's decision to grant planning permission a month before the actual grant of the planning permission (even though a decision rejecting a resolution to rescind that original decision was only granted days before the actual grant of planning permission)<sup>114</sup>; and
  - there was a particularly acute '*need for promptness in challenging planning decisions within [the Government's] policy framework [on renewable energy*

<sup>112</sup>As happened, for example, in *R v Independent Television Commission, ex p TV NI Ltd*, (1991)[1996]JR 60 CA and *R v Cotswold District Council, ex p Barrington* (1998) 75 P & C.R 515.

<sup>113</sup>[2008] EWCA Civ 1067.

<sup>114</sup>*Ibid.* at para 27.

*projects]... 'and '[d]elay in challenging decisions in respect of renewable energy projects is more than usually prejudicial to good administration'<sup>115</sup>.*

164. Reasoning in support of the court's decision hinged on the fact that in cases where planning permission is granted by the Secretary of State, appeals must be made within six weeks. Although the *Andrew Finn-Kelcey* case does not actually fall in this category of case, the argument is made because it '*emphasises the need for swiftness of action*'<sup>116</sup>, and also because a '*public law decision by a public body normally affects the rights of parties other than just the claimant and the decision-maker*'<sup>117</sup>, so there is a need to act promptly. The court also confirmed earlier cases that the requirement for promptness under CPR 54.5(1) did not offend against the principle of 'legal certainty' in European law.
165. Therefore, once again, claimants in E&W courts find themselves faced by complete uncertainty in relation to their claims. They can use their best endeavours to properly prepare a judicial review claim, file it within the already very short stipulated time period for bringing claims and still not know whether their claim is going to be dismissed for being made out of time because it did not satisfy the requirement for being filed '*promptly*'. This situation is clearly unfair, inequitable and prejudicial. In addition, it does not allow for sufficient time for claimants to prepare their claims.
166. In addition, certain pre-action protocols which apply in general, for example the need to have exhausted all other remedies before commencing a claim for judicial review<sup>118</sup> are not exempt from the three month rule<sup>119</sup>, which makes it very hard for claimants to comply with this rule.
167. Moreover, the time limit starts running from the time of the act or decision that the complaint is made against, not from the time of the subjective knowledge of the complainant of that act or decision<sup>120</sup>.

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<sup>115</sup> Ibid. at para 28, citing Sullivan J in *R (Redcar and Cleveland Borough Council) v. Secretary of State for Business, Enterprise and Regulatory Reform* [2008] EWHC 1847 (Admin).

<sup>116</sup> Ibid. at paras 22-24.

<sup>117</sup> Ibid. at para 21.

<sup>118</sup> See for example *R v Sandwell Metropolitan Borough Council, ex p Wilkinson* (1998) 31 HLR 22 and *R v Law Society ex parte Kingsley* [1996] COD 59.

<sup>119</sup> *Civil Procedure Volume 1, The White Book Service*, Sweet and Maxwell, 2008, p. 1537, para 54.5.1.: '*if [complying with the pre-action protocol] means that the claim would be lodged outside the three-month period, the sensible course of action would be to lodge the claim and to explain, in the claim form, why the need for urgency meant that it was not possible to comply [...].*'

<sup>120</sup> See *R v Cotswold District Council, ex p Barrington* (1998) 75 P & C.R 515.

168. In E&W, tort law and the law of contracts have a limitation period of 6 years from the time at which the cause of action accrued<sup>121</sup>. In negligence cases, time generally starts to run from the time the cause of action accrued or from the time the claimant found out about the facts giving rise to the right of action or might reasonably be expected to have known them<sup>122</sup>. In human rights cases, the time limit is one year<sup>123</sup>. Obviously, there is a need in many judicial review cases, for instance in the context of planning, not to cause too much delay. However, as already seen, there are many parallels between human rights and environmental/Aarhus cases, so even though a 6 year limitation period for bringing claims would be too long in many cases, a limit of one year, as in the Human Rights Act 1998<sup>124</sup>, would seem much fairer.
169. In addition, the Human Rights Act 1998 also provides courts with discretion to extend the time limit for bringing a judicial review action to *'such longer period as the court or tribunal considers equitable having regard to all the circumstances'*<sup>125</sup>.

### **The Port of Tyne case and timing rules**

170. As shown above, the Port of Tyne case rests on issues surrounding a licence that was granted in 2004. The deposit of the contaminated dredging material and the capping layers took place in 2005. Further sand and silt was deposited in 2006 and possibly later. Since then, MCS and Robert Latimer have been in constant contact with the relevant authorities asking questions and requesting more information. However, arguably, the grounds to make the claim first arose in 2005 or 2006 at the latest. Obviously the three month time period has long since run out. There may be an argument that there are ongoing breaches of environmental law. Even then, the defendant might be able to successfully persuade a Court that the grounds for making a claim arguably first arose in 2005/06. Therefore, English law on timing limits prevents a judicial review action being brought in this case, despite the potential claimants' ongoing interest and constant involvement in the issues at stake and a complete inability for practical and evidential reasons to bring a claim within the time limits stipulated for judicial review actions.

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<sup>121</sup> Limitation Act 1980, section 2 for tort and section 5 for simple contract.

<sup>122</sup> *Ibid.*, see section 14A, with a long-stop period of 15 years, see section 14B.

<sup>123</sup> Section 7(5)(a) of the Human Rights Act 1998.

<sup>124</sup> Section 7(5)(a) of the Human Rights Act 1998.

<sup>125</sup> *Ibid.* Section 7(5)(b).

171. A time limit, such as under the Human Rights Act 1998, would give the Claimants a possibility even now to bring an action for judicial review. This would satisfy the requirement of Article 9(4) for fairness.
172. Therefore, the time limits imposed by E&W case law and the CPRs are unfair and have denied the Claimants access to justice under Article 9(4) of the Aarhus Conventions.

### **Conclusion and recommendations**

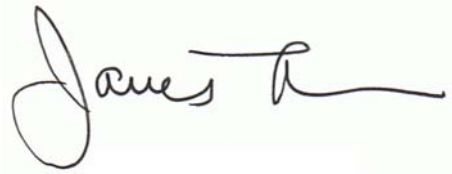
173. The current time limits set by the CPRs in England are overly restrictive. Firstly, three months is a very short time within which to apply for judicial review in the first place (compared, for example, with one year in human rights cases). Secondly, the rules are profoundly unfair in imposing the almost arbitrary requirement for promptness, which could mean almost anything, and which a claimant has no way of actually knowing and planning for before he makes the application, by which time it could be too late.
174. This means that the timing rules in relation to judicial review in E&W are in breach of Article 9(4) of the Aarhus Convention. They are unfair and inequitable, they are not 'timely', and they do not provide the possibility of adequate and effective remedies.
175. Therefore, it is necessary to change CPR54 to allow for longer, fairer and more equitable time limits by introducing a right to bring an action for judicial review by the end of an extended (but specified) time period during which the potential claimant should reasonably have found out about the act or decision giving rise to the action. Here the timing rules of the Human Rights Act 1998 could be followed, and a general time limit of one year for bringing environmental review actions could be introduced, with a shorter time limit of, say, six months for matters which are predominantly of a planning nature and require to be dealt with more quickly in the public interest. However, as in the Human Rights Act 1998, in both cases there should be judicial discretion to extend the time limit if that is equitable having regard to all the circumstances.
176. Again, this would mean that the general law on judicial review could remain unchanged, but the exception made in relation to human rights cases could be extended to apply to environmental cases too.

177. If an Aarhus Act was introduced, then that act could codify the timing rules in the same way as it would codify extended grounds for judicial review and different costs rules.
178. Lastly, time limits for judicial review claims should allow for claimants to first follow rules on the exhaustion of all other remedies or to comply with necessary pre-action protocols.

**Summary of recommendations:**

The way judicial review rules are applied in England & Wales needs to be reviewed. We urge the Aarhus Compliance Committee to make the following recommendation:

The time limits in E&W in relation to the judicial review of Aarhus cases need to be extended to be the same as those contained in the Human Rights Act 1998: a general one year time limit and possibly a 6 month time limit for matters which are predominantly of a planning nature and require to be dealt with more quickly in the public interest, but in both cases with a judicial discretion to extend the time limit if that is equitable having regard to all the circumstances.

A handwritten signature in black ink on a light green background. The signature is cursive and appears to read 'James Thornton'.

James Thornton  
Chief Executive Officer & General Counsel  
1 December 2008

## Annex I

### The Port of Tyne Case – Factual Background

#### Background

179. The purpose of the following summary of facts is to explain the background of the Port of Tyne case, show that there are strong prima facie theoretical grounds for a potential judicial review action, and demonstrate that despite the UK's claims that it has fully implemented the Aarhus Treaty, it is in fact extremely difficult to bring such an action in practice. This is due to the nature of the existing common law and procedural rules that currently govern judicial review actions in E&W.
180. Some of what follows repeats what has already been said in the main body of this Communication, but the Claimants feel that it is necessary to do this to allow for a better and more in-depth explanation of the facts, and so that this part of the Communication can also be read as a self-contained exposition of the Port of Tyne case.
181. As already explained, the Port of Tyne is a port in the North East of England. In October 2004, the MCEU issued a licence to the Port of Tyne Authority '*for a trial to assess the effectiveness of a methodology for capping contaminated dredged material from the Port of Tyne on the Souter Point disposal site*' (the 'Licence')<sup>126</sup>.
182. The Licence allowed waste sediments to be dredged from disused docks in the Port of Tyne and disposed of at an existing disposal site called Souter Point in the North Sea. The waste sediments in question are/were '*grossly contaminated with the anti-fouling agent tributyltin oxide (TBT) and heavy metals*'<sup>127</sup>. *Contaminants were above those levels that the UK would normally allow for disposal*

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<sup>126</sup>Licence 31995/04/1: *For a trial to assess the effectiveness of a methodology for capping contaminated dredged material from the Port of Tyne on the Souter Point disposal site*, issued on behalf of the Marine Consents and Environment Unit for and on behalf of the Licensing Authority on 6 October 2004.

<sup>127</sup> The CDM is contaminated with arsenic, cadmium, chromium, copper, mercury, nickel, lead and zinc, most of them exceeding the contamination levels at which sea disposal is usually allowed – see Port of Tyne Authority, Report 1740 *Sea Disposal Trials of Contaminated Tyne Estuary Sediment*, Part I: *Assessment of Contaminated Sediments and Capping Materials*, para 5.1, pp. 9 and 10 and Appendix I.

to sea'<sup>128</sup>. Throughout the process Defra has also been advised by CEFAS, as well as by the Environment Agency and Natural England.

### **The nature of the surrounding environment**

183. The North Sea, where the site is located, is one the most energetic seas in the world, and subject to enormous amounts of wave energy. Major and moderate storms are guaranteed, which will erode some of the capping material. Further storms are inevitable and, unless the contaminated dredging material ('CDM') is re-capped every time some of the capping material has been removed by the sea, it is only a matter of time before the original and any additional capping material is swept away, creating a real danger that the toxicity of the CDM will be released into the environment.

### **The nature of the threat to the environment**

184. The Licence was issued despite initial doubts on the part of CEFAS and Defra that this type of CDM should be deposited at sea. Indeed, both CEFAS and Defra letters and other documents repeatedly said that the material in question was not suitable for sea disposal:

*'The material proposed for sea disposal that has been characterised is categorically unsuitable for sea disposal due to the very high levels of TBT, cadmium, mercury, lead and zinc in the sediments'<sup>129</sup>; and*

*'...the material covered by [the] application IS NOT SUITABLE FOR SEA DISPOSAL'<sup>130</sup>.*

185. According to data provided by the Port of Tyne Authority itself, levels of TBT and heavy metals exceeded 'action level 2' by several multiples - when sea disposal would usually be deemed unacceptable<sup>131</sup>:

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<sup>128</sup> UK Report to the Meeting of the Working Group on the Environmental Impact of Human Activities of the OSPAR Convention for the Protection of the Marine Environment of the North East Atlantic (the 'OSPAR Convention'): *Capping of Contaminated Dredged Material Case Study Port of Tyne UK* (the 'UK OSPAR Report') at p. 3., 'Disposal Application'.

<sup>129</sup> Memorandum from Dr C. Vivian (CEFAS) to Mr G Boyes (Defra): *Port of Tyne Application DC 6742*, BLR 7570, DAS 31995/030222, DC 6742, dated 18 June 2003 at para 45, first bullet point.

<sup>130</sup> Letter of 9 September 2003 from Graham Boyes (Defra) to Mr Keith Wilson (Port of Tyne Authority), ref DC 6742 at para 1.

<sup>131</sup> See Port of Tyne Authority, *Report 1740 Sea Disposal Trials of Contaminated Tyne Estuary Sediment, Part I: Assessment of Contaminated Sediments and Capping Materials*, para 5.1, p. 9, Table 7 and tables contained in Appendix I.

Substance	Max. Concentration Measured (mg/kg)	Defra action level 2 (mg/kg)	CEFAS action level 2 (mg.kg)	Multiple by which CEFAS/Defra action levels exceeded (approx.)
TBT	30.01	1.0	1.0	30x
Arsenic	37.4	50	50-100	-
Cadmium	6.80	2.5	2.0	2-3x
Chromium	213.6	200	400	1x
Copper	1400.1	200	400	3-7x
Mercury	24.49	1.5	3.0	8-16x
Lead	952.4	250	500	2-4x
Nickel	139.9	100	200	1x
Zinc	2,881.6	400	800	3-7x

For the heavy metals alone, CEFAS regarded these levels as so high in 2003 that they recommended 'against sea disposal ... without even considering the TBT values'<sup>132</sup>, and the maximum TBT concentrations exceeded safe levels by much more than the heavy metals.

186. TBT is 'well known to be hazardous to the marine environment, fauna and human health... because it is toxic, bioaccumulates and is persistent in the environment... There is a large body of evidence accumulated over many years to indicate that the leaching of TBT has harmful environmental effects. For example, it was held responsible for the near collapse of commercial oysters farming in France, and the depletion of a variety of other invertebrate communities in the marine environment. The disposal of TBT contaminated material at sea has the potential to adversely affect local shell-fisheries (such as Nephros), and could enhance the scope for TBT bioaccumulation in fish'<sup>133</sup>. Indeed, TBT has been found to adversely affect benthic organisms and biodiversity on the seafloor, as well as being an endocrine disruptor causing female gastropods, dogwhelks, for example, to acquire male characteristics (imposex), and suffer impaired reproductive function<sup>134</sup>.
187. According to a FEPA Monitoring Report in March 2003 '[t]he effects of the TBT will be severe on the local biota and the only immediately apparent suitable mitigation measures are to dump the waste elsewhere, e.g. on the land .... Depending on concentrations, TBT has sub-lethal or lethal effects to a wide range of organisms and is accumulated into the food chain'<sup>135</sup>. In its conclusion the report states that the

<sup>132</sup> Memorandum from Dr C. Vivian (CEFAS) to Mr G Boyes (Defra): Port of Tyne Application DC 6742, BLR 7570, DAS 31995/030222, DC 6742, dated 18 June 2003 at para 27.

<sup>133</sup> FEPA Monitoring at Dredged material Disposal Sites off the Tyne; March 2003; Executive Summary 5<sup>th</sup> and 7<sup>th</sup> bullet points.

<sup>134</sup> See Defra Research and Development, Final Project Report, *The fate of TBT in spoil and feasibility of remediation to eliminate environmental impact*, CSG 15, 30/04/2002, parts 7 and 8.

<sup>135</sup> 'FEPA Monitoring at Dredged material Disposal Sites off the Tyne; March 2003, para 2.2 and 3.1.



*'sea disposal of dredged materials with high levels of TBT ....would appear to be environmentally unacceptable'*<sup>136</sup>. The effects of heavy metals, which are also present in the CDM were not considered in this report.

188. The toxic and damaging effects of heavy metals on the marine eco-system are well known, which is why they are regulated under the OSPAR Convention, the Dangerous Substances Directive<sup>137</sup> and its various daughter directives<sup>138</sup> which set quality objectives for many heavy metals.

189. CEFAS noted in April 2003 that:

*'Transport of sediment away from the disposal site does potentially raise the risk of contaminating fish and shellfish...'*<sup>139</sup>.

### **The lack of a full environmental impact assessment**

190. In spite of the known dangers of this type of contaminated dredging material, *'no single, formal environmental impact assessment was carried out'*<sup>140</sup>. Instead, it was decided that the deposit on the seabed of the contaminated dredging materials and their capping with a layer of silt and sand should be a trial project, which should inform other similar situations and may become general practice across E&W.

### **The Licence**

191. According to CEFAS, the *'sea disposal and capping trial was designed to meet the following requirement: ... Placement of adequate thickness of capping material over the whole volume of the deposited contaminated material'* and *'[l]ong term maintenance of the integrity and efficacy of the cap assured by monitoring and cap maintenance when required'*<sup>141</sup>.

192. The Licence, amongst other conditions, stipulated (emphasis added):

- **Maximum** amounts of contaminated dredging material to be deposited (cond. 1.1).
- **Maximum** amounts of silt and sand to be used for the cap (cond. 1.1).

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<sup>136</sup> Ibid. at p. 10.

<sup>137</sup> Directive 76/464/EC.

<sup>138</sup> E.g. Directive 82/176/EEC, 83/513/EEC and 84/145/EEC.

<sup>139</sup> Memorandum from Dr C Vivian (CEFAS) to Mr G Boyes (Defra), dated 1 April 2003: *Current Status of Tyne TBT Disposal Issues*, para 1, bullet point 6.

<sup>140</sup> See letter from John Maslin, Head of Marine Environment Branch 2, Defra to Thomas Bell, MCS, dated 3 February 2005.

<sup>141</sup> UK OSPAR Report, p. 3, 'Design Rationale'.

- The protective cap was to '*isolat[e] the CDM from the environment and protect[.] against erosion*'<sup>142</sup> and was to be **1.5m thick** (1m of silt '*to isolate the CDM*'<sup>143</sup> and 0.5m of sand '*to hold the silt cap and CDM in place and protect against erosion*'<sup>144</sup>)<sup>145</sup>.
- The Licence Holder is to '*ensure that the cap integrity is maintained. If monitoring of the cap integrity shows this to be under threat then consultation with the Licensing Authority is to be sought immediately to agree a course of action*'<sup>146</sup>.

193. In addition, one of the fundamental assertions made by the Port of Tyne to justify Souter Point as a suitable disposal site was that it was a non-dispersive site, i.e. a site not subject to strong wave action, so that both the contaminated and capping material would be certain to stay in place once deposited on the sea floor (emphasis added):

*'The site is fully licensed for sea disposal and has already been characterised as a non-dispersive site. The depth of the site (40 to 50m) also ensures that the CDM will be placed in a low-energy environment where there is little potential erosion of the cap'*<sup>147</sup>.

194. In the event, as will be shown in the following paragraphs, the Port of Tyne Authority has not been able to comply with many of the Licence conditions, and the assertion that the site was not a dispersive site has been shown to be wrong<sup>148</sup>.

### **The incorrect classification of the site as a dispersive site**

195. Indeed, in 2006, in a letter answering a request for information under legislation on access to information, the MCEU said:

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<sup>142</sup> At section 9.1, p. 28.

<sup>143</sup> At section 9.2, para.2.

<sup>144</sup> At section 9.2, para. 3.

<sup>145</sup> See Annex I of the Licence: Report No. 1613 *Work Plan for Sea Disposal Trials of Contaminated Tyne Estuary Sediment*, Final Work Plan – Revision 3, EnviroCentre, Port of Tyne Authority; see also cond. 1.6.1 and suppl. cond. 9.8, which make it a condition of the Licence to follow the methods set out in Annex I and Annex II.

<sup>146</sup> Suppl. cond. 9.15.

<sup>147</sup> At para 8.2, p. 23, Report No. 1613 *Work Plan for Sea Disposal Trials of Contaminated Tyne Estuary Sediment*, Final Work Plan – Revision 3, EnviroCentre, Port of Tyne Authority, attached to the Licence.

<sup>148</sup> Minute by Geoff Bowles (MEU) to Mike Waldoock (CEFAS), Andy Greaves (MCEU) and Jon Rees (CEFAS), dated 26 January 2007 setting out Defra's comment on MCS letter to Defra dated 20 December 2007 regarding Licence 31995/04/1, p. 1, Q1.

196. *'We are unable to provide information on the amounts of material that remain at the Souter site as a result of disposal as it is a dispersive site and the intention is to avoid long term accumulation of material'*<sup>149</sup>.
197. This statement is a direct contradiction not only of the fundamental assertions made to justify the choice of disposal site (i.e. that the site was non-dispersive), but also of the entire purpose and nature of the trial (i.e. guaranteeing the integrity of the cap to prevent dispersal of the material, whereas here it is said that long-term accumulation is to be avoided).
198. Another CEFAS memorandum in January 2007 confirmed that *'the Souter Point disposal site has always been viewed by Cefas as a dispersive site, albeit one of the least dispersive of all the dredged material disposal sites around England & Wales'*<sup>150</sup>.

### **The thickness of the protective cap**

199. The initial capping that took place required over 60% more silt and sand than originally specified ( a breach of the Licence), but even then the cap was *'very patchy'* and much thinner than originally planned (with the a maximum thickness of 1m, but the average thickness of the total cap being a mere 0.45m)<sup>151</sup> (in breach of the Licence).
200. With this kind of cap thickness the cap was at risk of eroding and exposing the contaminated dredging material to the environment (in breach of the Licence) posing a grave potential environmental hazard.
201. In June/early July 2006, the Port of Tyne deposited a further substantial quantity of silts and sands to increase the thickness of the cap. This was done without consulting Defra or CEFAS and under a different dredging licence, i.e. in breach of conditions of the Licence. Moreover, it consisted of potentially *'unsuitable'*<sup>152</sup> material, partially consisting of silt of which it was not clear whether it may have contained higher TBT and heavy metal concentrations than allowed for the capping material permitted by the Licence. If what is implied in the relevant CEFAS note is true, than the CDM may have been capped with additional material contaminated with the same

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<sup>149</sup> Letter from Andy Dixon, MCEU to Robert Latimer, dated 30 August 2006, Point 8.

<sup>150</sup> Memorandum from Chris Vivian and Sylvia Blake, CEFAS to Geoff Bowles, MEU dated 26 January 2007.

<sup>151</sup> UK OSPAR Report, p.11, 'Cap risk assessment'.

<sup>152</sup> See note on *Review Meeting at EnviroCentre with Port of Tyne Regarding the Placement of Contaminated Dredge material Offshore*, from Sylvia Blake, CEFAS addressed to Andy Dixon, MCEU, dated 14 September 2006, at para. 9.

substances, TBT and heavy metals, which the cap was intended to protect against<sup>153</sup>, although a subsequent report claims that these additional capping materials were '*fit for purpose*'<sup>154</sup>. Whatever the answer, this was another breach of Licence conditions.

202. The additional material increased the cap's mean thickness to approximately 0.8m<sup>155</sup>, although a recent report refers to an average cap thickness now of 37cm, with a maximum thickness of 61cm at the centre of the site<sup>156</sup>. It would appear that for a while a cap thickness of 0.6m was under discussion<sup>157</sup>. However, even this standard is clearly not met anymore by current conditions. In spite of this, it is now claimed that '*the cap has maintained its function... the cap has met the agreed specification and therefore no replenishment works are deemed necessary at this time.*' One page later in the same report, it is said that '*additional replenishment works will be required in near future to provide additional comfort over the medium term...*'<sup>158</sup>.
203. It is clear from this evidence that there have been a series of breaches of the original Licence conditions. The authorities have not taken any enforcement action that the Claimants are aware of.

### **The cap's continuing integrity and safety**

204. Initial concerns (before the re-capping) were that '*a major storm could remove up to 0.66 metres of sediment which would seriously compromise the integrity of the cap and the confined contaminated material underneath.... also ... a series of moderate storms removing 0.15m of material per storm would remove the cap in 3 years*'<sup>159</sup>.

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<sup>153</sup> See note on *Review Meeting at EnviroCentre with Port of Tyne Regarding the Placement of Contaminated Dredge material Offshore*, from Sylvia Blake, CEFAS addressed to Andy Dixon, MCEU, dated 14 September 2006, at paras. 9 and 13.

<sup>154</sup> UK OSPAR Report, p. 13 'Additional Capping'.

<sup>155</sup> UK OSPAR Report, p. 13 'Additional Capping'.

<sup>156</sup> Report No. 3308, *Port of Tyne – Sea Disposal Trials of Contaminated Tyne Estuary Sediment: Post Placement Monitoring – Tier 1 Second Annual Monitoring*, EnviroCentre, June 2008. At p. 37.

<sup>157</sup> '*Port of Tyne – Sea Disposal Trials of Contaminated Tyne Estuary Sediment: Required Cap Thickness*', Report No. 3040, February 2007, EnviroCentre, Glasgow, p. 1, 3<sup>rd</sup> paragraph; and . '*Review of Sea Disposal Trial of Contaminated Tyne Estuary Sediment: Required Cap Thickness Feb 2007 rep no: 11548*], MCMS Licence 31995/04/1', report by Sylvia Blake, CEFAS, Burnham Laboratory, 22<sup>nd</sup> February 2007.

<sup>158</sup> Report No. 3308, *Port of Tyne – Sea Disposal Trials of Contaminated Tyne Estuary Sediment: Post Placement Monitoring – Tier 1 Second Annual Monitoring*, EnviroCentre, June 2008, at pp. 37 and 38.

<sup>159</sup> Para. 3, Minutes of the Meeting Held to Discuss the Trial Capping Project of Contaminated Dredged Material from the Port of Tyne Disposal held on 10 May 2006'.

205. The authorities have argued that this is a worst case assessment<sup>160</sup> and that *'following twelve months of monitoring data it was revealed that the cap remained intact ...'*<sup>161</sup>.
206. However, there is a considerable degree of confusion regarding how often and how much additional capping material has been added to the cap before and after June/July 2006. This is very important, as claims by the authorities that the cap thickness has not changed significantly would be extremely misleading, if additional capping material has actually been added in the meantime.
207. Indeed, there is CEFAS documentation to show that it was agreed between CEFAS, Defra and the Port of Tyne that another capital dredge material licence (the 'Riverside and Tyne Commission Quay licence', which was unrelated to the Licence) should be amended to allow material totalling an additional 200,000 tonnes from that capital licence to be used *'as resource for future capping'* at Souter Point. A note is made that a request for a licence variation was made<sup>162</sup>. However, no further reference appears to have been made to these additional capping materials since. If further deposits of capping material were made at Souter Point under this other licence, then arguments stating that the cap thickness had not changed would clearly be misleading. MCS have requested further documentation in this regard from the relevant authorities under a request under the Freedom of Information Act 2000.
208. Evidence given orally in stakeholder meetings organised by Defra (particularly in the meeting held in February 2007), as well as observations made by local fishermen/inhabitants suggests that additional sand may have been deposited in 2007 and 2008. A more recent report refers to additional materials being deposited between July and December 2006, referring to different amounts and composition of deposited materials than that described previously for the June/July 2006 additional capping: The latest Port of Tyne monitoring report says that the *'volume of material deposited between the 2006*

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<sup>160</sup> Minute by Geoff Bowles (MEU) to Mike Waldoock (CEFAS), Andy Greaves (MCEU) and Jon Rees (CEFAS), dated 26 January 2007 setting out Defra's comment on MCS letter to Defra dated 20 December 2007 regarding Licence 31995/04/1, p. 2. Q3.

<sup>161</sup> Report No. 3040, *Port of Tyne – Sea Disposal Trials of Contaminated Estuary Sediment: Required Cap Thickness*, EnviroCentre, February 2007, at p. 1, para. 3.

<sup>162</sup> See note on *Review Meeting at EnviroCentre with Port of Tyne Regarding the Placement of Contaminated Dredge material Offshore*, from Sylvia Blake, CEFAS addressed to Andy Dixon, MCEU, dated 14 September 2006.

*survey and the 2007 survey was 119678 m<sup>3</sup> of which the vast majority was sand*<sup>163</sup>. However, the additional dredging material placed in June/July 2006 consisted of 95,000 m<sup>3</sup> silt and 57,000m<sup>3</sup> sand<sup>164</sup>, which makes the majority of the material silt and adds up to more than the quantity referred to above, which suggests that these are different deposits. Also, the EnviroCentre Cap Thickness Report in February 2007<sup>165</sup> refers to cap replenishment undertaken in May 2006, which is not referred to anywhere else.

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<sup>163</sup> Report No. 3308, *Port of Tyne – Sea Disposal Trials of Contaminated Tyne Estuary Sediment: Post Placement Monitoring – Tier 1 Second Annual Monitoring*, EnviroCentre, June 2008, p.12.

<sup>164</sup> See letter from Alexis Tregenza of Defra to Robert Latimer, dated 6 September 2006, ref. 259370.

<sup>165</sup> Report No. 3040, *Port of Tyne – Sea Disposal Trials of Contaminated Estuary Sediment: Required Cap Thickness*, EnviroCentre, February 2007 at p. 9, para 3.3.

## Annex II

### The rules of Judicial Review in E&W

#### The general rules

1. Subject to what has already been said in the main body of this Communication, the jurisprudence of the courts has established that, fundamentally, there are only four grounds on which an action for judicial review in E&W can be founded<sup>166</sup>: illegality<sup>167</sup>, irrationality<sup>168</sup>, procedural impropriety<sup>169</sup>, and, more recently, the principle of 'proportionality' for judicial review of cases involving breaches of EU law or of human rights legislation (see Claim 1, para 74).
2. Illegal decisions can be decisions where the authority has:
  - a. acted *ultra vires*, beyond its prescribed powers, for example by being in breach with EU legislation, the ECHR/Human Rights Act 1998 (see below) or domestic statutes<sup>170</sup>;
  - b. fettered its discretion, which means that it has bound itself to take a particular course of action in future (for example by introducing a new policy), even though it has been given a general discretion on how to act in certain circumstances and it should be exercising this discretionary power each time a decision has to be made<sup>171</sup>;
  - c. taken into account irrelevant considerations or failed to take account of relevant considerations<sup>172</sup>.
3. Irrational decisions are basically decisions that are '*so outrageous in [their] defiance of logic or of accepted moral standards that no sensible person who had his mind to the question to be decided could have arrived at it*'<sup>173</sup>. This is a very strong

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<sup>166</sup> See Lord Diplock's judgement in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (the 'GCHQ' case) at 410-411.

<sup>167</sup> Public acts which are 'ultra vires', where a public body has unlawfully delegated power or fettered its discretion or has taken into account irrelevant considerations: see pp. 13 - 14, House of Commons Library *Research Paper 06/44*.

<sup>168</sup> '*...a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had his mind to the question to be decided could have arrived at it...*' *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410.

<sup>169</sup> Grounds like bias, failure to give each party to a dispute an opportunity to be heard, failure to conduct a consultation properly, failure to give adequate reasons, pp. 16-17, House of Commons Library *Research Paper 06/44*.

<sup>170</sup> See for example *R v London Boroughs Transport Committee, ex p. Freight Transport Association Ltd* [1991] 1 WLR 828 in relation to a breach of EU law; or *Stewart v Perth and Kinross Council* [2004] UKHL 16 as regards domestic legislation.

<sup>171</sup> See for example *R v Secretary of State for the Home Department, ex p Venables* [1998] AC 407.

<sup>172</sup> See for example *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23.

<sup>173</sup> Lord Diplock in the GCHQ case referred to in FN 167 above, at 410.

test, leaving the courts unable to substitute their judgment for that of a decision-maker, or to challenge the reasons for a decision, unless they are completely unreasonable, perverse or absurd (not just incorrect)<sup>174</sup>.

4. Procedural impropriety covers cases where authorities have acted unfairly, for example by denying a party to a case the opportunity to be heard<sup>175</sup>, where a decision is biased<sup>176</sup>, where a proper consultation has not been carried out<sup>177</sup> or where the authority has failed to give adequate reasons for a decision where it is obliged to give reasons for its decision<sup>178</sup>.

### **Judicial review, human rights and the infringement of fundamental rights in general**

5. In addition to the rules and authorities already mentioned in the body of this Communication, it is useful to appreciate that the UK faced a similar situation to the Aarhus Convention implementation in relation to human rights, which culminated in the passing of the Human Rights Act 1998 (the 'HRA').

According to Laws LJ in *Sheffield City Council v Smart*:

*'Since [2 October 2000], compliance with the Convention rights listed in Part 1 of Schedule 1 to the [HRA] is a condition of the lawful exercise of power by every public authority, where the Convention's subject matter is involved. It follows in my judgement that the High Court's ancient jurisdiction strictly to keep inferior bodies within the law now requires it (absent an effective judicial alternative remedy) to review the use of power by such bodies for compliance with ECHR. This is not an extension of the jurisdiction. That has not changed. What has changed is the substantive law which governs the actions and omissions of public authorities. In the result...whereas before 2 October 2000 judicial review's effectiveness as a remedy for a ECHR violation was a contingent circumstance, now it is a necessary truth'<sup>179</sup>.*

6. It is also worth noting here that the courts in E&W have applied the proportionality principle in relation to the infringement of fundamental rights more generally, not necessarily purely by reference to breaches of human rights under the Human Rights Act 1998/the ECHR or breaches of EU laws<sup>180</sup>.

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<sup>174</sup> See also Lord Scarman in *R v Secretary of State for the Environment (ex p Nottinghamshire County Council)* [1986] AC 240, at 248.

<sup>175</sup> See for example *R v Deputy Industrial Injuries Commissioner, ex p Moore* [1965] 1 QB 456.

<sup>176</sup> See for example *Magill v Porter* [2001] UKHL 67.

<sup>177</sup> See for example *R (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin).

<sup>178</sup> See for example *R v Brent London Borough Council, ex p Baruwa* (1997) 29 HLR 915.

<sup>179</sup> [2002] EWCA Civ 04 .

<sup>180</sup> See p. 15, para 2.29, Treasury Solicitors, *The Judge Over Your Shoulder*, ed. 4: January 2006.



For example, in *R(Daly) v Secretary of State for the Home Department*<sup>181</sup> the court ruled that

*'[t]he infringement of prisoners' rights to maintain the confidentiality of their privileged legal correspondence'*<sup>182</sup>

out-weighed the state's '*legitimate public objectives*' in a blanket policy requiring prisoners to be absent during cell searches, whenever privileged legal correspondence was examined (but not read).

7. In *R v Secretary of State for the Home Department, ex parte Brind*, Lord Bridge said:

*'In deciding whether the Secretary of State ... could reasonably impose the restriction he has imposed on the broadcasting organisations, we are ... perfectly entitled to start from the premise that any restriction of the right to freedom of expression requires to be justified and that nothing less than an important competing public interest would be sufficient to justify it'*<sup>183</sup>.

8. Lord Woolf MR (as he then was) confirmed this approach in his judgment on the granting of anonymity to soldiers in the Bloody Sunday Inquiry, stating that decision-makers could not interfere with fundamental rights '*in the absence of compelling justification*'.<sup>184</sup>.

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<sup>181</sup> [2001] 2 AC 532.

<sup>182</sup> *Ibid.* at 543.

<sup>183</sup> [1991] 1 AC 696 at 748 – 749.

<sup>184</sup> *R v Lord Saville of Newdigate, ex parte A* [2000] 1 WLR 1855, at 1867.

## Annex III

### The status of the Aarhus Convention in EU and UK law

1. It is important to note that access to justice rights under Article 9(3), except in relation to the Community institutions<sup>185</sup>, is not covered yet by any specific EU instruments. A Directive was proposed in 2003<sup>186</sup>, but has proved very controversial, and it is not clear whether it will eventually be passed.
2. Nonetheless, Article 9(3) (and, even more so, Article 9(2) which has been specifically implemented into EU law in Directive 2003/35/EC<sup>187</sup>), applies in the UK, firstly because the UK has itself ratified the Aarhus Convention, but also because the entire Aarhus Convention must be treated as an integral part of EU law by the Member States, because it is an international agreement entered into by the EU<sup>188</sup>.
3. Article 300 TEC allows the EU to conclude international agreements in areas where it has competence (e.g. the environment). The Aarhus Convention concerns the environment, so the EU is entitled to ratify it (under Article 175(1), TEC). In addition, it is a so-called 'mixed' agreement. Under Community law mixed agreements:

*'have the same status in the Community legal order as purely Community agreements, in so far as the provisions fall within the scope of Community competence'*<sup>189</sup>.

*'From this the Court has inferred that, in ensuring compliance with commitments arising from an agreement concluded by the Community institutions, the Member States fulfil, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement'*<sup>190</sup>

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<sup>185</sup> Regulation EC 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

<sup>186</sup> Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters, COM (2003) 624 final.

<sup>187</sup> Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.

<sup>188</sup> See Case C 181/73 *Haegeman v Belgium* [1974] ECR 449, paras 2-6 and Case T115/94 *Opel Austria v Council* [1997] ECR II 39, paras 101-102.

<sup>189</sup> Para. 25, of judgment of the European Court of Justice in Case C 239/03 *Commission v France*, see also Case 12/86 *Demirel* [1987] ECR 3719, para 9 and Case C-13/00 *Commission v Ireland* [2002] ECR I-2943, para 14.

<sup>190</sup> *Ibid.* at para 26.

4. At the same time, all EU law is automatically part of UK law by virtue of section 2(1) of the European Communities Act 1972, which provides for the direct applicability of EU law in the UK. This means that all EU law has to be given legal effect and must be enforced without further enactment<sup>191</sup> – a principle further confirmed by the European Court of Justice in decisions regarding the supremacy of EU law<sup>192</sup>.
5. Therefore, because the EU has signed the Aarhus Convention and has agreed to be bound by it, and because the Convention falls under the Community's competence (under Article 175(1) TEC), the UK is bound to comply with the Aarhus Convention, not only because it has ratified the Convention itself, but also because it is bound to do so by virtue of the Aarhus Convention forming part of Community law.
6. Moreover, the EU expressly made a declaration on ratifying the Convention, stating that until the Community adopts EU provisions covering the implementation of Article 9(3), '*the Member States are responsible for the performance of these obligations*'. In addition to the general obligations already set out, this declaration further delegates the implementation of Article 9(3) to the Member States for the moment.

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<sup>191</sup> See also *R v Secretary of State for Transport ex parte Factortame (No.2)* [1990] 3 WLR 818.

<sup>192</sup> See Case 6/64 *Costa v ENEL* [1964] ECR 585; case 11/70 *Internationale Handelsgesellschaft mbH* [1970] ECR 1125 and case 106/77 *Simmenthal* [1978] ECR 629.

## Annex IV

### Protective cost orders ('PCO's)

1. As already seen in the body of this Communication, CPR 44.3(2) sets out the general rule that the unsuccessful party will be ordered to pay the costs of the successful party. However, the same rule also states that the court may make a different order and that the court has discretion as to whether and how to award a costs order. Moreover, CPR 44.3 must be read and applied in accordance with Section 51 of the Supreme Court Act 1981, which says that costs are at the discretion of the courts and CPR 1 which stipulates that the case must be dealt with justly and fairly.
2. Because of this wide discretion, it has been possible for the courts to depart from the general costs rule in certain cases by granting, in an interim hearing, protective costs orders ('PCOs'). PCOs can exempt the claimant fully or partly from having to pay for the defendant's costs. They can even order the defendant to pay for the claimant's costs in spite of the claimant losing. Most of the cases where PCOs have been awarded set a cap on the costs that defendants can claim<sup>193</sup>. Some have exempted claimants completely<sup>194</sup>.
3. PCOs have not developed specifically for use in environmental cases. Generally they are **only to be granted in exceptional circumstances**<sup>195</sup> and under certain conditions. A number of core principles on which PCOs are usually decided were established in *R (Corner House Research) v Secretary of State for Trade & Industry*<sup>196</sup>. Out of the five 'rules' or guiding principles set up by this case, the following are of particular concern in the context of this Communication:
  - The issue raised has to be one of general public importance and the public interest must require that the issue should be resolved: These two issues

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<sup>193</sup> A good list of examples of the range of different PCOs and discussion of the detailed cases can be found in the Liberty Report, paras 45 – 64; pp.20-26.

<sup>194</sup> E.g. *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192.

<sup>195</sup> See *R v Lord Chancellor ex parte CPAG* [1999] 1 W.L.R. 347 and confirmed in a number of cases since, including in *Corner House*. However, there is a judicial debate around the question whether exceptionality should be an additional principle under *Corner House* ) as held for example in *Goodson V HM Coroner for Bedfordshire & Luton & Anor* [2005] EWCA Civ 1172) or is more of a general description of the kind of case which would merit a PCO. The latter approach seems to be gaining more acceptance, see for example *R (Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749, per Lord Justice Waller, at paras 19-25; per Lord Justice Buxton (dissenting), at paras 64-66; and per Lady Justice Smith at paras 80-83. Similarly, in *R (Buglife - The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corporation* [2008] EWCA Civ 1209, the court held that it must take account of all the circumstances of the case and that *CornerHouse* does not impose the principle of exceptionality as an additional criteria to those generally set out, at paras 16-20.

<sup>196</sup> [2005] EWCA Civ 192.

are inter-linked and are frequently discussed together in court judgements<sup>197</sup>. English courts generally interpret 'public importance' and 'public interest' quite restrictively. Thus, the Sullivan Report refers to a recent case in which effects on a population of 500,000 people was held not to be of 'general public importance'<sup>198</sup>. Again, however, it is within the courts' power to interpret the public importance/public interest requirements in a way that complies with the Aarhus Convention, and, again, there is huge uncertainty surrounding this issue. In environmental cases, where Article 9(1), 9(2) or 9(3) of the Aarhus Convention apply, there should be no question as to whether a matter of '*broad environmental benefit*' is at issue. Indeed, one of the reasons for the Aarhus Convention to come into existence in the first place was the fact that its provisions **are** in the public interest. The right of the public to a healthy environment and its duty to protect and improve it are inherently in the public interest. Instead, there should be a presumption that any issue falling under the Aarhus Convention is *prima facie* of public importance and requires to be resolved in the public interest.

**If PCO rules are to work and comply with the Aarhus Convention, any case that falls under the Aarhus Convention needs to qualify as being inherently in the public interest, otherwise the law is in obvious breach of the Convention<sup>199</sup>.**

- The claimant cannot have a private interest in the outcome of the case: The Aarhus Convention makes no such restriction. In fact, in some cases 'having an interest' is one of the standing requirements for being able to bring a claim. Sometimes it can be the involvement of some sort of a private interest (for example living close to a proposed development) which will propel the claimant to court. **This condition is in breach of the Aarhus Convention.** Indeed, the courts in E&W have recognised that the exclusion of cases where there is a private interest may not always be appropriate, especially in the context of access to justice in environmental matters<sup>200</sup>, but, again, the case law is still uncertain in this context and a

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<sup>197</sup> See for example references in *Wilkinson v Kitzinger and others* [2006] EWHC 835(Fam), per Sir Mark Potter, P at para 53 and 56. This is also a good discussion of the type of circumstances in which the public importance and public interest requirements should be satisfied, including mention of matters of '*broad environmental or social benefit to the community*' (at para 53).

<sup>198</sup> At para 45, p. 20. See also, CAJE UK Implementation Report, p. 3, para 11

<sup>199</sup> See also, CAJE UK Implementation Report para. 10 -13; pp. 3-4.

<sup>200</sup> See *R (Derek England) v LB Tower Hamlets and others* [2006] EWCA Civ 1742, per Lord Justice Carnwath at paras 14-15, see also *Susan Wilkinson v Celia Kitzinger* [2006] EWHC 835 (Fam), per Sir Mark Potter P, at para. 54; and PCO made by Mr Justice

claimant cannot rely on this approach being taken<sup>201</sup>. **Therefore, in environmental cases at least, the existence of a private interest should not be allowed to exclude a claimant from obtaining a PCO.**

- The existence of pro bono legal representation for the claimant is likely to enhance the merits of an application for a PCO (and if a PCO is made where a lawyer is paid, if the claimant wins, the claimant should only be able to claim for the costs of 'solicitors' fees and a fee for a single advocate of junior counsel status that are no more than modest'):

**Both of these conditions are inequitable and unfair to claimants and do not therefore comply with Article 9(4).** Claimants cannot be expected to find lawyers willing to act pro bono in every public interest case, and lawyers cannot be expected to act for free just because a case is in the public interest. Similarly, there is an inbuilt inequality in the system if claimants are not allowed to instruct senior lawyers, even in highly complex cases, simply because of the danger that they may not be allowed a PCO if they do, or may not be able to recover their costs, particularly as defendants are free to do so. In *R (Buglife - The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corporation*<sup>202</sup>, the court admitted that:

*'there can be no absolute rule limiting costs to those of junior counsel because one can imagine cases in which it would be unjust to do so. However, in Corner House, this court laid down guidance, which, subject to the facts of a particular case and unless and until there is a rule which has statutory force to the contrary, we must follow, albeit in a flexible way...'*<sup>203</sup>.

Once again, this statement clearly shows the problem with the existing jurisprudence of the English courts in relation to Aarhus Convention rights. Although the legal structure would permit an interpretation of the law in compliance with the Aarhus Convention, the jurisprudence of the courts prevents this. The suggestion by the court in the *Buglife* case is that statutory intervention is necessary.

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Collins in *Kings Cross Railway Lands Group v London Borough of Camden*, in the High Court of Justice, QBD, Administrative Court, 22 March 2007, CO Ref: CO/1185/2007, at para 3.

<sup>201</sup> See for example opposite approach taken in *Rita Goodson v HM Coroner for Bedfordshire and Luton and others* [2005] EWCA Civ 1172.

<sup>202</sup> [2008] EWCA Civ 1209.

<sup>203</sup> At para. 25.

## Annex V

### Floodgates arguments and costs

1. It is often said that making more equitable costs rules in environmental cases in the E&W legal system would open the floodgates to litigation, overwhelming the courts with the number of actions. No evidence supports such predictions.
2. It is possible, however, to show evidence to the contrary. Such evidence demonstrates that a fairer cost regime is not only possible but will not overburden the judicial system.
3. To generate this evidence, it is useful to look at the number of environmental cases brought in eight EU Member States including the UK. The other seven states all have fairer cost rules than the UK<sup>204</sup>.
4. Specifically, it is useful to examine how frequently environmental NGOs currently resort to civil actions in these countries<sup>205</sup>, in particular civil actions brought by established environmental NGOs.<sup>206</sup>
5. A recent study is valuable for these purposes: the de Sadeleer Study<sup>207</sup>. Prior to the Milieu Study, the de Sadeleer Study was the most thorough study on barriers to environmental justice (and arguably it remains so on the numbers of civil cases in the eight Member States studied). The study's authors observe that:
  - i. *[e]ven in countries which provide as a matter of law for a very broad access to the courts in environmental matters, the actual number of cases brought by NGOs is limited.*<sup>208</sup>
6. For E&W for the period 1995-2001, the de Sadeleer Study finds about 4 cases per year brought by "established environmental NGOs."<sup>209</sup>

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<sup>204</sup> See Summary Report of Milieu Study, Table 3: *Costs and legal aid schemes*.

<sup>205</sup> Actions can also of course be brought by individuals. Even if the cost rules were rewritten so that each side bore its own costs, however, the costs of one's own lawyers remains high, which acts as a natural deterrent to individual actions. We assume that specialist environmental NGOs are the entities most likely to mount legal actions.

<sup>206</sup> Administrative actions may be brought by individuals, are often a way to resolve local disputes, and are not burdensome to the judiciary. Criminal cases are necessarily rarely brought by individuals or charities. Our main analytical interest for present purposes is civil actions.

<sup>207</sup> N. de Sadeleer, G. Roller and M. Dross, *Access to Justice in Environmental Matters and the Role of NGOs: Empirical Findings and Legal Appraisal* (Groningen 2005).

<sup>208</sup> *Ibid.*, at p. 167.

7. For the seven countries with fairer cost rules, the number of civil actions was not much higher. The de Sadeleer Study findings show that:
- a. For Denmark, 4 civil cases were brought by NGOs between 1996 and 2002<sup>210</sup>.
  - b. For the Netherlands, 4 civil cases were brought by NGOs between 1997 and 2002<sup>211</sup>.
  - c. For Portugal, an average of between 2 and 3 civil cases per year were brought by NGOs between 1995 and 2002<sup>212</sup>.
  - d. For Belgium, one civil case was brought by NGOs between 1996 and 2001<sup>213</sup>.
  - e. For Germany 20 cases per year were brought by NGOs between 1995 and 2001<sup>214</sup>.
  - f. For Italy, no civil cases are reported in the study for the period. There are 147 administrative cases from 1994 and 2003, or about 15 administrative actions per year<sup>215</sup>.
  - g. For France, the numbers are more difficult to tease out. Civil and criminal decisions combined for the period 1996-2001 totalled 237<sup>216</sup>. Of these, “[c]riminal prosecutions were much more common than civil

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<sup>209</sup> Ibid. at p. 157, table 1. There were a smaller number brought by “ad hoc identifiable NGO/environmental groupings,” and more brought by individual claimants. Ibid. The study of the England and Wales system in de Sadeleer Study is particularly helpful in breaking down NGO actions into those brought by “established NGOs”, and those brought by “ad hoc identifiable NGO/environmental groupings (“such as Surfers Against Sewage and The Crystal Palace Campaign,”) *ibid.* at n. 119. This distinction, which is not carried through in all the country studies, is useful because, once again, it is the established NGOs who will more likely have the expertise to launch impact litigation.

<sup>210</sup> Ibid. at p. 41. In Denmark, ‘quasi-judicial bodies’ handled a large number of administrative matters, *ibid* at 166 and n. 9.

<sup>211</sup> Ibid. at p. 110. During the same time, there were many administrative matters.

<sup>212</sup> Ibid. at pp. 108 and 130, reporting 15 civil cases, 41 administrative, and 6 penal cases during the period in which an NGO was a petitioner.

<sup>213</sup> Ibid. at p. 16. de Sadeleer writes that in Belgium [a]dministrative action aimed at preventing environmental harm is much more developed than litigation in the ordinary courts (civil and criminal)”. Ibid. During the same period, some 101 administrative actions were brought, or about 17 per year. Ibid.

<sup>214</sup> Ibid. at p. 74, n. 43.

<sup>215</sup> Ibid. at p. 90, table 1. Interestingly, of these 147 administrative actions, 133 were brought by 4 “recognized environmental organizations.”

<sup>216</sup> Ibid. at p. 59. These are the cases in the French ‘ordinary courts.’ Under French law, “[c]riminal law provides for numerous offences against environmental law (though none has the status of a crime).” Ibid. at p. 52. That is, many penalty-generating offences come under criminal jurisdiction. Ibid.



claims”<sup>217</sup>. So civil actions, though the precise count is not clear, cannot be very numerous.<sup>218</sup>

8. If you take the number of civil cases reported in the de Sadeleer Study as analysed above, and average them over the countries studied, how many cases are brought each year by recognized NGOs during the period studied? Fewer than 5 per year.
9. The authors of the de Sadeleer Study offer several observations on the value of citizen access to the courts:
  - i. *‘The existing enforcement deficit with regard to environmental law could be tackled more successfully if more extensive litigation rights were conferred on NGOs’*<sup>219</sup>.
  - ii. *‘[L]itigation rights of environmental associations contribute to the democratic endeavours of the Aarhus convention....’*<sup>220</sup>.
10. The possibility for environmental associations to bring actions in the courts will generate public attention. Even if the response of the public in some cases might be to criticize the fact that a lawsuit was brought or the outcome of the actual court decision, the fact that the public is thereby informed on environmental issues may in itself be seen as a benefit of a legal action<sup>221</sup>.
11. In addition, the Sullivan Report confirms the conclusions drawn above from the de Sadeleer Study. Thus, the Sullivan Report states:

*‘It would therefore appear that the number of cases that may be affected by the conclusions of this report will not be unduly high, and it needs to be seen against the much larger number of judicial review applications handled by the Administrative Court as a whole. In 2005, 1,981 applications for permission (excluding immigration and criminal cases) were received, of which 412 were granted...’*

*It may be argued that the number of environmental cases pursued each year will substantially increase if costs barriers were removed or alleviated in the way we have suggested. However, the Working Group has found no basis for the ‘floodgates’*

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<sup>217</sup> Ibid. at p. 59. The study also reports some 954 administrative actions during this time, of which “40% focus on environmental matters as against 60% dealing with town planning.” Ibid. at p. 58.

<sup>218</sup> For present purposes we need to assign a value to the number of civil cases. We will assume that being ‘much less common’ than criminal cases, there were 70 civil cases out of the 237 combined group of cases.

<sup>219</sup> de Sadeleer et al. at p. 177.

<sup>220</sup> Ibid.

<sup>221</sup> Ibid. at p. 178.

*argument. Judicial review is not undertaken lightly by individuals or NGOs, and such cases are resource intensive and inherently high risk. It is essentially a remedy of last resort in every sense. Our judgment is that there would be a modest increase in environmental applications, but, particularly if our recommendations concerning improved case management were adopted, not so large that they could not be handled by the Administrative Court.'*<sup>222</sup>

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<sup>222</sup> At p. 33, paras 105-106.

## Annex VI

### List of Reports on Access to Justice

(with quotes on costs where applicable)

1. 'Ensuring access to environmental justice in England and Wales', Report of the Working Group on Access to Environmental Justice chaired by the Hon. Mr Justice Sullivan, May 2008 (the 'Sullivan Report')

*Our overall view is that the key issue limiting access to environmental justice and inhibiting compliance with Article 9(4) of Aarhus is that of costs and the potential exposure to costs. What is notable about the problem is that, by and large, it flows from the application of ordinary costs principles of private law to judicial review and, within that, of ordinary principles of judicial review, to environmental judicial review. We consider that the first of those does not take proper account of the particular features of public law. And that the latter is only acceptable in so far as it maintains compliance with Aarhus' at para 25, p.15*

2. 'Key Issues arising from the UK Government Aarhus Convention Implementation Report', UKELA, March 2008 (the 'UKELA Implementation Report')

Quoting Lord Justice Carnwath in the context of environmental litigation in 1999:

*'Litigation through the Courts is prohibitively expensive for most people, unless they are either poor enough to qualify for legal aid or rich enough to be able to undertake an open-ended commitment to expenditure running into tens or hundreds of thousands of pounds'.*

*'Such figures not only make the process of seeking justice unfair, but also have a chilling effect in deterring individual applicants and NGOs from pursuing cases. This results in those with an otherwise legitimate grievance being denied redress, while those who have undermined environmental legislation or the decision making process, go unchallenged.'*

Paras 2.3.2 and 2.3.3, pp. 3-4

3. 'Response of the Coalition for Access to Justice for the Environment (CAJE) on the UK's Implementation Report under the Aarhus Convention', CAJE, 2008 (the 'CAJE UK Implementation Report')

*'... [I]t is our view that PCOs provide only a partial solution to the problem of prohibitive costs and that the present UK position on costs is not in compliance with the Aarhus Convention.'*, para. 24, p. 6

4. *'How Far Has the EU Applied the Aarhus Convention?'*, European Environmental Bureau (EEB), 2 October 2007 (the 'EEB Report')

*'In the UK, the risk of bearing one's opponent's legal costs acts as a major deterrent to legal action.'*, p. 31

5. *'Summary Report on the inventory of EU Member States' measures on access to justice in environmental matters'*, Milieu September 2007 and *'Measures on access to justice in environmental matters (Article 9(3)) – Country report for United Kingdom'*; Milieu, January 2006 (the 'Milieu Study')

*' In conclusion, it can be said that the potential costs of bringing an application for judicial review to challenge acts or omissions of public authorities is a significant obstacle to access to justice in the United Kingdom';* p. 22, Country Report

6. *'Litigating the Public Interest – Report of the Working Group on Facilitating Public Interest Litigation'*; Liberty and the Civil Liberties Trust, July 2006 (the 'Liberty Report')

*'However, it remains the case that there are public interest cases which merit litigation but which are excluded from the courts for reasons of costs';* Foreword, p. 9 – This report deals exclusively with the issue of protective costs orders in E&W and therefore does not make any more general statements.

7. *'Briefing on Access to Environmental Justice'*; Coalition for Access to Justice for the Environment (CAJE), July 2004 (the 'CAJE 07/04 Briefing')

*'The most significant barrier to environmental justice is the cost of legal action.'* p. 1

8. *'Briefing: Access to environmental justice: making it affordable'*; CAJE, June 2004 (the 'CAJE 06/04 Briefing')

*'The cost of enforcing environmental law in England and Wales has been too high for too long for most people and organisations. It is generally regarded as the highest in Europe...'* p. 1

9. *'A Report by the Environmental Justice Project'*, The Environmental Justice Project comprising the Environmental Law Foundation, Leigh, Day & Co Solicitors and WWF-UK), March 2004 (the 'Environmental Justice Project Report')

*'[M]any practitioners believe the current costs rules are a major impediment to access to Environmental Justice by a highly significant proportion of the population. These concerns are echoed by the NGOs, who take strategic decisions on legal action with an eye as much to resources as legal principles. Many respondents point out that the current regime precludes the UK from compliance with the Aarhus Convention...'* p. 6 under 'Costs'

10. *'Using the Law: Access to Environmental Justice, Barriers and Opportunities'*, Maria Adebowale, Capacity Global, 2004 (the 'Capacity Global' Report)

*'The cost rules need to be reformed to allow for a balance of resources between parties.'* p.8

11. *'Modernising Environmental Justice – Regulation and the Role of an Environmental Tribunal'*, Professor Richard Macrory C.B.E. with Michael Woods LL.M, Solicitor, June 2003 (the 'UCL Report')

No direct statement on costs – different focus of report.

12. *'Access to Justice in Environmental Matters – Final Report'*, Prof. Dr. Nicolas de Sadeleer, Prof. Dr. Gerhard Roller, Miriam Dross, LL.M, 2002 ENV.A.3/ETU/2002/0030, 2002 (the 'de Sadeleer Report')

*'Thus, in practice the costs are one of the main obstacle for NGOs to sue polluters or to seek redress. If the procedure is too expensive or entails the risk for the NGOs to pay the costs for the counter party in case of a loss, the NGO will seek other means to solve the problem.... In ... the UK, bringing public interests actions has also involved a high risk of costs for NGOs.'*, para 4.5, pp. 31/32

## **Annex VII**

### **Cases cited**

#### **European cases**

1. Case C 239/03 *Commission v France*
2. Case C-13/00 *Commission v Ireland* [2002] ECR I-2943
3. Case 6/64 *Costa v ENEL* [1964] ECR 585
4. Case 12/86 *Demirel* [1987] ECR 3719
5. Case C 181/73 *Haegeman v Belgium* [1974] ECR 449
6. Case 11/70 *Internationale Handelsgesellschaft mbH* [1970] ECR 1125
7. Case T115/94 *Opel Austria v Council* [1997] ECR II 39
8. Case 106/77 *Simmenthal* [1978] ECR 629

#### **English cases**

1. *Alconbury* [2001] UKHL 23
2. *Andrew Finn-Kelcey v Milton Keynes Council and others* [2008] EWCA Civ 1067
3. *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (the
4. *Edore v Secretary of State for the Home Department* [2003] EWCA Civ 716
5. *Georgina Downs v Secretary of State for Environment, Food and Rural Affairs*  
[2008] EWHC 2666 (Admin)
6. *Goodson v HM Coroner for Bedfordshire & Luton & Anor* [2005] EWCA Civ 1172
7. *Kings Cross Railway Lands Group v London Borough of Camden*, in the High  
Court of Justice, QBD, Administrative Court, 22 March 2007, CO Ref:  
CO/1185/2007
8. *Magill v Porter* [2001] UKHL 67.
9. *R (Alconbury Developments Ltd) v Secretary of State for the Environment,  
Transport and the Regions* [2001] UKHL 23
10. *R (British Union for the Abolition of Vivisection v the Secretary of State for the Home  
Department* [2006] EWHC 250 (Admin)

1. *R (Buglife - The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp* [2008] EWCA Civ 1209
2. *R(Campaign to End All Animal Experiments) v Secretary of State for the Home Department* [2008] EWCA Civ 417
3. *R (Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749
4. *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192.
5. *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532
6. *R (Derek England) v LB Tower Hamlets and others* [2006] EWCA Civ 1742
7. *R (Friends of the Earth Ltd) v Environment Agency* [2003]EWHC 3193 (Admin)
8. *R (Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin)
9. *R v Anglian Water Services* [2003]EWCA Crim 2243
10. *R v Brent London Borough Council, ex p Baruwa* (1997) 29 HLR 915
11. *R v Cotswold District Council, ex p Barrington* (1998) 75 P & C.R 515
12. *R v Criminal Injuries Compensation Board, Ex p A* [1999] 2 AC 330
13. *R v Deputy Industrial Injuries Commissioner, ex p Moore* [1965] 1 QB 456.
14. *R v Independent Television Commission, ex p TV NI Ltd*, (1991)[1996]JR 60 CA
15. *R v Law Society ex parte Kingsley* [1996] COD 59.
16. *R v London Boroughs Transport Committee, ex p. Freight Transport Association Ltd* [1991] 1 WLR 828
17. *R v Lord Chancellor ex parte CPAG* [1999] 1 W.L.R. 347
18. *R v Lord Saville of Newdigate, ex parte A* [2000] 1 WLR 1855
19. *R v Sandwell Metropolitan Borough Council, ex p Wilkinson* (1998) 31 HLR 22
20. *R v Secretary of State for Education and Employment ex p Begbie* [2000] 1 WLR 1115
21. *R v Secretary of State for the Environment (ex p Nottinghamshire County Council)* [1986] AC 240

22. *R v Secretary of State for the Environment ex parte the Royal Society for the Protection of Birds* (1997) Env. L.R. 431
23. *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696
24. *R v Secretary of State for the Home Department, ex p Venables* [1998] AC 407
25. *Sheffield City Council v Smart* [2002] EWCA Civ 04
26. *R v Secretary of State for Transport ex parte Factortame (No.2)* [1990] 3 WLR 818.
27. *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014
28. *Stewart v Perth and Kinross Council* [2004] UKHL 16
29. *Wilkinson v Kitzinger and others* [2006] EWHC 835(Fam)

#### **French cases**

1. Cour Cass., SCI Les Chênes, 26 September 2007.
2. Cour de Cassation, 29 September 2007, no. 0420636)
3. Conseil d'Etat, 10 August 2005, no. 265034
4. Conseil d'Etat, 2 July 2007, no 285974

#### US cases

1. *Aleyska Pipeline Serv. Co. v Wilderness Soc'y*, 421 U.S. 240 (1975)
2. *Loggerhead Turtle v. County Council*, 307 F.3d 1318 (11th Cir. 2002)
3. *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983)



## Annex VIII

### Port of Tyne documents\*

#### Licence

1. *Licence 31995/04/1: For a trial to assess the effectiveness of a methodology for capping contaminated dredged material from the Port of Tyne on the Souther Point disposal site, issued on behalf of the Marine Consents and Environment Unit for and on behalf of the Licensing Authority on 6 October 2004*

#### PoT Reports

2. *Report 1740, Port of Tyne Sea Disposal Trials of Contaminated Tyne Estuary Sediment, EnviroCentre, June 2004,*
3. *Report No. 1613 Work Plan for Sea Disposal Trials of Contaminated Tyne Estuary Sediment, Final Work Plan – Revision 3, EnviroCentre, Port of Tyne Authority, August 2004 (attached to Licence)*
4. *Report No. 3040, Port of Tyne – Sea Disposal Trials of Contaminated Estuary Sediment: Required Cap Thickness, EnviroCentre, February 2007*
5. *Report No. 3308, Port of Tyne – Sea Disposal Trials of Contaminated Tyne Estuary Sediment: Post Placement Monitoring – Tier 1 Second Annual Monitoring, EnviroCentre, June 2008*

#### Other reports

6. *UK Report to the Meeting of the Working Group on the Environmental Impact of Human Activities of the OSPAR Convention: Capping of Contaminated Dredged Material Case Study Port of Tyne UK (the ‘UK OSPAR Report’), undated.*

7. *FEPA Monitoring at Dredged Material Disposal Sites off the Tyne*; March 2003
8. *The fate of TBT in spoil and feasibility of remediation to eliminate environmental impact*, Defra Research and Development, Final Project Report CSG 15, 30/04/2002
9. Presentation by Mike Waldock on behalf of Kevin Thomas, Jacquie Reed, Rebekah Owens, Jan Balaam and Steve Brooks Cefas Burnham, Jim Readman, PML and John Zhou, University of Sussex, *Contaminated Dredged Material*, FEPA Topic Review 23<sup>rd</sup> June 2005

## **Correspondence**

10. Memorandum from Dr C Vivian (CEFAS) to Mr G Boyes (Defra), dated 1 April 2003: *Current Status of Tyne TBT Disposal Issues*
11. Memorandum from Dr C. Vivian (CEFAS) to Mr G Boyes (Defra): *Port of Tyne Application DC 6742*, BLR 7570, DAS 31995/030222, DC 6742, dated 18 June 2003
12. Letter of 9 September 2003 from Graham Boyes (Defra) to Mr Keith Wilson (Port of Tyne Authority), ref DC 6742
13. Letter from John Maslin, Head of Marine Environment Branch 2, Defra to Thomas Bell, MCS, dated 3 February 2005.
14. Minutes of the Meeting Held to Discuss the Trial Capping Project of Contaminated Dredged Material from the Port of Tyne Disposal held on 10 May 2006
15. Letter from Andy Dixon, MCEU to Robert Latimer, dated 30 August 2006
16. Letter from Alexis Tregenza of Defra to Robert Latimer, dated 6 September 2006, ref. 259370
17. Note on *Review Meeting at EnviroCentre with Port of Tyne Regarding the Placement of Contaminated Dredge material Offshore*, from Sylvia Blake, CEFAS addressed to Andy Dixon, MCEU, dated 14 September 2006

18. Memorandum from Chris Vivian and Sylvia Blake, CEFAS to Geoff Bowles, MEU, and others dated 26 January 2007.
19. 'Review of Sea Disposal Trial of Contaminated Tyne Estuary Sediment: Required Cap Thickness Feb 2007 rep no: 11548J, MCMS Licence 31995/04/1', report by Sylvia Blake, CEFAS, Burnham Laboratory, 22<sup>nd</sup> February 2007

*\*Please note that in order to avoid unnecessary amounts of paper being copied that is not directly relevant to this Communication, only pages directly referred to in this Communication are being copied for inclusion in the original 'paper' version of the Communication, at least in relation to very long documents, e.g. the numbered reports. The electronic documents submitted contain the entire documents to the extent that these have been available to us in electronic format.*

*In addition, the original Licence has Reports 1613 and 1709 attached to it. Report 1709 has not been referred to in this Communication, so we are not submitting it as evidence either in electronic or in paper format. Similarly, we have not included the appendices to Report 1613. They are not directly relevant and very lengthy. However, all of these are available on request.*