The Kent Environment and Community Network
Response to the Draft Findings of the ACCC-Communications 45 and 60

Article 6

1.We respectfully ask the ACCC to reconsider its reasoning at paragraph 74-76 of the draft findings and to revisit its decision on the Czech communication ECE/MP.PP/C.1/2012/11, para 82.

2.Screening a proposal to see whether it should be subject to an EIA is part of the EIA process that has been part of numerous legal systems for many years including the European legal order since EC Directive 97/11/EC. On the other hand, the Aarhus Convention entered into force in October 2001 and was ratified by the UK and the EU in February 2005.Although, there is some overlap between article 6 and the EIA process, our submission is that article 6 goes further than the English and Welsh EIA process.

3.The screening process in England/Wales is about determining whether a certain proposal *will likely have* significant effects on the environment by reference to and consideration of Schedule 2 and 3 of the applicable EIA regulations. If it is determined through screening that the proposal *will likely have* significant effects, it will be subject to an environmental impact assessment otherwise it will not.

4.It is likely that thousands of decisions that *might* have a significant effect on the environment are screened out of the EIA process because it cannot be established by the decision-maker that the decision will likely have significant effects on the environment. The article 6 test of m*ight have* is a much lower threshold than the EIA test of *will likely have*.

5.In England/Wales, other decisions which are outwith the EIA process are not considered as being subject to article 6 at all. The EIA screening hurdle has been criticised by many for being too high to adequately safeguard the environment. It does not reflect the Precautionary Principle. Furthermore, the actual reach of article 6.1(b) to all decisions (for example such as agreeing to adopt a Local Investment Plan or to construct a superstore) that *may have* a significant effect on the environment, are not recognised in England as being subject to Article 6 because they are not deemed to be subject to the Strategic Environmental Assessment or EIA processes.

6.Consequently,without the application of article 6.1(b) to broader decision- making that might significantly effect the environment, the public will be unable to effectively participate in the decision-making processes that might have a significant effect on the environment. This makes it difficult to participate when all the options are still open for determination or to have sufficient time or information available to participate effectively during the process leading up to when the final decision is made or before an application for a proposal is made. The continuing problem of being barred from early effective public participation will likely result in many more thousands of decisions being made singularly or cumulatively that will have adverse effects on the environment.

7. Additionally, and of grave concern is that should the public wish to seek legal redress for a decision/proposal that does not engage article 6.1(b), the public will not be able to rely on the new cost rules in England in force since April 2013. These new cost rules were implemented *only* for claims that engage the Aarhus Convention. Without protection from the new costs rules, access to justice will be prohibitively expensive, will likely deter environmental actions and increase environmental harm. It is difficult to understand or accept the rationale behind article 6.1(b) as stated by the ACCC in these circumstances.

8.The Convention states that the provisions of Article 6 will be applied to decisions listed in Annex 1. Paragraph 20 of Annex 1 includes public participation under environmental impact assessment not included in paragraphs 1-19 of the Annex. Therefore, Article 6.1(b) has wider scope than Annex 1 because Schedule 2 and 3 of the The Town and Country Planning (EIA) Regulations 2011 are covered by Annex 1.

9.This view is supported by page 90 of the Aarhus Implementation Guide where it is stated;

'*At first glance, it may appear that Article 6 refers simply to public participation in "environmental impact assessment" (EIA). Environmental impact assessment is not itself a permitting or authorisation process. It is a tool for decision-making. The Convention expressly mentions EIA in article 6, paragraph 2(e). The term EIA has become associated with a particular standard form of process for the assessment of potential environmental impacts as part of the decision -making process relating to a particular proposed activity (see commentary on article 6, paragraph 2 (e). It is found in many countries in the UN/ECE region. While this term is used in the Convention, the test as to whether the Convention applies to a particular decision-making is not whether the procedure is required to include EIA, or is considered an "environmental decision-making" under national law (for example, because EIA is required), but whether the decision-making itself may have a potentially significant effect on the environment*'.

10.The test as can be seen from the excerpt above as to whether article 6.1(b) applies is whether the decision-making itself may (potentially) have a significant effect on the environment. The Government has not yet determined how decision-making under this category will be subject to article 6.1(b). It would have not been possible for the Government to have made such a determination under 6.1(b) by way of the applicable EIA regulations not only because the regulations predate the Convention by many years but also because it is clear that article 6.1(b) is more than just EIA. It is about public participation rights in all decision-making that *may* significantly effect the environment.

11. A partial solution to the above stated problem is to make the decision to undertake a screening itself (rather than the screening outcome) as the trigger event for engaging article 6. However, a further determination by the UK Government would still be needed with regard to how article 6 can be made to apply to other decisions that might significantly effect the environment.

Article 7

12.We are pleased that the ACCC recognises the difficulties of effective public participation with regard to LIPs at paragraphs 78-80 of the draft findings. We are also heartened to see the acknowledgment that article 7 considerations might also possibly apply to LSPs and LEPs. We humbly submit that they must.

13. With regard to paragraph 81 of the draft findings, the practice for the preparation of LIPs has now crystallised and been superseded to a large degree across England by way of Local Growth Plans (LGP). These are being prepared by the 39 Local Enterprise Partnerships (LEP) that cover all of England. See here a map of England with each LEP division: http://www.lepnetwork.org.uk/leps.html

and their roles described here https://www.gov.uk/government/policies/supporting-economic-growth-through-local-enterprise-partnerships-and-enterprise-zones#actions

14. The LGPs are seen as being the key documents that will drive forward the Government's economic growth plans in each of the 39 LEP areas. It is highly likely that the LGPs will significantly influence if not direct the policies to be adopted or added to local statutory plans.See a recent article about LGPs here: http://www.publicfinance.co.uk/news/2013/03/ministers-back-heseltine-plan-for-local-growth/ Further information on the wide impact of LEPs and their plans can

be viewed on the LEP website: http://www.lepnetwork.org.uk/index.php

15.We believe that LEPs and LGPs will very much impact on decision-making that may have a significant impact on the environment and yet public participation as granted by the Convention in the LEPs and LGPs has been and is likely to remain almost non-existent. In these circumstances, it would be valuable if the ACCC was to consider the matter more fully in order to make a suitable recommendation on the application of article 6 and 7 to the LEPs and the LGPs. This would raise the importance of public participation in these new planning developments now when public participation could make a valuable contribution to environmental outcomes. It would also stop the need for further communications on this same issue being made by a concerned individuals and groups across the country.

Article 9 and enforcing planning conditions against private persons

16.Article 9.3 gives the right to individuals to challenge acts or omissions by private persons and public authorities which contravene provision of national law. Planning conditions often relate to an article 6 decision and yet an individual cannot challenge a private person as a result of an act or omission in relation to a planning condition.

17. We do not dispute that an action for judicial review can in some circumstances be considered by a third party to challenge an act or omission related to a planning condition against the public authority. However, the more effective course of action would be for an individual to be able to directly hold the the alleged wrong doer to account (the condition holder). This is not possible and ought to be under article 9.3 of the Convention.

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