Re: Reply to the EU Commission in relation to Letter of 22nd April 2013 concerning Access to Documents and SEA: Your ref; PL/ENER/B1/mmr/(2013) 789936

To: EU Commission: DG Energy

From: Joseph Caulfield, Rathrobin, Mountbolus, Co. Offaly, Ireland

Date: 28/4/2013

1. ACCESS TO DOCUMENTATION

With regard to the filled in questionnaires, which were provided in a partly redacted manner, in the reply received from yourselves in DG Energy on the 19th October 2012[1], it was stated:

- "With regard to your request to *access environmental information on certain projects*, I have to inform you that the Commission does not have more detailed information in its position at this stage".

A review of the information now provided in these questionnaires, despite them being partly redacted, clearly demonstrates that they contain considerable environmental information, which can only lead one to conclude that what you disseminated above in your reply to me of the 19th October 2012 was plainly false and inaccurate.

With regard to the redacted information, I am highlighting Article 6(1) of Regulation 1367/2006:

- *"As regards the other exceptions set out in Article 4 of Regulation (EC) No 1049/2001, the grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment".*

If we consider the "Aarhus Convention: An Implementation Guide[2]" in relation to Article 4(4)(d): *The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed.* Then the "Aarhus Convention: An Implementation Guide" states:

- *Under the Convention, public authorities are allowed to withhold certain, limited types of commercial and industrial information from the public. For public authorities to be able to withhold information from the public on the basis of commercial confidentiality, that information must pass several tests.*

- *First, national law must expressly protect the confidentiality of that information. This means that the national law must explicitly protect the type*

[1] Reference PL/ENER/B1/MRD/ab(2012) 1341824

[2] http://www.unece.org/fileadmin/DAM/env/pp/acig.pdf

of information in question as commercial or industrial secrets. Second, the confidentiality must protect a "legitimate economic interest."

At no stage have you provided in your correspondence of 22nd April 2013 the basis in Community legal order for excluding this information from public access. Indeed if we refer back previously to your letter of 19th October 2012, reference was made then to a 'privacy statement' and personal data. However, an examination of the redacted questionnaires provided, clearly shows that the information redacted goes well beyond the scope of 'personal data'.

It is also necessary to point out that in their Report of the Compliance Committee to the UNECE Aarhus Convention Meeting of the Parties in July 2011[3]; the situation in relation to confidentiality of information was further clarified as:

- *82. In this context, the question of confidentiality of information has been raised (see also ECE/MP.PP/2008/5, para. 55) with regard to "commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest" (art. 4, para. 4 (d) of the Convention). The Committee points out that this exemption may not be read as meaning that public authorities are only required to release environmental information where no harm to the interests concerned is identified. The exemptions of the Convention under article 4, paragraph 4, are to be interpreted in a restrictive way, taking into account the public interest served by disclosure. Thus, in situations where there is a significant public interest in disclosure of certain environmental information and a relatively small amount of harm to the interests involved, the Convention would require disclosure (ACCC/C/2007/21 (European Community), para. 30 (c)).*

Once again there has been a failure by DG Energy to comply with the Community legal framework. Unfortunately having formally requested this documentation back on the 20th August 2012, and having already had to go through a confirmatory application process, it seems that once again it is necessary to go through a confirmatory application to assert our rights to access to information about the infrastructural developments that are not only foreseen for our environment, but for which we will also be forced to pay for.

2. STRATEGIC ENVIRONMENTAL ASSESSMENT

With regard to your statement:

- "Secondly, concerning **the requested clarification** as regards to the obligation of Member States to conduct a Strategic Environment Assessments (SEA) according to Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment".

At no stage in my correspondence to DG Energy, such as on the 17th March 2013, was a clarification concerning the above requested. So this is a statement that should be withdrawn. Instead what was clearly pointed out to DG Energy was that the above Directive had not been complied with in relation to the implementation of the renewable energy programme in Ireland, in particular through the National

[3] http://www.unece.org/fileadmin/DAM/env/pp/mop4/Documents/ece_mp.pp_2011_11_eng.pdf

Renewable Energy Action Plan (NREAP). However, this is a matter which was first pointed out in the CHAP (2010) 00645 complaint file, which was then referred back to the EU Commission by the EU Ombudsman in Complaint 2587/2009/JF[4] for appropriate consideration and follow-up within the Commission's role as "Guardian of the Treaties". It was a matter which led to the UNECE Aarhus Convention Compliance Committee investigation in Communication ACCC/C/2010/54[5], in which the EU was found in breach of the Convention in respect of its implementation of the renewable energy programme through Directive 2009/28/EC[6] and the associated NREAPs, in particular its implementation in Ireland.

In your reply of the 22nd April 2013 you stated DG Energy's position that:

- In case a Member State has decided not to include in its NREAP specific mandatory measures to comply with, a SEA is not required at that stage.

This is quite a remarkable statement and one which no doubt in time I look forward to hear being presented to a judge. To be clear, Article 3 of Directive 2009/28/EC on renewable energy is entitled:

- "Mandatory national overall targets and measures for the use of energy from renewable sources".

Article 4 of the Renewable Energy Directive 2009/28/EC is also very clear:

- "The National Renewable Energy Action Plans shall set out Member States' national targets for the share of energy from renewable sources……adequate measures to be taken to achieve those national overall targets, including cooperation between local, regional and national authorities, planned statistical transfers or joint projects, national policies to develop existing biomass resources and mobilise new biomass resources for different uses".

If we examine the NREAP template produced by the EU Commission, namely C(2009) 5174-1[7]. The introduction is clear:

- "The purpose of the template is to ensure that NREAPs are complete, cover all the requirements laid down in the Directive".

The NREAPs implement mandatory targets, this is undisputable, even your wording in your letter of the 22nd April 2013 is a complete farce in this point.

- "The aim of the NREAP is to pave the way as to how the Member States are planning to **achieve their national mandatory targets**. In case a Member State has decided **not to include in its NREAP specific mandatory measures** to comply with, a SEA is not required at that stage".

So how on earth can a Member State plan to achieve national mandatory targets, but not include mandatory measures? Does DG Energy take people to be some sort of

[4] http://www.ombudsman.europa.eu/cases/decision.faces/en/10882/html.bookmark

[5] http://www.unece.org/env/pp/compliance/Compliancecommittee/54TableEU.html

[6] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=Oj:L:2009:140:0016:0062:en:PDF
[7] http://ec.europa.eu/energy/renewables/doc/nreap_adoptedversion_30_june_en.pdf

fools? Indeed in the evidence presented by the Irish State to the President of the High Court Justice Kearns on the 12th and 16th of April 2013[8], it was stated:

- "The NREAP is intended to set out the measures that will achieve the specific legal target assigned to Ireland under the renewable energy Directive".

In no uncertain terms the NREAP is mandatory; there is absolutely no intent that its implementation is optional.

Furthermore, if one considers Article 3 (2) (a) of the Directive on Strategic Environmental Assessment 2001/42/EC, this requires that such a detailed assessment and public participation be completed for programmes, which lead to future development consent of a range of energy infrastructure, including wind farms. Does the NREAP lead to future development consent? Clear it does; for instance, sectoral targets are set in Section 3, the measures for achieving those targets are set in Section 4, in particular those for the electricity infrastructure development in Section 4.2.6 and the support schemes in Section 4.3, while in Section 5, the contribution of each renewable technology is defined, as the template states:

- "For the electricity sector, both the expected (accumulated) installed capacity (in MW) and yearly production (GWh) should be indicated by technology".

To summarise, the NREAP is a ten year plan in which defined infrastructure is to be supported and brought through the regulatory framework. It therefore in no uncertain terms sets out the framework for future development consent. In the Irish context this can be seen clearly in the planning approvals of the Irish Planning Appeals Board (An Bord Pleanala)[9], see examples below, while similar decisions based on the NREAP are to be found in relation to approvals by the local authority planning departments.

Case Reference and Description	Reasons and Considerations for Approval Included
D237401: Approval of seven wind turbine generators in Co. Mayo.	The National Policy on the development of renewable energy including the National Renewable Energy Action Plan to deliver 40% of electricity from renewable resources by 2020.
D237469: Approval of five wind turbines in Co. Waterford.	The target of the National Renewable Energy Action Plan to deliver 40% of electricity from renewable resources by 2020.
D237656: Approval of thirty five wind turbines in Co. Donegal	The National Renewable Energy Action Plan to deliver 40% of electricity from renewable resources by 2020.
D238982: Approval of a 2 MW wind turbine.	The target of the National Renewable Energy Action Plan to deliver 40% of electricity from renewable resources by 2020.

[8] Preliminary issues on Judicial Review 2012/920JR *Swords v Department of Communications, Energy and Natural Resources*; First Affidavit of Una Dioxin.

[9] http://www.pleanala.ie/

Case Reference and Description	Reasons and Considerations for Approval Included
DVA0011: 220 kV and 110 kV transmission system upgrade in Co. Kerry.	The National Renewable Energy Action Plan 2020.
DVA0012: Additional 220 kV and 110 kV transmission system upgrade in Co. Kerry.	The National Renewable Energy Action Plan 2020.

The Irish NREAP is repeatedly being used as the main criterion for development consent; despite there never having been a Strategic Environmental Assessment completed for NREAP or the renewable energy programme itself.

It is also necessary to respond to your assertions in DG Energy that a national assessment of the programme can be dispensed with in favour of multiple downstream localised assessments, such as by County Development Plans. This is a blatant example of 'salami slicing'. Indeed in the March 2013 publication on "Environmental Impact Assessment of Projects; Rulings of the Court of Justice[10]", in the section on "Splitting of projects – cumulative effects", it is made clear:

- "The purpose of the EIA Directive cannot be circumvented by the splitting of projects and the failure to take account of the cumulative effect of several projects must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the EIA Directive".

Advocating such a position with respect to Strategic Environmental Assessment of the Irish renewable energy programme is a breach of Community jurisprudence. It addition, claims made by yourselves in relation to Irish County Development Plans incorporating Strategic Environmental Assessment of renewable energy developments are nothing other than claims, the reality is far from that. The environmental information legally required was never generated, the public were never informed and the mitigation measures never developed, while the monitoring of the existing installed wind energy for unforeseen adverse environmental effects never occurred; see for example the situation of County Laois[11], in which land has already been leased in conjunction with Project E 156 - Greenwire Interconnector[12].

Furthermore, the absurdity of this claim of compliance with the SEA Directive by means of assessment of downstream individual programmes can be seen in your reference to Eirgrid's Grid25[13], a massive expansion of the Irish power distribution network to facilitate an increased input of renewable energy (Note; a cost of over €4 billion to double the high voltage grid by an additional 5,000 km). The objectives of

[10] http://ec.europa.eu/environment/eia/pdf/eia_case_law.pdf

[11] See for instance for County Laois: http://www.laois.ie/media/Media,534,en.pdf
See top of page 30: http://www.laois.ie/media/Media,7823,en.pdf
Absolutely no mention of a Strategic Environmental Assessment at all:
http://www.laois.ie/media/Media,6702,en.pdf

[12] http://www.elpower.com/element-power-signs-land-lease-option-with-coillte-for-leading-irish-export-wind-energy-project

[13] http://www.eirgrid.com/media/Environmental%20Main%20Report.pdf

this programme were never quantified in the environmental report. Instead reference was made to the Irish renewable energy programme, which of course as it had never been subject to Strategic Environmental Assessment, had zero quantification of its environmental objectives and zero quantification of alternatives to achieve those objectives.

Indeed in his submission to the Grid25 Strategic Environmental Assessment Mr Pat Swords raised the following; no Strategic Environmental Assessment had been completed for the renewable energy programme; there was a failure to comply with the legal binding requirements in relation to public participation; a failure to quantify the environmental objective of Grid25 and in particular to quantify the expected greenhouse gas savings and the alternatives to reach them and finally the presence of the on-going Communication at the UNECE Compliance Committee. On Section 2 point 2.4 of the subsequent finalised Environmental Report it is stated with regard to Submission No. 4 Pat Swords;

- "Comments on the undertaking of environmental assessment or otherwise of other policies, plans, programmes or projects is not within the scope of this report".

- "The type and extent of future renewable energy projects is unknown and therefore it is not realistic to quantify impacts upon greenhouse gas emissions".

Therefore this evidence presented by yourselves in DG Energy to conclude that Ireland is in compliance with respect to Directive 2001/42/EC on Strategic Environmental Assessment is nothing short of farcical and an insult to those whose legal rights of public participation you have deliberately subverted.

As regards your claims in relation to obligations stemming from this Directive having not been fulfilled and that currently no such evidence is available in relation to Ireland, again it is regretful that once again this is a plainly false and inaccurate statement. In their findings against the EU as a Party to the Convention on Communication ACCC/C/2010/54, the Aarhus Convention Compliance Committee stated:

- "By not having in place a proper regulatory framework and / or clear instructions to implement Article 7 of the Convention with respect to the adoption of NREAPs by its Member States on the basis of Directive 2009/28/EC has failed to comply with Article 7 of the Convention".

Article 7 of the Convention on public participation on plans, programmes and policies related to the environment, while less specific than Strategic Environmental Assessment is closely related to it. Indeed in its first Implementation Report to the UNECE Aarhus Convention Meeting of the Parties in 2008[14], the EU stated as regards Article 7, it would be ensured through the implementation and application of: "Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment".

Clearly therefore the proper regulatory framework with respect to the adoption of the NREAPs, as has been highlighted previously in relation to Community law, was the

[14] http://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_ir_2008_EC_e.pdf

Directive on Strategic Environmental Assessment. Given the above and the additional findings of the Compliance Committee, see below, a ruling of non-compliance with an International Treaty which is part of Community Law, it is simply incredible that yourselves in DG Energy can now claim in writing that no evidence is available. The evidence is there and is in a legal ruling of non-compliance against you, a non-compliance which is directly related to subversion of the legal rights of EU citizens.

- By not having properly monitored the implementation by Ireland of Article 7 of the Convention in the adoption of Ireland's NREAP has also failed to comply with Article 7 of the Convention/

- By not having in place a proper regulatory framework and / or clear instructions to implement and proper measures to enforce Article 7 of the Convention with respect to the adoption of NREAPs by its Member States on the basis of Directive 2009/28/EC has failed to comply also with Article 3, paragraph 1, of the Convention.

3. MEETING WITH EU COMMISSION

As regards the proposed meeting mentioned in your correspondence, I have already made it clear that I believe strongly in active citizenship and public participation. Despite myself previously highlight it, we are still in the position where there is no agenda, no defined objectives, no definition of who will attend, no outline of what steps will be taken following the meeting, etc. You now state you propose a meeting to clarify outstanding issues in relation to the access of documents request GESTDEM4179/2012, in particular regarding my request for environmental information for the above mentioned electricity projects. As far as I'm concerned the redacted information should be provided, a position I have already articulated in Section 1 of this reply.

As I have pointed out in previous correspondence on the 17th March 2013, there is growing outrage in the Irish midlands in relation to the whole manner in which this renewable programme is being forced upon the people there without them being informed, being allowed to participate in the decision-making and having access to legal procedures to challenge its provisions. Therefore I am most certainly not alone in wishing to meet with officials who represent the legal order of the European Community, and who will provide an agenda and timescale in which the dreadful abuse of law and subversion of our Rights previously documented in this reply will be addressed.

Yours truly,

Joe Caulfield