12th August 2010

" Gorewell"
Selling Road
Old Wives Lees
Canterbury
Kent, CT4 8BD
UK

Dear Mr Blakeland

Re: **EU Pilot Project Case: 950/10/ENVI – UK Environmental Impact Assessment (Your Ref: ENV A.2/SG/yy/Ares(2010)423975)**

Thank you for your letter dated 13 July 2010 which I have just received having returned from holiday. I thus apologise for getting my response to you at this late date. This letter is an additional comment that in my opinion needs to be made.

KECN is pleased that the UK Government has a schedule in place to amend its legislation in line with most of the substance in the *Baker* and *Mellor* judgments. However, KECN is not satisfied with the UK's response regarding 10a of the EIA Directive. I insert the relevant paragraph from the UK's response to KECN's complaint below:

"The KECN have asked that infringement proceedings against the UK are commenced against the UK because it has failed to properly transpose article 10a of the EIA Directive into UK law. We have carefully considered Mr Justice Collins' comments with regard to regulation 4(8) of the EIA Regulations 1999. We wish to explain that regulation 4(8) of the EIA Regulations does not, and is not intended to, transpose Article 10(a) of the EIA Directive. It is a residual power vested in the Secretary of State to direct that a development is EIA development notwithstanding that it falls neither within Schedule 1 nor with the relevant Schedule 2 thresholds. There is guidance on regulation 4(8) in Circular 02/99 (Environmental Impact Assessment) which can be found at:http://www.communities.gov.uk/documents/planningandbuilding/pdf/155958.pdf. It is considered that the domestic remedy of judicial review satisfies the requirements of the review procedures under Article 10(a). Part 6 of the EIA Regulations sets out provisions relating to the availability of opinions, directions etc. for inspection and also the requirements relating to information regarding the right to challenge the validity of decisions and the procedures for doing so".

Firstly, KECN would like to repeat the relevant wording of Article 10a, it says:
"The provisions of this Article 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. Any such procedure shall be fair, equitable, timely and not prohibitively expensive. In order to further the effectiveness of the provisions of this article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures"

Whether or not, Regulation 4(8) of the EIA Regulations is a residual power or not is irrelevant. The fact remains that a member of the public can (if they knew what Regulation

4(8) meant) rely on this section to get the Secretary of State to undertake a screening opinion even when one already exists (but might be considered inadequate for example). This section is effectively an administrative review procedure that can and has been used for these purposes for those with experience in planning matters, and it costs nothing.

The problem with Regulation 4(8) is that no practical information is provided by the Secretary of State or by the planning authorities to inform the public that this procedure does exist. This must logically, and as found by Justice Sullivan in the *Baker* case, be considered, a breach of 10a of the Directive. Part 6 of the EIA Regulations does not inform the public about the administrative procedure under Regulation 4(8).

Judicial review does not in the least satisfy the requirements under 10a of the Directive. It is a legal remedy of last resort. It is prohibitively expensive and highly risky. Many meritorious cases never see the light of day because of this. Organisations such as the Environmental Law Foundation (ELF), have researched this area and have established that a high percentage of meritorious environmental cases are dropped because of the risk of paying the other sides' costs. These costs can and often have amounted to over £100,000. For more explicit details please consult this link to ELF's recent report on this topic which was published in January 2010:
http://www.elflaw.org/site/assets/files/Access%20to%20Justice%20Report%202009.pdf

You may also be aware that a number of complaints about the UK's legal cost regime have been made to the Aarhus Compliance Committee. KECN has made such a complaint and it is to be discussed at the next Aarhus Compliance Committee meeting in September.

For the reasons set out above, KECN believes that infringement proceedings should be commenced against the UK for its failure to properly implement Article 10a of the EIA Directive.

I apologise if this adds to your workload but we at KECN believe that the present situation is intolerable and that the UK government are failing to deliver justice regarding this issue. I look forward to hearing from you further about this matter.

Yours sincerely

Geoff Meaden (Dr)