

## **EXTENDED PARTIAL REGULATORY IMPACT ASSESSMENT**

### **FURTHER EUROPEAN COMMUNITY (EC) PROPOSALS IN RELATION TO THE AARHUS CONVENTION**

#### **1. TITLE OF PROPOSED MEASURES**

1.1 This document is an extended partial regulatory impact assessment (RIA) of three related EC legislative proposals published in October 2003. The proposals<sup>1</sup> comprise:

- (i) a draft Decision to enable the European Community to ratify the Aarhus Convention, an international agreement providing for public involvement in environmental matters and signed by the EC and Member States in 1998;
- (ii) a draft Regulation to apply the Convention to Community institutions and bodies, such as the European Commission; and
- (iii) a draft Directive to complete any further Community legislation necessary for Member States to comply with the Convention in relation to access to justice.

1.2 Copies of the actual proposals, and the European Commission explanatory memoranda on them, can be found at <http://europa.eu.int/comm/environment/aarhus/index.htm>

#### **2. PROGRESS TO DATE**

2.1 The European Parliament completed its first reading of the proposals in March 2004. The European Council of Environment Ministers reached political agreement to a common position on the draft Decision and draft Regulation in December 2004. The Community notified its Decision to ratify the Aarhus Convention (which is not subject to co-decision with the European Parliament) to the UN authorities in February 2005. The UK also ratified the Convention in February 2005. The Council held initial general discussions of the draft Directive during Luxembourg's Presidency of the EU in the first half of 2005.

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<sup>1</sup> The titles are: 1) A Council Decision on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision making and access to justice regarding environmental matters; 2) A Regulation of the European Parliament and of the Council 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 EC institutions and bodies. 3) A Directive of the European Parliament and of the Council on access to justice in environmental matters.

2.2 The Department consulted with stakeholders on a partial RIA to inform the Government's options for the EC negotiations on the proposals between September and December 2004. *A summary of, and a response to, the main concerns raised, and of the answers to the particular questions posed in the consultation, is at **Annex 1***. This extended partial RIA updates the partial RIA and draws further conclusions, taking account of the outcome of the stakeholder consultations and further analytical work.

### **3. PURPOSE AND INTENDED EFFECT OF PROPOSED MEASURES**

#### **(i) The objective:**

3.1 The outcomes the proposals are intended to lead to are: (i) the European Community will have in place all the measures necessary to show it can meet its international obligations under the Aarhus Convention; and (ii) the provisions on access to justice in environmental matters will lead to an improvement in the application and enforcement of environmental law throughout the Community.

#### **(ii) The background:**

##### ***The Aarhus Convention and how it relates to the Commission's proposals, wider environmental policy and existing law:***

3.2 The issue addressed by the Commission's proposals is widely reflected in the Aarhus Convention itself, in other international agreements and undertakings, and in Community and UK Government policy on the environment and sustainable development.

3.3 The Aarhus Convention is a multilateral environmental agreement adopted under the auspices of the United Nations Economic Commission for Europe (UNECE)<sup>2</sup>. Its objective is to contribute to a sound and sustainable environment by laying down certain standards and procedures for environmental democracy. These include giving the public specified entitlements to action in environmental matters based on three "pillars": access to information, participation in decision-making, and access to justice.

3.4 The European Community, and existing Member States, signed the Convention in 1998, and are committed to giving full legal effect to its obligations by ratifying it. The Government stated in a revised explanatory memorandum to the UK Parliament in January 2005 that all necessary measures had been adopted, either at EC or national level, to enable ratification of the Aarhus Convention by the UK, which was completed in February 2005. At the time of ratification, Defra also published a more detailed explanatory table showing the

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<sup>2</sup> <http://www.unece.org/env/pp/welcome.html>

specific implementing measures ensuring UK compliance with the Convention. Links to the revised memorandum and to the explanatory table can be found at <http://www.defra.gov.uk/environment/internat/aarhus/index.htm>

3.5 The approach taken in the Convention is consistent with Principle 10 of the Rio Declaration of 1992<sup>3</sup> and with subsequent reiterations of it, such as in the 2002 World Summit on Sustainable Development Plan of Implementation<sup>4</sup>. It also reflects the UK Government's approach to sustainable development, including the promotion of good governance, through transparency, information participation and access to justice.

3.6 Most of the principles and procedures in the Convention have been embedded in the UK law and practice for several years. However, at Community level, there is wide acceptance that much of the substance of the Convention concerns matters on which it is appropriate to establish common rules under Article 175(1) of the EC Treaty to meet the environmental objectives set out in Article 174(1) of that Treaty<sup>5</sup>. To this end, and with the purpose of ensuring the consistent application of environmental law in the Community, two Directives have already been adopted to give effect to the Convention at Community level. They are:

- (i) Directive 2003/4/EC on public access to environmental information and repealing Council Directive 90/313/EEC<sup>6</sup>; and
- (ii) 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>7</sup>.

3.7 Member States were required to transpose these Directives into national law by respectively January and June 2005. It is important to note that, taken together, the existing Directives already address all three pillars of the Convention, including some aspects of access to justice in environmental matters, but not those covered by Article 9(3) of the Convention. Article 9(3) deals more generally with the ability of members of the public (including NGOs) to challenge public authorities and private bodies on matters of environmental law.

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<sup>3</sup>“Environmental issues are best handled with the participation of all concerned citizens at the relevant level. At the national level each individual shall have appropriate access to information concerning the environment.... States shall facilitate and encourage public awareness and participation.... Effective access to judicial and administrative... shall be provided”.

<sup>4</sup> See paragraph 128

<sup>5</sup> The objectives are: preserving, protecting and improving the quality of the environment; protecting human health; prudent and rational utilisation of natural resources; promoting measures at international level to deal with regional or worldwide environmental problems.

<sup>6</sup> OJ L41m 14.2.2003, p.26

<sup>7</sup> OJ L156, 25.6.2003, p.17

3.8 Directive 2003/4/EC implements the access to justice provisions in Article 9(1) and (4) of the Convention in relation to any applicant who considers that a request for environmental information has been ignored, wrongfully refused, inadequately answered, or otherwise improperly dealt with.

3.9 Directive 2003/35/EC implements the access to justice provisions in Article 9(2) and (4) of the Convention in relation to public participation in decision-making on specific activities and plans and programmes within the scope of Articles 6 and 7 of the Convention. Such activities and plans and programmes include, for example, those covered by environmental impact assessment and integrated pollution prevention and control, as well as those related to certain specific sectoral measures, such as on waste and air quality.

3.10 Comprehensive arrangements based on the Convention, which already apply to individual Member States, would apply under the Regulation to Community institutions, such as the Commission, the Council, the European Parliament, and other related bodies. For example, Regulation (EC) No 1049/2001/EC<sup>8</sup> contains provisions on general access to European Parliament, Council and Commission documents, but there are no specific provisions on public participation and access to justice in environmental matters.

***The specific provisions of the proposals:***

3.11 *The proposed Decision* is for the European Community to conclude (ratify) the UNECE Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. The Community ratified the Convention in February 2005. The Decision was modified in negotiations to clarify the arrangements for the sharing of competence between Member States and the EC as whole on the matters covered by the Convention.

3.12 *The proposed Regulation* to apply the Aarhus Convention to Community bodies and institutions addresses access to information, public participation, and access to justice in one piece of legislation (Article 1). It defines the scope of application of the Regulation (Article 2) and proceeds to deal with each of the three Aarhus pillars under separate headings:

- (i) On access to information, the Regulation seeks to align existing Community legislation on access to documents with the Convention (Article 3), to specify how environmental information shall be actively collected and disseminated (Article 4), to ensure information is of high quality (Article 5), to ensure that requests for information not held are appropriately handled (Article 6), and to ensure effective information dissemination in emergencies (Article 7).

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<sup>8</sup> OJ L145, 31,5,2001, p.43

(ii) Provision is made for public participation on Community plans and programmes (Article 9).

(iii) On access to justice, the Regulation sets out procedures for internal review of Community administrative acts (Article 9) and provisions on legal standing (Article 10) in internal review and proceedings before the European Court of Justice (Article 11).

(iv) A significant innovation is that entitlement to act under the access to justice provisions on actions or is restricted to “qualified entities”, with defined criteria (Article 12) and procedures (Article 13) for recognition. The Regulation has been modified in Council in negotiations, inter alia, to clarify the definition of “environmental law” and to simplify the provisions relating to qualified entities and access to justice.

3.13 The subject matter and scope of *the proposed Directive on access to justice*, addressed to Member States, makes a distinction between the entitlements of members of the public and qualified entities (Article 1) and defines key concepts (Article 2). It then sets out specific provisions:

(i) Member States are to ensure members of the public (defined to include groups of persons as well as individuals) have access to proceedings to challenge private persons in breach of environmental law, on the basis of criteria laid down in national law (Article 3).

(ii) Member States are also required to ensure members of the public have legal standing to challenge the substantive legality of administrative acts and omissions of public authorities in breach of environmental law, subject to demonstration of a “sufficient interest” or “impairment of a right” by the applicant (Article 4).

(iii) “Qualified entities” (such as certain NGOs) do not have to show sufficient interest or impairment of a right to gain legal standing in environmental proceedings if the action concerned relates to their “statutory activities”, and falls within the geographical area of their activities (Article 5). Further, qualified entities recognised in one Member State are entitled to request an internal review in another Member State on a similar basis.

(iv) Members of the public and qualified entities with legal standing are entitled to make a request for internal review of the alleged act or omission by the relevant public authority (Article 6). Applicants for review to the public authority are entitled to institute environmental proceedings (before a court or a statutory independent body) if a decision on the review is not

taken within prescribed time limits, or if they are dissatisfied with the decision taken (Article 7).

(v) Member States are required to designate competent authorities to operate a procedure for the recognition of qualified entities, either on an ad hoc basis or in advance (Article 9). The criteria for recognition (Article 8) are that the body concerned must be: (i) independent and non-profit-making, with the objective of protecting the environment; (ii) with an organisational structure enabling adequate pursuit of their environmental objectives; (iii) with a track record, for a period of no longer than three years fixed by individual Member States, of working actively for environmental protection in conformity with their statutory objectives; and (iv) with an audited statement of accounts for the same period as in (iii).

(vi) Member States are required to ensure (Article 10) that environmental proceedings are adequate, effective, objective, equitable, expeditious, and not prohibitively expensive (although no specific Community harmonisation is proposed on these matters).

(vii) Final provisions in the Directive deal with reporting arrangements by Member States and the Commission (Article 11) and with transposition of the Directive's requirements by Member States and entry into force (Articles 12 to 14).

**(iii) Devolution:**

3.14 There are no devolution aspects to be considered in relation to the proposals.

**(iv) Risk assessment:**

***Risks addressed***

3.15 The subject matter of the Aarhus Convention – public information, participation and access to justice in relation to environmental matters - covers a field of EU competence shared between the European Community as a whole and individual Member States. The main argument for regulatory action at Community level is to ensure the Community and Member States fully meet their obligations under the Convention.

3.16 The harmful consequences of not taking appropriate EC action would, firstly, be damage to the Community's international standing through failure to adequately implement an international agreement it has concluded, or ratified. In relation to the proposed Directive on access to justice, the Commission also suggest that there are currently shortcomings in the enforcement of

environmental law, which might not be addressed without the aid of this proposal, and the harmonised provisions on access to justice it would create.

### ***Regulatory action already taken and the need for further measures***

3.17 As explained in more detail in paragraphs 3.2 – 3.10, existing EC legislation already covers all of the matters covered by the Convention: access to environmental information; public participation in decisions affecting the environment; and access to justice related to these issues. Further measures can only be justified if they ensure: (i) compliance with the Aarhus Convention; or (ii) otherwise contribute significantly to the pursuit of Community environmental objectives.

3.18 The first consideration – compliance with international environmental obligations through implementation of the Aarhus Convention – is already being met. Most (19 out of 25) Member States have ratified the Convention. Member States have also reached a common position on the Regulation to apply the Convention to EC institutions and bodies, and the EC has ratified the Convention. This implies the EU can already meet its Convention obligations without the final proposed measure - the Directive on access to justice in environmental matters.

3.19 Member States (such as the UK) that have individually ratified the Convention are legally bound to meet all of its requirements on access to justice, whether or not Community measures cover particular requirements. Equally, having ratified the Convention, the EC as a whole is obliged to comply with its requirements.

3.20 The second consideration – better application of Community environmental law through harmonised access to justice provisions relating to such law – may still provide a justification for the Directive, whether or not there is a specific need for it in relation to the Convention. However, there is a possible link with Article 9(3) of the Aarhus Convention. The Directive seeks to secure this harmonisation through providing a common EU framework for Article 9(3) of the Aarhus Convention. This Article sets out a general entitlement for the public to have access to administrative or judicial procedures, within the framework of national law, in order to challenge acts and omissions by private persons and public authorities that contravene environmental law. The RIA considers the UK costs and benefits of creating such a framework.

3.21 An example of environmental proceedings taken in the public interest is given in research undertaken by the Commission to support the EC proposals<sup>9</sup>. A UK Country Report presents a case study in which Greenpeace successfully challenged the legality of a decision by the Secretary of State for Trade and

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<sup>9</sup> <http://europa.eu.int/comm/environment/aarhus/index.htm>

Industry<sup>10</sup> on the regime for deciding whether to grant licences for the exploration of oil and gas in part of the North East Atlantic. The outcome of the case was generally considered to be environmentally beneficial and in the public interest.

### ***Scope of regulatory impact of the Decision, Regulation and Directive***

3.22 Neither the Decision for the EC to ratify the Aarhus Convention, nor the Regulation to apply the Convention to its own bodies, present any specific direct or indirect costs the UK. Their benefits to the EC include the fulfilment of international obligations, and the extension of public participation in Community plans and programmes.

3.23 Given that there are no direct impacts on the UK from the Decision and Regulation, the rest of this extended RIA concentrates on the potential UK impacts of the draft Directive.

## **4. OPTIONS FOR NEGOTIATIONS ON THE DRAFT DIRECTIVE**

4.1 Three options for the negotiations on the draft Directive have been identified:

**Option 1:** Oppose it on the basis that it is unnecessary for the UK to meet the requirements of the Aarhus Convention.

**Option 2:** Support it as it stands on the grounds that it introduces benefits within the Community, irrespective of the requirements of the Convention.

**Option 3:** Seek to modify it where it goes beyond, or over-elaborates, the requirements of the Convention, particularly where the result could be to reduce access to justice in the UK.

## **5. BENEFITS AND COSTS**

5.1 The character of the main potential benefits claimed from the proposed Directive is environmental. Specifically, the Commission points to the more extensive group of litigants in the Community, including NGOs, that will be deemed to have passed the test of “sufficient interest” when claiming legal standing in relation to alleged infringements of environmental law. The Commission’s expectation is that this will result in improved application and enforcement of Community environmental law. In addition, economic benefits to operators arising from a more level playing field in the application of environmental law in the Community are also considered to be feasible.

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<sup>10</sup> R.v.Secretary of State for Trade and Industry, Ex Parte Greenpeace Ltd. See pps. 154-170 of the United Kingdom Reported included in the Commission’s research.

## **Option 1: Oppose the Directive:**

***There are no benefits to the UK from the draft Directive as a measure to ensure compliance with the Convention:***

5.2 Option 1 represents the status quo with regard to access to justice in environmental matters in the UK. It is based on the analysis informing the UK's ratification of the Convention in February 2005 (see paragraph 3.4). This analysis shows the UK is compliant with the Convention by virtue of our existing Community obligations, national legislation, and systems of access to justice.

***The possible "level playing field" benefits of the draft Directive are unclear:***

5.5 A possible risk of Option 1 is that it does not take sufficient account of the Commission's argument that, within the Community as a whole, the lack of enforcement of environmental law is "too frequently" due to the fact that legal standing in proceedings against infringements of environmental law is limited to persons directly (or personally) affected by the infringement<sup>11</sup>. It is claimed this hinders the ability of bodies such as NGOs to take action in the public interest, and creates the potential for possible distortions in the EU internal market.

5.6 As illustrated by the example given in paragraph 3.21, standing for NGOs is not an issue in the UK where it can be shown, in any particular allegation of an infringement of environmental law, there is an arguable case to answer. However, the following table taken from the Commission's research suggests there are wide variations between Member States in the ability of representative environmental bodies to access environmental proceedings:

**Estimated absolute number of court cases brought by environmental associations: 1996-2001<sup>12</sup>**

<b>Belgium</b>	<b>France</b>	<b>Netherlands</b>	<b>Portugal</b>	<b>Italy</b>	<b>Germany</b>	<b>UK</b>	<b>Denmark</b>
146	1197	4000	57	117	115	102	4

5.7 The Commission notes the difficulties of obtaining consistent comparative data because of the different legal traditions, systems and circumstances in individual Member States<sup>13</sup>. But it also draws the conclusion that the variations between the available data in Member States are significant and may reflect the inconsistent enforcement of environmental law throughout the Community. A particular drawback to such inconsistency could be the distortion of the internal functioning of the EU market and an uneven playing field for businesses.

5.8 The solution proposed in the draft Directive is to ensure that in Member States representative associations seeking to protect the environment should

<sup>11</sup> Commission's explanatory memorandum to the proposed Regulation, p.3.

<sup>12</sup> Research report for Commission on Access to Justice in Environmental Matters, p3

<sup>13</sup> See research report for Commission on Access to Justice in Environmental Matters, e.g. p2.and p. 17.

have access to administrative or judicial proceedings in environmental matters. However, as the Commission recognises, other factors such as resources and relative political priorities may also have a bearing on the effectiveness of the enforcement of environmental law in the Community. Also unclear is the extent to which there is a significant correlation between the ease with which representative associations may access environmental proceedings in particular Member States and the number of cases brought. So, the evidence that the Commission's proposal would result in more consistent enforcement of EU environmental law, and consequently a more level playing field, is inconclusive.

***Opposing the Directive would entail no quantifiable costs:***

5.9 Option 1 represents the status quo and would therefore entail no additional costs to the UK.

**Option 2: Support the Directive as it stands**

***The draft Directive elaborates significantly on some of the Convention's requirements, and in some respects makes them less flexible:***

5.10 Assessing the benefits and costs to the UK of supporting the Directive as drafted requires an analysis of where it appears to go beyond, or to elaborate significantly, the access to justice requirements of the Aarhus Convention.

5.11 The access to justice provisions of the Convention are set out in its Article 9. The intention is that members of the public should have access to legal procedures for reviewing infringements of (i) the access to information and (ii) the public participation requirements of the Convention, as well as (iii) breaches of national environmental law. Further provisions require that (iv) procedures should be fair, equitable, not prohibitively expensive, and provide adequate and effective remedies. There are also requirements on (v) disseminating information to the public on procedures, and (vi) on the encouragement of the development of assistance mechanisms to remove or reduce financial and other barriers.

5.12 A common requirement of the Convention's access to justice provisions is that review procedures should be available within the framework of national law. The Convention also allows for preliminary review of an act or omission by a public authority, but such review is not made a precondition of judicial review. A further feature is that, for the purposes of the public participation requirements of the Convention, NGOs promoting environmental protection are deemed to have a "sufficient interest" in terms of legal standing before judicial review bodies if they meet the requirements of national law.

5.13 The draft Directive, which addresses breaches of environmental law not already covered by the previous Directives concerning access to information and public participation, goes beyond these basic Convention requirements by

referring to access to judicial or quasi-judicial review as “environmental proceedings”. It then seeks to regulate some of the conditions and procedures for access to proceedings. These include specifying a mandatory procedure and criteria for the recognition of NGOs promoting environmental protection (“qualified entities”) and appearing to require the grant of access to substantive environmental proceedings in any Member State to such bodies.

5.14 As drafted, the Directive is unclear about whether a request for an internal review of a decision taken by a public authority should, in some cases, be a mandatory precondition for access to proceedings. It also includes a definition of “environmental law” (not in the Convention) that includes matters outside the current body of EC law, such as “town and country planning and land use”.

***Available evidence tends to confirm that legal standing in environmental cases is not an issue in the UK, relative to other Member States:***

5.15 In the area targeted for further specific Community measures – namely, the legal standing of individuals, organisations and groups to gain access to justice in environmental matters with a strong public interest - available evidence tends to confirm that the draft Directive will not bring significant benefits to the UK.

5.16 The Commission’s research puts the UK among those Member States that takes an “extensive approach” to legal standing before the administrative courts<sup>14</sup>. Based on the Commission’s evidence, the following table illustrates that, in recent years, the English courts have given an expansive interpretation to the criterion of “sufficient interest” for obtaining a hearing before the courts:

**Estimated number of public interest court cases brought by environmental NGOs, citizen groupings or individuals: 1995-2001<sup>15</sup>**

<b>Category of Applicant/Intervenor</b>	<b>Total number of cases</b>
Established environmental NGOs (e.g. Greenpeace, FoE)	25
Ad hoc identifiable grouping (e.g. the Crystal Palace Campaign)	20
Ad hoc collection of individuals (e.g. representing village residents)	21
Individual applicants reflecting a community concern (e.g. parents)	34
Individual applicants defending public interests (e.g. on radio masts)	8
Other (e.g. complaints engaging public environmental interest)	2
<b>Total</b>	<b>110</b>

5.17 Although the number of court cases brought by environmental associations in the UK seems low in relation to some other countries, the data on “court cases” do not include any of the matters dealt with by administrative review, such as under the planning system, or under statutory “environmental appeals”, of which over 50 have been identified. The Commission’s research

<sup>14</sup> Research report for Commission on Access to Justice in Environmental Matters, p.22

<sup>15</sup> UK Country Report, p148

recognises that such review systems play an important part in our system of environmental law, and may be equivalent to environmental actions taken in other countries through the courts.<sup>16</sup>

5.18 The numbers of such administrative review cases affecting specifically environmental issues are difficult to assess. The Commission's research refers to an estimated 14,000 land-use cases a year handled by the Planning Inspectorate, 280 statutory "environmental appeals", and about 14,700 statutory nuisance notices<sup>17</sup>. However, it is important to stress that most land use appeals, for example, are against refusals to grant planning permission. The UK Country Report cites an estimate of 200-230 environmental appeals handled by the Planning Inspectorate a year<sup>18</sup>.

***Substantial direct benefits to the UK from the Directive are unlikely; minor benefits are possible, but the evidence they would be realised is poor.***

5.19 The evidence on legal standing suggests that substantial direct benefits to the UK arising from the Directive's main provisions are unlikely. However, there are two areas in which possible indirect benefits could arise.

5.20 Firstly, the proposal to introduce enhanced rights of access to justice in the UK for particular organisations from other Member States could help to improve the application of environmental law in the UK. However, the Commission cites no cases of transboundary actions to date, nor any evidence that the Directive would make such actions more likely. The use of a transboundary entitlement in the UK is likely to be very infrequent (probably far less than one a year). This is primarily because the UK already has a strong and professional environmental movement with multiple links to European and international umbrella organisations. Also, as discussed above, the question of legal standing seems to be less of an issue in the UK compared with other Member States. The provision could present an opportunity for NGOs to operate in Member States with less well-developed environmental organisations. Overall, however, the provision is likely to make little difference, either way, in the UK.

5.21 Second, facilitating wider access to justice in those Member States thought to have a more restrictive approach to questions of legal standing<sup>19</sup> could lead to a more level playing field in the application of environmental law throughout the Community. This could be of some benefit to countries such as the UK that are already considered in the Commission's research to have an extensive approach to legal standing. However, there is no evidence of this.

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<sup>16</sup> UK Country Report, p124

<sup>17</sup> Research report for Commission on Access to Justice in Environmental Matters, p4

<sup>18</sup> UK Country Report, p 137

<sup>19</sup> Research report for Commission on Access to Justice in Environmental Matters, p22

Any benefit arising is, in any case, likely to be very limited given the small number of environmental cases that are likely to be brought in total.

***The costs of supporting the proposal as it stands are significant, without any corresponding benefits to the UK:***

5.22 There could be significant costs (both financial and non-financial) to the UK from supporting the draft Directive as it stands in order to secure the benefits to the Community that are claimed for it. The main costs would appear to be:

- (i) the efficient operation of the English system of justice could be impaired if access to substantive environmental proceedings, even where a party has legal standing, were not related to the need to demonstrate an arguable case, or to comply with procedural rules such as time limits;
- (ii) an aggrieved person could be in a more detrimental position than under the current system if precluded from proceeding to judicial review until a compulsory internal review process had been completed;
- (iii) smaller NGOs and ad hoc groups would have a different entitlement to pursue environmental proceedings in the public interest from qualified entities, who would have enhanced rights; and
- (iv) if town and country planning and related matters came within the scope of the proposal, the associated risk of the possibility of third party challenges to planning decisions could slow down and compromise the efficiency of the planning system.

***Lossing current procedural safeguards governing access to the UK Courts would be likely to increase costs without corresponding benefits:***

5.23 Article 7 of the Directive, which entitles applicants to institute environmental proceedings, appears not to contain the procedural safeguards that exist in UK law. These safeguards include a permission stage where an arguable case needs to be demonstrated (this permission stage and the substantive stage are sometimes amalgamated for urgent cases), rules on time limits, and rules preventing frivolous or vexatious claims.

5.24 Article 6 (internal review) does provide that requests for internal review do not have to be considered where the request is clearly unsubstantiated, but it does not necessarily follow that the same exception can be applied to environmental proceedings. It may also be that demonstrating a case is clearly unsubstantiated is a lower threshold than the UK requirement of demonstrating an arguable case. Access to the permission stage may be considered to

constitute access to environmental proceedings, but equally this may not be the case.

5.25 The estimated potential cost implications of these uncertainties in the Directive are calculated as follows:

- (i) Based on the case sample of civil (non-immigration) judicial review cases between 1 October 2003 and 30 September 2004, 74.4% of cases fall at permission stage. The vast majority of applications for permission will be determined by a paper application, although some will go to oral hearing.
- (ii) On the basis of the 110 UK recorded cases between 1995 and 2001 cited in paragraph 5.15 and making an allowance for possible inconsistencies in reporting, it is assumed there are, on average, 17 separate environmental oral cases (as opposed to paper applications) per year.
- (iii) It is further assumed that none of these 17 cases is a pure permission oral application. Using the statistic that 74.4% of cases fall at permission stage implies that 66 environmental cases per year are started, of which 49 fall at permission stage.
- (iv) If the Directive required the removal of the permission stage, these 49 cases would go to substantive hearing in addition to the 17 that already go. The Court Service estimate that the additional cost of processing each of these 49 cases would be £540 (£26,460 per year), and that each will lead to an additional 6 hours of court time (294 hours per year).
- (v) Assuming the number of environmental cases brought in the first place by would increase by 5% per year each year for three years after the Directive enters into force in the UK, the level of cases would rise to 76 per year, rather than 66 cases per year. The cost of processing each of these 10 extra cases would be £785 (£7,850) and the additional Court time per case would on average be 9.5 hours (95 hours per year).
- (vi) Taking the considerations outlined in points (iv) and (v) together, the total potential costs implications of relaxing the existing UK procedural safeguards as a result of the Directive would be an estimated £34,000 a year in increased costs to the Courts of processing claims, involving an additional 400 hours of Court time.
- (vii) Other potential, but less easily quantifiable, costs could be the additional costs to litigants in bringing unsuccessful cases, and

inconsistencies arising from the fact that judicial review in the environmental sphere would be different for judicial review in other spheres.

***The internal review provisions could imply additional costs, but they are difficult to quantify and are unlikely to be significant in practice, provided the Directive does not imply the examination of the merits of decisions:***

5.26 Article 9(3) of the Aarhus Convention provides for access to administrative or judicial proceedings. The Directive appears to elaborate on this provision by requiring an internal review as a precondition for environmental proceedings. The effect would be that public authorities would have to have an internal review procedure that potentially gives additional access to internal review for members of the public and qualified entities.

5.27 As identified in paragraph 5.17, the UK already has in place a wide range of mechanisms for internal administrative review. In addition, many bodies, such as the Environment Agency, Local Authorities, the Health and Safety Executive and the Marine and Coastguards Authority, all have complaints procedures in place that are likely to equate to internal review.

5.28 Provided the Directive's internal review provisions do not require examination of the merits of decisions, this new duty does not appear to add anything to existing UK practice – although there may be a few extra requests for internal review as a result of publicity associated with the directive.

***The reference to planning in the Directive would not, in itself, imply additional costs, as there are no relevant operative EC provisions:***

5.29 Article 2(g) of the Directive defines the scope of Community "environmental law" for its purposes, and includes "town and country planning and land use" as an example of an area within the scope of this definition. This reference is confusing, as the EC has adopted no measures on town and country planning and land use. Under the EC Treaty, Member States would need to agree unanimously to adopt such measures. If measures were adopted, there could consequently be significant cost implications for the UK planning system arising from the access to justice Directive. However, since these implications would be contingent on the UK agreeing to whatever substantive measures were proposed, it is unnecessary to consider the theoretical costs for the purposes of this RIA.

5.30 The original proposal for the Regulation to apply the Aarhus Convention to EC bodies included the same definition of "environmental law" as in the draft Directive. However, during negotiations the definition was modified as follows:

“Environmental law” means Community legislation which, irrespective of its legal base, contributes to the pursuit of the objectives of Community policy on the environment according to the Treaty establishing the European Community: preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems’

5.31 It is extremely likely that this more general, and less confusing, definition would be adopted for the Directive.

***The criteria for “qualified entities” are unlikely to have significant practical effects or benefits in the UK, but some costs could arise from the administration of the system for the recognition of such bodies:***

5.32 Article 8 of the Directive sets out the criteria for the recognition of organisations (“qualified entities”) who may have access to environmental proceedings without having to demonstrate “sufficient interest” in the alleged breach of environmental law they are seeking challenge. As discussed previously, separate concerns and cost implications arise from the possibility that such access could be obtained in a way that would weaken the current procedural safeguards for access to the UK courts. However, the distinction made in the Directive between the entitlements of “members of the public” (Article 4) and qualified entities (Article 5) is unlikely to have a significant practical effect in the UK.

5.33 Article 2 of the Directive defines members of the public widely as “one or more natural persons and in accordance with national law, associations groups, organisations, or groups made by these persons.” Article 4 says that, in contrast to qualified entities (covered by Article 5), members of the public have to show “sufficient interest” in order to challenge an alleged breach of environmental law. Member States are to determine sufficient interest in accordance with their national law. As discussed above, the UK Courts have tended to take a wide interpretation of sufficient interest in environmental cases taken in the public interest. So, the detailed criteria for the recognition of qualified entities in Article 8 will be less relevant in the UK than in Member States that take a narrower view of sufficient interest under their national law.

5.34 Examination of the environmental cases from 1995-2001 reported in the UK country study discussed above reveal that several of the appellants would not have qualified under the criteria in Article 8 of the Directive. These include: Huntingdon says no to Alconbury proposal; Blackfordby and Boothby Action Group; Camel Trail Preservation society; Save Coneygar Hill Protest group; Middleton quarry action group; Kirkstall Valley campaign ltd; and the Crystal Palace campaign. None of these bodies are legally constituted (registered with the Charity Commission) nor do they appear to have three years of certified accounts (except the Crystal Palace campaign which has qualifying accounts).

5.35 The Article 8 criteria are more restrictive than the current UK test but, provided that ‘members of the public’ remains broadly defined in the Directive, the inclusion of Article 8 does not restrict access to justice. It does not add anything and would ideally be removed, but this is less of a priority than protecting the procedural rules governing access to the Courts.

5.36 Article 9 requires that a procedure is in place for recognition of qualified entities. The article allows either a case-by-case (“ad-hoc”) system or an advance recognition procedure. Either way it seems likely that an officer will have to be in place in Defra or elsewhere to administer the system. It is estimated that this will require half the time of an Executive Officer and a tenth of the time of a Grade 7 for the more high profile aspects of maintaining such a system. The estimate assumes that the decision is taken that there is one recognition system in the UK in order to save resources: it is, however, possible that devolved administrations will want to run their own systems in which case the administrative consequences of setting up separate systems would increase the cost.

5.37 The costs associated with this are calculated on the basis of the full costs of employment in Defra, as follows:

0.5 Executive Officer: Maintaining list, criteria checks, queries, publicity, correspondence, co-ordination of Devolved Administrations, non-productive time  
0.1 Grade 7: Setting up, Management and public relations  
= £26,887

(Full costing = Salaries and allowances, ERNIC, superannuation costs, accommodation overhead, general overhead and notional insurance)

***Any additional costs arising from qualified entities from other Member States instituting proceedings in the UK are likely to be negligible:***

5.38 For the reasons discussed in paragraph 5.20, the costs of proposals to introduce enhanced rights of access to justice in the UK for particular organisations from other Member States are likely to be negligible.

### **Option 3: Seek to minimise possible costs of the Directive**

***The risks and potential costs of the Directive to the UK could be minimised, although this strategy would still be unlikely to entail substantial benefits.***

5.39 Option 3 builds on the analysis under Options 1 and 2, which concludes there would be no substantial benefits to the UK from the Directive, by outlining a negotiating strategy that would aim to minimise the possible costs associated with Option 1 and 2. An approach on these lines could involve the following elements:

- (i) seeking to clarify and amend the proposals on access to environmental proceedings so as to more closely reflect the position in the UK, where there is wide access to environmental proceedings provided it can be demonstrated there is a case to answer;
- (ii) amending the proposals so as to make clear that an internal review of a decision taken by a public authority is not a mandatory precondition for access to environmental proceedings, as this is not a requirement of the Convention and could diminish the scope for access to justice in certain cases in the UK; and
- (iii) seeking to clarify the definition of “environmental law” so as to exclude reference to matters (in particular, town and country planning) on which Community legislation has not been adopted.

5.40 An approach on these lines would be largely defensive, as minimisation of the costs to the UK from the Directive would not bring additional benefits.

***If successful, the financial implications of seeking to reduce the costs to the UK from the Directive (Option 3) should be as minimal as those implied by opposing it (Option 1)***

5.41 Option 3 seeks to reduce to a minimum the risks and costs associated with Option 2, by seeking to clarify and amend the proposals as they affect access to environmental proceedings, the need for internal review, and the definition of “environmental law”. The overall effect of this approach would be to maintain the status quo in the UK, but to allow for the possibility of any necessary changes in other Member States.

## **6. IMPLICATIONS FOR SMALL BUSINESS**

6.1 The Commission’s proposals imply no significant direct impact on small business. Option 2 may have an indirect impact on business in the event that more court cases were brought where businesses may be thought to be acting outside the law, even if claims were unjustified. On the other hand, any changes that improved access to justice in the environmental cases might benefit small businesses by creating a more level playing field. Environmental improvements resulting from successful public interest actions could also benefit small businesses. However, there is a lack of evidence that this would be the case.

## **7. COMPETITION ASSESSMENT**

7.1 The proposals raise no competition issues. All businesses are already expected to comply with environmental legislation, so changes to improve enforcement and application of environmental law would have an equal effect on

all businesses. However, there is a lack of evidence about whether the Directive would achieve the intended effect of securing level benefits to the EC. If it did so, it seems likely that the advantage to UK business of improved enforcement of environmental regulations pursuant on increased access to justice in other Member States would be very limited.

## **8. ENFORCEMENT AND SANCTIONS**

8.1 The proposals raise no direct issues of enforcement or sanctions, although their overall indirect effect could be to improve the application and enforcement of environmental law in the European Community. However, there is, again, a lack of evidence on this point.

## **9. MONITORING AND REVIEW**

9.1 Monitoring and review of the Directive, if and when adopted, would be carried out in accordance with the reporting cycle specified in Article 11.

## **10. CONSULTATION**

10.1 The Commission conducted consultations with Member States and stakeholders on draft proposals in 2002. The final proposals have been subject to internal Government consultation.

10.2 The general level of written responses to the Government's formal consultation with UK stakeholders on the proposal in 2004 was low (see **Annex 1**). 12 organisations or individuals sent replies to the consultation letter, which was sent directly to about 120 organisations, as well as being placed on the Defra website. The low spontaneous response level is unsurprising given the rather specialist nature of the subject matter. Copies of the responses received are publicly available through the Defra Information Resource Centre, Lower Ground Floor, Ergon House, 17 Smith Square, London SW1P 3JR.

10.3 In addition to inviting responses in writing, the Department also held meetings, or had telephone contacts with a number of bodies, including NGOs, industry representatives, local authority representatives, enforcement agencies and legal experts.

## **11. SUMMARY AND RECOMMENDATION**

11.1 The table at the end of this section summarises the key costs and benefits arising from the issues discussed in this RIA.

11.2 The overall conclusion on the proposed Regulation to apply the Aarhus Convention to EC institutions and bodies and on the Decision for the EC to ratify the Convention is that they will bring benefits at no cost to the UK.

11.3 As regards the draft Directive on access to justice in environmental matters, the general conclusion is that it would entail some financial costs to the UK. These costs are likely to be small (under £75,000 a year), but they are not attached to any corresponding benefits. Significant non-financial costs could arise if the current procedural safeguards governing access to the UK Courts were affected.

11.4 Given wide agreement - both among UK stakeholders and in Member States - that the Directive cannot be accepted as it stands (Option 2), the choice of negotiating strategy lies between opposing the Directive (Option 1) and seeking to improve it (Option 3). As the most that can be realistically expected from Option 3 is effectively to neutralise the more negative aspects of the Directive, Option 1 would be consistent with better regulation objectives of not supporting unnecessary legislation.

**Summary of costs and benefits of proposals:**

<b>Issue</b>	<b>Cost</b>	<b>Benefit</b>
1) <u>Regulation to apply the Aarhus Convention to EC institutions and bodies</u>	Nil to the UK	Fulfilment of international obligations and increased public participation in EC plans and programmes on the environment
2) <u>Decision for the EC to ratify the Aarhus Convention</u>		
3) <u>Access to environmental proceedings without procedural safeguards under Articles 4-5, 7 and 10 of the access to justice Directive</u>	£34,000 in increased costs to Courts of processing claims. 400 hours of Court time. Costs to litigants in bringing unsuccessful cases. Inconsistencies with judicial review in other areas.	Nil
4) <u>Internal reviews as a pre-condition to environmental proceedings (Article 6/7 of the access to justice Directive)</u>	Likely to be negligible as internal reviews are widely available in the UK. Costs could be more significant if internal reviews required re-examination of the merits of a decision, but does not appear to be the intention of the Directive	Likely to be nil as internal reviews are widely available in the UK
5) <u>Inclusion of town and country planning in the definition of “environmental law” in Article 2 of the access to justice Directive.</u>	Nil, as unanimity would be required among Member States to introduce substantive planning measures as part of the framework of EC environmental law	Not applicable, as it is assumed the definition of “environmental law” (excluding planning) will be brought into line with that agreed for issue 1)
6) <u>Criteria for recognition of “qualified entities” (Article 4, 5 and 8 of access to justice Directive)</u>	Nil, provided procedural safeguards are protected as part of issue 3) and 4)	Nil, as legal standing is broadly interpreted in the UK and “member of the public” includes groups and associations

7) <i>System for recognition of NGOs (Article 9 of access to justice Directive)</i>	£27,000 per annum	None
8) <i>Ability for qualifying bodies to bring environmental proceedings in other Member States (Article 5 of access to justice Directive)</i>	Negligible. Number of cases likely to be far less than one per year.	Negligible. Could present a potential opportunity for UK NGOs
9) <i>Overall: (i) compliance with the Aarhus Convention; and (ii) increased access to justice in other Member States</i>	(i) Nil as regards the <u>Directive</u> . UK, and the EC, are already compliant with the Convention; (ii) lack of evidence to enable quantification, but benefits are likely to be small.	

## **Annex 1: Summary of written responses to consultation on draft Directive in access to justice in environmental matters**

### **A: Response to main themes addressed in consultation comments**

#### *Devolution aspects*

1. One consultation response expressed concern that the Scottish justice system is not compliant with the Aarhus Convention. This concern is answered in the explanatory table referred to in paragraph 3.4 of the RIA. The table includes changes to the Scottish justice system required to implement an existing EC Directive - 2003/35. The Directive introduces EC requirements on Member States that will implement the public participation and related access to justice obligations of the Aarhus Convention. (See [http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l\\_156/l\\_15620030625en00170024.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_156/l_15620030625en00170024.pdf)). Member States already have an obligation to take appropriate action to transpose this Directive into national law by June 2005; so no further action on this issue is required at EC level.

#### *Regulatory impact of the draft Regulation and Decision*

2. There was no dissent from the conclusion that the benefits of both the Regulation and the Decision (the fulfilment of international obligations, and the extension of public participation in Community plans and programmes) outweigh any potential costs. Neither of these measures directly affects the UK, and no specific direct or indirect costs have been identified.

#### *Options for negotiations on the draft Directive*

3. Stakeholders generally agreed that the three options for the UK negotiating position on the draft Directive had been correctly identified. However, the environmental NGOs did not agree that the Directive went beyond the Convention. They considered that it sets out minimum requirements, which should be further enhanced. On the other hand, most industry and public agencies thought that seeking to modify the Directive (Option 3) should only be considered as a fallback to opposing it (Option 1).

#### *Benefits and costs of Option 1 (oppose the Directive)*

4. The environmental NGOs did not agree with the underlying assumption that the UK was already substantially compliant with the Aarhus Convention. They also did not agree that Option 1 would entail no additional costs to the UK. They considered that, without the Directive, there would be (unspecified) costs to the environment arising from poorer decision-making, and the lack of a consistent standard for access to justice in environmental matters. They considered the UK should seek specific amendments to the Directive under an enhanced version of Option 3 (modify the Directive). By contrast, industry stakeholders generally considered the benefits of Option 1 would outweigh the costs. Government bodies could also see the benefits of Option 1, but there was some concern about possible damage to the UK, either in terms of reputation or through legal challenge, arising from outright opposition to the Directive.

5. It is difficult to assess the significance of these possible wider, and unquantifiable, consequences. However, the fact that the EC already has adopted a substantial body of legislation on Aarhus related matters, and that most Member States and the Community as a whole, have ratified the Convention, tends to confirm that EC level action already taken in this area is already sufficient to enable compliance with the Aarhus Convention. Also, most Member States share with the UK significant detailed concerns about the Directive, so we would be unlikely to be isolated in negotiations.

*Benefits and costs of Option 2 (support the Directive as it stands)*

6. The environmental NGOs disagreed with the analysis that the Directive would not bring significant benefits to the UK. In particular, they favoured an interpretation of the Directive that brought town and country planning within its scope (for a response on this issue see paragraph 5.29 of the RIA). They also did not accept that the UK courts took an “expansive” view of criteria for legal standing before the Courts in environmental cases. However, as detailed in the RIA, the Commission’s evidence tends to support this conclusion, relative to the position in some other Member States.

7. Industry representatives were unequivocal in considering the costs of Option 2 outweighed the benefits. However, NGOs also thought there were risks, similar to those identified above, in accepting the Directive as it stands. The concept of “qualified entities” could threaten to create new barriers to access to justice. A particular concern of mandatory internal reviews was the possible interaction with Civil Procedure Rules, which require a claim form to be filed with the Court no later than 3 months after the grounds for the claim first arose.

8. Government agency representatives were generally in agreement with the NGOs concerns about the internal review and qualified entity provisions. There was some support for the argument that, with the introduction of modifications to address the mandatory review and qualified entity issues, the Directive could bring harmonisation benefits in terms of the application and enforcement of environmental law.

9. NGOs did not agree with the assumption underlying the RIA analysis of Option 2 that procedural safeguards would be weakened under the Directive. On the other hand, industry and government agency representatives thought, in general, that the potential costs arising from the Directive could be significant as a result of the potential risk of the Courts having to hear frivolous and vexatious cases. It would appear to remain the case that the Directive is at least ambiguous on this point.

10. As regards internal review provisions of the Directive, the Environment Agency mentioned that, if they did require examination of the merits of decisions, the consequent delays could amount to about 200 cases a year, at a cost of about £2m. This cost might be offset by there being fewer judicial reviews. Industry representatives were also concerned that additional costs could arise from this scenario if, for example, they were subject to more calls for information in relation to the review of decisions. However, the intention of the Directive seems to be to address the substantive or procedural legality of decisions, or the failure to act, according to the requirements of national law, rather than the merits of the decision itself.

11. The NGOs were concerned about the cost of the qualified entity provisions, as well as the principle underlying them

*Benefits and costs of Option 3 (seek to minimise the possible costs of the Directive)*

12. The environmental NGOs generally agreed with the principle of the approach outlined in Option 3, apart from the proposal to clarify that town and country planning was not covered by the definition of “environmental law”. They were particularly concerned that the UK should seek amendments to the draft Directive that (i) would clarify that an internal review is not a pre-condition for access to the Courts; and (ii) would ensure that the time limits for lodging an application for Judicial Review does not apply until the conclusion of the review procedure had been notified to an aggrieved person.

13. The NGOs also suggested that further benefits could be obtained by amending the Directive in ways that would (iii) specify more detailed requirements on costs and related matters (iv) establish simple, harmonised EU standards for legal standing (v) and specify equivalent access provisions on proceedings for private persons and public bodies. However, these

suggestions mostly go beyond the requirements of the Convention, or largely relate to matters (for example, the costs faced by litigants in going to Court) that are better addressed at national rather than EC level.

14. Industry representatives, and most government bodies, generally considered that Option 3 was appropriate, but some considered it should only be pursued as a fallback to Option 1. However, one enforcement agency thought there could be merit in including town and country planning within the definition of environmental law.

15. Industry and government agency representatives tended to agree that, if it is successfully pursued, the costs of Option 3 should be similar to those implied by Option 1 (that is, there would be no significant costs to the UK). However, there was some difference of emphasis between stakeholders as to whether Option 1 was preferable to Option 3, as the latter entailed greater risk (since it was dependent on the successful negotiation of amendments that were acceptable to the UK).

## **B: Responses to particular questions posed in consultation document**

**Q1. Do you have any general comments on the need for further EC regulatory action on access to justice in environmental matters and the overall approach to further action proposed?**

<i>Body</i>	<i>Comment</i>
<i>National NGOs:</i>	
RSPB	Support the proposals, which are needed to ratify the Aarhus Convention. But approach could be even more robust.
Environmental Law Foundation	Support the proposals and overall approach, with some modifications.
Friends of the Earth	Support overall approach, but could be even more robust.
WWF - UK	Support the proposals, which are needed to ratify the Aarhus Convention.
<i>Local NGOs:</i>	
Newport and Valleys branch of CPRW	Support further action at EC level
<i>Trade, industry, and transport bodies:</i>	
CBI	Support principles behind proposals, but concerned about specific issues.
Environmental Services Association	Proposals go beyond Convention, as regards NGOs. Existing enforcement arrangements are sufficient.
Syngenta	Support draft Regulation and EC ratification Decision, as they are necessary to meet Aarhus obligations.
Transport for London	No general comments
<i>Government bodies:</i>	
Environment Agency	Welcome the proposals. Believe the access to justice Directive could encourage an EU level playing field.
Health and Safety Executive	No general comments
<i>Individuals:</i>	
Mr Barry Love	Some concerns about specific effects in Scotland.

**Q2: Do you agree with the conclusion that the proposed Regulation to apply the Aarhus Convention to Community institutions could result in benefits with no direct costs to the UK? Are there any significant indirect costs – for example, to businesses in their interactions with Community institutions – that should be taken into account?**

<i>Body</i>	<i>Comment</i>
<i>National NGOs:</i>	
RSPB	Agree that the Regulation will be of benefit in ensuring consistency with the Convention and in upholding environmental democracy in the EC.
Environmental Law Foundation	Agree that the Regulation will result in benefits, for the same reasons as those given by RSPB.
Friends of the Earth	Agree. Can identify no significant indirect costs.
WWF - UK	Agree, for same reasons as above. Also in line with Commission White Paper on European Governance.
<i>Local NGOs:</i>	
Newport and Valleys branch of CPRW	Agree that there will be benefits. Uncertain whether there will be additional compliance costs.
<i>Trade, industry, and transport bodies:</i>	
CBI	No comment on this aspect.
Environmental Services Association	No comment on this aspect.
Syngenta	Agree that there will be benefits. But could be additional EC costs, which could affect business.
Transport for London	No comment on this aspect.
<i>Government bodies:</i>	
Environment Agency	Agree on benefits on that there will be no direct costs. No view on whether there will be indirect costs.
Health and Safety Executive	No comment on this aspect.
<i>Individuals:</i>	
Mr Barry Love	No comment on this aspect.

**Q3: Do you agree with the options for negotiations on the draft Directive on access to justice in environmental matters? If not, what do you consider the options should be?**

<i>Body</i>	<i>Comment</i>
<i>National NGOs:</i>	
RSPB	Do not agree that Directive goes beyond Convention requirements. Convention allows Parties to go beyond the minimum. Should be clarified (Article 1) that Directive sets out minimum requirements.
Environmental Law Foundation	Favour Option 3. But should go further in direction of enhanced rights of access to justice. Right that EU should go beyond Convention requirements. Want same amendment to Article 1 as RSPB.
Friends of the Earth	Directive needs to be strengthened to ensure Aarhus compliance. Do not agree that it goes beyond Convention requirements. Want same negotiating stance on minimum standards as

	RSPB and FoE.
WWF - UK	Same views as RSPB, ELD and FoE.
<i>Local NGOs:</i>	
Newport and Valleys branch of CPRW	Agree
<i>Trade, industry, and transport bodies:</i>	
CBI	No comment on this aspect.
Environmental Services Association	Agree.
Syngenta	Agree.
Transport for London	Agree. Favour Option 3
<i>Government bodies:</i>	
Environment Agency	Agree.
Health and Safety Executive	Agree. Favour Option 1. Would only support Option 3 as fall-back, providing it was flexible enough to avoid imposing mandatory review.
<i>Individuals:</i>	
Mr Barry Love	No comment on this aspect.

**Q4: What are your views on the assessment of the benefits and risks of Option 1 (oppose the Directive on access to justice in environmental matters)?**

<i>Body</i>	<i>Comment</i>
<i>National NGOs:</i>	
RSPB	Do not agree with assumption underlying Option 1 that UK is compliant with the Convention, in respect of (i) the costs of taking environmental cases to court (particularly the risk of adverse cost orders); (ii) the difficulty of obtaining interim relief without giving a cross undertaking in damages; (iii) standing before the Courts; and (iv) acts and omissions by private persons. Amendments should be made to the Directive in respect of all these issues. They would improve standard of EU-wide compliance and enforcement, and facilitate dealing with cross-boundary problems. [But they would all go beyond the Convention's requirements]
Environmental Law Foundation	Same views as RSPB.
Friends of the Earth	Same views as RSPB
WWF - UK	Same views as RSPB
<i>Local NGOs:</i>	
Newport and Valleys branch of CPRW	Risks of Option 1 would outweigh benefits.
<i>Trade, industry, and transport bodies:</i>	
CBI	Benefits of Option 1 would outweigh risks, which are (i) increase in 3 <sup>rd</sup> party actions, and possible delays in issuing permits; (ii) possible increased fees and calls for information from businesses as a result of actions; (iii) uncertainty of how concept of "qualified entities" would work in practice; (iv) inclusion of "planning" in definition of "environmental law" re-opens possibility of 3 <sup>rd</sup> party appeals against planning decisions.
Environmental Services Association	Benefits of Option 1 outweigh risks, as the UK already provides sufficient legislative and

	administrative mechanisms enabling members of the public to pursue infringements of environmental law.
Syngenta	Benefits of Option1 outweigh the risks, as the UK already has stringent national legislation and systems of access to justice.
Transport for London	No specific comments on Option 1. Prefer Option 3 as a means of minimizing risks presented by Directive.
<i>Government bodies:</i>	
Environment Agency	Risks of damage to the UK's reputation for recognizing public rights in relation to environmental matters would be damaged would outweigh the benefits of Option 1.
Health and Safety Executive	Prefer Option 1, but could live with Option 3 as a fallback.
<i>Individuals:</i>	
Mr Barry Love	Oppose Option 1 as do not agree that the UK is already compliant with the Aarhus Convention, particularly as regards Scotland.

**Q5: What are your views on the assessment of the benefits and risks of Option 2 (support the draft Directive as it stands) In particular, what do you consider the effect would be, if any, on the number and effectiveness of cases of environmental proceedings taken in the public interest?**

<i>Body</i>	<i>Comment</i>
<i>National NGOs:</i>	
RSPB	Do not agree that Directive will not bring significant benefits to the UK, or that UK courts take expansive view of "sufficient interest". But (i) share concerns about making an internal review a pre-condition for access to the courts (particularly given that Civil Procedure Rules require a claim form to be filed with the Court no later than 3 months after the claim grounds first arose. And (ii) about "qualified entities" – not in Convention and threatens to create new barriers to access to justice. Either remove from Directive or give MS more discretion. Do not agree on conclusions in relation to planning.
Environmental Law Foundation	Same views as RSPB
Friends of the Earth	Same views as RSPB
WWF - UK	Same views as RSPB
<i>Local NGOs:</i>	
Newport and Valleys branch of CPRW	Agree with analysis under Option 2, but support third party planning appeals.
<i>Trade, industry, and transport bodies:</i>	
CBI	No comment on this aspect as favour Option 1
Environmental Services Association	Risks would outweigh benefits, so therefore favour Option 1
Syngenta	Risks outweigh benefits, so favour Option 1
Transport for London	No comment on this aspect
<i>Government bodies:</i>	
Environment Agency	Consider harmonization intentions of Directive

	would be beneficial, but concerned about internal review aspects of the proposal, and “qualified entity” provisions.
Health and Safety Executive	No need to elaborate significantly on the Aarhus Convention. Particularly opposed mandatory internal review provision.
<i>Individuals:</i>	
Mr Barry Love	Disagree with analysis, particularly in relation to ability of NGOs to access the Scottish Courts (but also in relation to implementation public participation Directive).

**Q6: Do you agree with the approach of addressing the risks identified in Option 2 while maintaining its benefits? Do you think including the elements outlined (clarification and amendment of the proposals on access to environmental proceeding, internal review, and the definition of “environmental law”) would secure this aim?**

<i>Body</i>	<i>Comment</i>
<i>National NGOs:</i>	
RSPB	(i) on internal review, seek to amend Directive either by making clear that an internal review is not a pre-condition for access to the courts; or (ii) ensure time limits for lodging an application for Judicial Review do not apply until the conclusion of the review procedure has been sent to the aggrieved person.
Environmental Law Foundation	Same views as RSPB, but strongly disagree with proposal to exclude town and country planning from the definition of “environmental law” in the Directive.
Friends of the Earth	Same views as ELF on town and country planning.
WWF - UK	Same views as RSPB
<i>Local NGOs:</i>	
Newport and Valleys branch of CPRW	Agree with general approach for minimizing risks on internal reviews, but in favour of retaining reference to town and country planning.
<i>Trade, industry, and transport bodies:</i>	
CBI	No comment on this aspect.
Environmental Services Association	Agree Option 3 appropriately addresses identified risks, but consider Option is the sounder approach.
Syngenta	As there are no tangible benefits to the UK from the Directive, would not support this option.
Transport for London	Agree. Favour Option 3
<i>Government bodies:</i>	
Environment Agency	Favour Option 3 in relation to “qualified entities” and internal review. Would like to see retention of inclusion of “town and country” planning within definition of “environmental law”.
Health and Safety Executive	Would only support Option 3 as fall-back, to Option 1, providing it was flexible enough to avoid imposing mandatory review.

<i>Individuals:</i>	
Mr Barry Love	No comment on this aspect.

**Q7: Do you agree Option 1 (oppose the Directive) entails no additional costs to the UK?**

<i>Body</i>	<i>Comment</i>
<i>National NGOs:</i>	
RSPB	Disagree, because without the Directive there would costs to the environment arising from poorer decision-making. Directive would introduce consistent standard for access to justice in environmental matters.
Environmental Law Foundation	Same view as RSPB
Friends of the Earth	Same view as RSPB
WWF - UK	Same view as RSPB.
<i>Local NGOs:</i>	
Newport and Valleys branch of CPRW	Agree
<i>Trade, industry, and transport bodies:</i>	
CBI	Agree
Environmental Services Association	Agree.
Syngenta	Agree.
Transport for London	No comment on this aspect
<i>Government bodies:</i>	
Environment Agency	There could be a possible political cost to opposition to the Directive.
Health and Safety Executive	Agree
<i>Individuals:</i>	
Mr Barry Love	No comment on this aspect.

**Q8: What are your views on the kind and extent of costs that would flow from Option 2 (support the Directive)**

<i>Body</i>	<i>Comment</i>
<i>National NGOs:</i>	
RSPB	(i) Do not accept there would be additional costs to the justice system if the Courts' procedural powers were diminished, as do not accept they would be diminished (ii) Accept there would be additional costs arising from the "qualified entity" proposals, and are opposed to them.
Environmental Law Foundation	Same view as RSPB
Friends of the Earth	Same view as RSPB
WWF - UK	Same view as RSPB
<i>Local NGOs:</i>	
Newport and Valleys branch of CPRW	Should be possible to control costs arising from possible vexatious cases.
<i>Trade, industry, and transport bodies:</i>	
CBI	See response to Q4.
Environmental Services Association	Agree that potential costs from frivolous and vexatious cases could be significant. Could result in delays in decision-making by public authorities, which could affect business.

Syngenta	Costs could arise from delay and inclusion of planning in definition of “environmental law”.
Transport for London	No general comments
<i>Government bodies:</i>	
Environment Agency	Could be additional costs from (i) more internal reviews (200 a year costing c.£2m?); but could be offset by (ii) fewer judicial reviews.
Health and Safety Executive	Could be additional costs arising from internal reviews.
<i>Individuals:</i>	
Mr Barry Love	No specific comments on this aspect.

**Q.9: What are your views on the assessment of the costs of Option 3 – seeking to minimise the possible risks flowing from Option 2?**

<i>Body</i>	<i>Comment</i>
<i>National NGOs:</i>	
RSPB	Negotiating stance should be to support the Draft directive as it stands and to amend the Directive in areas of: (i) more detailed mechanisms relating to Article 9(4) of the Convention, including interim relief; (ii) to establish simple requirements for legal standing for citizens and their organizations; (iii) equivalent access proceedings for private persons and public bodies; disapplication of time limits for judicial review until the conclusion of any internal review; and (iv) to include town and country planning in any definition of “environmental law”.
Environmental Law Foundation	Same views as RSPB
Friends of the Earth	Same views as RSPB
WWF - UK	Same views as RSPB
<i>Local NGOs:</i>	
Newport and Valleys branch of CPRW	Agree that status quo is acceptable for the UK, but should be scope to modify other Member States’ systems.
<i>Trade, industry, and transport bodies:</i>	
CBI	No specific comment on this aspect
Environmental Services Association	If approach is successful, then there would be some costs in making public aware of new regime.
Syngenta	If Option 3 is successful, then costs should be similar to Option 1.
Transport for London	No general comments
<i>Government bodies:</i>	
Environment Agency	Generally agree flexible approach suggested by Option 3. But consider it should give more support to the principle of internal review, as long as the relevant procedures are clear.
Health and Safety Executive	If successful, there should be no additional costs arising from Option 3.
<i>Individuals:</i>	
Mr Barry Love	No specific comment on this aspect.

