**Environmental Management Services**
***Comhairleoirí Comhshaoil***
**Environmental and Planning Consultants**

# Levelling the Pitch

## Bringing About Equality of Access to Environmental Justice

### A Discussion Paper Prepared for the Shannon Protection Alliance (SPA)

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**20 September 2008**

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## 1. Introduction

During the course of a campaign to bring about a more sustainable approach to the problem of Dublin's water supply deficit, and to discourage Dublin's local authorities from unnecessarily abstracting very large quantities of water from the River Shannon Catchment, the Shannon Protection Alliance (SPA) became aware of the significant inequality between voluntary non-Government organisations (NGOs) and state authorities in matters concerning environmental protection and management of resources.

On the one hand, a voluntary NGO such as the Shannon Protection Alliance has to engage in a significant amount of fund-raising in order to pursue a genuine campaign for what may be seen as a desirable goal from the perspective of the common good – and if it were not for the generosity of many people living in the Shannon basin, who provided financial support, energy and time, such a campaign would not be possible. Clearly, to participate in any form of planning or policy-making consultation or dialogue requires considerable effort, and the assistance of the appropriate professional experts is essential.

On the other hand, the local authorities and State Agencies who are promoting the plan to abstract large amounts of water from the River Shannon, and to send it by pipeline to Dublin, have no such difficulty. Local authority funds, provided directly by ratepayers and indirectly by the Irish tax-paying public, are available to commission and pay for detailed and costly studies to support the plan devised by the executives of these organisations. Even the elected members of the Dublin local authorities, should they wish to critically evaluate the water abstraction proposals, have no means of commissioning independent investigations or assessments of the executives' plans.

During our campaign, we have also become aware that, in addition to the above financial barrier, there are also very significant legal barriers placed in the way

of citizens who, for whatever reason, wish to examine and challenge policies, plans or programmes devised or implemented by the State. It must be clearly obvious from recent environmental conflicts, and from cases taken against Ireland in the European Court of Justice, that the State does not always conduct itself in the most environmentally responsible manner, and that well-funded lobby groups representing narrow sectoral interests have a disproportionate influence on Government policy and actions. While it must be accepted that, in a democracy, any individual or group has a right to make their views heard, what is disturbing about the situation in Ireland is the excessive political power made possible by access to very large sources of funding, with the result that "the common good" becomes almost voiceless or inaudible against the back-ground noise of money being transferred from poor to wealthy on a large scale.

When W. B. Yeats wrote the well-known and frequently quoted words --

> "What need you being come to sense,
> But fumble in a greasy till,
> And add the halfpence to the pence
> And prayer to shivering prayer, until
> You have dried the marrow from the bone?"

he may not have been thinking about environmental and planning issues, as these were not so much to the forefront in his time. But now we have allowed the external costs imposed on others by the activities of "developers" to be absorbed by the State. These costs do not show up in the profit and loss accounts of companies engaged in construction, or in the purchase and sale of land for "development"; instead they are subsidised by the State, at the expense of the ordinary taxpayer. And to enable this situation to continue, and even to become worse, the planning legislation has been changed, section by section, until now it is more difficult than ever before to prevent unsustainable and environmentally damaging schemes from being forced through the planning process.

## 2. Increasingly Restrictive Planning Legislation, and Its Failure to Include Citizens' Rights

From the time of the first Planning and Development Act in 1963, Irish planning legislation was considered to be among the most open planning systems in Europe, with reasonably accessible third party rights of participation. But over time these rights have been substantially revised and narrowed down, and third parties' access to justice has been significantly reduced. The focus of the planning system, supported by legislation, is now oriented toward ensuring the most rapid determination of planning applications, with the additional outcome of decisions favourable to developers in many cases.

The most recent restriction of public participation in the planning process is embodied in the Planning and Development (Strategic Infrastructure) Act, 2006. If a proposed development falls within the broad definition of "*strategic infrastructure*" a prospective applicant for planning permission can by-pass the local authority planning system, and can make a planning application directly to

An Bord Pleanála. Furthermore, the applicant is allowed to hold meetings with An Bord Pleanála, in accordance with Section 37B (1) of the Planning and Development Act, 2000, as inserted by Section 3 of the Planning and Development (Strategic Infrastructure) Act, 2006. When the Bill which preceded the 2006 Act was being debated, the public were informed that the Act would apply only to large-scale and necessary infrastructure such as major roads, railway lines, port developments and other similar types of development.

However, it has become clear that the 2006 Act was a developer's charter, with a broad range of development types (including privately promoted projects that could never be properly described as "infrastructure") being considered for planning permission under the Strategic Infrastructure Act.

It is a matter of serious concern that third parties are not allowed to participate in the pre-application consultations which take place between the applicant and An Bord Pleanála. Local residents and other parties, including environmental NGOs, cannot even make submissions to the Board at this important pre-application stage; and therefore they have no rights under the above Act until the Board makes a decision to accept or reject the applicant's submission. It is our belief that the procedure is further deficient in that:

i) When making its decision, the Board has before it no information about the proposed development other than that presented to it by the applicant;

ii) The Board has before it no evidence, other than the applicant's assertion, as to whether the applicant's proposal falls within the definition of "*strategic infrastructure*"; and it is in the applicant's interest to make such assertions in order to "fast-track" the project and to avoid having to make a planning application to the local authority.

Therefore, a developer may (without being challenged) convince the Board that his project meets with the criteria set out in the 2006 Act. Furthermore, even when the Board has decided that an application can be considered as strategic infrastructure, and an application can be made directly to it, the Board will not cross-circulate submissions, as happens in the "normal" planning process where an appeal is made to the Board against the decision of a Planning Authority.

Under the Planning and Development (Strategic Infrastructure) Act, 2006, the Board has the opportunity to *advise* a prospective applicant in relation to the planning application, and this consultation process between the Board and the applicant takes place outside public scrutiny, thereby frustrating the standards of transparency and openness that voluntary groups and local residents are legally entitled to expect under the Articles of the Aarhus Convention of 1998.

When a case is to be decided by An Bord Pleanála under the Planning and Development (Strategic Infrastructure) Act, 2006, the Board will hold an oral hearing; but this merely perpetuates the inequality between a local voluntary group of residents and a well-funded developer, whether a private company or a State agency. There is some merit in the provision under which the Board can require the developer / applicant to pay a substantial fee, the major part of

which goes to the Board as payment for its costs incurred in determining the planning application, and another part of which may be given by the Board to a voluntary or local group of people as a contribution to offset their costs of hiring experts and legal counsel to protect their interests at the oral hearing.

However, the provision is uncertain; a local or national environmental NGO will still have to raise significant funds in order to participate and be represented professionally at the oral hearing, with no indication of the degree to which that expenditure might be reimbursed by the Board. It is not until the Board makes its decision, long after the oral hearing, that an order will be made by the Board, determining such amounts as it thinks appropriate. Only very few and well-organised local groups, and almost no national environmental NGOs, can afford to wait out this uncertainty. And it should also be noted that, some weeks or months before an oral hearing is held, a local voluntary group has to decide the level of technical and legal representation it can afford, without knowing whether any or some of this necessary expenditure will be reimbursed by the Board. A local voluntary group wishing to participate in the planning process is therefore placed in a position of great uncertainty and difficulty.

The restriction of public participation in the planning process is most obvious in relation to the rules which govern access to the Courts, e.g., to seek Judicial Review of a planning decision – a development which is in direct conflict with the ethos of the Aarhus Convention and the amended EIA Directive 2003/35/EC, both of which stress participation and access to justice.

When the 2006 Act was being introduced, we were informed that one of its intentions was to improve access to the Judicial Review process for environmental NGOs that met specified criteria, provided that the proposed development required an Environmental Impact Assessment. Nevertheless, an environmental NGO would have to show that it had the necessary legal interest, and was engaged in some form of environmental campaigning for a significant period of time before being allowed to seek leave. Furthermore, an NGO or local voluntary association is also required to establish that there are substantial grounds for challenging the decision of An Bord Pleanála in order to obtain leave. It is clear that these restrictions are used to exclude many local residents' groups, which may have been established to object to a planning application, and have no history of environmental campaigning.

Our main concerns therefore include: restrictive *locus standi* rules; the very high costs associated with taking Judicial Review proceedings; strict time limits (proceedings must be launched within two months of a planning decision); long delays in the legal system; and the narrow view taken by the courts when considering the decision being challenged (matters outside the scope of the decision being challenged cannot be pleaded or introduced as evidence, even if such matters are of vital concern to the local community).

## 3. The Aarhus Convention

In almost complete contrast, the Aarhus Convention of 1998 recognises that the public and environmental non governmental organisations (ENGOs) have an important role in protecting the environment, and in ensuring that the environmentally optimum policy and planning decisions are made, in the interest of sustainability and the common good.

The three pillars of the Convention, the right to information, the right to participate in decision-making and the right to access to justice are considered necessary to support the fundamental right of every person to live in a healthy environment, and to support the duty, both individually and collectively, to protect or improve the environment for the benefit of present and future generations. All of the Member States and the European Community (EC) are signatories to the Convention along with several other countries.

The first pillar of the Aarhus Convention concerning public access to environmental information was implemented into EC law by Directive 2003/4/EC which had to be transposed into national law by all Member States before 14 February 2005.

Directive 2003/35/EC implements the public participation pillar of the Aarhus Convention into EC environmental assessment (EIA) law. It inserts a new Article 10a into the EIA directive (Directive 85/337/EEC as amended by Directive 97/11/EC and Directive 2003/35/EC). Article 10a sets down core requirements in respect of access to review mechanisms. These provisions allow Member States considerable discretion to determine what constitutes a sufficient interest or an impairment of a right for the purpose of national *locus standi* rules. However, this must be consistent with the objective of giving members of the public wide access to justice, in order to challenge the substantive or procedural legality of decisions which concern projects subject to EIA. Environmental NGOs that meet any requirements under national law are deemed to have the necessary legal interest. The Convention also requires that review procedures must be fair, equitable, timely and not prohibitively expensive.

The enforcement of EC environmental law in the Member States largely depends, in the first instance, on competent authorities applying the law properly and failing that, on the national courts being prepared to enforce the law. The European Commission also has an important role in ensuring that EC environmental law is implemented and enforced, and the Directorate General for the Environment has pointed out that the environmental sector continues to have the highest number of open infringement cases; and in 2005 it accounted for over one quarter of the total number of open cases concerning non-compliance with Community law. Ireland (along with other Member States) has frequently fallen short of EC law requirements in relation to the proper implementation and application of EC environmental law. The Commission is currently pursuing infringement proceedings against Ireland on a wide range of issues including matters relating to the EIA, Waste and Habitats Directives; and the European Court of Justice has found against Ireland for failing to transpose

environmental Directives into Irish legislation and for non-compliance with Directives.

The Aarhus Convention and the European Commission and Parliament recognise that environmental NGOs and individual members of the public play a fundamental role in ensuring the implementation and enforcement of EC environmental law by the national Courts, and by making complaints to the Commission.

Ireland is the only Member State not to have ratified the Convention to date, and therefore is not a Party, and may not be bound by the Convention as a matter of international law. However, as Ireland is a member of the EU, and as the EU has ratified the Convention, there are strong reasons for arguing that Ireland is fully bound by it, as if this country were a party to the Convention. This view has yet to be tested in the Courts, but there is a very strong case that Ireland has failed to meet its access to justice obligations under Article 10a of the EIA directive. Clearly the requirement to establish a 'substantial interest' conflicts with the objective of giving members of the public equality of access to justice. Furthermore, Irish Judicial Review procedures are prohibitively expensive, particularly because of the lack of availability of legal aid for environmental challenges. Irish planning procedures do not allow a legal challenge on the planning merits (substantive review) of the decision, and the standard of review applied by the courts in Judicial Review proceedings in relation to a decision of a planning authority or An Bord Pleanála is extremely narrow.

## 4. The Costs of Challenging a Planning Decision

One of the most serious constraints faced by people or NGOs in Ireland wishing to challenge planning decisions, or decisions made by the EPA, is the high cost of getting a case into and through the High Court. The difficulty has been increased by the practice of environmental law cases now having to be heard in the commercial division of the High Court, with the further disadvantage that the Respondent(s) or the Notice Parties may seek security of costs, i.e., one or more of these parties to the case may ask the Court to require that the Applicant can provide evidence by way of a bond or other financial security that the legal and other costs of the Respondent and/or Notice Parties can be met if the case is lost and costs are set against the Applicant. This can be a serious problem, especially in cases where the Respondent or one of the Notice Parties is a developer who will claim huge costs or loss of profits caused by delaying a project, if the delay is the result of legal proceeding being taken by way of Judicial Review or other environmental challenge.

It is our experience that cases which can be well argued on their merits have not been taken or heard, because the potential litigants could not face the risk of major financial losses, amounting in some instances almost to the value of their homes. Others, as result of bravery and courage, or well organised fundraising, have succeeded in getting a case heard; but it is becoming more difficult and costly.

Perhaps, in the near future, as a result of last year's changes in Government, we might see an improvement from an environmental perspective; but so far there is no sign of any such change. This is profoundly regrettable, as many environmentally damaging decisions remain unchallenged, often with serious and long term adverse environmental consequences, and much better solutions are either ignored or are not considered.

## 5. Some New Suggested Approaches to Environmental Conflicts and Equality of Access to Justice

Even though the Aarhus Convention has had a major influence on the development of EC environmental law, and therefore it has the potential to impact on access to justice and the enforcement of EC environmental law in Ireland, we cannot wait for these changes to be imposed on the Government by the European Commission or by the European Court of Justice. The ECJ moves slowly, and gives Member States every opportunity to defend themselves before making a judgment.

The conflict between Irish planning legislation and procedure and this country's obligations (as an EU member state) under the Aarhus Convention and EIA law is likely to arise in the Irish courts; but there is no guarantee that the Irish courts would change the current very restrictive planning legislation or would review the narrow definition of *locus standi* in the light of the much broader definition in the Aarhus Convention, and in the EU implementation of the Convention.

So what can be done ?

There are some approaches which we would suggest could be implemented relatively quickly; and these include:

i) Providing sufficient preliminary funding to a voluntary NGO, to enable it to undertake research and put forward a professional case; and,

ii) Providing a mechanism and financial support for environmental and public policy mediation, i.e., the resolution of disputes by mediation rather than by an adversarial process.

### 5.1 An Independent Environmental and Planning Assistance Board

We would suggest that an Independent Environmental and Planning Assistance Board should be established, similar to the Legal Aid Board or the three-person Employment Appeals Tribunal; and the functions of this Board could include awarding to a voluntary NGO or group of people concerned about a policy, plan, programme or project sufficient funding to enable the NGO or group to undertake research and put forward a professional case, and to challenge the developer's arguments. If appropriate, the Board could request a fee to take on a case and evaluate the need for funding.

Such a Board must be clearly separate from An Bord Pleanála, and from the EPA (as it would be providing funding to local or national voluntary groups and NGOs who would be making submissions to these agencies, and may subsequently challenge their decisions), and appointments should be made to it on the basis of expertise and knowledge, rather than political affiliation.

The Board could also be given the task of drawing up guidelines and standards for alternative means of dispute resolution in the areas of environment and natural resource management (see section 5.3 below). For example, a panel of mediators experienced in public policy dispute resolution could be prepared, so that parties in a dispute would have the opportunity to select one or more mediators from the panel, if that was acceptable.

## 5.2 The Role of the Attorney General

One possibility which could be considered is an expansion of the role of the Attorney General, and the following information about this AG's present role is taken from the "*Guide to the Functions and Records of the Office of the Attorney General*", published in 2001.

In addition to his or her primary role under the Constitution as adviser to the Government on matters of law and legal opinion, the Attorney General has a statutory function to represent the public in all legal proceedings for the assertion or protection of public rights. This function is conferred by section 6(1) of the Ministers and Secretaries Act, 1924. This arises most commonly when the Attorney General seeks an injunction to restrain a breach of the criminal law or a public nuisance, such as an interference with a public right of way.

Where a member of the public wishes to enforce a right which belongs to the public as a whole rather than a right which has an exclusively private character, the member of the public can apply to the Attorney General to join in the proceedings for the purpose of enforcing that public right. Where the Attorney General agrees to do so, the action is said to be brought by the Attorney General "*at the relation of*" the member of the public concerned, and the action is known as a "relator action". Where the Attorney General is approached in relation to such a proposed action, he or she has to decide whether or not to consent to a relator action being brought.

In such a case, the Attorney General does not merely lend his or her name to an action brought by a private individual,l but the Attorney General becomes the plaintiff with the right to decide how to conduct the case. However in practical terms the invariable practice is that once the Attorney General is satisfied with the basis of the proposed action and the manner in which the action is to be brought, the case is handled by the private individual's solicitor.

The Attorney General decides whether to grant or refuse consent to the bringing of a relator action and may attach such conditions to the grant, as he or she considers appropriate. Without limiting the generality of this discretion in making his or her decision, the Attorney General may have regard to, amongst

other matters, the rights which are alleged to be infringed, the extent of the alleged infringement, the consequences to the public (or a portion of the public) of this infringement, the strength of the case, both legal and evidential, the motives of the relator, the effect of the legal proceedings on the proposed defendant or defendants, and the ability of the relator to honour any undertaking as to damages or to pay any costs awarded against him.

The Attorney General's office is also responsible for operating a scheme under which litigants may receive financial support for taking an action, including Judicial Review proceedings. This provision is known as the Attorney General's Scheme, and it applies to the following forms of litigation (which are not covered by Civil or Criminal Legal Aid):

(i) Habeas corpus applications;

(ii) Bail Motions;

(iii) Such Judicial Reviews as consist of or include Certiorari, Mandamus or Prohibition; and,

(iv) Applications under section 50 of the Extradition Act, 1965.

Of interest to us here is the third form of litigation, i.e., where an individual or group seeks to Judicially Review a decision by a State agency, e.g., An Bord Pleanála or the EPA.

The purpose of the Scheme is to provide for persons who merit legal representation but cannot afford it. It is not an alternative to costs! Accordingly, a person wishing to obtain from the court a recommendation to the Attorney General that the Scheme should be applied must make his or her application (personally or through his lawyer) at the commencement of the proceedings. The applicant must satisfy the court that he or she is not in a position to retain a solicitor (or, where appropriate, counsel) unless he or she receives the benefit of the Scheme. To this end the applicant must provide such information about his means as the court deems appropriate, and the court must be satisfied that the case warrants the assignment of counsel and/or solicitor. If the court considers that the complexity or importance of the case requires it, the recommendation for counsel may also include one senior counsel.

The costs payable to the solicitor, and the fees payable to counsel, under the Scheme are those which would be payable in a case governed by the Criminal Justice (Legal Aid) Regulations current for the time being, applied mutatis mutandis.

The following important points about the Scheme should be noted:

(a) The Scheme is an administrative, non statutory arrangement whereby payments are made out of the vote of the Office in respect of certain legal costs in the types of litigation referred to above in which, for the most part, the State is a party (although the State need not be a party to proceedings which are eligible for the Attorney General's Scheme).

(b) The Scheme applies only to proceedings conducted in the High Court and the Supreme Court and (in relation to extradition cases) the District Court. Where the proceedings are of a type which fall outside the scope of the Scheme, as for example family law cases, the Scheme cannot be applied to those proceedings because public funds may only be applied for the purpose for which they have been provided by the Oireachtas. It is not within the discretion of the Attorney General to apply public funds to other purposes; without limiting the generality the foregoing, the Scheme does not apply to any form of litigation which is covered by Civil or Criminal Legal Aid.

The term "*the commencement of these proceedings*" has been interpreted by the Office of the Attorney General as referring to the commencement of proceedings in a particular court. In other words, an applicant would not be prejudiced from seeking the benefit of the Attorney General's Scheme to be applied to him or her in respect of Supreme Court proceedings by reason of the fact that he/she had not made such an application in relation to the High Court proceedings. However in these circumstances the Scheme does not have effect retrospectively to entitle him/her to costs under the Attorney General's Scheme in respect of the High Court proceedings.

A review of the Office of the Attorney General, carried out in 2006 by the Secretary General of the Department of Finance, made no recommendations about the Attorney General's Scheme, except to suggest that it should be transferred to the Department of Justice, Equality and Law Reform, where other legal aid schemes are administered. The review also recommended that all constitutional actions must receive the prior approval of the Attorney General before being allowed to proceed. Unfortunately, this may be interpreted as a further barrier to environmental law cases being taken by a member of the public or by a group, where there is a constitutional issue involved.

The Attorney General's Scheme has been used to defray the cost of legal proceedings taken by the applicant in the "Glen of the Downs" case, and possibly other environmental cases as well. However, the principal problems associated with it are that it is slow, the AG's office takes a long time to make a decision on an application for the costs of legal representation, the application must be made in Court at the commencement of proceedings, the result is uncertain, the Scheme has been narrowly interpreted by the AG's office and by the Courts, and it does not completely remove the barriers to *locus standi* noted in section 2 above.

### 5.3 Environmental Mediation

The process of mediation involves the intervention into a dispute of an acceptable, impartial, neutral and informed third party who has no decision-making authority, but who will procedurally assist the protagonists to voluntarily reach a mutually acceptable settlement of the unresolved or disputed issues.

Mediation is a non-adjudicatory process; the mediator being an independent or impartial facilitator who has no authority to make any decision which can bind

the parties. In mediation the parties to the dispute retain their power, and one of the mediator's principal aims is to ensure that this retained power is used in the most positive way so as to reach an agreed settlement. Furthermore, a mediator with significant knowledge of the issues involved can suggest new or altered approaches, or innovative solutions which may become acceptable to all sides in the dispute.

Mediation evolved from a perception that traditional methods of resolving resource management conflicts, such as public hearings, court cases, licensing or other arrangements, were becoming increasingly unsatisfactory. Traditional methods usually rely on an adversarial or legislative approach in which one side "wins" and the other "loses". In such situations, the losing group (if its feelings are strongly held) will attempt to shift the conflict to another arena, or may seek "revenge" in an unrelated situation (Susskind and McCreary, 1985).

Mediation is one of a number of alternative dispute resolution techniques which are slowly achieving more widespread use and authority in areas of civil and commercial disputes, and in situations involving marital separation and divorce. Alternative dispute resolution (ADR) offers a range of additional and informal procedures and resources to complement adjudication or litigation. One of the fundamental features of ADR is its flexibility and adaptability to the needs of the parties in dispute.

Environmental mediation, though practised in a number of other countries, is relatively new to Ireland. Various alternative means of resolving public policy disputes and natural resource conflicts have a long history, particularly in the United States where mediation became a major tool of public policy makers in the 1970s, especially in the area of environmental policy. The mediation of a dispute over the construction of the Snoqualmie River dam in Washington State was the first effort to apply dispute resolution techniques to environmental issues. This mediation, begun in 1974, was sponsored primarily by the Ford Foundation in an effort to expand the range of applications of dispute resolution techniques from the labour-management arena to that of neighbourhoods and communities.

The practice of environmental mediation has expanded from the resolution of site-specific disputes to cover a wide array of applications, including formal and informal policy dialogues at local, regional, national and international levels; regulatory negotiations; strategic planning for public and private organisations; training and education; and in the development of public participation through task forces, envisioning processes, and ordinary public hearings.

Environmental mediation aims to produce an outcome or result that can be described as a "win-win" rather that a "win-lose" solution, and its primary goals should be to:

i) satisfy the interests of everyone involved;

ii) select an efficient solution, i.e., an option which ensures that all possible mutual or joint gains will be achieved, including long term environmental benefits, and that the principle of sustainability is maintained;

iii) result in commitments which can be implemented (all parties should be encouraged to make only those promises which they can keep);

iv) ensure the legitimacy of the conflict resolution process or mediation in the eyes of all those affected by the outcome;

v) ensure that the outcome deals wisely with uncertainty and recognises our lack of knowledge of natural systems; this is especially important in dealing with issues which hinge on the interpretation of scientific (particularly ecological) data or observations;

vi) ensure that the outcome is reached reasonably quickly; and,

vii) result in improved relationships, so that the participants are left in a better position to deal with their differences in the future.

In the context of growing concern about world-wide environmental deterioration, climate change and resource destruction, mediation may also attempt to bring the parties closer to the goals of achieving environmental sustainability, with minimal adverse impact, no unnecessary use of non-renewable resources, and the employment of the most environmentally benevolent technologies.

Before embarking on environmental mediation, the following issues should be clarified, necessary information obtained, and ground rules established:

i) the participants or actors in the conflict process must be identified at a very early stage: local people, neighbours, potential employees, local municipal government, central government, state agencies, non-government organisations concerned with natural resources or with the environment, actual or potential users of resources, the local business community, etc.;

ii) the aspirations, perceptions and legitimate fears of each group must be identified, recognised and accepted;

iii) the impacts of the proposed or on-going activity or development in dispute must be clearly identified, along with the inter-actions (positive and negative) between it and other existing or future uses of land and/or water;

iv) in some circumstances, general agreement must first be sought and obtained that multiple or mixed use is the best strategy for the local area, that the problem cannot be resolved in an "either/or" way, but that an integrated approach will yield better gains in the long term;

v) a set of clearly stated and agreed objectives must be produced;

vi) some mechanism must be found or established for formal registration of the agreement or consensus reached, with a means of ensuring as far as possible that participants adhere to what was agreed; and,

vii) a suitable mediator (an individual or a team, with a detailed understanding of the issues in dispute) must be located, and adequate funding found to support the expertise required in the process.

For environmental mediation to be successful, there must also be adequate shared knowledge among participants and a clear understanding of:

i) the physical and biological realities which govern the resources we are using or intend to use;

ii) the carrying capacity of the environment;

iii) the complexity of ecological relationships;

iv) the limits to our knowledge of the environment and of the effects of the on-going or proposed activity or development, i.e. the extent of biological uncertainty;

v) where relevant, the importance of cultural heritage, whether this consists of the natural environment, the built environment, unique cultural sites or buildings, artefacts, or historical associations valued by the local community;

vi) where relevant, the social structure, land ownership, demographic pattern, current economic activities, cultural patterns and local lifestyles; and,

vii) the limits to mediation, which include its cost, length of time to achieve an acceptable solution, uncertainty of outcome, and difficulty of ensuring compliance with what was agreed.

Disputes amenable to resolution by mediation include those in which a number of alternatives can be examined, and for which there are a large number of possible solutions or different outcomes. The mediation process itself may also help to generate alternatives, especially if an open attitude can be established and maintained. In mediation-based or non-adjudicatory approaches to resource allocation and conflict resolution, policies and attitudes are important; decisions based on economics alone will rarely achieve their objectives or be viable / sustainable in the long term.

### 5.4 Representing the Environment

If it is agreed that all “affected parties” or stakeholders should have an input into a decision-making process which affects their well-being, or has the potential to affect it, then the question of who is not represented “at the table” when important environmental decisions are being made becomes a critical issue from a practical as well as an ethical point of view. This is especially true if the decision-making process is assumed to produce the best outcome for the environment, through promoting sustainable forms of development or minimising the adverse impacts of human activities on ecosystems or on other living organisms. A case can therefore be made for giving enhanced representation to “the environment” as an interested and affected party, not capable of self-representation in the context of the dispute.

While it may be argued that State Agencies and organisations such as local authorities, the Environmental Protection Agency, Fisheries Boards and the National Parks & Wildlife Service (NPWS, a section of the Department of the Environment Heritage and Local Government responsible for the conservation of habitats and species in Ireland) have a duty to protect the environment, the reality is that such protection is subject to significant interference by the political elite and by developers. In a small but significant number of cases, the failure

by the NPWS to act against a proposed development, or to intervene in the planning process, has led to the destruction of the protected habitat, or to a significant reduction in its conservation value, or in its historical, cultural or scientific interest. Local authorities are equally reluctant to protect the environment, especially when large-scale commercial or State developments are being considered. The power of commercial interests, the financial benefits to local authorities from commercial development (through the payment of levies and rates) and the fact that local authorities perceive themselves as development agencies, are other reasons why planning decisions are frequently made which are in conflict with the needs of environmental or resource protection.

Environmental organisations claim generally to speak for the environment, and therefore to represent the environmental interest, but few of them claim to speak for non-human life forms. Most environmental organisations focus on particular geographic areas, or on particular habitats or species; and their activities frequently reflect institutional needs (e.g., gaining publicity, increasing membership, attracting funds, obtaining political support, etc.) rather than environmental priorities determined by ecological realities. Environmental NGOs are also under considerable pressure to survive, often competing for scarce resources, and these pressures encourage compromise or selective attention to issues. In general, NGOs are also short of those resources which enable them to engage fully in the settlement of an environmental dispute, unless they receive specific assistance for the task.

All of the above features of NGOs suggest that the environment and non-human life forms may not be adequately represented in negotiations under the present circumstances. A good case can be made for giving participating environmental NGOs some additional resources to assist them during the settlement negotiations, and this strategy should result in a greater degree of equality among the interests represented. However, a more radical and possibly controversial solution to the problem would be to appoint an independent special representative for environmental interests. While this may seem unusual in the context of our human-centred approach to the resolution of environmental disputes, it is a logical consequence of an environmental ethic which assigns a significant intrinsic value to the environment, outside of human needs, i.e., other life forms have an intrinsic right of existence, and their purpose is not merely to serve as resources for our own species.

If this may appear unusual, consider the fact that there already exist acceptable circumstances in which one human is allowed to speak for another who is deemed to be incapable of self-representation. For example, power of attorney and trusteeship are legally accepted methods of giving power to one or more persons to represent the interests, and speak on behalf of, a person who may be under-age or incapacitated in some way. A somewhat similar approach also exists in the creation by Governments of specific officials or offices to protect and/or represent the interests of particular groups of people, without specific authorisation from those groups. Such examples include the Office of Consumer Protection, the Office of Ombudsman, State Regulators such as Comreg and the Electricity Regulator, and Statutory Officials who ostensibly

represent the interests of users of certain public utilities and services (e.g., electricity, telecommunications).

At least one expert in environmental ethics has recommended the use of a "special representative" for the environment. This would require the setting up of a system such that when one or more parties involved in environmental mediation or negotiation perceive that a natural object (e.g., an ecosystem, habitat, group of living organisms, or a species) becomes endangered or is likely to be damaged, there should be a mechanism allowing a petition to be made for the appointment of a "guardian" or professional representative to speak for the endangered life forms, and to strengthen the pro-environment side in the resolution of the conflict. There are difficulties with such a proposal, but the opportunity should be taken to experiment with and refine the idea.

One difficulty to be overcome arises because of the frequently diverse and occasionally incompatible interests subsumed under the term of "environment". The environment is not static, unified or predictable; and any naturally occurring or human-caused environmental impact or change has the potential to benefit some species and/or habitats and to adversely affect others. In addition to protecting or conserving species and/or habitats, there is also a valid interest in protecting those features or characteristics of the environment or landscape which are considered essential or desirable for ethical or aesthetic reasons, or which are deemed to be a part of the cultural environment. Some of these features may be protected by tourism interests but, as we know from recent conflicts in Ireland, tourism-related activities and infrastructure have the potential to damage or even to destroy the environment on which tourism depends.

## 6. Conclusions

Equality of access to environmental justice is poor in Ireland, and successive changes in the Planning Acts have created additional barriers to meaningful participation by individuals and groups, including environmental NGOs, in the planning process. This tendency is in conflict with the spirit and articles of the Aarhus Convention, which has been incorporated into European legislation, and which applies to all Member States. Irish planning and environmental law and legal practice therefore appears to be on a collision course with the Aarhus Convention and there is a very strong case that Ireland has failed to meet its access to justice obligations under Article 10a of the EIA Directive. It is also very likely that the Planning and Development (Strategic Infrastructure) Act, 2006, is contrary to the principles of natural justice and to the State's obligations under the Aarhus Convention and under Article 10a of the EIA Directive.

State agencies and local authorities perceive their roles as promoters of physical development rather than custodians of the environment, landscape or cultural heritage; and the conflict between these roles generally results in the continuing incremental loss of environmental features or qualities. These agencies are also subject to significant interference by the political elite and by

developers, to an extent far greater than the influence wielded by environmental NGOs or by groups of citizens.

In addition to making changes in the planning and environmental legislation in order to remedy these serious issues, we would recommend that a fully independent Board (an "Independent Environmental and Planning Assistance Board") should be established, which would have the power to financially assist environmental NGOs, local groups and individuals to participate in the planning process, and to make written submissions to planning authorities, An Bord Pleanála and the Environmental Protection Agency. This would include giving financial support for professional representation (legal and technical) at oral hearings, and for making written submissions.

We would also recommend giving easier and less costly access to the Courts for Judicial Review and other legal proceedings on environmental and planning issues, especially where public rights, environmental rights and the common good is concerned; and it is essential that some means should be found to underwrite or grant-aid the legal costs involved. Whether this should be done by an expansion and improvement of the Attorney General's Scheme, or though the proposed Environmental and Planning Assistance Board is a matter for further debate; but, in any event, a decision is urgently needed.

We would also recommend that more consideration should be given to the role of environmental or public policy mediation in the resolution of disputes about environmental, planning or resource management issues. Mediation has the potential to resolve disputes in the most environmentally optimum way, to the reasonable satisfaction of all parties, and at a cost which is more equitable and much less than the cost of High Court proceedings. However, in order to make mediation a workable approach, a system of financing the mediation team is needed, and there is no provision for this type of financial support in Ireland. We would suggest that this is an issue which should be examined urgently, as the "win-win" solutions reached though mediation can be much more beneficial for the common good and for sustainability, than the results of the adversarial process.

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