

To the President and Members of the General Court
of the European Union

Application for Annulment
under Article 263 of the Treaty on the Functioning of the European Union

- (1) **ClientEarth**
(2) **Transport & Environment**
(3) **European Environmental Bureau**
(4) **BirdLife International**

Applicants

v.

European Commission

Defendant

Date of Lodgment:

8 March 2010

Addressee:

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Preliminary Information

Representation by Lawyers

Organisation Representing the Applicants: ClientEarth

Names of Participating Lawyers/Agents: Stephen Hockman QC, Barrister of England & Wales
James Thornton, Solicitor of England & Wales
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Tim Grabiell, Staff Lawyer
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In accordance with Article 44(3) of the Rules of Procedure of the European Communities of 2 May 1991, as amended, the lawyer representing ClientEarth, Transport & Environment, European Environmental Bureau and BirdLife International is Stephen Hockman QC, member of the General Council of the Bar of England and Wales, having his offices at 6 Pump Court, Temple EC4Y 7AR, London, United Kingdom, and whose certificate of authorisation to practise before the Court is included with this application.

For purposes of these proceedings, in accordance with Article 44(2) of the Rules of Procedure of the European Communities of 2 May 1991, as amended, Applicants agree to accept service through their designated agents for service of process via electronic mail.

Designate Agents for Service of Process: James Thornton, jthornton@clientearth.org
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Information on Applicants

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In accordance with Article 44(5) of the Rules of Procedure of the European Communities of 2 May 1991, as amended, the required proof of existence in law for ClientEarth, as a legal person, and proof of the authority granted to the applicant's lawyers is included with this application.

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In accordance with Article 44(5) of the Rules of Procedure of the European Communities of 2 May 1991, as amended, the required proof of existence in law for Transport & Environment, as a legal person, and proof of the authority granted to the applicant's lawyers is included with this application.

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In accordance with Article 44(5) of the Rules of Procedure of the European Communities of 2 May 1991, as amended, the required proof of existence in law for European Environmental Bureau, as a legal person, and proof of the authority granted to the applicant's lawyers is included with this application.

Name of Applicant Organisation: BirdLife International
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In accordance with Article 44(5) of the Rules of Procedure of the European Communities of 2 May 1991, as amended, the required proof of existence in law for BirdLife International, as a legal person, and proof of the authority granted to the applicant's lawyers is included with this application.

Information on Defendant

Name of Defendant: European Commission

Introduction

1. At issue is the future regulation of biofuels in Europe. The Commission is withholding time-sensitive and critical environmental information necessary for meaningful public participation in biofuel policy-making. In the process, it is setting a dangerous precedent that European Union (EU) institutions may delay the release of documents until after a policy decision has been made, striking at the heart of democracy. With this case, ClientEarth, Transport & Environment, European Environmental Bureau, and BirdLife International (collectively, the “Applicants”) seek to uphold their rights to access Commission documents.
2. The Community legislature adopted Directive 2009/28/EC, also known as the Renewable Energy Directive, requiring Member States to use renewable energy sources to meet 10% of their transport needs by 2020. This target will be met in large part through the increased use of biofuels. A well-known consequence of biofuels production is the conversion of forests and other natural areas into cropland to replace croplands lost to biofuels production — a phenomenon called indirect land-use change. The destruction of these natural areas releases greenhouse gases. When indirect land-use change is properly taken into account, certain biofuels are less-effective at reducing greenhouse-gas emissions than envisioned and, at times, worse than conventional fossil fuels. In addition to these climate consequences, indirect land-use change holds implications for biodiversity and forest-dependent communities. These are matters of significant public interest, considered “common concerns of humankind” in treaties signed and approved by the European Community.¹
3. When biofuel consumption is increased due to public policy, a demand for biofuels is created where little previously existed – inventing an artificial market worth billions. With such a policy comes the responsibility to ensure its environmental objectives are achieved. In recognition of the threat of indirect land-use change to climate objectives, legislators included language in Directive 2009/28/EC that directed the Commission to produce a report analysing the indirect land-use change impacts of biofuels and, if appropriate, to introduce an accompanying legislative proposal “based on the best scientific evidence,

¹ United Nations Framework Convention on Climate Change (New York, 9 May 1992), Recital 1; Convention on Biological Diversity (Rio de Janeiro, 5 June 1992), Recital 3.

containing a concrete methodology for emissions from carbon-stock changes caused by indirect land-use changes.”²

4. In order to obtain information necessary for their well-informed and meaningful participation in biofuels policy-making, on 15 October 2009, the Applicants requested documents related to biofuels modelling and relevant correspondence, amongst other documents. On 9 February 2010, after several delays and denials, the Commission rejected Applicants’ request. This rejection came 117 days after the original application. The Applicants were informed by the Commission of their right to initiate court proceedings before the General Court.
5. The Applicants therefore apply to the General Court to annul the decision by the Commission to unlawfully refuse access to the requested documents. In withholding these documents, the Commission committed several violations of fundamental EU laws designed to ensure the transparency, legitimacy, effectiveness and accountability of EU institutions: (i) Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (hereinafter the “Public Access Regulation”), and (ii) Regulation (EC) No 1367/2006 of the European Parliament 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 Community institutions and bodies (hereinafter the “Aarhus Regulation”).
6. The impacts of EU biofuels policy and associated indirect land-use changes will be felt for generations to come. By depriving the public access to critical environmental information at this key juncture, the Commission is precluding meaningful public participation in environmental decision-making and upsetting the principles of transparency and openness upon which the EU was founded.

Parties to the Application

7. ClientEarth is a non-profit organisation dedicated to safeguarding the planet—its flora, fauna, ecosystems and people—for the benefit of current and future generations. Its mission

² Directive 2009/28/EC, Article 19(6).

is to usher in a new era of environmental protection in Europe and beyond, pioneering innovative ways to protect the environment through the power of law. With offices in London, Brussels and Paris, ClientEarth provides legal and technical capacity to the environmental movement. Its activities focus on transformational changes to the European legal and legislative landscape, including increasing citizens' access to justice, advocating for effective environmental legislation with binding and enforceable provisions, bringing transparency to European policy-making, and empowering non-governmental organizations.

8. Transport & Environment is an independent not-for-profit organisation whose mission is to promote transport policy based on science and the principles of sustainable development to both minimise the use of energy and land—and associated impacts on the environment and health—while maximising safety and guaranteeing sufficient access to transportation for all. The Brussels-based team focuses on areas where EU policy has the potential to achieve the greatest environmental benefits, including technical standards for vehicle fuel efficiency and pollutant emissions, environmental regulation of international transport such as aviation and shipping, European rules on infrastructure pricing, and environmental regulation of energy used in transport. Established in 1990, Transport & Environment represents over 50 organisations across Europe, mostly environmental groups and sustainable transport campaigners.
9. The European Environmental Bureau is a federation of more than 140 environmental citizens' organisations based in all EU Member States and most Accession Countries, as well as in neighbouring countries. These range from local and national groups to European and international organisations. The aim of the European Environmental Bureau is to protect and improve the environment of Europe and to enable the citizens of Europe to play their part in achieving that goal.
10. BirdLife International is a global partnership of conservation organizations that strives to conserve birds, their habitats and global biodiversity, working with people towards sustainability in the use of natural resources. BirdLife International partners operate in more than 100 countries and territories worldwide. BirdLife International is represented in 43 countries in Europe and is active in all EU Member States.

Factual Background

11. On 15 October 2009, Transport & Environment submitted an application to the Commission's Directorate-General for Agriculture and Rural Development (DG AGRI) requesting access to documents under the Public Access Regulation. The application detailed several documents for disclosure:

“Specifically, we would like to request all documentation (including terms of reference, proposals from researchers, correspondence from and to the Commission, minutes of working meetings, datafiles with inputs and results, draft, interim, and final reports etc.) related to the modelling of the impacts of indirect land-use change caused by increased biofuels production performed for the Commission by the IPTS Section of JRC, and by other consultants if applicable, as of 1 January 2009.”³

The application was registered the same day. This application is hereinafter referred to as the “15 October 2009 Application” and is attached hereto as Annex A.1.

12. On 3 November 2009, DG AGRI responded granting itself an additional 15 working days to substantively comply under Article 7(3) of the Public Access Regulation. It cited “administrative reasons” for the delay.⁴ This document is hereinafter referred to as the “3 November 2009 Extension Email” and is attached hereto as Annex A.2.

13. During consideration of the application, neither the Commission nor any subdivision thereof claimed that the application was insufficiently precise, that clarification on the request was needed, or that the application was deficient in any other way. Further, neither the Commission nor any subdivision thereof sought to confer informally with a view toward finding an alternative solution.

14. On 27 November 2009, DG AGRI responded with an effective refusal of the request. Although technically a partial refusal, DG AGRI substantially denied the application by withholding all consequential information, releasing instead just four “terms of reference”

³ Annex A.1, p. 1.

⁴ Annex A.2, p. 2.

for studies on indirect land-use change.⁵ For all other categories of documents—proposals from researchers, correspondence to and from the Commission, minutes of working meetings, data-files with inputs and results, draft reports, interim reports, and final reports—DG AGRI denied the request outright, stating that those documents were covered by an exception:

“I regret to inform you that the study requested, the correspondence concerning the work process and the minutes of the working meetings are covered by one of the exceptions provided for by the policy relating to access to documents and that they cannot be made available to you. The exception which applies to the documents you requested is the one mentioned in Article 4(3) of Regulation (EC) No 1049/2001. According to it, the institutions could refuse access to a document:

- drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure.

- containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned even after the decision has been taken if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure.

The studies are not yet finalized and it is our opinion that the public disclosure of all of the information that you requested (namely, proposals from researchers, correspondence, minutes of working meetings, data files and draft interim reports) on such a complex and sensitive issue currently under analysis and validation by the Commission is not appropriate.

⁵ Annex A.3, p. 5.

However, on the question of the modelling of the potential impacts of indirect land use change caused by increased biofuel production, the Commission will make studies public once the work has been completed.”⁶

This document is hereinafter referred to as the “27 November 2009 Refusal Letter” and is attached hereto as Annex A.3.

15. On 17 December 2009, Transport & Environment, this time joined without objection by ClientEarth, European Environmental Bureau, and Birdlife International, submitted a confirmatory application to the Secretary-General of the Commission, outlining in explicit terms the Commission’s legal obligations and requesting a reversal of DG AGRI’s action. The confirmatory application is hereinafter referred to as the “17 December 2009 Confirmatory Application” and is attached hereto as Annex A.4.
16. On 18 December 2009, the Commission informed the Applicants via electronic mail that their 17 December 2009 Confirmatory Application was registered. This document is hereinafter referred to as the “18 December 2009 Email” and is attached hereto as Annex A.5.
17. On 19 January 2010, the Commission responded to the Applicants’ 17 December 2009 Confirmatory Application, granting itself an additional 15 working days to comply under Article 8(2) of the Public Access Regulation. It cited “the complexity of the issue and the need to consult all the involved internal services” as the reasons for the delay.⁷ This document is hereinafter referred to as the “19 January 2010 Extension Letter” and is attached hereto as Annex A.6. The new deadline was 9 February 2010.
18. On 8 February 2010, the Commission informed the Applicants in a letter that it would be unable to disclose the documents within the statutorily prescribed time-limit. It cited as the reasons for its inability to comply the “numerous documents from several Directorates-General of the Commission and also from third parties” in addition to the need to perform an “analysis of these documents.”⁸ It also expressed an interest, for the first time, in finding a

⁶ Annex A.3, p. 6.

⁷ Annex A.6, p. 47.

⁸ Annex A.7, p. 50.

“fair solution.”⁹ The document is hereinafter referred to as the “8 February 2010 Letter” and is attached hereto as Annex A.7.

19. The Applicants responded on the same day. In their reply, the Applicants made clear that 116 days had elapsed since the original request. The Applicants also stated that although they would try to work with the Commission, a failure to produce the documents within the prescribed time-limit would be considered a negative reply and entitle them to seek redress. In the interest of expediting the review process, the Applicants listed four specific documents for immediate disclosure without prejudice to their rights under the law. This document is hereinafter referred to as the “8 February 2010 Response Letter” and is attached hereto as Annex A.8.

20. On 9 February 2010 the Commission refused the confirmatory application, informing the Applicants of their right to initiate proceedings before the General Court or lodge a complaint with the European Ombudsman. The Commission stated that it had “identified around 200 documents which fall within the scope of your request and we have made progress with the concrete analysis of a number of them.”¹⁰ The Commission did not release any documents nor give any reasons for withholding them from public review. This document is hereinafter referred to as the “9 February 2010 Refusal Letter” and is attached hereto as Annex A.9. It is the contested measure upon which this application for annulment is based under Article 263 of the Treaty on the Functioning of the European Union.

21. The effect of this denial was to preclude access to any substantive documentation that would allow the public to engage meaningfully in the environmental decision-making process. In denying the request, the Commission acted unlawfully. This action seeks to remedy the Commission’s unlawful refusal to make those documents available to the public.

22. Following those unlawful acts, on 22 February 2010, the Commission informed the Applicants of its decision to release 59 documents and subsequently provided access to those documents. This document is hereinafter referred to as the “22 February 2010 Partial Release Letter” and is attached hereto as Annex A.10.

⁹ Annex A.7, p. 50.

¹⁰ Annex A.9, p. 55.

23. On 22 February 2010, the Applicants agreed to the form of receipt of those 59 documents, inquiring about the remaining documents and ensuring that no redaction occurred. The document is hereinafter referred to as the “22 February 2010 Email” and is attached hereto as Annex A.11.
24. On 24 February 2010, the Commission responded that it was “still in the process of analysing the remaining documents falling under the scope of your request” and that it would send one or more complementary replies regarding disclosure of these remaining documents separately.¹¹ The document is hereinafter referred to as the “24 February 2010 Email” and is attached hereto as Annex A.12.
25. The Commission’s belated release of certain documents is not sufficient to remedy the unlawful act committed by the Commission in failing to release those 59 documents by 9 February 2010. In addition, the Commission has informed the Applicants that it has identified approximately 141 additional documents that have not been released, although it is unclear as to the precise number¹² and whether it includes “communications from other Directorate-Generals regarding the request.”¹³ At the time of lodging of this application, those documents have not been released nor have lawful justifications for the failure to do so been forthcoming.
26. The Commission’s failure to comply with the requirements of the Public Access Regulation on a timely basis is consistent with a pattern of disregarding its duty to respond promptly and lawfully to applications for access to documents. This failure is particularly egregious in instances in which an applicant, as here, seeks timely access to environmental information in order to participate effectively in the environmental policy-making process. To withhold disclosable environmental information through unjustified delays during key junctures of the decision-making process renders the notion of public participation in environmental policy-making meaningless.
27. The Commission’s pattern of disregarding its duty to respond promptly and lawfully to requests for access to documents has been documented by the European Ombudsman. In a 2008 decision, the Ombudsman found excessive and unjustified delays in the Commission’s

¹¹ Annex A.12, p. 61.

¹² Compare Annex 10, p. 56 with Annex 12, p. 61.

¹³ Annex 4, p. 43.

handling of the complainant's request for access to documents, noting "it is clear that the tight deadlines foreseen in Regulation 1049/2001 are meant to ensure that the right of access is fully respected. Any failure to respect these deadlines thus constitutes an instance of maladministration."¹⁴ Moreover, the Ombudsman referenced critical remarks, made in the context of a previous case concerning similar circumstances, about the Commission's apparent pattern of failing to promptly register applications upon receipt, to inform applicants of an extension for the time-limit to reply before it expires, and to provide detailed explanations as to the reasons for extending the time-limit.¹⁵

28. On 4 March 2010, the Ombudsman published a *Special Report from the European Ombudsman to the European Parliament* highlighting unjustified delays on the part of the Commission in its response to an application for access to documents related to environmental policy decision-making that continued even after the Ombudsman's intervention.¹⁶ The draft recommendation concluded that the Commission had wrongly refused access to documents resulting in another "instance of maladministration."¹⁷ On the basis of Article 228 of the Treaty on the Functioning of the European Union, the Commission was required to respond to the Ombudsman's draft recommendation with a detailed opinion within three months. The Commission delayed for 15 months.¹⁸ In the *Special Report*, the Ombudsman emphasised that:

"[T]he Commission's attitude is detrimental not only to inter-institutional dialogue, but also to the public image of the EU.... The Commission's uncooperative attitude... risks eroding citizens' trust in the Commission and undermining the capacity of the European Ombudsman and the European Parliament adequately and effectively to supervise the Commission. As such, it runs counter to the very principle of the rule of law, on which the Union is [] founded."¹⁹

¹⁴ *Decision of the European Ombudsman closing the inquiry on complaint 1010/2008/(AL)DK against the European Commission*, paragraphs 26, 32-33.

¹⁵ *Ibid.* (citing remarks concerning complaint 3697/2006/PB).

¹⁶ See *Special report from the European Ombudsman to the European Parliament concerning lack of cooperation by the European Commission in complaint 676/2008/RT*.

¹⁷ *Ibid.*, paragraph 20.

¹⁸ *Ibid.*, paragraph 38 (further noting that, as of the date of the publication of the Special Report —over three years since the initial application —the Commission had still not fulfilled its duties in relation to the applicant's request for documents).

¹⁹ *Ibid.*, paragraph 39 (citing Article 2 TEU).

29. The Commission's maladministration in this case is clear. Any release of the remaining documents or additional reasons for refusal offered by the Commission after 9 February 2010 is not sufficient to remedy the unlawful acts and unjustified delays committed by the Commission. The Commission cannot remedy lost time and missed public-participation opportunities on these important issues. But the Court can compel the Commission to release all requested documents identified in the course of the Commission's review of 15 October 2009 Application and the 17 December 2009 Confirmatory Application, in addition to all documents generated during the consideration thereof, without delay or redaction. This is what the law requires.

Legal Background

30. The Public Access Regulation establishes the right of public access to EU documents. It ushered in a new era of accessibility and legitimacy to Community institutions, codifying the principles of openness, transparency and democracy to promote legitimacy, accountability, and effectiveness in EU decision-making. It also reaffirmed the right of public access to documents.²⁰

31. The Aarhus Regulation gives fuller effect to the public's right to environmental information when in the possession of EU institutions. The Aarhus Regulation was adopted five years after the Public Access Regulation, reaffirming and strengthening these principles under its first pillar, "access to environmental information."²¹ The right to access environmental information also serves as an essential condition precedent to give full effect to the Aarhus Regulation's second pillar, "public participation in decision-making."²²

32. The Public Access Regulation's two-stage administrative procedure is designed to "to ensure the widest possible access to documents," "to establish rules ensuring the easiest possible exercise of this right," and "to promote good administrative practice on access to documents."²³ The prescribed time-limits assist in "giv[ing] the fullest possible effect to the right of public access to documents."²⁴ In order to ensure the "right of access is fully

²⁰ See Regulation (EC) No 1049/2001, Recitals 1-4.

²¹ Regulation (EC) No 1367/2006, Recital 5 and Article 1.

²² Regulation (EC) No 1367/2006, Recital 5 and Article 9.

²³ Regulation (EC) No 1049/2001, Article 1(a)-(c).

²⁴ Regulation (EC) No 1049/2001, Recital 4.

respected,” the Public Access Regulation also provides the possibility of court proceedings or complaints to the Ombudsman.²⁵

33. The foundation of the two-stage administrative procedure is a presumption overwhelmingly in favour of disclosure: “[i]n principle, all documents of the institutions should be accessible to the public.”²⁶ With respect to documents containing environmental information, as here, the Aarhus Regulation essentially “guarantee[s] the right of public access to environmental information received or produced by Community institutions or bodies and held by them.”²⁷
34. The first stage of the two-stage administrative procedure begins when an application is “made in any written form.”²⁸ In the instance of a request for access to Commission documents, as here, the application may be submitted to any relevant department, Directorate-General, or the Secretary-General.²⁹
35. The Public Access Regulation requires that the application “be handled promptly.”³⁰ Within 15 working days, the institution is required to “either grant access to the document requested... or, *in a written reply*, state the reasons for the total or partial refusal and inform the applicant of his or her right to make a confirmatory application.”³¹ The reasons stated in the written reply will serve as the basis for an applicant later seeking reconsideration.³²
36. Only in “exceptional cases” may the time-limit be extended.³³ A refusal to disclose a document or a failure to reply within the prescribed time-limit entitles the applicant to submit a confirmatory application.³⁴ This is in recognition of the time-sensitive nature of most document requests, especially those containing environmental information, and represents the balance struck by the Community legislature between administrative review and timely disclosure.

²⁵ Regulation (EC) No 1049/2001, Recital 13.

²⁶ Regulation (EC) No 1049/2001, Recital 11.

²⁷ Regulation (EC) No 1367/2006, Article 1(1)(a).

²⁸ Regulation (EC) No 1049/2001, Article 6(1).

²⁹ Commission Decision 2001/937/EC, Annex, Article 2.

³⁰ Regulation (EC) No 1049/2001, Article 7(1).

³¹ Regulation (EC) No 1049/2001, Article 7(1)(emphasis added).

³² *See, e.g.*, Regulation (EC) No 1049/2001, Articles 7(2) and 8(1).

³³ Regulation (EC) No 1049/2001, Article 7(3).

³⁴ Regulation (EC) No 1049/2001, Article 7(2) and (4).

37. The second stage of the two-stage administrative procedure begins when a confirmatory application is submitted requesting reconsideration of the refusal. In the instance of a request for access to Commission documents, as here, the confirmatory application should be submitted to the Secretary-General.³⁵
38. The Public Access Regulation requires that the confirmatory application “be handled promptly.”³⁶ Within 15 working days, the institution is required to “either grant access to the document requested... or, *in a written reply*, state the reasons for the total or partial refusal.”³⁷ Only in “exceptional cases” may the time-limit be extended.³⁸ A refusal to disclose or failure to reply entitles the applicant to certain remedies, “namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman.”³⁹
39. The institution must state its reasons for refusal “in a written reply” *during* the two-stage administrative procedure, not after. This serves two primary purposes.
40. First, it provides the basis upon which applicants may determine whether to challenge the refusal, providing them the ability to weigh the presumption in favour of disclosure against the reasons for refusal to determine whether their rights have been violated or a claim to exception is vitiated by error. In *Kingdom of Sweden v. Commission of the European Communities*, the Court found that the “information will allow the person who has asked for the document to understand the origin and grounds of the refusal of his request and the competent court to exercise, if need be, its power of review.”⁴⁰ In *WWF European Policy Programme v. Council of the European Union*, the Court found that this obligation to state the reasons for denial is “to provide the person concerned with sufficient information to make it possible to determine whether the decision is well founded or whether it is vitiated by an error which may permit its validity to be contested.”⁴¹ It also makes common sense. Stating the reasons in written form provides the applicant with the ability to secure counsel to review the legal merits of the refusal and, if necessary, initiate court proceedings or make a complaint to the Ombudsman, as circumstances may require.

³⁵ Commission Decision 2001/937/EC, Annex, Article 4.

³⁶ Regulation (EC) No 1049/2001, Article 8(1).

³⁷ Regulation (EC) No 1049/2001, Article 8(1)(emphasis added).

³⁸ Regulation (EC) No 1049/2001, Article 8(2).

³⁹ Regulation (EC) No 1049/2001, Article 8(1).

⁴⁰ Case C-64/05 P, *Kingdom of Sweden v. Commission of the European Communities* (2007), paragraph 89.

⁴¹ Case T-264/04, *WWF European Policy Programme v. Council of the European Union* (2007), paragraph 36, *citing* Case T-187/03, *Scippacervola v Commission* (2005), paragraph 66.

41. Second, it creates an administrative record upon which judicial review is based. In *WWF European Policy Programme v. Council of the European Union*, the Court stated that “settled case-law provides that the purpose of the obligation on the institution to state the reasons for its decision to refuse access to a document is... to enable the Community judicature to review the lawfulness of the decision.”⁴² In order to ensure the most efficient use of limited judicial resources, the institution must raise the reasons for withholding the document in written form during the course of the two-stage administrative procedure, or otherwise waive its ability to raise them later. Reasons offered orally or after the two-stage administrative procedure are not within the scope of judicial review.
42. The institution must give detailed reasons for the refusal. In *Kingdom of Sweden v. Commission of the European Communities and Others*, the Court found that “as is apparent in particular from Articles 7 and 8 of the regulation, the institution is itself obliged to give reasons for a decision to refuse a request for access to a document.”⁴³ In *Kingdom of Sweden and Maurizio Turco v. Council of the European Union*, the Court found that “it is incumbent on the institution concerned to give a detailed statement of reasons for such a refusal.”⁴⁴
43. The institution must also carry out a concrete, individual assessment of the content of the documents referred to in the request.⁴⁵ Courts have found that “where an institution receives a request for access under [the Public Access Regulation] it is required, in principle, to carry out a concrete, individual assessment of the content of the documents referred to in the request.”⁴⁶ This is made apparent in “that all exceptions mentioned in Article 4(1) to (3) are specified as being applicable to ‘a document.’”⁴⁷ On this point, in *Verein für Konsumenteninformation v. Commission of the European Communities*, the court rejected as insufficient an assessment of documents by reference to categories rather than on the basis of the actual information contained in those documents, “since the examination required of an institution must enable it to assess specifically whether an exception invoked actually

⁴² Case T-264/04, *WWF European Policy Programme v. Council of the European Union* (2007), paragraph 36.

⁴³ Case C-64/05 P, *Kingdom of Sweden v. Commission of the European Communities and Others* (2007), paragraph 89.

⁴⁴ Joined cases C-39/05 P and C-52/05 P, *Kingdom of Sweden and Maurizio Turco v. Council of the European Union* (2008), paragraph 69.

⁴⁵ Case T-2/03, *Verein für Konsumenteninformation v. Commission of the European Communities* (2005), paragraphs 69-74; see also Case T-188/98 *Kuijjer v. Council of the European Union* (2000), paragraph 38; Case T-14/98, *Hautala v. Council of the European Communities* (1999), paragraph 67.

⁴⁶ Case T-2/03, *Verein für Konsumenteninformation v. Commission of the European Communities* (2005), paragraphs 69-74; see also Case T-188/98 *Kuijjer v. Council of the European Union* (2000), paragraph 38; Case T-14/98, *Hautala v. Council of the European Communities* (1999), paragraph 67.

⁴⁷ See Case T-2/03, *Verein für Konsumenteninformation v. Commission of the European Communities* (2005), paragraph 70.

applies to all the information contained in those documents.”⁴⁸ A concrete, individual assessment is also needed to ensure compliance with other provisions of the Public Access Regulation, including whether redaction is appropriate under Article 4(6) and the period of time protection is justified under Article 4(7).⁴⁹ The purpose of this assessment must be forwarded to the applicant to serve as the basis for determining the applicability of the exception with respect to the document in question.⁵⁰

44. In order to be withheld, a document falling under the purview of the Public Access Regulation must fall under one of the exceptions provided in the regulation. The only exception at issue here is found in Article 4(3) of the Public Access Regulation, which allows for denial when disclosure would seriously undermine the institution’s decision-making process:

“Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure.”⁵¹

45. Article 4(3) establishes the obligation to disclose the basis for the denial sufficient to meet the “seriously undermine” standard.⁵² The institution must disclose a document that “relates to a matter where a decision has not been taken” or contains “opinions for internal use as

⁴⁸ Case T-2/03, *Verein für Konsumenteninformation v. Commission of the European Communities* (2005), paragraph 73, citing Case T-123/99, *JT’s Corporation v. Commission of the European Communities* (2000), paragraph 46.

⁴⁹ See Case T-2/03, *Verein für Konsumenteninformation v. Commission of the European Communities* (2005), paragraph 73; see also Regulation (EC) No 1049/2001, Article 4(6), Article 4(7), and Article 11(1).

⁵⁰ See, e.g., Case T-2/03, *Verein für Konsumenteninformation v. Commission of the European Communities* (2005), paragraphs 69-74; Case T-188/98 *Kuijer v. Council of the European Union* (2000), paragraph 38; Case T-14/98, *Hautala v. Council of the European Communities* (1999), paragraph 67.

⁵¹ Regulation (EC) No 1049/2001, Article 4(3).

⁵² See, e.g., Case T-264/04 *WWF European Policy Programme v. Council of the European Union* (2007), paragraph 36, citing Case T-187/03 *Scippacercola v. Commission* (2005), paragraph 66; see also Case C-64/05 P, *Kingdom of Sweden v. Commission of the European Communities and Others* (2007).

part of deliberations and preliminary consultations” unless it would seriously undermine its decision-making process.⁵³ The courts have found that the exception “must be interpreted and applied strictly.”⁵⁴

46. The word “seriously” indicates a strong presumption toward disclosure, in line with the Public Access Regulation’s stated purpose in the preamble to “give the fullest possible effect to the right of public access to documents.”⁵⁵ This has been taken to mean that “all documents of the institutions should be accessible to the public,” thereby placing the burden on the institution.⁵⁶ The recitals further clarify that the exception only entitles institutions “to protect their internal consultations and deliberations where *necessary* to safeguard their ability to carry out their tasks.”⁵⁷ As a result, under the Public Access Regulation, only in very rare instances is denial warranted under this exception – where it would seriously undermine the decision-making and withholding information is necessary to prevent that.

47. The Aarhus Regulation provides a special rule of interpretation when reviewing the grounds for refusal for environmental information. It states that, when claiming the Article 4(3) exception for environmental information, “the grounds for refusal... should be interpreted in a restrictive way,” particularly when the “information requested relates to emissions in the environment,” such as greenhouse gasses:

“The grounds for refusal as regards access to environmental information should be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions in the environment.”⁵⁸

48. The term “environmental information” is expansively defined, “encompass[ing] information in any form on the state of the environment.”⁵⁹ It includes “reports on the implementation of environmental legislation,” “the state of the elements of the environment... and the interaction among these elements,” and “measures (including administrative measures)... and

⁵³ Regulation (EC) No 1049/2001, Article 4(3).

⁵⁴ Case C-64/05 P *Kingdom of Sweden v. Commission of the European Communities and Others* (2007), paragraph 66; see Joined cases C-39/05 P and C-52/05 P, *Kingdom of Sweden and Maurizio Turco v. Council of the European Union* (2008), paragraph 36.

⁵⁵ Regulation (EC) No 1049/2001, Recital 4.

⁵⁶ Regulation (EC) No 1049/2001, Recital 11.

⁵⁷ Regulation (EC) No 1049/2001, Recital 11 (emphasis added).

⁵⁸ See Regulation (EC) No 1367/2006, Recital 15 and Article 6(1).

⁵⁹ Regulation (EC) No 1367/2006, Recital 8.

activities affecting or likely to affect [the environment] as well as measures or activities designed to protect those elements.”⁶⁰

49. In addition to the narrowness of the Article 4(3) exception and the restrictive interpretation thereof, the Public Access Regulation requires even wider access where, as here, the documents relate to the Commission’s delegated legislative capacity. Under Recital 6, the documents should be made accessible to the greatest possible extent in matters related to legislative activities:

“Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under the delegated powers, while at the same time preserving the effectiveness of the institution’s decision-making process. Such documents should be made directly accessible to the greatest possible extent.”⁶¹

This wider access has been expansively interpreted. For example, in *Kingdom of Sweden and Maurizio Turco v. Council of the European Union*, the Court rejected the Council’s argument that disclosure of legal documents advising the Council on legislative matters would undermine the Council’s decision-making.⁶² Citing Recital 6, the Court found that, on the contrary, openness contributed to “strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act,” adding further that the “possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights.”⁶³ That the Court would not protect legal documents containing legal advice given to the Council—a category of documents that has traditionally enjoyed far more privilege under the law than inter-departmental communications or scientific and technical findings—underscores the particularly restrictive application of any exception when serving in a legislative capacity.

50. The Public Access Regulation also contains an exception to the Article 4(3) exception. Assuming a document falls under the narrow category of documents whose disclosure

⁶⁰ Regulation (EC) No 1367/2006, Article 2(1)(d)(i), (iii), and (iv).

⁶¹ Public Access Regulation, Recital 6.

⁶² Joined cases C-39/05 P and C-52/05 P, *Kingdom of Sweden and Maurizio Turco v. Council of the European Union* (2008), paragraph 46.

⁶³ Joined cases C-39/05 P and C-52/05 P, *Kingdom of Sweden and Maurizio Turco v. Council of the European Union* (2008), paragraph 46.

would seriously undermine the decision-making process and when withholding it is necessary to carry out the Commission's tasks—two conditions that are narrow to begin with and then restrictively interpreted thereafter—an “overriding public interest in disclosure” will nevertheless compel its release.⁶⁴ In short, the burden on an institution claiming the Article 4(3) exception with respect to environmental information is significant.

51. The review of the basis to a claim to exception is limited to the written record generated during the course of the two-stage administrative procedure. Any reason for the total or partial refusal offered after the prescribed time-limit is not subject to judicial review. A document may only be withheld if the grounds for refusal are established by the Commission in written form. An overriding public interest in disclosure is sufficient to defeat an otherwise valid claim to an Article 4(3) exception.⁶⁵
52. In its performance and response to the request for access to documents, the Commission committed several unlawful acts that compel reconsideration and, in the final analysis, disclosure of the documents. These violations are addressed in turn and the Applicants hereby incorporate by reference all of the foregoing paragraphs as though fully set forth therein.

First Plea in Law – Ground for Annulment

Violation of Article 8 of Regulation (EC) No 1049/2001

Failure to Provide Timely Disclosure of Documents or Reasons for Withholding

53. Under Article 8(1) of the Public Access Regulation, the Commission is required to handle a confirmatory application promptly. Within 15 working days from the registration of the confirmatory application, the Commission shall either grant access to the documents requested and provide access in accordance with Article 10 of the Public Access Regulation, or, in a written reply, state the reasons for the total or partial refusal. Only in exceptional cases may the time limit be extended an additional 15 working days.⁶⁶

⁶⁴ Regulation (EC) No 1049/2001, Article 4(3).

⁶⁵ Regulation (EC) No 1049/2001, Article 4(3).

⁶⁶ Regulation (EC) No 1049/2001, Article 8(2).

54. On 19 January 2010, the Commission requested an additional 15 working days to respond to the confirmatory application. The time-limit to provide either access to the documents or a written reply stating the reasons for the refusal was extended to 9 February 2010.⁶⁷
55. On 9 February 2010, the Commission failed to provide access to the documents or an adequate written reply stating the reasons for the refusal.⁶⁸
56. Any efforts to disclose documents or provide a written reply with the reasons for refusal after expiry of the prescribed time-limit are inadequate to address this violation. To ensure the timely access to documents, detailed reasons for withholding a document must be offered within the prescribed time-limit.⁶⁹
57. The Commission's failure to provide the documents in a timely manner in accordance with the prescribed time-limits deprives the Applicants of the ability to meaningfully engage in the decision-making process, including, *inter alia*, participation in the development of policy and legislative proposals, and securing third-party and peer review of the technical findings of biofuels modelling on the impacts of indirect land-use change on climate policies.⁷⁰
58. The Commission's actions in failing to provide access to the requested documents are in violation of the statutory time-limit set out in Article 8 of the Public Access Regulation.

Second Plea in Law – Ground for Annulment

Violation of Article 7(1) of Regulation (EC) No 1049/2001

Violation of Article 8(1) of Regulation (EC) No 1049/2001

Failure to Provide Detailed Reasons for Withholding Each Document

59. Under Article 7(1) and Article 8(1) of the Public Access Regulation, the Commission must “state the reasons for total or partial denial.” The courts have interpreted this to require detailed reasons for the denial of each specific document.⁷¹

⁶⁷ Annex A.6, p. 47.

⁶⁸ Annex A.9, pp. 54-55.

⁶⁹ See, e.g., Regulation (EC) No 1049/2001, Article 8.

⁷⁰ See, e.g., Regulation (EC) 1049/2001, Recital 2.

⁷¹ See Case C-64/05 P, *Kingdom of Sweden v. Commission of the European Communities and Others* (2007), paragraph 69 (“it is incumbent on the institution concerned to give a detailed statement of reasons for such refusal”); Case T-264/04

60. The detailed reasons justifying a claim to exception for each requested document must be provided within the statutorily prescribed time-limit set out in Article 7(1), Article 7(3), Article 8(1), and Article 8(2) of the Public Access Regulation. Justifications offered after the prescribed time-limit have no legal relevance.
61. In its 27 November 2009 Refusal Letter, the Commission offered a categorical explanation for withholding around 200 documents that were identified as responsive to the request, stating “[t]he studies are not yet finalized and it is our opinion that the public disclosure of all of the information that you request... on such a complex and sensitive issue currently under analysis and validation by the Commission is not appropriate.”⁷²
62. In their 17 December 2009 Confirmatory Application, the Applicants challenged this explanation as being inadequate as a matter of law for failing to provide a “detailed statement with reasons for withholding any specific requested document.”⁷³
63. In its 9 February 2010 Refusal Letter rejecting the 17 December 2009 Confirmatory Application, the Commission offered no additional reasons for withholding any specific document. The Commission did claim to “have made progress with the concrete analysis of a number of [documents],” but failed to disclose the documents or provide the content of that analysis.
64. The Commission’s actions in failing to provide detailed reasons after a concrete analysis for each specific document for denying Applicant’s request are not in accordance with its lawful obligations. Therefore, the Commission is in violation of Article 7(1) and Article 8(1) of the Public Access Regulation.

WWF European Policy Programme v. Council of the European Union (2007), paragraph 36 (the obligation to state the reasons for denial is “to provide the person concerned with sufficient information to make it possible to determine whether the decision is well founded or whether it is vitiated by error which may permit its validity to be contested”), *citing* Case T-187/03, *Scippacervola v. Commission* (2005), paragraph 66.

⁷² Annex A.3, p. 6.

⁷³ Annex A.4, pp. 36-37.

Third Plea in Law – Ground for Annulment

Violation of Article 4 of Regulation (EC) No 1049/2001

Failure to Carry Out a Concrete, Individual Assessment of the Content of Each Document

65. Under Article 4 of the Public Access Regulation, the Commission must carry out a concrete, individual assessment of the content of the documents referred to in the request.⁷⁴
66. The concrete, individual assessment for each requested document must be performed within the statutorily prescribed time-limit set out in Article 7(1), Article 7(3), Article 8(1), and Article 8(2) of the Public Access Regulation. Assessment of documents by reference to categories rather than on the basis of the actual information contained in those documents is insufficient.⁷⁵
67. In its 27 November 2009 Refusal Letter rejecting the 15 October 2009 Application, the Commission assessed the requested documents by categories, not on the basis of the actual information contained therein, stating “[t]he studies are not yet finalized and it is our opinion that the public disclosure of all the information that you request (namely, proposals from researchers, correspondence, minutes of working meetings, data files and draft and interim reports) on such a complex and sensitive issue currently under analysis and validation by the Commission is not appropriate.”⁷⁶
68. In its 9 February 2010 Refusal Letter rejecting the 17 December 2009 Confirmatory Application, the Commission stated, despite two extensions and over 117 days to comply, that “we have not completed the analysis of the requested documents and are, therefore, not in a position to take a final decision on your application for access.”⁷⁷ The Commission did claim to “have made progress with the concrete analysis of a number of [documents],” but failed to disclose any documents or provide the content of that analysis.⁷⁸ Any concrete,

⁷⁴ See Regulation (EC) No 1049/2001, Article 4; Case T-2/03, *Verein für Konsumenteninformation v Commission of the European Communities* (2005), paragraphs 69-74; see also Case T-188/98 *Kuijer v. Council of the European Union* (2000), paragraph 38; Case T-14/98, *Hautala v. Council of the European Communities* (1999), paragraph 67.

⁷⁵ Case T-2/03, *Verein für Konsumenteninformation v. Commission of the European Communities* (2005), paragraph 73, citing Case T-123/99, *JT's Corporation v. Commission of the European Communities* (2000), paragraph 46.

⁷⁶ Annex A.3, p. 6.

⁷⁷ Annex A.9, p. 54.

⁷⁸ Annex A.9, p. 55.

individual assessment offered after that date to justify a claim to exception is without legal relevance.

69. The Commission's actions in failing to perform a concrete, individual assessment for each specific document are not in accordance with its lawful obligations. Therefore, the Commission is in violation of Article 4 of the Public Access Regulation.

Fourth Plea in Law – Ground for Annulment

Violation of Article 4(3) of Regulation (EC) No 1049/2001

Violation of Article 6(1) of Regulation (EC) No 1367/2006

Unlawful Application of the Article 4(3) Exception

70. Article 4(3) of the Public Access Regulation identifies two categories of documents that fall under its exception to the general principle that all documents of the institutions should be accessible to the public. The first category involves a document “drawn up by an institution, which relates to a matter where the decision has not been taken by the institution... if disclosure would seriously undermine the institution's decision-making process.”⁷⁹ The second category involves documents “containing opinions for internal use as part of deliberations and preliminary consultations within the institution... if disclosure would seriously undermine the institution's decision-making process.”⁸⁰ Any claim to an Article 4(3) exception is defeated if there is an “overriding public interest in disclosure.”⁸¹

71. Article 6(1) of the Aarhus Regulation provides that these “grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions in the environment.”⁸² As a result, not only is Article 4(3) narrow on its face, but subsequent legislation underscores that it is to be interpreted in a restrictive way when pertaining to information on the environment. The presumption is overwhelmingly in favour of disclosure.

⁷⁹ Regulation (EC) No 1049/2001, Article 4(3), Paragraph 1.

⁸⁰ Regulation (EC) No 1049/2001, Article 4(3), Paragraph 2.

⁸¹ Regulation (EC) No 1049/2001, Article 4(3).

⁸² *See also* Regulation (EC) No 1367/2006, Recital 15 (“the grounds of refusal as regards to environmental information should be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions in the environment”).

72. The Commission, by its own admission, acknowledges that “the subject matter of the request relates to emissions in the environment.”⁸³
73. In the 27 November 2009 Refusal Letter, the Commission made a blanket claim to the Article 4(3) exception for all the requested documents, stating that “[t]he studies are not yet finalized and it is our opinion that the public disclosure of all of the information that you requested... on such a complex and sensitive issue currently under analysis and validation by the Commission is not appropriate.”⁸⁴ The Commission also stated that “on the question of the modelling of the potential impacts of indirect land use change caused by increased biofuel production, the Commission will make studies public once the work has been completed.”⁸⁵
74. In their 17 December 2009 Confirmatory Application, the Applicants challenged the basis of the Commission’s claim to the Article 4(3) exception, citing several shortcomings that rendered the exception inadequate as a matter of law.⁸⁶
75. In the 9 February 2010 Refusal Letter, the Commission failed to disclose the documents within the prescribed time-limit or to offer further reasons to justify a claim to benefit from the Article 4(3) exception as interpreted and applied through Article 6(1) of the Aarhus Regulation. Nor is a detailed statement with reasons for withholding any specific requested document included in its 9 February 2010 Refusal Letter.⁸⁷
76. To the extent any statement in its 27 November 2009 Refusal Letter is proffered now as a justification for refusal under the Article 4(3) exception, those statements are immaterial.
77. First, the analysis was never performed for each specific document as required under Article 7(1) and Article 8(1) of the Public Access Regulation. The Commission admits this in its 9 February 2010 Refusal Letter, stating, in the context of failing to comply with the statutorily prescribed time-limit, that it is “carrying out a concrete analysis of all documents with a view to grant you the widest possible access.”⁸⁸ The Applicants take this to imply that the analysis

⁸³ Annex A.3, p. 5.

⁸⁴ Annex A.3, p. 6.

⁸⁵ Annex A.3, p. 6.

⁸⁶ Annex A.4, pp. 31-43.

⁸⁷ Annex A.9, pp. 54-55.

⁸⁸ Annex A.9, p. 55.

has not been fully performed, rendering any justification offered in the 27 November 2009 Refusal Letter inadequate as a matter of law. The Article 4(3) exception requires detailed reasons tailored to each specific document (or part document) to be withheld based on the content therein. That was not done.

78. Second, the only identifiable response upon which the Commission might rely merely opines that disclosure of the requested documents is generally “not appropriate” based on the nature of the issue (complex and sensitive) and its timing (under analysis and validation).⁸⁹ Reliance on this argument should be rejected. Simply reciting the nature and timing of the issue is insufficient to deprive the public its right to access the content of the documents. If the intention of the Community legislature had been to grant a blanket exception for documents related to issues that share this nature and timing (or to large groups of documents which may or may not contain within them a small amount of information qualifying for withholding), it would have done so through an explicit exception. Instead, the Aarhus Regulation provides for increased access to this very type of information.⁹⁰
79. In the alternative, the Commission found its own justification inadequate when it subsequently released 59 documents on 22 February 2010, despite originally claiming protection under the Article 4(3) exception.⁹¹ It should be estopped from claiming the contrary now. As a result, any reliance on the 27 November 2009 Refusal Letter is misplaced.
80. The Commission has not met the “seriously undermine” standard in the Article 4(3) exception to justify withholding the documents. The courts have found that this exception “must be interpreted and applied strictly.”⁹² This conforms to the stated purpose of the Public Access Regulation to “give the fullest possible effect to the right of public access to documents,” taken to mean that “all documents of the institutions should be accessible to the public.”⁹³ This exception may only be claimed “where necessary to safeguard [the institutions’] ability to carry out their tasks.”⁹⁴ The 9 February 2010 Refusal Letter makes no

⁸⁹ Annex A.3, p. 6.

⁹⁰ See, e.g., Regulation (EC) No 1367/2006, Recital 2 (providing adequate environmental information and effective opportunities for public participation in environmental decision-making), Recital 15 (grounds for refusal interpreted restrictively), Recital 17 (effective public participation must take place at early stage when all options are open), and Article 6 (restrictive interpretation of the Article 4(3) exception).

⁹¹ See Annexes A.10 and A.12.

⁹² See, e.g., Case C-64/05 P, *Kingdom of Sweden v. Commission of the European Communities and Others* (2007), paragraph 66; Joined cases C-39/05 P and C-52/05 P, *Kingdom of Sweden and Maurizio Turco v. Council of the European Union* (2008).

⁹³ Regulation (EC) No 1049/2001, Recitals 4 and 11.

⁹⁴ Regulation (EC) No 1049/2001, Recital 11.

effort to meet this burden to show that the disclosure would seriously undermine the Commission's decision-making process.

81. In addition, as noted above, Recital 6 of the Public Access Regulation further narrows Article 4(3) and the already restrictive interpretation thereof for documents related to the Commission's delegated legislative capacity:

“Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under the delegated powers, while at the same time preserving the effectiveness of the institution's decision-making process. Such documents should be made directly accessible to the greatest extent possible.”⁹⁵

82. The requested documents relate to the Commission's delegated legislative capacity. In Article 19(6) of the Renewable Energy Directive, the Commission is charged with submitting a report and, if appropriate, a legislative proposal:

“The Commission shall, by 31 December 2010, submit a report to the European Parliament and to the Council reviewing the impact of indirect land-use change on greenhouse gas emissions and addressing ways to minimise that impact. The report shall, if appropriate, be accompanied, by a proposal, based on the best available scientific evidence, containing a concrete methodology for emissions from carbon stock changes caused by indirect land-use changes, ensuring compliance with this Directive, in particular Article 17(2).”⁹⁶

Moreover, in the terms of reference for the “Administrative Arrangement between JRC and DG ENV on Indirect Land Use Change Emissions from Biofuels,” one of the few documents released, DG AGRI acknowledges this relationship to its delegated legislative capacity:

⁹⁵ See also Joined cases C-39/05 P and C-52/05 P, *Kingdom of Sweden and Maurizio Turco v. Council of the European Union* (2008), paragraph 46.

⁹⁶ Directive 2009/28/EC, Article 19(6).

“The Commission has recognised that careful consideration of this problem is needed, further to its proposal for a Directive on the promotion of Renewable Energy, which includes a greenhouse gas calculation methodology as part of the sustainability criteria. These criteria are currently under discussion in Council and the European Parliament for elaboration of a common text to be included in both the Renewable and Fuel Quality Directives.”⁹⁷

Because the report will form the scientific and technical basis for any accompanying legislative proposal, even wider access is compelled.⁹⁸

83. Article 4(3) of the Public Access Regulation also states that the exception is not applicable where, as here, there is “an overriding public interest in disclosure,” including, but not limited to, where the requested information relates to climate policies, emissions into the environment, protection of forests and the biodiversity, legislative matters, and scientific and technical analyses on impacts from EU policy targets.⁹⁹
84. Even assuming all other requirements were met, there is an overriding public interest in disclosure, as evidenced in detail in the 17 December 2009 Confirmatory Application.¹⁰⁰
85. The reasons proffered to justify a claim to the Article 4(3) exception are inadequate as a matter of law. Any reasons offered after 9 February 2010 are without legal relevance. Therefore, the Commission is in violation of Article 4(3) of the Public Access Regulation and Article 6(1) of the Aarhus Regulation.

⁹⁷ Annex A.3, p. 24.

⁹⁸ See also Annex A.3, pp. 8-9.

⁹⁹ See Joined cases C-39/05 P and C-52/05 P, *Kingdom of Sweden and Maurizio Turco v. Council of the European Union* (2008), paragraph 67 (the Court found that an overriding public interest is constituted by the fact that disclosure of documents “on legal questions arising when legislative initiatives are being debated increases the transparency and openness of the legislative process and strengthens the democratic right of European citizens to scrutinize the information which has formed the basis of a legislative act”).

¹⁰⁰ Annex A.4, pp. 41-43.

Fifth Plea in Law – Ground for Annulment

Violation of Article 4(6) of Regulation (EC) No 1049/2001

Failure to Redact Documents

86. Article 4(6) of the Public Access Regulation states that “only parts of the requested document that are covered by any of the exceptions” may be withheld while “the remaining parts of the document shall be released.”¹⁰¹

87. Upon a finding that documents with environmental information may be withheld, Article 4(6) requires the documents to be redacted, if possible, to allow their disclosure:

“It is clear from the wording itself of Article 4(6) of Regulation (EC) No 1049/2001 that an institution is required to consider whether it is appropriate to grant partial access to documents requested and to confine any refusal to information covered by the relevant exceptions. The institution must grant partial access if the aim pursued by that institution in refusing access to a document may be achieved where all that is required of the institution is to blank out the passages which might harm the public interest to be protected.”¹⁰²

88. To the extent that any part of a requested document is covered by any exceptions, the Commission failed to release the remaining parts within the statutorily prescribed time-limit set out in Article 7(1), Article 7(3), Article 8(1), and Article 8(2) of the Public Access Regulation.

89. The Commission’s failure to consider and perform redactions to remove only those portions of the documents that fall with the Article 4(3) exception is not in accordance with its obligations under the law. Any consideration or redaction performed after 9 February 2010 is without legal relevance. Therefore, the Commission is in violation of Article 4(6) of the Public Access Regulation.

¹⁰¹ Regulation (EC) No 1049/2001, Article 4(6).

¹⁰² Case T-264/04, *WWF European Policy Programme v. Council of the European Union* (2007), paragraph 36, citing Case C-353/99 P, *Council v. Hautala* (2001), paragraph 29.

Sixth Plea in Law – Ground for Annulment

Violation of Article 4(7) of Regulation (EC) No 1049/2001

Failure to Identify Period of Application of the Article 4(3) Exception

90. Article 4(7) of the Public Access Regulation states that “the exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document.”¹⁰³ This determination is, likewise, document and content specific.
91. To the extent any part of a requested document is covered by the Article 4(3) exception, the Commission failed to justify on the basis of the content of the document, and to disclose within the statutorily prescribed time-limit, the period during which protection under the Article 4(3) exception applies. Efforts to comply with Article 4(7) of the Public Access Regulation after 9 February 2010 are without legal relevance.
92. The Commission’s failure to consider and disclose the period of application of the Article 4(3) exception is not in accordance with law. Nor do the documents at issue and information therein justify protection, even temporarily, under Article 4(3) of the Public Access Regulation. Therefore, the Commission is in violation of Article 4(7) of the Public Access Regulation.

Form of Order Sought

For the reasons outlined above, Applicants respectfully request the Court to:

- a. Declare the Commission in violation of Regulation (EC) No 1049/2001 and Regulation (EC) No 1367/2006, namely:
 - (i) violation of Article 8 of Regulation (EC) No 1049/2001 for failure to disclose documents within the statutorily prescribed time-limit;

¹⁰³ Regulation (EC) No 1049/2001, Article 4(7).

- (ii) violation of Article 7(1) and Article 8(1) of Regulation (EC) No 1049/2001 for failure to provide detailed reasons for withholding the requested documents;
 - (iii) violation of Article 4 of Regulation (EC) No 1049/2001 for failure to perform concrete, individual assessments for the requested documents;
 - (iv) violation of Article 4(3) of Regulation (EC) No 1049/2001 and Article 6(1) of Regulation (EC) No 1367/2006 for unlawful application of the Article 4(3) exception;
 - (v) violation of Article 4(6) of Regulation (EC) No 1049/2001 for failure to redact documents to ensure release of disclosable information; and
 - (vi) violation of Article 4(7) of Regulation (EC) No 1049/2001 for failure to justify period of application of Article 4(3) exception;
- b. Declare that the reasons for refusal of a document under Article 4(3) of Regulation (EC) No 1049/2001 must be stated in a written reply during the prescribed time-limits of the two-stage administrative procedure, or be waived as claims to an exception or defences at law, and otherwise fall outside the scope of judicial review;
- c. Annul the Contested Decision of 9 February 2010, Ref. Ares(2010)70321 - 09/02/2010, by which the Commission declared its intention to withhold certain documents containing environmental information from the Applicants;
- d. Order the Commission to provide access to all requested documents identified in the course of its review of the 15 October 2009 Application, the 17 December 2009 Confirmatory Application, and all documents generated during the consideration thereof, without delay or redaction according to Article 10 of Regulation (EC) No 1049/2001;
- e. Order the Commission to pay Applicants' costs pursuant to Article 87 of the Rules of Procedure of the Court of First Instance, including the costs of any intervening parties.

Dated: 8th March 2010 Respectfully submitted,

CLIENTEARTH

By: 
Stephen Hockman QC

On behalf of the Applicants ClientEarth,
Transport & Environment, European
Environmental Bureau and BirdLife International