

Case Summary

Ref: 13189

Sector: Central Government

Investigation into a complaint against the former Department of the Environment

In April 2012 a complaint was made to the Ombudsman's office about the former Department of the Environment's (now the Department of Infrastructure) handling of unauthorised opencast mining. This was alleged to have occurred in the vicinity of the River Faughan where it meets the Mobuoy Road in the Limavady area. It was alleged that unauthorised activities had been ongoing in this area before and after 2000.

The Ombudsman's investigation report was completed in October 2017.

The investigation established that the Department had sought to regularise particular breaches of planning control through the processing of a number of planning applications. These ranged from 2000 – 2011. These applications were submitted in retrospect by the developer. Where a retrospective application was received, the investigation established that formal enforcement action (with one exception) was not undertaken by the Department.

It was noted with concern that the mining was typically permitted to continue throughout the period of the Department's consideration of each retrospective planning application. The Department is and was obliged to comply with EU Directives and Northern Ireland legislation designed to protect the environment. Having established the chronology of events it was found that the Department did not act to prevent long term unauthorised mineral excavations. As a result, the excavation of various sites continued in the absence of a decision at Departmental level on the legitimacy of these significant mining activities.

In 2008 the surrounding area within which these unauthorised excavations were permitted to continue was officially recognised as environmentally significant. However, this designation did not prompt the Department to reconsider its determination to protect the environment at the site.

The investigation established that EU Directives 85/337/EEC and 92/43/EEC (as amended) introduced the requirement that potential risks to the environment of proposed projects must be properly addressed before consent to commence works which could potentially damage the environment is considered by the planning authority. By 2014 it became clear that planning permission for eight outstanding

retrospective applications would not be granted by the Department, although at that stage the minerals in all sites had been depleted.

The role of the Ombudsman is to independently and impartially investigate complaints of maladministration, and, where maladministration is found to have caused injustice to any person, to recommend a remedy. It is not the role of Ombudsman to make a finding of a breach of the law, that is a matter for the courts.

The Treaty on the functioning of the EU (at Article 91) referred to the need for societies to practice caution when considering projects where there is uncertainty about the environmental impact of those projects on state heritage that is potentially irreplaceable. The natural heritage of the environment is an obvious example.

The investigation established that the application of 'Precautionary Principle', which is a key element of decision making in this context, was not evident in this case despite the Department's clear responsibilities in that regard. The Ombudsman was satisfied that the failings constituted maladministration, which caused RFA the injustice of frustration and outrage as its members endeavoured to ensure that serious risks to the area were considered by the Department.

The investigation also disclosed maladministration in the Department's handling of related correspondence from RFA. It was found that there was avoidable delay in the Department's responses.

The Ombudsman recommended that a payment of £3,000 be made to RFA by way of solatium for the delay, frustration and outrage that the Department's actions had caused RFA during the period of the unauthorised excavations. It was also recommended that the Department review its policy in relation to retrospective planning applications for mineral extraction.

The Ombudsman noted that the Department accepted the findings of maladministration and agreed to the recommendation.

The Ombudsman also noted the Department's assurances that administrative and systemic improvements had been implemented, and its view of substantial organisational changes made to the planning regime in Northern Ireland. The Department stated that the resulting reorganisation, supported by new planning legislation, consolidated planning policy and revised guidance and procedures would 'assist in ensuring that mistakes will not be repeated.' The Ombudsman was pleased to note the commitment to improvement in service, but that the assessment of the administration of the planning regime would continue to be influenced by the experience of users.

Conclusion

The investigation into these issues of complaint disclosed a number of instances of maladministration on the part of the Department in relation to the following issues:

- (i) Failure to provide reasons for Environmental Impact Assessment (EIA) determinations;
- (ii) Failure to make an EIA determination in respect of a particular planning case;
- (iii) Failure to review the EIA determinations at an appropriate point;
- (iv) Failure to consider the issue of formal enforcement action at an appropriate point;
- (v) Avoidable delay in taking enforcement action in one instance and general delay in the consideration of all the retrospective planning applications at the Mobuoy Road site;
- (vi) Failure to take enforcement action so as to prevent immunity;
- (vii) Failure to take into account the issue of site restoration for the mining activities in the context of retrospective applications at the Mobuoy Road site;
- (viii) Failure in respect of the handling of RFA's correspondence.