ANNEX B. RESPONDENT'S LETTER TO THE COURT.

2nd July 2009

Dear Lord Justice Sullivan, Lady Justice Arden and Lord Justice Keene,

I am grateful for the receipt of the draft Judgment, received on Friday 26th June 2009.

This letter sets out the most important factual errors that I wish to raise with the Court in relation to the draft Judgment, as in view of the serious nature of these errors it would seem only right that I point them out directly myself in my own words as they all involve me, including some errors which are related to my own personal health.

The most important factual errors which I would like to raise arise under 2 headings which are as follows:

1. The draft Judgment has been formed on a factually incorrect basis
2. Factually incorrect information and/or statements regarding my own ill-health

1. The draft Judgment has been formed on a factually incorrect basis

The most important factual error of this draft judgment is that almost the entire judgment, (in particular in relation to Grounds 1 and 2 of my original Judicial Review challenge) has been formed on the wrong basis. This is because the factual evidence and arguments that support the legal arguments in the Respondent's case (*my* case) as meticulously set out in my witness statements, (in particular the 149 page second witness statement) have been substituted with someone else's arguments (the Royal Commission on Environmental Pollution's) and are therefore not the same *"cogent arguments and evidence"* of mine that were *"scientifically justified"* and that Mr. Justice Collins formed his judgment on in the court below (see §39 of the High Court Judgment).

A legal judgment should reflect the arguments that were set forth by the named parties involved and cannot be *substituted* with another parties case and arguments. In incorrectly basing the Respondent's case on the conclusions of the Royal Commission as opposed to correctly basing it on the factual arguments and evidence set forth in my witness statements, it has effectively turned the case into the *RCEP v DEFRA*. Yet the RCEP is not a named party in this case, as I have been the *only party* involved in this legal case against DEFRA, as it is ***Georgina Downs** v DEFRA*, and I have taken this case at considerable personal, professional and financial costs for myself and my family.

The conclusions in the RCEP report were reached following submissions and evidence from *hundreds of stakeholders*, yet in this legal challenge the Court were

supposed to be assessing the factual arguments and evidence that formed the basis of *my legal case*, and which I repeatedly pointed out were predominantly contained in the second witness statement.

For example, I had already drawn the Court's attention to this point in my sixth Witness Statement where I pointed out in §136 that, *"It is very important for me to clarify a fundamental aspect of this legal case for the avoidance of doubt. The Royal Commission's report was only a small part of my original Judicial Review challenge in relation to Ground 3. Therefore the Respondent's case itself has always been based on my arguments and evidence as set out in my 5 Witness Statements, in particular the second Witness Statement. This was recognised by Mr. Justice Collins in his Judgment, eg. at §39 Mr. Justice Collins stated, "The alleged inadequacies of the model and the approach to authorisation and conditions of use have been scientifically justified.* ***The claimant*** *has produced cogent arguments and evidence to indicate that the approach does not adequately protect residents and so is in breach of the Directive."* ***[CB1/K/18]****.*

I went on to say in §137 of my sixth statement that, *"Therefore in relation to Grounds 1 and 2 of the original Judicial Review challenge, as well as the Human Rights Ground, I would reiterate the importance of my second Witness Statement, as it sets out the very important factual detail and arguments that provided the critical basis of* ***my*** *case and original challenge, (and subsequent Judgment from Mr. Justice Collins), concerning the legality (in EC and domestic public law terms) of the Government's policy and approach in view of the overriding public safety duty as required by the European Directive and the UK equivalent legislation regarding the protection of human health."*

Lord Justice Sullivan in *substituting* my case and arguments with those set out in the RCEP report has based the justification for doing that on the incorrect assumptions that *"all of the material relied on by the Respondent before Collins J had been considered"* by the RCEP (as well as the ACP in preparing its Commentary on the Report, for which also see Downs 1 §50 to §52 regarding the ACP's completely inadequate consideration of my second video which led to a formal complaint to Ministers in 2004) (§76); and that, *"The RCEP's views, unmoderated by the ACP's comments, must, realistically, be the high water mark of the Respondent's case"* (§45). Not only is this not correct, it is simply not possible considering that the 6 Witness Statements that I produced for this case (along with the majority of the vast amount of documentation that went with it as there are a few thousand pages before the court) were all prepared after the RCEP report had been published in 2005. For example, my first witness statement was a year later in October 2006. Therefore it is of course not possible for the RCEP (or the ACP) to have assessed the exact case and factual arguments and evidence that were set forth before the court if all the witness statement materials that provided the critical basis of my case and arguments all post-dated the RCEP report (and the ACP's response to it). This especially applies to the second witness statement which is the most important in detailing the full factual

arguments and evidence *my case* is based on and which was dated 29th April 2008, which is 3 years after the RCEP report (and 2 years after the publication of the ACP's Commentary in February 2006). The second witness statement took the best part of a year to put together and compile, and contained information and evidence that was never assessed by the RCEP in any capacity, as my arguments and evidence were of course developed even further for the purposes of this legal challenge (with accompanying documentation obtained that had not been obtained previously) and was specifically developed to provide the factual evidence and arguments to support the legal arguments in this specific legal challenge between myself and DEFRA.

It should be noted that I had previously pointed out in §134 and §135 of my sixth Witness Statement that the RCEP did not assess all the same evidence and arguments as has been set forth in the court. Also, footnote 77 of my sixth statement pointed out that the RCEP were not provided with the HSE's Field Operations Directorate (FOD) reports, which means that the RCEP did not see the raw data of the ill-health incidents reported to the HSE and assessed by PIAP and only saw the statistics based PIAP reports which did not set out any of the data of the actual incidents themselves. (It would also appear that the RCEP did not have the manufacturers adverse incident reports either). It was also pointed out in my Witness Statements that, in any event, the RCEP report had been superseded by subsequent studies and findings, as the RCEP report was published 4 years ago, in 2005.

I have put considerable work and effort into producing the arguments, evidence and materials for this legal case and I have worked to the highest professional standard and been meticulous with accuracy and attention to detail. Therefore not only is it not correct, it is quite frankly an insult to the work that I have produced since 2006 (which is long after the publication of the RCEP report) to say that the RCEP's views *"must"* be the *"high water mark"* of my case. Aside from the critical fact that, as pointed out earlier, the conclusions in the RCEP report were reached following submissions and evidence from hundreds of stakeholders. Therefore there is simply no parallel between the *"RCEP's views"* (or the RCEP's conclusions) and the very detailed and cogent factual arguments and evidence I have produced specifically for this legal case.

The draft judgment has wrongly substituted the cogently argued case I presented with another parties. It is completely unacceptable to me to see my case and arguments misrepresented in such a way. It also means as said that the Court has not gone by the same factual arguments and evidence produced for my case as that which Mr. Justice Collins did in his Judgment in the court below. (In addition to §39 of the High Court judgment §1 stated, *"She has been accustomed to presenting her arguments, which involve detailed scientific considerations and reference to facts and figures, often complicated, to support them. Thus she has produced in this claim three very detailed statements which set out the factual basis for the arguments presented on her behalf and which seek to meet the contrary arguments put forward on behalf of the defendant."*)

The result of this is that the draft Judgment does not actually reflect or resemble the factual arguments and evidence set forth in my witness statements, in support of the legal arguments, and so it cannot possibly be said that this draft Judgment reflects the Respondents case (in the places where it is referring to the Respondent's case), as it simply does not.

To give a few further specific paragraph examples of this, firstly regarding Ground 1.

§44 of the draft Judgment states, *"However, what is of particular significance for present purposes is that she was able to, and did, present all of her criticisms of the current model to the RCEP."* This paragraph is simply not correct, as whilst *a few* of the same points may have been considered by the RCEP, it most certainly did not consider all the same points, and certainly not to the level and degree that has been put together for this legal case. As said above, my arguments and evidence were developed even further for the purposes of this legal challenge, with accompanying documentation obtained that had not been obtained previously. For example, I managed to acquire a number of scientific studies, (such as those undertaken by Bedos *et al* on pesticides in the air and vapour), that were not considered by the RCEP, as I only discovered them in 2007 (2 years after the publication of the RCEP report) during the intensive period of preparation for my 2008 second Witness Statement. Also, as I have previously pointed out in §134 of my sixth Witness Statement the RCEP's remit, which had been agreed with DEFRA, was to assess the same evidence that DEFRA had based its decisions on the risks to people from crop spraying. Considering DEFRA's risk assessment for *bystanders* is predominantly related to spray drift, then the RCEP report was *still* predominantly related to spraydrift as well, and the RCEP did not assess, all the exposure factors and routes in totality, as per a residents exposure scenario, as detailed in my second Witness Statement. Nor did the RCEP assess, amongst other things, the very detailed and meticulous analysis I produced in my second Witness Statement in relation to the January and July 2003 PSD papers and thus the 82 examples of the AOEL (all based on one exposure factor *only* even before adding them together with other exposure factors which is what it would need to be for a residents exposure scenario), in some cases an *order of magnitude* higher, when *any* exceedance under the European Directive, should have triggered prohibition. Incidentally, there is no mention in the draft Judgment of these very serious and *illegal* AOEL exceedances.

Other examples in the draft Judgment in relation to Ground 1 include, §47, *"Pausing there, before considering the ACP's response to the Report, the fact that a model has been criticised by an expert body such as the RCEP does not necessarily mean that it is not "a suitable calculation model" for the purposes of paragraph 7.2.2 of Annex III"*; §49 *"Reading the Report as a whole, and in particular the passages set out in paragraph 46 above, I do not consider that the Report leads to the conclusion that the current model is so defective that it is not a suitable model for the purposes of paragraph 7.2.2. Rather, the Report supports the view that an improved model should be devised, and that while that is being done the current model, despite its defects,*

continues to be suitable, provided extra precautions are taken…If the RCEP had concluded that the current model was unsuitable, in the sense that it materially underestimated residents' exposure, then I have no doubt that the RCEP would have recommended either that its use should immediately cease, or that modifications should be made to the exposure calculations to eliminate any risk of underestimation, in the short term, pending the development of a replacement model"; and §50, *"When considering whether there was a "manifest error" in the Appellant's approach to the suitability of the current model the views of the RCEP do not stand alone."*

Again by substituting the RCEP's conclusions in place of my factual arguments and evidence it is fundamentally misrepresenting the Respondent's case, which was that there is no risk assessment for a residents specific exposure scenario and thus under the Directive approval cannot be granted if a risk assessment has not been undertaken as it will not have been established that there will be no harm to human health. The RCEP still appeared to consider residents and bystanders in one group and yet *my case* before the Court of Appeal and the court below has always been very clear in that residents and bystanders are two separate exposure groups as set out in detail in my second Witness Statement.

A further specific paragraph example in relation to Ground 2.

§78 of the draft Judgment states, *"Having considered the evidence in some detail in the Report the RCEP did not go as far as Collins J. appears to have done in paragraphs 46 and 47 of his judgment."* Again, this is because Collins J based his Judgment on *my case, arguments and evidence* that were before him (and considering I am the named party in this case then that was of course right to do so), including in relation to the FOD reports and manufacturers adverse incident reports, both of which are part of the Government's own monitoring system, and neither of which as said earlier were considered by the RCEP during its enquiry. Collins J also had before him the detailed analysis I had produced of the Government's repeated *inaction* when faced with, as shown in its own monitoring system, evidence of actual harm (as well as the risk of harm) to human health as a result of pesticide exposure (eg. §127 to §152 of the second statement at [pages 99 to 111]) that again was not assessed by the RCEP as my second statement was submitted to the court in April 2008, post-dating the RCEP report. In relation to one of the points raised in the detailed analysis, regarding the lack of information on the end classification of cases recorded by PIAP as '*pending*', (thus resulting in no means of cross-referencing back to the original incident), I pointed out in §138 of the second statement that an HSE inspector stated that he did not think that anyone had raised this point before, or that it had been considered previously. Therefore again Collins J saw this point raised in my evidence and arguments, which had not been considered by the RCEP in its 2005 report.

It is evident from the Witness Statements I have produced since 2006 and set forth before the court, in particular the second Witness Statement, that the scale of the failings in the Government's policy and approach had not been identified before to

the degree that I have for the purposes of this legal case. Therefore as said earlier, there is no parallel between the cogent arguments and evidence Collins J considered in my Witness Statements and formed his Judgment on and the RCEP's conclusions.

2. Factually incorrect information and/or statements regarding my own ill-health

The draft Judgment contains a number of very serious and important factual errors in relation to my own personal health situation which need to be corrected. I shall address these in the order they arise.

§84 of the draft Judgment states, *"The RCEP considered the evidence relating to "Pesticide Spraying and Health" in detail in Chapter 2 of the Report. If it had concluded that Dr Myhill's views were persuasive, and if in particular it had concluded that there were "powerful reasons for concluding that there has been the necessary cause and effect", it would surely have said so."*

This is not factually correct for the following reasons:-

a) The RCEP report was not an assessment of my specific health problems, it was a report in *general* regarding the scientific evidence that DEFRA had based its decisions on the exposure of people from crop-spraying. Therefore the RCEP's conclusion (that were reached following submissions and evidence from hundreds of stakeholders, including farmers and the chemical industry) were not related to the personal chronic ill-health of any *one individual*;

b) As set out above it continues to *substitute* my case and arguments with the conclusions of the RCEP. The evidence relating to my own personal health problems, and blood and fat test results etc. was set forth meticulously and in detail in my sixth Witness Statement and accompanying exhibits and that is the material that the court should have referred to when considering my own personal health situation. A doctor's assessment of a patient's chronic health problems should not be overridden by the conclusions of a report that was 4 years earlier and that was not specifically related to that individual's personal health situation.

In relation to §87 of the draft Judgment, it is immaterial whether Professor Hooper submitted to the RCEP enquiry as his submissions to the RCEP were in *general terms* and were not in relation to my own personal health situation. Considering the sixth Witness Statement that I set forth in this legal case was relating to my own personal health problems, and blood and fat test results etc. then Professor Hooper set forth comments that were submitted to the court specifically in support of my case, and in response to some of the points made by Mr. Hamey in his third Witness Statement.

Following on from the above comments regarding §84, §88 of the draft Judgment is also factually incorrect for the following reasons:-

a) The conclusions of the RCEP were i) not related to the personal chronic ill-health of any *one individual*; ii) the RCEP conclusions were reached following submissions and evidence from *hundreds of stakeholders*; and (iii) the RCEP did not assess all the same evidence that has been set forth specifically for this legal case;

b) Professor Hooper's actual statement including the bits in red and underlined was that there is *"a considerable body of scientific evidence"* to support my case that my *"chronic ill health is due to her exposures to…pesticides"*. Therefore Professor Hooper's statement was related to scientific evidence and not scientific "*consensus*" across the *"scientific community,"* as scientific consensus is a completely different point. The authorities have previously said that anyone suffering ill-health should have it confirmed by a doctor to be related to pesticides. There is even a Department of Health document in relation to this entitled *"Pesticide Poisoning,"* 2nd Edition – "*Notes for the Guidance of Medical Practitioners"* (which I referred to in footnote 17 of my second Witness Statement). What Lord Justice Sullivan has basically said in various paragraphs of his draft Judgment (eg. also in §90) is that a doctors confirmation of pesticide related ill-health is now not good enough evidence as it cannot be confirmed definitively until there is consensus across the scientific community. With the greatest of respect to Lord Justice Sullivan this is a very serious misinterpretation and is completely shifting the goalposts in relation to this issue. Evidence is the word Mr. Justice Collins recognised was the right one in the High Court Judgment, as to say effectively that no diagnosis can be confirmed and thus action taken until there is scientific *consensus* is not only incorrect, it is an impossibility considering the diversity of scientific positions between Government scientists who want to maintain a certain position on the issue and various independent scientists who want to act on the existing scientific and medical evidence. Therefore I reiterate scientific consensus is not the same as the statements made by Dr. Myhill and Professor Hooper in exhibits 1 and 2 to the sixth Witness Statement that said that there is *"a considerable body of scientific evidence to support her case"*. Also it is important to reiterate that as I pointed out in a number of my Witness Statements, DEFRA itself has previously stated that, *"If there is scientific evidence that use of a pesticide may harm human health, that is considered unacceptable."* In my own case I do have confirmation from a doctor that specializes in pesticide related ill-health that my chronic ill-health is caused by pesticides, as Dr. Myhill stated in her letter dated 29th May 2009 that *"I have no doubt that Georgina's chronic long-term health problems are due to her repeated exposures to mixtures of agricultural pesticides sprayed near her home throughout the last 25 years."*

§90 of the draft Judgment states, *"The Report, the Commentary and the RCEP's Response all make it clear that there is no consensus in the scientific community that there is "solid evidence" as found by Collins J."* Aside from the comments made above, regarding consensus, this again is factually incorrect and misleading because:

a) Collins J based his Judgment on *my case, arguments and evidence* that were before him, including (i) the FOD reports, (ii) manufacturers adverse incident reports, (neither of which were considered by the RCEP during its enquiry), (iii) the detailed analysis I had produced of the Government's repeated *inaction* when faced with, as shown in its own monitoring system, evidence of actual harm (as well as the risk of harm) to human health as a result of pesticide exposure (eg. §127 to §152 of the second statement at [pages 99 to 111]) that again was not assessed by the RCEP as my second statement was submitted to the court in April 2008, 3 years after the RCEP report had been published;

b) In any event, acute effects were accepted by the RCEP, eg. see 2.9 of the RCEP report under the heading *"Acute Effects Immediately Following Pesticide Spraying,"* that stated, *"The evidence from the residents and bystanders visited identified a series of well-defined acute symptoms immediately following pesticide spraying. These include upper and lower respiratory tract irritation, eye irritation, skin rashes, headaches and, in susceptible subjects, asthma attacks."*

c) Various statements have previously been made by either DEFRA, PSD, ACP or other Government departments stating that there are confirmed cases of residents and bystanders suffering acute effects from pesticide spraying (eg. §102 to §116 of the second statement at [pages 87 to 93]).

§107 of the draft Judgment states, *"The Respondent genuinely believes that her own, and her family's health problems have been caused by their exposure to pesticide spraying. However, that is not enough for the purposes of her Article 8 claim. In the absence of evidence to support an argument that there is a sufficient degree of probability of a causal link between the pesticide spraying and her health problems the Respondent is not able to establish that there has been a breach of Article 8 (see "Solid Evidence" above)."*

§108 of the draft Judgment then states, *"On the premise that in an Article 8 case the Court is entitled to form its own view as to whether, by reason of severe environmental pollution, there has been an interference with the individual's right to respect for his private and family life, home and correspondence, under Article 8.1, I can see no evidential basis for going further than the RCEP's conclusions on causality in respect of both chronic illnesses and local effects. While the possibility that some or all of the Respondent's medical conditions may be due to pesticide*

spraying cannot be ruled out, that possibility is not a sufficient foundation for an Article 8 claim."

Lord Justice Sullivan's conclusion on causality *in my specific case* is again incorrectly based on the conclusions of the RCEP as opposed to the clear evidence relating to my own personal health situation that was set forth meticulously and in detail in my sixth Witness Statement and accompanying exhibits and which is the material that the court should have gone by in this legal case when considering my own personal health problems. As said earlier, I do have confirmation from a doctor that specializes in pesticide related ill-health that my chronic ill-health is due to pesticides. (This is further supported by a Professor Emeritus of Medicinal Chemistry, PhD, BPharm, MRIC, CChem, who also has decades of experience in relation to the chronic adverse health effects of pesticides and other chemicals).

§108 goes on to state, *"Moreover, even if the probability of a causal link had been established in respect of certain local effects, such as skin or eye irritation, it must be questionable whether they would fall within the description of "severe environmental pollution" in the Lopez Ostra and Guerra decisions."*

To just correct the facts on this point, as I detailed in my witness statements, the acute effects I regularly suffered following repeated exposure to pesticides, in particular flu-type illnesses, headaches, sore throats covered in blisters, as well as blisters/ulcers in the mouth, (at times this could be as many as 20 at a time), were not minor or mild and left me seriously affected, (even before considering the chronic long-term health problems that I have) and led to me missing many weeks off school and college at the time as a result. These acute effects are well recognised acute effects of pesticide exposure and the safety data sheets for pesticides can carry warnings of these types of acute effects.

§110 states, *"However, if causality is not sufficiently established in respect of the medical effects of spraying, I do not consider that these general effects on the Respondent's family fall within the ECtHR's description of "severe environmental pollution". In saying this, I do not intend to minimise the problems experienced by the Respondent, but she has made her claim as an individual, not in a representative capacity. In Lopez Ostra and Guerra and Fadeyera the pollution came from a particular source and affected a wide area containing a considerable number of people. It was therefore entirely reasonable to expect the state authorities to have taken action to prevent, or at least minimise, the widespread pollution from that particular source."* See earlier comments about incorrectly basing conclusions in relation to causality in my specific case on the conclusions of the RCEP etc. Secondly, although I am obviously the only named party in the case, the evidence and arguments presented in my legal case are related to the failure to protect rural residents and communities *per se* and hence why the video and other materials containing just a few examples of the many I have received were set forth to show the adverse impacts on the health and home life of other residents from living in the

locality to pesticide sprayed fields etc. Therefore this does affect a considerable number of people and just because they are spread out over the country and not necessarily all in the same one area should not take away from the fact that the case is, in principle, in a representative capacity on behalf of rural residents living in this situation.

§111 states, *"…the legal system does afford a remedy to those individuals who are adversely affected*" and goes on to state, *"However effective the framework, particular cases of nuisance or other harm may occur. If they do, the legal system provides redress for the individuals concerned."* Whilst it is accepted that there are legal routes of redress in relation to certain aspects of environmental damage from pesticides (eg. damage to plants, aquatic animals, wildlife etc.), in relation to harm to human health, and/or any adverse effects from chemical fumes etc. it is factually incorrect to say there is legal redress or that the legal system affords a remedy to those who are adversely affected. There is no system for redress in relation to harm to health which was agreed by the RCEP in chapter 4 of its report that there is currently no legal redress for individual's harmed by pesticides. Therefore I am not sure what system of legal redress Lord Justice Sullivan is referring to, as after 8 years of running a full-time campaign on pesticides I certainly do not know what it is!

Considering the content of this letter and that this issue is of significant public interest and importance, especially to residents throughout the country living near pesticide sprayed fields, then I intend to make this letter publicly available in due course, obviously only after the embargo has lifted following the hand down of the Judgment. The main reason for this is so that people can see that I did inform the Court of these important factual errors that are contained within the draft Judgment.

Yours sincerely,

Georgina Downs FRSA.