

Comments on the second progress report from the UK on Decision V/9n and the position of the UK on matters of energy policy involving articles of the Aarhus Convention and wind power. 11.01.16.

1. On Access to Justice and the important issue of judicial reviews I comment as follows:

a. I will not be alone in finding grounds for grave concerns over plans to curtail judicial reviews as outlined. As others have already observed, these proposals would unacceptably diminish the financial protection for members of the public bringing environmental law cases before the courts in England and Wales and clearly any changes to procedures in England are likely to be followed by Scotland and Northern Ireland.

b. If implemented, the UK would be inviting further and justified complaints to the Aarhus Convention Compliance Committee from UK citizens adversely affected by such curtailments.

c. As the UK (and Ireland's) common law system has been allowed to develop into a bad and challengeable cost basis, it should perhaps be remembered that the Compliance Committee can tire of non-compliance or delaying tactics as they have with those of the EU. The EU was ordered to appear on Wednesday 16th December, when the Committee has held a review of the Communication on the Projects of Common Interest in Geneva as reported on the UNECE webpage of the Communication: <http://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/tfwg/envppcc/envppcccom/acccc201396-european-union.html>

d. Judicial reviews are 'part and parcel' of the public participation process so it follows that the UK having been found non-compliant with Article 7 before (as in ACCC/C/2012/68) it makes little sense to risk a repeat ruling. In addition, the ACCC has recently ruled the U.K. Government in breach of its obligations in respect of court costs, leading to the current cost protection limits being set at the current figures. Therefore any proposals to alter the cost limits in environmental cases amount to restriction and/or prevention of proper legal challenges to those developers who apply for proposals which will harm the environment. Local Planning Authorities would also fail in their obligations under the Aarhus Convention Treaty by approving them. In order to avoid undermining the rule of law, citizens must not be made to feel that the courts costs attached to their attempts to protect the environment by bringing court actions in accordance with an International Treaty will make this impossible.

e. The Judiciary have an obligation to be efficient and productive, just like everybody else in society. When we consider 'what is the norm' in UK and compare it with other Member States, the message is very obvious after you read a few Member States carefully, such as Finland and the Netherlands. See: https://e-justice.europa.eu/content_access_to_justice_in_environmental_matters-300-en.do

f. The Euan Mearns pdf is attached as a guide to the current situation being faced in the UK (and Ireland as another member State). It reinforces the widely held view that many planning deals have been agreed long before they go to planning, which reduces the likelihood of any being ultimately refused. That this is 'par for the course' can be shown by examining page 17 of : http://westcorkwind.com/images/Adobe/EPAW_N-S.pdf of interest to the Committee will also be p.74 8.2 covering 'How the EU's Renewable Targets won't be met, particularly by the UK.'

2. The problems being faced by UK citizens, and especially those residing in Scotland when looking at the overall picture of Aarhus Compliance, is that whilst public participation takes place to a degree via consultations and Freedom of Information requests, the results and suggestions made are rarely taken up. Essentially public participation exercises become a 'box ticking' method of compliance and little if anything, improves. FoI requests can be lengthy and time consuming with Government agencies and departments often taking way beyond the time allocated for replies. A prime example of this has been the dialogue held with the CAA over Air traffic Safety involving wind turbines radar and turbulence issues. The questions related to the FoI are yet to be answered despite numerous assurances since October 2015 that a reply will be sent. That response with questions is attached (To Mark Stevens Re. FoI Act request F0002371pdf) to demonstrate the seriousness of this little appreciated aspect. Also, authorities are not always willing to answer legitimate questions involving matters of public safety. Especially when they involve a technology where vital checks and balances remain in question.

Replies received are often seriously redacted using 'business confidentiality' or 'intellectual property rights' to avoid giving the information required. Examples rendering the information provided almost useless are attached as 'The Screggagh Wind Farm – redacted' (a turbine collapse incident for which more information and reports are available upon request) and 'Sneddon Law windfarm, Annex A – FOI2015 2654pdf.

Other examples relevant to public participation difficulties occur. One such being the refusal of Scottish Water to provide a report requested under FoI regulations by the Non Government Organisation the John Muir Trust (JMT) relating to a water pollution incident in North Lanarkshire. It is not unreasonable that the JMT feel that 7 months is long enough to wait for an outcome of this request. These environmental problems are occurring and the public are essentially powerless, despite apparently having protective legislation in place.

As in the SW refusal: "In this case the public interest in making the information available is outweighed by that in maintaining the exception."

It is abundantly clear however, that there can be no better example of where the public interest is better served than publishing information on a pollution incident that affected many people's drinking water.

In respect of water contamination and wind power developments the experience at-Whitelee, the largest onshore windfarm in the UK, South of Glasgow Scotland, should be outlined as due to its importance, the extensive evidence from monitoring over seven years are relevant, not only to Articles of the Convention, but breaches of EU Water Directives.

Scottish Power Renewables (SPR) having monitored private water supplies for 7 years were fully aware that there was contamination to these supplies and yet they failed to comply with planning conditions for the Whitelee Extension by notifying the local authority and local residents. During that time, in one road alone, residents, their visitors (especially very old and young) were intermittently very unwell with severe gastric upsets and had no idea that their water supply was contaminated. Water contained increased sediment, known to be associated with wind farm construction activity and occurred in numerous PWS, including borehole supplies from deep groundwater.

During the height of Whitelee windfarm construction in 2008, the degree of bacterial contamination in untreated drinking water reliant on the Whitelee windfarm water catchment area was recorded up to 730,000 coliforms/100ml in 2008 (UK and WHO standard = 0) This was considerably worse than drinking untreated drinking water from the Limpopo river in Mozambique in 2004, which at its worst was 870/100ml. ([Challenges Facing Drinking Water Production In Mozambique- A Review Of Critical Factors Affecting Treatment Possibilities Matsinhe N. P et al Submitted for publication in the Journal Water Science and Technology](#)). (WHO recognise Mozambique as a third world country with very limited availability of treated public water) In 2015, untreated private water supplies were supplying over 3% of Scotland's population with an estimated 150,000 PWS, mostly in rural Scotland (Scottish Government Figures 2015) In contrast to the untreated water in Mozambique, over the course of windfarm construction at Whitelee, 2006 to 2013, monitored PWS regularly had bacterial contamination running into the thousands. These PWS, like most PWS in Scotland, had previously shown only intermittent low level contamination. At Whitelee, four PWS lost their water supplies altogether due to sediment related blockage of supply pipes and three of these households had to install boreholes at their own expense.

Scottish water (SW) was contracted by SPR to monitor the PWS and provide the accredited results. SW was therefore fully aware of the dangerous, contamination levels found in these test results. When contacted, SW's response about the failure to disclose this public health information, (Prof. Simon Parsons, Customer liaison and services development manager) was that their duty was to protect commercial client confidentiality. This was surely a conflict of interest with the prospect of profit out weighing public health. **SW did not/would not, even notify in confidence, the local Consultant in Public Health (CPHM) so that the Local Authority could independently confirm results and allow private consumers to take simple measures like boiling water or drinking bottled water.**

To compound this, Scottish Water regularly failed to meet standards for public potable water from the Amlaird water treatment works, because of the deteriorating quality of raw water from the two public reservoirs on the Whitelee Windfarm site. (Monitoring data over this period has been obtained from SW and SPR from relating to surface, groundwater and public reservoir raw water and potable water monitoring data.) DIRECTIVE 2004/35/CE '[Request for Action](#)' submitted to the Scottish Government and being 'reviewed by SEPA shows water test results from other water treatment works, demonstrating that this is a growing problem recurring at other reservoirs on SW land associated with windfarm development. Groundwater monitoring at Whitelee windfarm also demonstrated EU list 1 pollutants appearing in groundwater over 400 times the allowable drinking water levels, as well as increase in minerals (iron, manganese and aluminium) more than 20 times over baseline and well above allowable statutory levels in drinking water.

Surface water monitoring at Whitelee also demonstrated a documented deterioration from monitoring conducted both by Glasgow and Edinburgh Universities and by SEPA (Scottish Environment Protection Agency) over seven years, such that contrary to requirements of the Water Framework Directive(WFD),(EU Water Framework Directive(2000/60/EC, Article 7 (7)) there was a deterioration of the overall status of water bodies arising from the Whitelee windfarm site persisting until at least 2013.

Failures to comply with the WFD, transposed into Scottish Law, have clearly been breached with documented evidence in relation to the public water supply from Whitelee windfarm site:

Drinking Water Protected Areas have to be protected with the aim of avoiding any deterioration in their quality that would compromise a relevant abstraction of water intended for human consumption. A supply intended for human consumption would be compromised if as a result of deterioration in the quality of the water body:

- an abstraction (or planned abstraction) of water intended for human consumption
- has to be abandoned and an alternative used to provide the supply;
- water abstracted (or planned to be abstracted) has to be blended with water
- abstracted from another source

- additional purification treatment has to be applied; or

- the operating demand on the existing purification treatment system has to be
- increased significantly.

N.B. All of the above are documented in response to FoI requests to have occurred in relation to the Public water supply from the Whitelee windfarm site.

At Whitelee SW 'host' 60 of SPR's turbines on a public water catchment area, which is supposedly protected under statute under the terms of the Water Framework Directive (The Water Environment (Drinking Water Protected Areas)(Scotland) Order 2013, amended from 2007.) First Minister Alex Salmond pushed through a bill requiring SW to 'develop' its resources for renewable energy purposes in 2012. This involved an important amendment to the Water Industry (Scotland) Act 2002. Section 25 of the Water Resources (Scotland) Act 2013 *In Support of Renewable Energy*

SW receives millions of pounds into SW's subsidiary, private development company (Horizons Ltd) from SPR and Whitelee alone, where the funds cannot be traced as easily as for a public organisation.

Through the 'Request for Action', this has been further brought to the attention of the Scottish Government, the Scottish office, DECC, DEFRA and the Directorate of the Environment in Brussels, yet no action is being taken to prevent further pollution as developments are allowed to proceed.

Even though:

DIRECTIVE 2004/35/CE Article 5 Preventive action: 1. Where environmental damage has not yet occurred but there is an imminent threat of such damage occurring, the operator shall, without delay, take the necessary preventive measures. 2.....whenever an imminent threat of environmental damage is not dispelled despite the preventive measures taken by the operator, operators are to inform the competent authority of all relevant aspects of the situation, as soon as possible. 4. The competent authority shall require that the preventive measures are taken by the operator. If the operator fails to comply with the obligations laid down in paragraph 1 or 3(b) or (c), cannot be identified or is not required to bear the costs under this Directive, the competent authority may take these measures itself.

Incidents and concerns have been reported by Planning Monitoring Officers (PMO) to the regulatory authorities but have not been investigated. PMOs are not routinely employed and information from a PMO may be difficult and costly for the public to access, consequently developments proceed unabated. ELD 2004/35/CE (8) Those activities should be identified, in principle, by reference to the relevant Community legislation which provides for regulatory requirements in relation to certain activities or practices considered as posing a potential or actual risk for human health or the environment and 2000/60/EC (14) The success of this Directive relies on close cooperation and coherent action at Community, Member State and local level as well as on information, consultation and involvement of the public, including users. This clearly is not happening.

Despite investigation and remedial upgrades to the Amlaird WTW, SW has still been unable to consistently produce potable water to statutory standards. Following enforcement action from the Drinking Water Quality Regulator (DWQR), SW's solution is to abandon the two Whitelee reservoirs and build a new, approximately 30 km, 1m wide pipeline to supply water from north of Glasgow (Loch Katrine) to over 50,000 consumers in Kilmarnock, surrounding towns and the Irvine valley - all paid for by the public purse at a cost of many millions of pounds, whilst the profits from hosting these 60 turbines are fed into Scottish water Horizons Ltd.

The DWQR's role in all of this (in unison with SW) is to publicly deny that there is, or has been a problem for public water which has resulted from windfarm construction. (Even in providing information for Ministers to respond to Parliamentary Questions, (S4W-22216, S4W-21826, S4W-21827).

However, FOI responses to meetings that occurred with the local CPHM, East Ayrshire Council, DWQR, SEPA and SW, make it clear they were all aware of the public water problems at the time of the Whitelee Wind Farm and windfarm Extension construction - although inexplicably, wind farms were not actually mentioned in minutes of those meetings from 2010. (The acknowledgement that the wind farms had caused deterioration in other public water reservoirs was stated in other SW risk assessment documents (Catchment risk assessment Amlaird WTW 2010: Report produced for Scottish Water). Incidentally, it should be noted that the Drinking Water Quality Regulator (DWQR) SW and SEPA share the same FOI Officer.

It is perhaps relevant that water pollution is no different to the *smells, noise and polluting fumes* as regards [http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-01\(2003\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-01(2003).pdf) Page 60.

- *Protection from environmental nuisance: In López Ostra v. Spain 1996 the Court established the full applicability of Article 8 to the context of environmental nuisance. The applicant complained about smells, noise and polluting fumes caused by a waste treatment plant situated a few metres from her home and the infringement of her right to respect for her home, private and family life that this caused. On the facts of the case, the Court noted that the applicant and her family had had to live with the plant for a number of years and it considered the domestic findings related to the damage caused to their health to be convincing. Even taking the State's margin of appreciation into account, however, it held that the State did not succeed in striking a fair balance between the interest of the town's economic well-being – that of having a waste treatment plant – and the applicant's effective enjoyment for her right to respect for her home and family life.*

- *What medical evidence will be required to establish an interference with home and family life caused by pollution? Given the difficulty which may be experienced in proving a causal link between environmental pollution and damage to health, it is important that the Court accepted in Lopez Ostra that actual damage to health was not required by Article 8. On the facts it concluded that [n]aturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family health adversely without, however, seriously endangering their health.¹⁹⁷ This suggests, therefore, that while evidence is necessary to illustrate an infringement with the enjoyment of home and family life under Article 8, it is not necessary to establish a clear and direct causal link between the pollution and the health problems of the applicants.*

The European Convention on Human Rights:

- http://www.echr.coe.int/Documents/Convention_ENG.pdf
- *Right to respect for private and family life 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

3. Of particular relevance to issues of public participation is the fact, as noted by various UK groups and individuals, is that we are now all at risk of being unable to follow through with complaints in the UK Courts.

Mr. Paul Mobbs for example, notes his concerns which serve to highlight Aarhus Convention problems arising in his warnings found at :

http://www.theecologist.org/essays/2986484/uk_government_attacks_public_right_to_environmental_justice.html Excerpts follow (my emphasis):

"If the public are unable to challenge regulators because they cannot muster the resources to do so, any failures will pass unchallenged. The Government's policies of 'environmental austerity' will proceed unhindered by adverse court rulings.

Little publicised government plans to 'reform' court costs are intended to foreclose access to environmental justice for all but the wealthiest individuals and communities. Meanwhile cuts to agencies and regulators will make it ever harder for them to do their jobs –

1. *Making public participation in environmental protection all the more important.'*
2. *Restricting the right to affordable environmental justice*
3. *Of course, if Britain has ratified this Convention, the Government can't just ignore these requirements ... can they?*
4. *What the Government are seeking to do with their current consultation is very subtle - and will be difficult for many without legal experience to understand fully.*
5. *They are making very carefully worded changes to the definitions which British courts use in their interpretation of the public's rights under the Convention. And of course, being a process based*

upon rules and procedure, how certain terms are defined has a significant impact upon how our Convention rights can be exercised.

6. *Firstly, what is 'environmental law'? The Department of Justice state that not all legal challenges are covered by the Convention's costs protection requirements. That is because they narrowly interpret Aarhus protection as applying only to European Directives on environmental matters - not to UK-specific planning or heritage / conservation law even where it involves 'the environment'.*

7. *This means that many decisions which the public might want to challenge, especially those on planning, would not have their costs capped.*

8. *The next significant change is the definition of what constitutes a 'member of the public'. The Department of Justice claim that " ... wording of the current rules does not expressly specify the types of claimant which are eligible for costs protection."*

9. *In other words, when the Convention definition states 'member of the public', they take that to mean a single person - not a collection of people.*

10. *That could exclude local and national groups from launching actions on behalf of their members. And while currently the costs cap of £5,000 or £10,000 applies irrespective of how many people bring a case, in future it would be £5,000 or £10,000 per person involved - significantly raising the costs to a community bringing a joint case.*

11. *Perhaps the most chilling part of these proposals relates to the timing for when costs protection is granted to those bringing a case. Currently those applying for judicial review are told immediately if they can get costs protection for their case - and if their case fails at this first hurdle, they still only have to pay £5,000 or £10,000 at most in costs.*

12. *What the Department of Justice propose is that the public must succeed with getting leave to appeal before they are told if they can have costs protection. That would mean that those bringing the action, if they fail to get leave, might be sued by the opposing party for their full costs in defending the application - effectively preventing anyone without the means from the risk of bringing even a well-founded case before the court.*

13. *In fact the Aarhus Convention sets out, in Article 9, stating ' legal procedures "shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive." But making the government comply with its obligations is another matter.'*

4. Current unprecedented flooding events in the UK can be associated with areas where the developments of wind farms have aided the potential for increased water run-off in the upper reaches of river catchments. Indeed the Environmental Statement for Whitelee wind farm predicted a 10% increased flood risk for the River Irvine lasting for 10 years. This river flooded in Kilmarnock last year trapping shoppers who were rescued by boat. Evidence of other towns being similarly affected is compounded by a study from Aberdeen University which can be viewed at <http://banksolutions.co.uk/powys/wp-content/uploads/2013/05/7-Smith-et-al-Windfarms-on-undegraded-peatland.pdf>

Conclusion. The UK would appear to be no further forward in fulfilling full compliance with the Articles of the Aarhus Convention as cited in *Decision V/9n concerning the United Kingdom*. It is hoped that the Committee will feel able to ask for more information should any of the issues raised need further clarification or more supporting documents.

Yours sincerely,

Mrs. V.C.K. Metcalfe.

Attachments:

Comments pdf.

Screggagh Report – redacted pdf.

Annex A – FOI2015 26454

To Mark Stevens Re. Freedom of Information Request F0002371 pdf.

Euan Mearns pdf.

['Request for Action'](#)