Format for communications to the Aarhus Convention Compliance Committee

I. Information on correspondent submitting the communication

Full name of organization or person(s) submitting the communication: Neil Foulkes
Permanent address: [redacted]
Address for correspondence on this matter, if different from permanent address:
Telephone: [redacted]
E-mail: [redacted]

II. Party concerned

Name of the Party concerned by the communication: Forest Service of the Department of Agriculture Food and the Marine, Republic of Ireland

IV. Facts of the communication

Detail the facts and circumstances of the alleged non-compliance. Include all matters of relevance to the assessment and consideration of your communication. Explain how you consider that the facts and circumstances described represent a lack of compliance with the provisions the Convention.

Under the Forestry Regulations 2017 (SI No 191 of 2017), all applications for licences for afforestation, forest road construction projects, whether grant-aided or not, and for aerial fertilisation and tree felling operations, require the prior written approval of the Minister for Agriculture, Food and the Marine.

Before the Minister can grant approval for any of the above, he must first determine if the project is likely to have a significant environmental effect. As part of this Environmental Impact Assessment (EIA) screening process the Regulations provide for public consultation and notification. This brings the process within the remit of the Aarhus Convention. The screening process is covered by paragraphs 10, 11 and 21 of the Forestry Regulations which are highlighted in the supporting documentation. In addition the Agriculture Appeals Act, 2001 (paragraph 7) in conjunction with the Forestry Appeals Regulations (S.I. No. 68 of 2018) provides for the public to appeal (within a specified period) a decision made by the Minister on any of the above applications.

The appended document *FS Public Notifications.xls* summarises the situation in respect of consultation and notification for each of the four categories of application (afforestation, forest roads, aerial fertilisation and tree felling licences).

The public consultation and notification process, including the appeals system, should comply with the principles of the Aarhus Convention but, in my view, it fails to do this in a number of ways.

Public consultation, notification and participation should be adequate, timely and effective. I wish to present evidence that shows that the Forest Service procedures fail to meet these criteria. Also the

Department's procedures for notifying the public of decisions and their rights to appeal is not done in a manner that is adequately or effectively facilitating the public's access to justice.

My submission will make numerous references to The Aarhus Convention: An Implementation Guide published by the UN (AIG). The details are included in my response under category VI.

V. Provisions of the Convention alleged to be in non-compliance

List as precisely as possible the provisions (articles, paragraphs, subparagraphs) of the Convention that you allege the Party concerned has not complied with.

Article 3 (2)
Article 6 (2)

VI. Nature of alleged non-compliance

For each of the above provisions which you allege to be in non-compliance, clearly explain how you consider that the Party concerned has failed to comply with that provision based on the facts of your case. (Provide as attachments to your communication the key supporting documentation that will help to substantiate your allegations).

Also indicate whether the communication concerns a specific case of a person's rights of access to information, public participation or access to justice being violated as a result of the non-compliance of the Party concerned or whether it relates to a general failure by the Party concerned to implement, or to implement correctly, the provisions of the Convention. If you consider that the non-compliance concerns a general failure by the Party concerned, provide as attachments to your communication any key supporting documentation that will help to substantiate that it is a general failure.

This submission relates to a general failure by the Party concerned to implement correctly the provisions of the Convention.

It is my contention that the process of public notification and consultation for the EIA scoping phase of forestry related activities as implemented by the Forest Service of the Department of Agriculture, Food and the Marine (DAFM) does not conform with Article 6 (2) of the Convention in that it is not carried out in an '*adequate, timely and effective*' manner. Consequently the Department is failing to endeavour to ensure that it is facilitating public participation in decision-making and in ensuring that the public is sufficiently aware of its rights to seek access to justice in environmental matters contrary to Article 3 (2).

Although Article 3 (5) of EU Directive 2003-35-EC states

"*The detailed arrangements for informing the public (for example by bill posting within a certain radius or publication in local newspapers) and for consulting the public concerned (for example by written submissions or by way of a public inquiry) shall be determined by the Member States."*

those detailed arrangements must be consistent with the principles of the Convention. In respect of 'Public Participation In Decisions On Specific Activities' Article 6 (2) of the Convention states:

"*The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner,*"

The Aarhus Implementation Guide clarifies this;
"The article provides for two methods of informing the public — public notice and individual notice. Public notice means the dissemination of information to as many members of the public as possible, making use of the normal means for general and widespread transmission of information. Means of public notification might include publication in a newspaper or other generally available printed media, dissemination through mass media (TV, radio), through electronic means or posting of notices in areas with heavy traffic or places frequented by the local population (e.g., bus stations, churches, shops, etc). The EIA Directive mentions, for example, bill-posting within a certain radius, publication in local newspapers"

The AIG also states

"For the purposes of this article, public notice would be considered adequate so long as it effectively targets at least the public concerned with the decision."

"While narrower than the "public," the "public concerned" is nevertheless still very broad. With respect to the criterion of "being affected", this is very much related to the nature of the activity in question. Some of the activities subject to article 6 of the Convention may potentially affect a large number of people."

"Efforts must be made to ensure that the public concerned is not only reached, but that the meaning of the notification is understandable and all reasonable efforts have been made to facilitate participation".

Forestry activities have the potential to impact on a wide range of the public from those in direct proximity to those that may be affected by the 'downstream' consequences of the activity. These include (literally) water quality impacts, health and well-being impacts, quality of life impacts, biodiversity impacts, landscape impacts, impact of increased traffic from forestry operations, etc.

As can be seen from the *FS Public Notification.xls* document there is;

- no public notification through the printed media of applications for afforestation, forest roads, aerial fertilisation or tree felling licences. The Department's justification for this (contained in *Email Thread 2.pdf*) is

"It must be borne in mind that in choosing a print media outlet or outlets, it would be difficult to determine what outlet should be used; why choose one particular outlet over another; covering the plethora of regional outlets; the burden of advertising costs on the taxpayer, among other considerations. The use of the Department's website provides one single source of information emanating from the Department".

To favour a single source for information strikes me as being contrary to the spirit of informing the public and in encouraging the engagement that is a principle of the Convention. To see the cost of informing the public as a '*burden*' does not speak well to the Department's approach to public

engagement and participation and completely misses the point that participation by the public may lead to better environmental outcomes which could, ultimately, result in better value for the taxpayer.

- no local, on the ground notification to the local community of an application for, or the issuing of, felling licences (which could include clear felling). The issuing of a felling licence is subject to an appeals process.

- no routine direct notification to adjacent landowners or those living in close proximity to the proposed activity. The activities under consideration have the potential to significantly impact on the use of neighbouring lands. In particular the impact of shading from plantations (especially of exotic evergreen species) can be considerable. In its findings on communication ACCC/C/2006/16 (Lithuania), the Compliance Committee held that:
"The requirement for the public to be informed in an "effective manner" means that public authorities should seek to provide a means of informing the public which ensures that all those who potentially could be concerned have a reasonable chance to learn about proposed activities and their possibilities to participate".

On the ground notification is by site notice on a public road at the entrance to the site. Whilst acknowledging the value of this, it could be argued that most people would pass by such notices in a vehicle and there is no guarantee that these notices will be seen by the public concerned. Members of the local community may be impacted by a development that has a site entrance on a road that they do not use or use infrequently. How are they supposed to find out about the development?

In restricting local public notification to notices at site entrances I would argue that there is no way that the Department can ensure that a sufficient representation of the public concerned can be adequately targeted.

In the current system submissions or observations on applications must be made in writing. Many members of ageing rural communities may not be inclined to or adequately able to express their concerns through this medium. I would argue that making provision for concerned individuals to make a verbal submission, at a local Department of Agriculture Office for example, should be considered. This would be consistent with Article 3 (2).

The only public notification of decisions on any of these applications, which are all subject to an appeals process, is through the Department's website. Limiting the scope of the notification of decisions to a single webpage is, in effect, limiting the access to justice through the appeals process.

In its report to the third session of the Meeting of the Parties, the Compliance Committee noted that "*unfortunately, countries usually rely on only one of the means of notification"* and suggested that *"simultaneous use of several methodologies would often be significantly more effective*".[268] ECE/MP.PP/2008/5, para. 56.

Alternatives to public notification through electronic means should not be an option, they should be a requirement in order to ensure efficacy.

In Case C427-07, the European Court of Justice found that Ireland had not fulfilled its obligation to inform the public about access to judicial review procedures

"*as the mere availability on the internet of rules and decisions cannot be regarded as ensuring, in a sufficiently clear and precise manner, that the public concerned is in a position to be aware of its rights on access to justice in environmental matters*".

The logical corollary of this judgement is that the mere availability on the internet of an application for or a decision relating to the granting of a licence for an activity which may have a significant effect on the environment is not, of itself, an adequate or effective means of facilitating public participation.

Site Notifications are a feature of Afforestation, Forest Roads and Felling Licence procedures but the National legislation requiring Site Notification for Felling Licences does not form part of the consultation process. Site notices for tree felling works, which must be erected seven days before tree felling operations commence according to Section 4 (1) of SI No 191/2017, are purely informative. They offer no opportunity for the public to comment, object, influence or participate in any way. It strikes me as perverse that the public must be notified by a Site Notice that works are about to take place based on a licence granted but the public are not notified by the same means that a licence for an activity has been applied for or a licence has been granted and that they have a right to make submissions or appeal the decision respectively.

The application system for tree felling licences and the appeals process for all schemes are reliant solely on public notification through the Department's website. I consider it contrary to the spirit of the Convention that members of the public should be expected to monitor on a routine basis a government website on the off chance that a notification that may be of significant import to them may be posted. This restricts the participating public to a very limited cohort (of which I am one). In my view the Department needs to be much more proactive in making the public, particularly the public concerned, aware of the activity and their right to participate in the decision making process for this to be considered adequate.

The document *CSO Statistics.doc* contains some key statistics from 2017 from the Central Statistics Office that indicate the inadequacy of a public notification procedure (particularly in the areas where forestry activity is relatively high) that is heavily weighted to notification through the internet.

Based on records provided in response to an AIE request the homepage of the Department's applications web-pages was accessed just 7742 times in 2018 (I would have accounted for a good proportion of them!) The homepage of the decisions web-pages was accessed just 586 times. Given that the number of annual applications alone run in to the thousands, is this indicative of an effective system of notification?

Any business intending to publicise its product or service to local (mainly rural) communities would not rely on posting a notice on its website. It would put an ad in the local paper or on local radio, it would target potential customers by email or it would, as a number of forest management companies have done, have a presence in one of the local towns. The Department has a minimalist, tick-box approach to public consultation. They have satisfied, in the most basic way, the requirements of National legislation but is this adequate to meet the spirit and the letter of the Aarhus Convention?

The framework of the National legislation does not require the public to be accorded a minimum period of notification in which to appeal decisions (would this be contrary to Article 9 (4) of Aarhus?). In the Forestry Regulations the right to appeal relates to the timing of the Minister's

decision (Section 4 (1) of SI 68 (2018)). Under that code the public has a right to appeal within a 28 day period of that decision but there is no legal requirement as to the actual timing of when the public notification of the decision must be made. This further erodes the public's right of participation and access to justice.
Prior to my correspondence with the Department, up to and including October 2018, decisions were published twice weekly (Tuesday and Thursday). Notifications of decisions are now published three times a week (Monday, Wednesday and Friday). However, a decision that is issued to an applicant on a particular day may not be notified to the public on that day, it may only appear on the next publication day. For example, a decision issued to an applicant on a Friday may not be notified to the public until the following Monday. The period for making an appeal relates to the date of the issuing of the decision, not the publication of the notice of the decision which means that, in this case, 3 days are lost out of the 28 days for making an appeal (reduced from 5 under the twice weekly publication system). I consider this to be untimely and contrary to the public's right of access to justice. The period allowed for making an appeal should run from the period when public notification of the decision is made. If public notice of a decision is required other than through the website then the time period should run from the issuing of the last public notification.

In respect of this the Aarhus Implementation Guide states;

"Another important point is the initial day from which the time frame for public participation should be calculated. In many countries it is deemed to start immediately following the public notice. However, often national law may require several different forms of public notice and, for practical reasons, it may not be possible to make these different forms of notice available all at the same time. Good practice would be for the time frame to be counted from the date the last notice required under national law is posted."

The spirit of this would necessitate a 28 day period of notice from the issuing of the public notification of the decision, not the actual issuing of the decision to the applicant.

No account for Holiday periods

In addition the notification timeframes are never modified to take account of holiday periods. By way of an example, on 19th December 2018 the published notification for felling licence applications ran to 199 pages (over 2000 individual applications) as it included the applications made by the semi-state forestry company Coillte Teoranta (the average weekly page count is 2 to 3 pages). The period for submissions remained the same even though the Christmas and New Year holiday period meant that effectively a week or more was lost. The final public notifications for 2018 were made on 19th December for felling licence applications and 27th December for Afforestation and Forest Road applications. The first public notices for 2019 did not appear until 9th January clearly indicating a slow down or suspension of activities in the Forest Service over the holiday period. This was not reflected in an extension of the period for public consultation. I would also point out that decisions on 117 of those applications (on areas up to 44 Hectares) were published on 23rd January 2019 just 35 days from the publication of notice of the application; those 35 days including the Christmas holiday period. It is difficult not to get a sense that this is seen as a procedural formality rather than a participative process.

The ACCC itself has made comment in this respect;

"*Another issue is the time of year that the public participation is held. There are certain periods in public life which are traditionally considered as holidays and not much is expected to happen. For example, the days of the major religious festivals for each country, national days and to a certain extent, the main summer vacation period. In its findings on communication ACCC/C/2008/24 (Spain), the Compliance Committee held: "a period of 20 days for the public to prepare and participate effectively cannot be considered reasonable, in particular if such period includes days of general celebration in the country*".[287]
ECE/MP.PP/C.1/2009/8/Add.1, para. 92.

The Government's own Consultation Principles Guidance document states "*longer consultation periods may be necessary when the consultation process falls around holiday periods."*

Some of my suggestions for procedures that would better reflect the spirit and letter of the Convention are:

- Landowners directly affected by the activity should be notified directly by the Department and informed of their rights.
- Any licence or approval should require the erection of a site notice within seven days if an affirmative decision has been issued. The notice must inform the public of their right to appeal the decision.
- The period for the submission of appeals should be 28 days from the erection of the site notice or 35 days from the issuing of the decision whichever is the shorter.

To affirm its commitment to genuine public engagement and participation;

- The Department should consider publishing a weekly bulletin on local forestry applications and decisions (with details of timescales for participation) in the appropriate local press outlets. This should be regionally specific – e.g. notifications for Co. Leitrim should appear in the local newspaper the Leitrim Observer.

- The period for public consultations should be extended where the timescales for submissions runs through a recognised holiday period.

- Provision should be made for members of the public concerned to be able to make verbal submissions on applications that directly affect them.

I argue that the Department is too reliant on issuing notification to the public through its website and has not adequately considered other means of informing the public in general and the public concerned of both the actual consultations or the wider rights of the public to participate in the decision making process regarding the applications under consideration in this correspondence. In the case of tree felling licences in particular, which can include clear felling of substantial areas (up to 40 or 50 hectares), by failing to provide for any alternative means of public notification other than through its website the Department has failed to both 'adequately and 'effectively' inform the public of the activity in question and its right to participate in the decision making process. I contend, in so (not) doing, that the implementation of Regulation 10 (4) of the Forestry Regulations (2011) by DAFM is not in compliance with Article 3 (2) and Article 6(2) of the Convention.

The points raised in this correspondence need to be viewed in the wider context of forestry policy in Ireland. It is Government policy to increase national afforested land cover to 18% (from approximately 11%) by 2046. To this end the Government offer grants and tax free premiums for afforestation. It also subsidises the thinning of plantations. This policy and its implementation predominantly through the planting of exotic conifer species is very contentious.

At a National level environmental groups are highly critical. Certain areas where there is a high proportion of marginal agricultural land are effectively being targeted for planting. Co. Leitrim has already passed the 18% national target figure.

The Leitrim branch of the Irish Farmers Association has called for a moratorium on planting in the County. A campaign group Save Leitrim has been "*set up to fight for the survival and future of Co. Leitrim, which is being decimated by the relentless subsidised Sitka Spruce afforestation programme*." The group is organising a rally outside Dáil Eireann on 30th January 2019.

This type of recourse is happening because of a failure by the Government to properly engage with local communities on its policies. The failures of the notification procedures are just a symptom of this larger problem in terms of public engagement. There is a sense that certain rural areas are being sacrificed to blanket afforestation to mitigate against the expansionist plans of the dairy sector, with its concomitant increase in greenhouse gas emissions,
Given the opposition to forestry policy and local concerns in specific areas the question needs to be asked – '*How adequate, timely and affective does the Department want the consultation and notification process to be?*' From the Department's perspective, to improve its procedures could be seen as increasing the opportunity for dissent. The Forestry Appeals Committee (FAC) was established in 2017 and issued its first decision on 5-3-18: Up until the 28-9-18 it has reviewed 33 cases; of these over 60% have resulted in either a variation or annulment of the initial decision. The FAC has already a backlog of cases stretching in to months (approximately 95 cases).

Issues with contention with policy should be dealt with through public participation in the development of policy not by inadequate and ineffective consultation and notification in its implementation.

"If one accepts the basic premise that freer information and a more active public can assist authorities in doing their jobs, then it is also in the authorities' interests to assist the public in exercising their rights because positive results can be expected". AIG

VII. Use of domestic remedies

I have been engaging with the Forest Service (FS) by email since September 2018. Two threads of my correspondence are appended. They contain a certain amount of justification from the Department of its procedures which rely mainly on its minimum requirements under National law. In response I have challenged their position and have indicated my concerns in relation to what I considered to be potential breaches of the Convention and have requested that they review their consultation / notification procedures to ensure that they are in compliance not only with National Law but also European and International Law. In an email from 21-9-18 Ms Anne Cunningham of the Forest Service has stated

"*The Department does not intend to revisit the Act, Regulations or its procedures in this matter*"

I made an Access to Information on the Environment (AIE) request to acquire metrics for access to relevant public consultation web pages of the Department's web site. The records indicated that the relevant Open Consultation pages were accessed 16 times more than the Closed Consultation pages.
On foot of my ongoing correspondence the FS has agreed to amend part of its website which listed decisions that were still subject to the appeals procedure under 'closed consultations'. These have now been moved to the 'open consultations' section of the page. However, there is no indication that the FS has any intention of reviewing its notifications procedures in respect of the issues raised in this communication. I informed the FS that I would refer the matter to the ACCC.

The Department appears to be relying on the fact that it is in compliance with the letter of National legislation. I have pointed out that National law cannot over-ride or dispense with the requirements of European Legislation. If National legislation does not adequately reflect European law then there is an issue with transposition which should be rectified not ignored.

VIII. Use of other international procedures

Indicate if any international procedures besides the Aarhus Convention Compliance Committee have been invoked to address the issue of non- compliance which is the subject of the communication. If so, specify which procedures were used, when, which claims were made and what the results were.

None. I am not aware of any other options open to me.

IX. Confidentiality

Note that unless you expressly request it, none of the information contained in your communication will be kept confidential. If you are concerned that you may be penalized, harassed or persecuted, you may request that information contained in your communication, including information on your identity, be kept confidential. If you request any information to be kept confidential, clearly indicate which information. It is also helpful for the Committee to know why confidentiality is requested.

I request that my permanent address and telephone number are treated as confidential information.

X. Supporting documentation (copies, not originals)

Avoid including extraneous, superfluous or bulky documentation. Attach only documentation essential to your case, including:

- Relevant national legislation, highlighting the most relevant provisions.

  Copy of Forestry Regulations (SI 191 of 2017) (most relevant sections highlighted)

  Copy of Forestry Appeals Regulations (SI 68 of 2018) (most relevant section highlighted)

  Copy of Agriculture Appeals Act, 2001 (most relevant sections highlighted)
- Relevant decisions/results of other procedures, highlighting the most relevant sections.
- Relevant correspondence with the Party concerned's authorities or other documentation substantiating your allegations of non-compliance, highlighting the most relevant sections.

Thread 1.htm - email correspondence with Ms Anne Cunningham of FS
Thread 2.htm - email correspondence with Ms Anne Cunningham of FS

My apologies but I have not been able to modify the documents, for technical reasons, in order to highlight the most relevant text.

For documents other than key legislation and decisions, there should be no more than **five** attachments (one document per attachment).

CSO Statistics.doc
FS Public Notifications.xls

For all documentation, highlight those parts which are essential to your case.

Provide all documentation in the original language, together with a legal standard English translation thereof, or if that is not possible, a legal standard translation in either Russian or French.
All correspondence is in the original language (English)

XI. Signature

Sign and date the communication. If the communication is submitted by an organization, a person authorized to sign on behalf of that organization must sign it.

Neil Foulkes 25-1-19

XII. Sending the communication

Send the communication by **e-mail and by registered post** to the following address:

Secretary to the Aarhus Convention Compliance Committee
United Nations Economic Commission for Europe
Environment Division
Palais des Nations
CH-1211 Geneva 10, Switzerland

E-mail: aarhus.compliance@unece.org

Clearly indicate:
"Communication to the Aarhus Convention Compliance Committee"
