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Secretary to the Aarhus Convention
UNECE, Environment and Human Settlement Division
Room 332, Palais de Nations
CH-1211 Geneva 10
Switzerland

Attn: Mr Jeremy Wates

Our ref. PS/MRG-1

11th November 2008

Dear Sirs

Communication to Compliance Committee ACCC/C/2008/23

We write in reply to Defra's response to the Compliance Committee of 30th October 2008 and further to our letter of 29th September 2008.

1. To which procedures and remedies in this kind of case do the provisions of article 9, paragraphs 3 and 4 of the Convention apply?

Defra suggests that it is only required to implement the Aarhus Convention 1998 on the basis that there is a presumption to avoid conflict with international treaties. However, Mr Justic Sullivan placed greater weight on the Convention in the case of *R (Greenpeace Ltd) v SSTI* [2007] EWHC 311 stating that:

> 49. … Whatever the position may be in other policy areas, in the development of policy in the environmental field consultation is no longer a privilege to be granted or withheld at will by the executive. The United Kingdom Government is a signatory to … [the Aarhus Convention] …

As the UK operates under a common law system, the High Court decision can be relied upon as a statement of the law rather than simply an example of an application of the law. Thus, there is greater onus to act in accordance with the Aarhus Convention than a presumption to do so. It is correct that the Civil Procedure Rule 1998 assist the common law in providing the right of claim and injunctive relief against private persons.

2. Which effective means of injunctive relief are available in cases such as the one referred to in the communication in accordance with the national legislation or case law?

It is correct that injunctive relief is available to parties seeking to resolve environmental problems, as in the present case. This was the relief sought, and granted, by the Court on 9th

November 2007. However, it was the intervention of the regulators, the Environment Agency and the Council (BANES) stating that they did not wish to be referred to in the private proceedings that resulted in the discharge of the injunction and costs award against the Mrs Baker and Mr Morgan.

Behind this of course, it is important to note that Mrs Baker and Mr Morgan were only compelled to take action themselves because of the continuing failure of the regulators since 2003 to control the waste operator and the odours, air pollution and other environmental problems arising from the site. The problems persist to date, with frequent and offensive odours arising from the site but no action being taken by the regulators. Indeed, problems have deteriorated, with the waste operator illegally expanding its waste activities closer to people's homes without any action being taken by the regulators (see letters of 11th November 2008 to BANES and the Environment Agency).

Both BANES and the Agency were under a duty to investigate complaints of odours. There was nothing over and above their normal regulatory functions they would have been asked to do.

3. What means are available in order to challenge a failure of a public authority to act in order to enforce environmental decisions?

It is correct that judicial review is available to challenge acts or omissions by regulators. There are proceedings relating to this site against both the land use planning regulator (BANES) and the Environment Agency. However, it cannot be correct that local residents are forced to have to pursue numerous courses of litigation to try and protect their environment, when regulators have been persistently advised about the problems and refuse to take effective enforcement action.

4. Why did the relevant authorities take no action?

The comments by Defra are not entirely accurate. It is not denied that the Agency has issued a number of enforcement notices against the waste operator, what it does fail to do is to prosecute the breach of notice and to stop the problems arising. The waste operator appears content to receive any number of notices but *effective* action to resolve the problems is absent, see for example, the latest summary of odour complaints to the Agency. If the regulators' enforcement action was effective, the complaints would stop.

In terms of BANES, abatement notices have been issued but again, they have not been enforced. Indeed, the latest one issued on 2nd October 2007 was drafted in such a way as to suspend its application (contrary to the legislation) the moment an appeal of that notice was issued. This can only described as either negligence or incompetence by a regulator's environmental health department who should know full well how to draft a s 80 abatement notice. Further, it is not correct that there has been no recurrence of odour amounting to a statutory nuisance; see eg the letter from BANES of 10th January 2008 (enclosed).

In summary, the position remains the relevant authorities have not taken any *effective* enforcement action. Instead, they have prevented local residents taking effective action themselves.

We trust the above assists and look forward to hearing from you.

Yours faithfully

Richard Buxton

cc Dr Asa Sjostrom, Head of EUIC Core Team, DEFRA