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Dear Sirs

Communication to Compliance Committee ACCC/C/2008/23

Thank you for your letter of 4 June 2010 enclosing the draft findings of the Compliance Committee in the above matter and inviting comment upon this.

Overall, we welcome the findings. We have the following comments which we hope will clarify a few points in the draft. We refer to the draft's paragraph numbers.

Paragraph 25

The choice of private nuisance proceedings in trying to resolve the environmental pollution over any other option was not primarily because legal expenses insurance was available, although this was a factor. It was considered the most effective course of action in the circumstances. If one considers the four options set out in para. 24, this, in our view, becomes clear.

- ***Options (a) and (d)***, s 82 proceedings and private prosecutions, would involve the communicants becoming prosecutors, a function generally (albeit not exclusively) conferred upon the state. The following factors militate against prosecution. It involves proving a crime has been committed (rather than pursuing a civil claim) and still involves cost. Criminal law involves an element of punishment, which is not the primary aim of the communicants who simply want to stop the environmental pollution. Any prosecutor must prove 'beyond reasonable doubt' that an offence has been committed compared to proving a private nuisance on a balance of probabilities (more probable than not - and so there is a much less onerous

standard). Also, the sanctions open to a criminal court tend to be less effective in terms of any remedy to prevent environmental harm (as is necessary in the communicants' case). Finally, any regulatory offence would require the Agency to issue an enforcement notice in the first place. The ineffectiveness of criminal proceedings is evident by the fact that the Agency has already secured two convictions for odour offences against the waste operator yet local residents continue to experience odours.

- ***Option (b), complaint to the ombudsman***. The primary difficulty with this option is that if a complaint is made out the ombudsman's recommendation will only ever be advisory and the public body need not accept that recommendation. Also, any complaint will not address the real problem which is the environmental harm; it will consider only whether there has been maladministration in government office. It is therefore at least one step removed from the stopping the offensive odours.

  In the present case, a complaint to the Local Government Ombudsman (LGO) about how the Council were dealing with odours and other problems from the waste site was made as early as 2005. The LGO concluded there were insufficient grounds for a complaint of maladministration. In 2006, the Parliamentary Ombudsman upheld, in part, a complaint about the Agency's handling of a nearby waste composting site. The Agency then identified a series of lessons to be learned in a briefing note of August 2006. Despite this, in the present case problems have persisted ever since 2006.

- ***Option (c), judicial review***. The primary difficulty with judicial review, as with an ombudsman complaint, is that the proceedings will not directly resolve the environmental harm but only consider whether a public body is acting unlawfully. With discretion often conferred on the public body as to whether or not it chooses to act this can present problems. Indeed, three separate judicial review proceedings have been pursued against the Environment Agency and the Council in relation to this waste operation.

  i) In *Baker v BANES* [2009] EWHC 595 (Admin) *(Baker No. 1)*, judicial review was successful in quashing 3 x planning permissions originally granted in 2006. The permissions allowed an intensification of waste operations at the site and the likelihood of odour problems. The unlawfulness was a failure by the Council to comply with the EIA Directive 85/337/EEC. Despite the ruling, the operator continued its waste operations without those planning permissions.

  ii) In *Baker v BANES* [2009] EWHC3320 (Admin) (*Baker No. 2)*, the High Court quashed the Council's EIA screening opinions carried out some four years after the original planning applications were made. The High Court did not, however, go on to grant an injunction requiring the Council to take enforcement action for carrying on waste operations without planning permission. To date, no lawful planning permission has ever been granted for the intensification of waste operations. Nor has an EIA ever been undertaken, despite the Council conceding that it should have been. Finally, since April 2010 the waste operator has had no planning permission whatsoever. Despite this, the Council refuses to take planning enforcement action to stop the waste operations. The Council has also been asked to stop using the site to dispose of its own waste and, again, it has refused to do so.

  iii) In *Baker v Environment Agency* [2010] EWHC 711 (Admin), an application challenging the Agency's failure to properly regulate the waste site was

dismissed when it was conceded that by the time of the court hearing (some two years on) the Agency had revoked an unlawful grant of a waste exemption licence and had revised the waste licence to require bioaerosol monitoring. The communicant's view was that it took the issue of legal proceedings to prompt the Agency into action. The Agency maintained that it would have taken such action anyway, although this was not the stance it took on issue of the proceedings in July 2008.

In summary, despite three judicial review claims that largely achieved what was claimed (save for an injunction requiring the Council to take enforcement action), the environmental problems continue. This, in the communicants' view, affirms that in the present case, private nuisance proceedings were, and remain, the most appropriate course of action open to the communicants.

Paragraph 29

The draft findings refer to the naming of an authorized officer as a monitor of the operator's activities. This was not the case. The correct position was that the injunction order of 9 November 2007 provided that the waste operator be:

> "… prohibited from causing odours at or in the immediate vicinity of the Claimants' respective properties … at levels that are likely to cause pollution of the environment or harm to human health or serious detriment to the amenity of those properties as perceived by either (a) an authorised officer of the Environment Agency; … (b) the Council."

This did not require an officer to be a monitor but that if an officer did visit the claimants' properties and perceived an odour that would be determinant of a breach of the injunction order. It was always open for an officer not to visit the claimants' properties. Indeed, when granting the injunction, the Judge expressly recognised this by stating that:

> "12. While Mr Hyam [Counsel for the Communicants] accepted that it was appropriate that there should be some independent assessment of whether there had been any breach (if there is said to be a breach) following the making of the order. Mr Hyam recognised that the court has no power and the claimants have no power to require either the Environment Agency or Bath and North East Somerset District Council to make available authorised officers for the purpose of making the assessments which the injunction that Mr Hyam seeks postulates.
>
> 13. That is a factor which I have taken into account. I have also taken into account the submission of Mr Wald as to the existing powers of the Environment Agency. However, it seems to me that making an injunction in the terms sought by Mr Hyam would have these benefits: (1) it would focus attention on the particular properties of the claimants; (2) it would add to the panoply of remedies available in the event of breach of the formidable powers of the court in relation to contempt of court. While it is to be hoped that the issue will not arise hereafter before the trial, of whether there has been any breach of the injunctions of which I am going to grant, nonetheless it does seem to me that is an appropriate step to take and potentially of value to the claimants to grant the injunctions sought. So that is what I am going to do."
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> [Judgment 9.11.07]

In summary, it is not strictly correct to imply that an officer of the Agency or the Council was being required to monitor the operator's activities at the Communicant's home. In fact, Agency and Council officers *were* required to monitor activities in general, the purpose of the order was, as the Judge found: (1) to focus attention on the particular properties; and (2) to add to the panoply of remedies available in the event of a breach.

What perhaps remains most surprising in all of the above, was that the terms of the injunction provided the most efficient and effective means of either the Agency or the Council to bring a regulatory breach before the Court where they had been failing to achieve this for some time, for one reason or another, e.g. by the Council issuing defective abatement notices and by the Agency regarding themselves as being bound by adverse rulings in other cases (e.g. in *Biffa v Environment Agency* [2006]).

Paragraph 30, line 6

The date is 9 November **2007** (not 2009)

Paragraph 31, last line

The Defendant's costs were **estimated** to be £19.190, rather than assessed.

Paragraph 59

Finally, we are concerned that paragraph 59 without further clarification may be read as stating that an order of £5,130 plus interest may not be prohibitively expensive when, in many cases, it will be precisely that. To be clear, the communicants' original allegation was that the overall costs order of 21 December 2007 of up to £25,000 (i.e. £19,190 plus £5,130 plus interest) was in breach of article 9(4) because it was unfair, inequitable and prohibitively expensive. However, once the Court of Appeal found that it was unfair for the Claimant to be liable for that order (or most of it) the communicants did not allege that the order of £5,130 plus interest was prohibitively expensive; which is what paragraph 59 as it currently reads suggests. The communicants did allege that it was unfair and inequitable that they should be solely responsible for paying the £5,130 plus interest and, further, that the Agency and the Council were unfairly penalizing the communicants compared to the waste operator by demanding that they pay this sum rather than the operator.

We submit that the Committee's conclusion on this point could read:

> "59. With regard to the issue as to whether the £5,130 plus interest was prohibitively expensive under article 9, paragraph 4, the Committee accepts the acknowledgement on behalf of the communicants (as noted in paragraph 43 above) that such a sum was not prohibitively expensive in this case, while observing that a similar order of a similar sum may well be prohibitively expensive in other circumstances."

We trust that the above assists.

Yours faithfully

Richard Buxton

cc Jane Barton, Defra