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3rd December 2010

Secretary to the Aarhus Convention
United Nations Economic Commission for Europe
Environment and Human Settlement Division
Room 332, Palais des Nation
CH-1211 Geneva 10
Switzerland

By post and by email

Dear Sirs,

Re: Decision of UK Upper Tribunal (Administrative Appeals Chamber) regarding the Environmental Information Regulations 2004 and the status of privatised water companies

Fish Legal (formerly the Anglers' Conservation Association) is a non-governmental, not-for-profit organisation which acts for a membership based in England, Wales, Scotland and Northern Ireland made up of angling clubs, individual supporters, riparian owners and other organisations.

We are writing with regard to the recent decision of the Upper Tribunal (Administrative Appeals Chamber) (Upper Tribunal case no. GI/2458/2010) in Smart Source v the Information Commissioner which has now confirmed that ***water and sewage companies (WASCs) or water only companies (WOCs) are not public authorities for the purposes of the Environmental Information Regulations 2004.***

Background: Information on deemed consents/ CSOs

In 2009, after a considerable period of campaigning, the Environment Agency had agreed with Fish Legal that it would seek to determine the conditions on what had previously been known as "deemed consents" for thousands of combined sewage overflows (CSOs) in England and Wales. Fish Legal had argued that the deemed consents were little more than *carte blanche* to pollute at will because no proper conditions had been applied to the consents since the privatisation of the water industry in 1989. Consequnetly, the outflows of untreated sewage caused significant environmental harm.

However, the Environment Agency's decision to determine the deemed consents was then challenged by the WASCs by way of appeal to the Planning Inspectorate (when?). The appeal was disappointing and illustrated to Fish Legal and its membership that the water industry was not prepared to improve its systems and allow its discharges to be properly

Fish Legal
Eastwood House
6 Rainbow St. Leominster
Herefordshire HR6 8DQ
Tel: 01568 620447
Fax: 01568 614236
www.fishlegal.net
admin@fishlegal.net

Patron: HRH The Duke of Edinburgh
Chairman: Roger Furniss
Chief Executive: Mark Lloyd
Solicitors: Dr. Justin Neal, Robert Younger, William Rundle

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regulated. Some of the sewage companies argued that it would be unfair to have new conditions set for their activities based on their view that the CSOs had not caused environmental harm. Challenging this view, Fish Legal wrote to several of the WASCs including Yorkshire Water and United Utilities to request environmental information – including documents relating to the extent, nature and frequency of discharges from the CSOs. The water companies refused to disclose the information stating that they believed that as *private companies* they were not public authorities for the purposes of the Environmental Information Regulations 2004.

Complaint to ICO

A complaint was made to the Information Commissioner's Office by Fish Legal in September 2009. The Information Commissioner in early 2010 then decided that the water companies were indeed not covered by the Environmental Information Regulations (EIR) as they were not public authorities; neither did they perform the functions of public authorities or were they closely regulated or controlled by a public authority (a copy of the ICO decision is attached).

Appeal to the Upper Tribunal

Fish Legal then sought to challenge this decision by way of appeal to the Tribunal (our Grounds of Appeal are attached). As there were several appellants from the decision of the ICO, the Tribunal ordered – on the request of the WASCs and WOCs - that the appeal from Smartsource – a commercial entity – be heard first as the lead case. Fish Legal's appeal and that of two other appellants-in-person were then stayed whilst the lead case of Smartsource was transferred up to the Upper Tribunal.

Smartsource is a company which had requested documents – including asset mapping databases, water and sewage billing records, sewer flooding registers, water quality reports and the trade effluent registers from both WOCs and WASCs. Although the purpose for its request was manifestly different from that of Fish Legal, both appeals rested on the issue of the status of water companies and whether they were subject to the EIR 2004.

After a two-day hearing, the Upper Tribunal issued its judgment – a copy of which we have attached to this letter.

Its decision was that, "the additional parties (being water and sewerage companies (WASCs) or water only companies (WOCs) are not public authorities for the purposes of regulation 2(2)(c) or (d) of the Environmental Information Regulations 2004. . .We therefore confirm the decision of the Information Commissioner dated 12 March 2010 that he has no jurisdiction to consider the complaint by the Appellant [Smartsource] under the Environmental Information Regulations 2004. . ."

Although finding that the companies were not covered by the EIR definition of public authority, there was a postscript to the Judgment which takes the suggestion from the Aarhus Guide on the production of "categories or lists made available to the public". It is postulated that although the DEFRA guidance states that there can be "no comprehensive list of those bodies that are under the control of another body because such relations are dynamic and are prone to frequent change", that a recommendation be made for such a list to be produced and kept updated.

Why we believe that the decision is wrong

Although we agree that Defra should act to clarify the matter once and for all, we believe that the judges decided in favour of the water companies based on a narrow definition of public authority functions rather than taking a purposive approach which would be consistent with the Aarhus Convention.

The United Kingdom is a signatory – as the Committee will understand – to the Convention on access to information, public participation in decision making and access to justice in environmental matters. The Convention was ratified by the United Kingdom on 24th February 2005. The same Convention was ratified by the European community in 2005.

Article 2(2) of the Aarhus Convention defines the expression "public authority" as meaning:

"(a) Government at national, regional and other level;

(b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;

(c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;

(d) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention.

In the guidance – "The Aarhus Convention: An implementation Guide (2000)" – the definition of a public authority is further clarified and it is stated that "...recently developments in "privatised" solutions to the provision of public services have added a layer of complexity to the definition. The Convention tries to make it clear that such innovations cannot take public services of activities out of the realm of public involvement, information and participation."

This definition of public administrative function in the Convention is loosely implemented in the EC Directive on Public Access to Information (2003/4/EC) and the EIR 2004 and compares with Article 2 (2) (b) and (c) and Regulation 2 (2) (c) and (d) respectively.

As the Committee will see from our Grounds of Appeal, we believe that the water companies – despite privatisation – fall under both heads of performance of public authority functions and administration and also that they are sufficiently controlled by another such body– namely OFWAT and EA – and that they satisfy the definitions given in the Convention at 2 (2) (b) and (c).

We would draw your attention to the analysis of the Aarhus Convention guide from paragraph 83 onwards in the judgment (page 22).

Most importantly, it cannot be the intention of the convention that WASCs and WOSCs should be above the scrutiny of the public.

As a signatory to the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, we believe that the UK has:

1) created a situation where – given the lack of clarity – water companies which discharge sewage into rivers, abstract water and carry clear statutory functions - are now immune from scrutiny and access to information. This in turn impedes and prevents access to justice for the public;

2) not acted to clarify the law in relation to the definition of *public authority;*

3) ignored the requirement for clearer domestic guidance to the implementation of the Convention.

Why this matters for access to justice

Overall, the decision of the Upper Tribunal is extremely important to Fish Legal and its members – but also to other NGOs, private persons whose property or rights have been threatened by pollution from water company installations as well as campaigners who want to see an end to the pollution of rivers.

At a time when the Environment Agency in England and Wales has implemented a system of operator self monitoring (OSM – a form of "soft touch" regulation where the water companies perform their own monitoring and provide data to the Environment Agency) – it is important that interested parties such as NGOs – including Fish Legal – are able to extract information from water companies regarding pollutions, management of polluting assets, data on water quality and discharges and so on.

As matters stand, it is likely that – just as with the water companies following the ICOs decision – our request for information will be met with refusals, leaving no clear route to access information other than in a very small number of cases through the civil courts where the providence of information is a preliminary procedural requirement of a claim for damages. This procedure would be disproportionately expensive, uncertain, time consuming and certainly does not provide a mechanism for compliance with the provisions of the Aarhus Convention.

We therefore request that the Committee considers this matter admissible and proceeds to examine the circumstances of this Communication.

We look forward to hearing from you in due course.

Yours faithfully,

Justin Neal
Head Solicitor for Fish Legal

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