Nobel House
17 Smith Square
London SW1A 3JR

Telephone 08459 335577
Email Jane.Barton@defra.gsi.gov.uk
Website www.defra.gov.uk

defra
Department for Environment
Food and Rural Affairs

18 June 2010

Ms. Ella Behlyarova
Secretary – Aarhus Convention
Economic Commission for Europe
Environment, Housing and Land Management Division
Bureau 332
Palais des Nations
CH-1211 Geneva 10
Switzerland

Dear Ella

Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by the United Kingdom with the provisions of the Convention in connection with costs associated with the discharge of an interim injunction(Ref. ACCC/C/2009/23).

Thank you for your letter of 4 June 2010 attaching draft findings of the Aarhus compliance committee in the above case. Please find attached UK comments on the draft findings.

Yours sincerely,

J M. Barton

Jane Barton, UK National Focal Point

Cc Richard Buxton

ACCC/C/2008/23

UK comments on the draft findings of the Aarhus Compliance Committee dated 4 June 2010

1. There seems to be an inconsistency between paragraph 7 and the first sentence of paragraph 8 in relation to the timing of the Party's response to the Committee's questions of 17.4.08

2. Paragraph 30, line 11, suggest: "By a judgment …"

3. Paragraph 32, last sentence is not quite accurate. The communicants did not seek to contest their own liability to the Agency and Council, but sought to argue that this liability should be met by the Defendant, or at least that they should have the opportunity at the conclusion of proceedings to argue that it should. Thus, the communicants accepted both their liability to the regulators in respect of the costs ordered, as well as the quantum of those costs. It is therefore suggested that the last sentence should be replaced by the following more accurate formulation:

   > *"Subsequently, the communicants narrowed the ground of their appeal so as to seek the dismissal of the costs order in favour of the operator in its entirety, and that the costs order in favour of the Agency and the Council should be transferred to the operator (or that this issue should be deferred until conclusion of the substantive proceedings). There was no challenge as to the quantum of the costs in favour of the regulators and the communicants had agreed with the regulators before the hearing that in the event that their argument that their liability for their costs should be transferred to the operator failed, the communicants would remain liable to the regulators in any event."*

4. Paragraph 33, end of first line, suggest: "the costs order …".

5. Paragraph 47, footnote 6: the reference seems incorrect, or at least not to the current edition of Halsbury's laws?

6. Paragraphs 54 and 60: the Committee is proposing to make a finding that the Court of Appeal's decision in relation to the costs payable by the communicants to the regulators constituted an isolated breach of Article 9(4) of the Convention constituted by. The UK Government respectfully suggests that this should be reconsidered:

   (a) Article 9(4) is concerned with "procedures". Indeed Article 9 as a whole is directed to a Party's obligation to provide suitable procedures to give access to environmental justice. As the United Kingdom Government

understands it, there is no criticism by the Committee of the procedures provided by the Party in this case, as opposed to the way in which the Court of Appeal applied those procedures in the specific respect identified by the Committee. Properly analysed, it is respectfully suggested that this cannot amount to a breach of Article 9(4).

(b) The relevant decision made by the Court of Appeal was made in the absence of any Party or other State body. As the Committee clearly appreciates from the terms of the draft decision, the Court of Appeal's decision was made in the context of a dispute between private parties. It was of no significance to the regulators whether the communicants' liability to them for costs should be shared by the site operator (as the Committee considers it should have been). The regulators did not seek to prevent the communicants from arguing that their liability should be transferred or shared with the operator. Indeed, the regulators played no part in the hearing before the Court of Appeal. In these circumstances, it is respectfully suggested that it would be surprising if the Court of Appeal's decision in the particular circumstances of the case, was capable of constituting a breach of Article 9(4).

(c) The United Kingdom Government is conscious that the Committee, in indicating that it is minded to criticise the Court of Appeal's decision, has not heard from the operator, who would be directly concerned with the order made. The Court of Appeal did of course hear from both interested parties (i.e. the communicants and the operator). No public body, as noted above, was represented at that hearing. In these circumstances, the Government would respectfully suggest that it may be inappropriate for the Committee to go so far as to find that the Court of Appeal's decision constituted a breach of the Convention, having only heard from one party interested in the decision under scrutiny where the national court had heard from both.

(d) Furthermore, in practical terms, if any unfair or inequitable decision by a national court in the context of a dispute falling within the subject matter of the Convention were to give rise to a breach of the Convention (albeit "*stricto sensu*") and hence found a legitimate complaint to the Committee, the work of the Committee would be diverted from effective consideration of possible systemic failures by Parties in implementing.

(e) Bearing in mind all the points above, the Committee is respectfully requested to reconsider the finding of a breach that it has indicated that it is minded to make in its draft decision.

7. Paragraph 55: Should the reference to the "Civil Registries Office" be to the "Civil Appeals Office"?

8. Paragraph 56: The UK Government respectfully suggests that the criticism (even mildly expressed as it is) should not be included, as:

(a) It relates to a matter that was not the subject of complaint by the communicants and so was not the subject of any detailed consideration or response by the Party (either in its written or oral representations);

(b) In any event is unfair as the request that it is suggested the Party should have made of the regulators could be regarded as unwarranted Governmental interference in the exercise of the statutory functions of a regulator; and

(c) Perhaps most significantly, it is not apparent how the making of such a request would have assisted the communicants' access to justice, even if that request had been granted by the regulators. The communicants did not have access to the funds for the purposes of pursuing their litigation, whether they remained in an interest-bearing account pending the conclusion of the litigation, or were paid immediately to the regulators following the Court of Appeal's judgment. The regulators had themselves agreed that the funds should be held by the communicants' solicitors pending the Court of Appeal's judgment. Thereafter, for those funds to have continued to be held by the communicants' solicitors (as has been suggested may have been appropriate) rather than by the regulators to whom those funds had been ordered to be paid would not obviously have enhanced the communicants' access to justice.