

BEFORE:
THE AARHUS CONVENTION COMPLIANCE COMMITTEE
UNITED NATIONS, ECONOMIC COMMISSION FOR EUROPE

RE: COMMUNICATION ACC/C/2009/38
(ROAD SENSE)

**SUMMARY OF THE POSITION OF
THE GOVERNMENT OF THE UNITED KINGDOM
for the Committee's consideration on 17 March 2010**

DEFRA
(Department for Environment
Food and Rural Affairs)

Nobel House
17 Smith Square
LONDON
SW1A 3JR

17 March 2010

INTRODUCTION

1. This Summary seeks to identify the principal elements of the complaints made in the communication from Road Sense, as set out in both the original communication (of 7.5.09) and supplementary submissions of 21.12.09 and 23.2.10. The United Kingdom Government's response to those complaints is summarised below, and reflects the approach of the oral representations which the Government proposes to make to the Committee at its consideration of this matter on 17.3.10. The Government continues to rely on its detailed response of 22.12.09 and this Summary does not seek to depart from or replace the Government's position previously as previously set out.
2. The factual background to the Aberdeen Western Peripheral Route (AWPR) is not rehearsed again here. There is a vast amount of information available in relation to the AWPR, the development of the project, and the assessments, investigations, consultations, and reports that have been conducted and produced in relation to it.

<http://www.awpr.co.uk/>

3. The entire Environmental Statement published on 11.9.07 is available from this site: all 14 volumes, including appendices, maps, and a non-technical summary. A large number of other reports may also be accessed from the site. There is also a link to the Report to Scottish Ministers following the Public Local Inquiry (PLI) conducted between September 2008 and February 2009, which was published on 21.12.09:

<http://www.scotland.gov.uk/Topics/Transport/Road/AWPR>

4. A chronology of key events is annexed to this Summary. Road Sense made their complaint in May 2009, before the report of the Public Local Inquiry conducted between September 2008 and February 2009 had been published and before any decision of the Ministers or Scottish Parliament in relation to the AWPR. Those decisions have now been made.

ADMISSIBILITY

5. On 3 July 2009 the Committee made a preliminary determination that this communication (ACCC/C/2009/38) was admissible. The United Kingdom Government does not formally request that the decision on

admissibility should be revisited, but notes the availability of domestic remedies which are neither unreasonably prolonged nor ineffective. By reference to paragraph 21 of the annex to Decision I/7, it is noted that the Committee “*should at all relevant stages take into account any available domestic remedy ...*”. The Government suggests that the availability of domestic remedies is an important feature in any consideration of this communication, as set out in the summary below.

PRINCIPAL HEADS OF COMPLAINT

6. The following may be identified as Road Sense’s principal complaints:
 1. *Failures to provide adequate access to environmental information, in particular in relation to (a) a report on populations of the freshwater pearl mussel; and (b) a report on the location of badger setts. (Arts 1, 3, 4, 5)*
 2. *Failure to involve the public in environmental decision making in relation to the 5 possible routes, in particular as to a lack of the consultation in relation to (a) the route chosen; and (b) “a new objective for the strategic transport plan” which should have been subject to a Strategic Environmental Assessment (SEA). (Arts 6, 7)*
 3. *Criticisms of the Report to Inform Appropriate Assessment which contains “major deficiencies”. (Art 3)*
 4. *The restricted ambit of the Public Inquiry in relation to its ability to consider (a) alternative routes; (b) the need for the scheme at all; and (c) matters under Article 16(1)(c) of the Habitats Directive. (Arts 7, 9)*
 5. *The absence of an effective and affordable review procedure for the decision of the Scottish Ministers. (Art 9)*
7. The provisions of the Convention said to have been breached are strikingly numerous and diverse: Articles 1, 3, 4, 6, 7, 9 and the Preamble are all relied upon.

SUMMARY RESPONSE TO THE COMMUNICANT'S COMPLAINTS

1) Failures to provide adequate access to environmental information

(a) the report on populations of the freshwater pearl mussel;

8. The Government's position is that:

- (i) It is important to note that a redacted version of the report was provided to Dr Hawkins in August 2008, with the redactions made in order to protect the pearl mussel population.
- (ii) SNH's refusal to disclose an unredacted version the report was plainly justified under Art 4(4)(h) of the Convention¹.
- (iii) The threat to the freshwater pearl mussel from illegal pearl fishing is not merely historic (as appears to be suggested by Road Sense). Scottish Natural Heritage (SNH)² has provided significant resources to raise the attention to the wider public regarding the plight of freshwater pearl mussel in Scotland³.
- (iv) The suggestion that disclosure could or should have been limited to Dr Hawkins (of Road Sense) is unrealistic. There would have been no justification for making a special dispensation to Dr Hawkins, over and above other potentially interested members of the public.
- (v) Furthermore, all information given to the Public Local Inquiry is a matter of public record. It would have been impracticable to give unredacted disclosure to Dr Hawkins for the purposes of him to make submissions to the inquiry on the basis of the redacted material, without compromising that information and the endangered species.
- (vi) In any event, there was an available domestic remedy in relation to the report, which Dr Hawkins did not pursue. The availability of that remedy has been acknowledged by Road Sense [21.12.09 at §7.4] There is no good reason why Road

¹ "A request for environmental information may be refused if the disclosure would adversely affect: ... (h) The environment to which the information relates, such as the breeding sites of rare species."

² SNH is the independent statutory Government adviser on nature conservation and landscape matters in Scotland.

³ The following link provides a leaflet published by SNH in 2009 seeking to highlight and combat illegal persecution of the freshwater pearl mussel in Scotland:

<http://www.snh.org.uk/pdfs/publications/marine/freshwaterpearlmusselleaflet.pdf>

Sense should not have pursued that remedy to seek disclosure before conclusion of the oral hearings in December 2008, or before the date for written submissions on 16.2.09.

Some further detail:

Dr Hawkins initially requested under Freedom of Information (Scotland) Act 2002 and Environmental Information (Scotland) Regulations 2004 a copy of the Freshwater Pearl Mussel Report in July 2008 in advance of the public local inquiry. SNH refused this request in August 2008. SNH withheld the information under Regulation 10(5)(g) of the Environmental Information (Scotland) Regulations 2004. Dr Hawkins did not ask for a review following this refusal.

A second request was submitted by Dr Hawkins on 8 April 2009 for a copy of the report. SNH withheld the information again on 11 May 2009. On 16 May, Dr Hawkins then requested that SNH undertake an internal review of its decision to withhold the information. Following internal review SNH responded to Dr Hawkins on 10 June 2009 maintaining that the information would not be released.

Dr Hawkins subsequently appealed this decision to the Scottish Information Commissioner in his letter dated 12 June 2009. The appeal was validated by the Scottish Information Commissioner on 18 June 2009 (Ref 200901106). SNH have not yet received any response from the Information Commissioner.

(b) a report on the location of badger setts.

- (i) Significantly, Road Sense *"appreciates that there is a risk of persecution of badgers if sett locations are revealed ..."* [21.12.09 at §4.6]. Badgers are the subject of specific legal protection from cruelty and persecution.
- (ii) As with the sensitive information relating to pearl mussels, non-disclosure of the report was justifiable under Art 4(4)(h) of the Convention.
- (iii) Neither Transport Scotland nor the AWPR Managing Agent (Aberdeen City Council) have any records of receiving a written

request from Road Sense for the Badger Report⁴ and Road Sense admit that they did not pursue the available domestic regimes⁵.

- (iv) The suggestion that there was insufficient time to pursue the domestic remedy for the public inquiry (communication of 8.5.08 at p.8) is not sustainable, given the time over which the inquiry was conducted, with closing submissions not being required until 16.2.09⁶.

2) Failure to involve the public in environmental decision making in relation to the 5 possible routes, in particular as to a lack of the consultation in relation to ...

(a) the route chosen

9. The Government would observe that:

- (i) The alternative routes were the subject of a major public consultation exercise in 2005.⁷
- (ii) All the essential elements of the route that was eventually adopted (including the crossing point of the River Dee) were included in the options consulted upon in 2005 and a composite was eventually decided upon.
- (iii) Although 'the Murtle route' was at that time the favoured option for the southern leg, the whole purpose of the consultation was to evaluate all options in the light of the public's involvement and participation in that process.
 - maps illustrating the options consulted upon, and that adopted are to be produced for the Committee.

⁴ The Badger report appears as a confidential annex to the Environmental Statement at Appendix A10.2. At the public local inquiry Road Sense attempted to get the Reporters to request that the Badger Report be lodged by Transport Scotland as an inquiry document. As badgers are legally protected from intentional or reckless cruelty, such as baiting the Reporters did not want this Report to be lodged as a documents because it would have then been publicly available.

⁵ Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004.

⁶ The regulations provide for time limits for responses and the determination of any appeal: 20 days to provide the information, or determine a request for a review, and 4 months for the determination of any appeal. The Environmental Statement listing the badger report at Appendix A10.2 had been published in September 2007, a full year before the start of oral evidence to the public inquiry in September 2008.

⁷ <http://www.awpr.co.uk/d/Leaflets/Public%20Consultation%20Spring%202005.pdf> is the link to the Spring 2005 consultation document, which accompanied a brochure with full information.

- (iv) It is untenable for Road Sense to suggest that there has been a lack of public involvement or consultation in relation to the selection of the route adopted.

(b) "a new objective for the strategic transport plan" which should have been subject to a Strategic Environmental Assessment (SEA).

10. The Government's position is that:

- (i) There was no basis on which a revised SEA was required. There has been no change to the MTS, and no further SEA was required.
- (ii) In any event the AWPR was a 'project' and does not fall within Article 7 of the Convention.

3) Criticisms of the Report to Inform Appropriate Assessment which contains "major deficiencies". (Art 3)

11. The criticisms made by Road Sense are not readily understood. Clearly Road Sense disagrees with the Report produced to the Ministers, but it has had a full opportunity to comment on that report (and has in fact done so, with evidence and submissions presented to the public local inquiry in 2008-2009), which have been repeated in the communication to the Committee.

4) The restricted ambit of the Public Inquiry in relation to its ability to consider (a) alternative routes; (b) the need for the scheme at all; and (c) matters under Article 16(1)(c) of the Habitats Directive. (Arts 7, 9)

12. The Government observes that:

- (i) In relation to both possible alternative routes and the need for the scheme at all, these had both been the subject of extensive public consultation.
- (ii) The Public Inquiry in 2008-9 did not refuse to consider refinements or objections to the route proposed.
- (iii) Road Sense had a full opportunity to comment on all these matters falling under Article 16(1)(c) of the Habitats Directive (and did so).
- (iv) In any event, Road Sense has the right to challenge any illegality in relation to these matters by way of statutory appeal (to the validity

of the Orders) or judicial review (where no statutory appeal is provided). There is therefore an available domestic remedy in any event.

Some further detail:

The RIAA concluded that, subject to appropriate mitigation, the construction and operation of the AWPR will not have an adverse impact on the conservation objectives for the qualifying species: freshwater pearl mussel, Atlantic salmon and otter, and that there will be no adverse effects on the integrity of the River Dee SAC. By letter dated 8 August 2008, Scottish Natural Heritage advised Transport Scotland and subsequently the Scottish Ministers, that it had formed the view, on the basis of the information provided by Transport Scotland and the appraisal carried out to date, that provided the proposals are undertaken in accordance with the proposed conditions/legal modifications, then the proposed AWPR would not adversely affect the integrity of the River Dee SAC. It is clear from the terms of SNH's letter that their appraisal included consideration of the RIAA of the River Dee SAC prepared on behalf of Transport Scotland in relation to both individual qualifying interests and the conservation objectives for the site. SNH raised no concern in relation to the adequacy or accuracy of information contained in the RIAA. Road Sense were provided a copy of SNH's letter which was lodged as an inquiry document at the recent PLI.

Road Sense made submissions to the public local inquiry which challenged the conclusion of the Environmental Statement, the RIAA, Transport Scotland's independent ecological advisors and SNH in relation to the adequacy of mitigation measures identified in the Environmental Statement and RIAA: §32.6.11 to 32.6.20.

These submissions were considered and addressed in the Report following the public local inquiry: §10.185 to 10.190.

- 5) *The absence of an effective and affordable review procedure for the decision of the Scottish Ministers.*
13. This complaint was originally made on the mistaken assumption that the judicial review was the appropriate procedure, whereas Road Sense are now aware that there is a statutory right of appeal.
14. It now appears that this ground of complaint is not maintained by Road Sense, at least not for the purposes of the present communication: see 21.12.09 submission at paras 8.1 and 8.2 which indicate that the concerns expressed cannot be dealt with currently.

15. The Government:

- (i) would not accept any suggestion that the statutory review procedure was not in compliance with the requirements of Article 9.
- (ii) But in any event agrees that it would be premature to raise this complaint.

CHRONOLOGY

1990-1996	Feasibility studies conducted for the southern section for a route running to the west of Aberdeen
2001-2003	Feasibility studies for the northern section conducted
3.03	<p>'Modern Transport System' (MTS) published</p> <ul style="list-style-type: none"> - provided for an integrated transport plan for NE Scotland - AWPR identified as a key element in this plan
2003-2005	Further appraisal of possible routes
4.3.05	<p>Ministerial announcement of dates and details for a public consultation on route corridor options</p> <ul style="list-style-type: none"> - major informal public consultation carried out in Spring 2005 - 'Murtle route' was then the preferred option for the southern leg
1.12.05	<p>Ministerial announcement: new preferred corridor: Miltimber Brae / Fastlink</p> <ul style="list-style-type: none"> - composite of routes that had been consulted upon
12.05-5.06	Further work to identify preferred route within the Southern leg / Fastlink corridor
2.5.06	Ministerial announcement: preferred route identified
14.12.06	Draft schemes and orders published, with the first Environmental Statement (then replaced by the 11.9.07 statement)
1.07-8.07	Further evaluation of preferred route, including taking into account further EIA work, and feedback from public exhibitions held in January 2007.
11.9.07	<p>Further draft Orders published (and on 12.10.07)</p> <p>Further Environmental Statement published following EIA (14 volumes, plus technical summary)</p>
10.07	Further public exhibitions
4.08	Report to Inform an Appropriate Assessment for works potentially

	affecting the River Dee (an SAC under the Habitats Directive) completed
9.9.08	Public Local Inquiry (PLI) started <ul style="list-style-type: none"> - Oral evidence to 10.12.09 - RS participated and presented evidence - RS case presented by two advocates, including a QC - Dr Hawkins appeared as a witness on behalf of RS
16.2.09	Closing submissions deadline for PLI
7.5.09	Road Sense submit communication to ACCC
3.7.09	ACCC : Preliminary determination that communication admissible
30.6.09	Report from PLI submitted to the Scottish Ministers
21.12.09	Scottish Ministers announce decision to make the Schemes and Orders to proceed with the scheme, subject to detailed modifications Report from PLI published, including Appropriate Assessments
15.1.10	Schemes and Orders laid before Scottish Parliament for final approval
3.3.10	Schemes and Orders approved by resolution of the Scottish Parliament <ul style="list-style-type: none"> - any person wishing to challenge the validity of these orders may do so on application to the Court of Session within 6 weeks of the date on which the Notice that Parliament has approved the Schemes and Orders is published. - the Notice is expected to be published later this month (March).
17.3.10	ACCC : Consideration of communication

