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Response to UK submissions - ACC/C/2014/115 (United Kingdom) 26th November, 2015

The following will clarify & respond to the very misleading information in the submissions made on behalf of the Welsh Government & its conservation agency, Natural Resources Wales (NRW):

Pillar I - access to information submissions:

We can summarize the respondent's arguments as:

- The communicant failed to either make a 'right to appeal' approach to NRW or make a complaint to the Information Commissioner; in doing so he 'abused' his right to bring a compliant to the attention of the Convention's Compliance Committee.
- 'In any event' NRW provided the requested documents in March 2015

Regarding NRW's internal 'right of appeal' mechanism:

If NRW had ever refused to provide the documents then the respondent's arguments may have had some validity. However NRW never refused to provide the requested reports but only stated they were in a draft form and that they would be sent when in a final version. [see North Wales Protected Sites Manager emails 23/09/13 & 18/10/13 - respondent's C-115 Annex 3].

Using the agency's 'right of appeal' was hardly a viable option when the communicant only had a suspicion that the documents were being withheld. Incidentally, that suspicion subsequently proved to be correct as I will show below. The emails saying the documents were in a draft form and would shortly be available meant I had little option but to give NRW the benefit of the doubt and wait. I waited as requested.

Regarding the respondent's claim in item 10 and 11 of the submission - as far as I'm aware I never made any suggestion that the Information Commissioner had to do anything, far less give NRW 'the benefit of the doubt'. My submission made it clear that I was referring to myself being obliged to give NRW the benefit of the doubt regarding the claim the reports were still in a draft form, and that I should wait and in doing so this resulted in exceeding the time limit set by the Information Commissioner.

Quote respondent's item 10:

'He suggests in his reply to the Committee's questions that the reason he did not approach the Information Commissioner was because he "felt they had to give the authority the benefit of the doubt". This is an unfounded assertion by the communicant.'

Quote respondent's item 11:

'The view that the Information Commissioner '[has] to give [NRW] the benefit of the doubt' is not tenable: the Information Commissioner is an independent statutory office-holder with a remit to deal with appeals in relation to decisions of public authorities concerning the provision of information.'

Regarding the respondent's arguments with respect to the Information Commissioner:-

The public must rely on the information provide by the Commissioner on their website. That states unequivocally that any 'undue delay' will mean a submission will not be dealt with; undue delay' is defined in the guidance provided as three (3) months. This would appear to be the Commissioner applying UK Civil Procedure Rule 54.5(1) which states a deadline of three months for initiating civil procedures such as judicial review.

Pre-Action protocol for Judicial Review: https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_jrv :-

1. *This Protocol applies to proceedings* ***within England and Wales only****. It does not affect the time limit specified by Rule 54.5(1) of the Civil Procedure Rules (CPR), which requires that any claim form in an application for judicial review must be filed promptly and in any event not later than 3 months after the grounds to make the claim first arose. Nor does it affect the shorter time limits specified by Rules 54.5(5) and (6), which set out that a claim form for certain planning judicial reviews must be filed within 6 weeks and the claim form for certain procurement judicial reviews must be filed within 30 days.* [1]

The respondent argues that the public should know the Information Commissioner's time limit information is not to be believed and that the rule is not a 'rule of law' in any case. If there is 'discretion' regarding the time limit as the respondent suggests then the Information Commissioner's website should make that clear; it does not. What it says is:

'We will not usually investigate concerns where there has been an undue delay in bringing it to our attention. You should raise your concerns with us within three months of your last meaningful contact with the organisation concerned.'

This is unequivocal and doesn't appear to the communicant to suggest 'discretion' or leeway in the time limit. There is no *caveat* stating that if there are reasonable grounds for delay a complaint will still be considered.

The respondent further argues that the documents were in a draft form until March 2015 and that they were then provided 'in any event'.

Once the requested dune habitat reports were provided in March 2015 it became clear that the reports had been withheld. It is important to remember that what had been requested were the **dune habitat** assessment reports, final versions of which are dated the 24th & 25th Sept, 2013 [see enclosed reports & their front pages]. The communicant was still being told they were in draft form nearly a month later and NRW said the reports would be delivered when finalized [NRW email dated 18/10/13 - respondent's submission C-115 Annex 3].

Furthermore NRW has a dedicated 'information team' whose role is to deal with information requests on behalf of the agency. While the reports may have been in a 'draft' form in July 2013 (although I would suggest that is dubious) the request for the reports remained outstanding and the agency's information team failed to ever follow up the request. The agency's North Wales Protected Sites Manager was still saying the reports were in a draft form in October 2013 significantly later than the final version dates of September. The agency made no effort to provide the requested documents after they were in a 'final version' and only supplied them following a second request from the communicant in early 2015.

Time line of the dune habitat survey's and reporting:

- The five dune habitat types within the SAC, Annex 1: 2130, 2120, 2190, 2170 & 2110 were surveyed in **June, July and August 2012**.
- The surveying officer wrote up the reports and these are dated January & March 2013: dune habitat 2130 - **30/01/13**; dune habitat 2120 - **23/01/13**; dune habitat 2110 - **10/01/13**; and dune habitats 2190 & 2170 - **23/03/13**. It should be noted that the surveying officer is the author of all the dune habitat reports and these would have contained all the detailed survey information & conclusions present in the final version i.e. the information being sought by the communicant. The reports would not have been re-written in any significant way after these dates.
- The Anglesey sites manager reviews the reports and '**final versions'** are dated either 24/09/13 or 25/09/13. **Final versions of the dune habitat assessment reports were complete at the end of September 2013** (this is already more than a year after the surveys were carried out)**.**
- NRW were still claiming the dune habitat reports were in a draft form in October 2013 and only provided the reports after a second request by the communicant in early 2015. The respondent suggests the reports were not ready until March 2015 more than two and a half years after the surveys were carried out.

In addition to the requested dune habitat reports NRW also provided in March 2015 two Habitats Directive Annex II plant species reports. It appears the respondent is trying to suggest that although not requested the inclusion of these reports establishes that the dune habitat reports were in a draft form until March 2015.

Annex II plant species survey & reporting timeline:

- Annex II species surveys: *Petallophyllum ralfsii (petalwort)* surveyed Nov. 2011 & March 2012; *Rumex rupestris* (shore dock) surveyed Sept.2012
- Survey reports completed and dated by the surveying officer: both reports dated **14/11/12**
- 'Final version': *P. ralfsii* 08/11/13; *R. rupestris* 10/03/15

The Annex II plant species reports were never requested and are only of 'academic' interest; to suggest that their inclusion with the requested reports was grounds for withholding the dune habitats reports until March 2015 is not tenable. I would also suggest that you would have to be credulous in the extreme to believe that the shore dock report took from the survey date of Sept. 2012 to March 2015 to complete. The report was written up by the surveying officer and dated 14/11/12; this would have been the substance of the report. We are expected to believe

that it took two and half years to finalize a fourteen page report that had not been requested, **and** that that was grounds for withholding the requested dune habitat reports.

The conclusion can only be that the conservation agency withheld dune habitat conservation assessment reports that would have allowed the public to challenge their rationale for proceeding with forest removal. This information was withheld until well after the agency had implemented their clearfelling agenda in Jan. to March 2014; the information effectively became 'academic' after the clearfelling of forest had been carried out.

Pilar II - public participation in decision making

We can summarize the respondent's arguments:-

- The forest removal was insignificant
- The Forest Management Plan is not a 'plan' and therefore article 6.1 b) does not apply
- Full and meaningful public consultation took place in the production of the 2010-15 forest management plan and its forest removal agenda.

Regarding the significance of the clearfelling

The respondent argues that the area of forest to be clearfelled was a small fraction of the total forest area. This is an argument oft cited by the conservation agency and it is irrelevant as they are well aware. It is not the total clearfell area but where it is that is important. The area felled is that area that provides an intimate link between the forest and the shore and beach. It is a key aesthetic asset of the forest and shore and where most of the public visitors go. If the felled area had been in a section of forest remote from the beach most of the public would not have been aware it had taken place. The clearfelling was highly significant because of where it was not because of its total area. It is also important to remember that this is the first stage of as yet unspecified further phases of forest removal - forest removal 'by stealth', each phase of forest clearfelling supposedly insignificant.

The cited EIA assessment form [respondent's C115 - Annex 4] is also an enlightening but perplexing document; one that the public has never seen despite having requested an EIA regarding the impact of the clearfelling agenda. The document states the felling is above the significant threshold and would impact: people, landscape, flora, fauna, recreation, soil, access and water. It then goes on to describe the impact as: 'Deforestation is fact of SAC restoration project' - in other words the impact is significant but irrelevant because the clearfelling will go ahead regardless of any impact. The document then mysteriously concludes that impacts are not significant. That is a view with which most of the public would strongly disagree and they believe an EIA should have been carried out. A properly conducted EIA would also, of course, have provided an ideal means of providing proper public consultation and assessing whether the requirements of Art. 2(3) of the Habitats Directive had been met.

Respondent argues the FMP is not a 'decision' and therefore art. 6 does not apply

The Forest Management Plan (FMP) is a plan for how the forest will be managed and includes all the actions that that entails. It was jointly produced (exclusively) by FCW and NRW and specifically included NRW's forest removal agenda at that agency's insistence. It is a 'decision' to

proceed with forest removal. The fact that the decision shouldn't have proceeded until arbitration resolved the disputed rationale for felling is also an important consideration. It did go ahead and did so because the FMP required it to do so (at NRW's insistence) and without arbitration having resolved the claimed rationale for clearfelling.

The respondent argues that because a clearfelling licence was required then the FMP was not a decision. This is nonsense and the respondent fails to understand how FCW manages forest activities. The licence was required because the clearfelling decision in the FMP exceeded the significant threshold of area and volume of timber to be permanently removed. The licence was merely a facilitating legal requirement to allow the FMP decision to proceed; it was required because of the significant level of woodland to be clearfelled. The need for a licence also contradicts the respondent's suggest that the clearfelling was insignificant.

Public participation in decision making: specifically regarding the development of the 2010-15 Forest Management Plan that incorporated NRW's clearfelling agenda.

The respondent seeks to demonstrate that a meaningful, well informed consultation took place that allowed the public to participate in the development of the FMP and especially the clearfelling element [C-115 Annexes 5, 6, 7, 8 (I - IV), 9, 10]. In particular he cites:-

- 2004-6 Liaison Partnership meetings & reports; and an Aug. 2007 draft plan feedback meeting
- The Science Review - forced on NRW/CCW following the attempt by the agency to proceed with forest removal on the basis of false claims that EU infraction proceedings would be instigated if clearfelling did not proceed immediately following an anonymous complaint to the EU [Joint FCW/CCW 'Cast' Technium meeting 30th April, 2009]
- July & Oct. 2010 FCW meetings where a finalized FCW/NRW produced FMP was presented to the public in Oct. 2010.

If the conservation agency had engaged in an honest, open and fully informed consultation that included NRW's agenda to permanently remove significant sections of forest, especially that bordering the beaches, then the Liaison Partnership meetings would have constituted meaningful public consultation. Sadly that was not what took place. NRW/CCW engaged in an elaborate and drawn out *pro forma* consultation in which they discussed at length anodyne, uncontroversial issues about footpaths, wheelchair access, educational use of the forest, provision of BBQ facilities etc. However, they failed to ever present their forest removal agenda either in detail or outline; misled the public about the conservation state of the dune habitats, and withheld key information and documents that would have allowed the public to be informed about the conservation issues and the agency's agenda.

In their determination to hide and obscure their plans the closest the agency came to admitting they had a forest removal agenda was a vague allusion to a possible option: 'shifting the focus of the forest landwards' [C-115 Annex 8-IV, item 7.3]. The public comments show that many of the public failed to understand what the vague allusion was implying and those that guessed were strongly opposed. It is also important to note that the agency had a clear but undisclosed forest removal agenda since 2000 [CCW SAC Core Management Plan, 2008]; an agenda that could but wasn't introduced during the Liaison Partnership meetings. Despite the agency's CEO stating that forest removal plans had been 'put aside' [public meeting Sept., 2004] the agency never

relinquished their determination to further their agenda and failed to present the forest removal plans during the Liaison Partnership meetings.

CCW SAC Core Mgnt Plan 2008 quote (p.48/49 of the plan)**:**
[Management requirements: Embryonic dunes & shifting dunes along the shoreline]:

'failure to meet the target for the range of zones within the vegetation structure (a CSM mandatory attribute), i.e. the intact zonation between embryonic dunes through yellow dune to fixed dune grassland along 95% of the frontage. This is primarily due to the afforestation of unit 20 (001901).'

'The main action required to restore the feature to favourable conservation status is the restoration of the natural zonation to fixed dune grassland. Removal of confer plantation near the shore and its restoration to mobile dune and fixed dune grassland is necessary. Discussion has been underway with the Forestry Commission (since 2000) for this under the Forest Design Plan process.'

Incidentally, the claim that idealized dune zonation must be present along at least 95% of all dune SAC coastlines is a core dispute issue. This claim that an idealized sequence of dune habitat types from beach through mobile foredunes to fixed dune grassland should exist along 95% of the coast irregardless of the features of the coast at the time of SAC designation is ludicrous. The Habitats Directive does not require or provide a remit for landscape engineering to modify our coastlines to create idealized dune zonation.

Furthermore that deeply flawed consultation was made effectively null & void when at the conservation agency's insistence the draft FMP based on the outcome of those meetings was torn up; euphemistically described as 'withdrawn'. This occurred at the joint FCW/CCW Cast Technium meeting, 30th April 2009, called to announce clearfelling would proceed immediately. This was the meeting where they falsely claimed EU infraction proceeding would start if clearfelling wasn't immediately carried out.

Dr Craig Shuttle worth who was an independent scientist participating in the Science Review has provided a comprehensive narrative (and indictment) of the consultation process up to July 2009 in a complaint to DG-Environment of the EU Commission. He has just provided a copy of that complaint and I enclose that document with this submission. This clearly shows the duplicity of NRW/CCW and the reason that process was deeply flawed and should not be considered a meaningful consultation that allowed proper public participation in the decision making process especially with respect to NRW's forest removal agenda.

Regarding the Science Review:

The respondent seeks to suggest the Science Review was an integral part of a planned consultation. It was not and only took place as a result of public outrage at the attempt to initiate clearfelling on the basis of false claims of impending EU infraction proceedings. It was an opportunity for NRW to substantiate claims made to support their forest removal agenda and which they singularly failed to do. The Chief Scientific Advisor to the Welsh Government concurred with that view when he diplomatically reported that NRW did not have the evidence

to support their claims and further research was needed if NRW were to substantiate their conservation arguments.

Note: In Annex 9 the respondent seeks to suggest Ken Pye Associates geomorphology surveys of Welsh dune systems (2012) were a response to the Chief Scientists statement that more research was required before any dune management decisions could be made. I will show in comment within the document why that is not the case.

The Science Review was meant to inform the development of a forest management plan. To do so it had first to resolve disputed conservation issues **and then** inform the development of a forest management plan. For the Review outcomes to inform the forest management plan it would have had to be concluded and that required impartial and independent arbitration to resolve key disputed issues. However, without the knowledge of the public or the independent participants in the Science Review NRW and FCW jointly produced a forest management plan **during the Review** that was supposed to have informed that plan.

Solely bilateral discussion between NRW and FCW created the 2010-15 FMP without the knowledge of the public or their participation. Those meetings took place during the Science Review so it is clear there was never any intention to inform the plan from outcomes of the Review. The respondent's suggestion that the Science Review was a consultation that would feed into the FMP is not tenable. A timeline of key events is illustrative.

- FCW indicate to the public that a plan will shortly be finalized, July 2010
- 5th Science Review meeting, 17th Aug., 2010 agrees to proceed to arbitration. The Review has not resolved key disputed issues and must go to arbitration.
- October 2010 a finalized plan is presented to the public by FCW/NRW. There was never any possibility of modifying this plan if for no other reason because NRW would not have accepted any changes to its agenda.

Respondent's C-115 Annex 9 is a very misleading and incorrect timeline and narrative of the Science Review and subsequent events. I enclose an annotated copy of the document with explanation and clarification of what actually took place.

The respondent suggests that the July & Oct. 2010 FCW/CCW public meetings were a part of a meaningful consultation process.

C115 Annex 10 - FCW/NRW meeting with LP 17/07/10

This meeting is cited as though it were consultation whereas it was merely the presentation of what had been decided by NRW & FCW in bilateral discussion and the first time the public became aware that a fully drafted plan had been completed. While the public and independent participants in the Science Review waited for arbitration to take place a finalized FMP was produced by the two agencies. There was not the slightest possibility of modifying the forest management plan presented at those two meetings. This was a continuation of a policy that would accept no modification of NRW's forest removal agenda as previously shown when a draft FMP was torn up in July 2009 [CCW/FCW Cast Technium meeting 30/04/09]. Importantly, because assurances were given that no forest removal would take place until the Science

Review had concluded following arbitration the public refrained from complaining about their exclusion from its development. July 2010 meeting quote:

'We now think that it would better to pull together a plan for the whole forest – albeit that we would not implement any changes along the coastal margins or by the Warren until the science review is concluded and we are sure that the changes are sensible in scientific terms and any necessary monitoring is in place.'

Summary

NRW's removal of coastal sections of forest was environmentally significant and the FMP a 'plan' in terms of Art. 6. Open, transparent and fully informed public consultation in development of the 2010-15 forest management plan did not take place.

Pilar III - justice in environmental matters

The respondent's arguments can be summarized as:

- Arbitration procedures lie outside the scope of Article 9 of the Convention and therefore the complaint is inadmissible
- Domestic remedies were available and not exhausted
- 'In any case (see below), the view was properly taken by the Welsh Ministers that arbitration was not necessary in light of the way the position developed.' [see Annex 9]

Regarding the admissibility of the complaint:

The Pilar III complaint was not about an arbitration procedure *per se* but about the decision not to honour the commitment to resolve disputed issues through impartial arbitration. To the public at large and the communicant the decision not to honour that commitment is clearly a breach of the Convention requirements regarding justice in environmental matters.

Regarding domestic remedies

The suggestion is that options such as the Ombudsman, judicial review and 'internal appeals' were available but not used.

The Ombudsman has made it clear that they will only deal with 'maladministration' which they interpret strictly in legal terms. Arbitration was never a 'legal' requirement; it was a commitment made by NRW with the support of the WG prior to the start of the Science Review. Without that commitment the Review would never have taken place because the independent participants would have refused to take part. However, since it was not a legal requirement the Ombudsman would have refused to deal with any complaint made to them. [see previously submitted information from the Ombudsman].

Regarding judicial review two key issues are relevant: the cost element which the respondent dismisses as of no concern but is a very significant concern to the public and, secondly, the judicial review time limit rules.

Over and above any financial concerns, going to judicial review required a clear statement that arbitration would not take place. The Welsh Government & NRW failed to make such a statement and to the contrary strung Review participants along asking us to wait while the Chief Scientist reviewed evidence and then failing ever to state explicitly that they had decided to renege on their commitment to go to arbitration. If the Welsh Government had had the courtesy to contact the independent participants in the Review and state explicitly that arbitration would not go ahead then and only then could a judicial review have been an option. That would also have been the opportunity for the WG & NRW to have provided clear information to the public about any appeal procedures and other options such as judicial review.

The Pre-Action Protocol information [see below] makes clear that a time limit is applied to the access to judicial review and with no clear statement about arbitration being made by the WG it was never clear if and when such an option could be considered.

https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_jrv

Alternative Dispute Resolution

9. The courts take the view that litigation should be a last resort. The parties should consider whether some form of alternative dispute resolution ('ADR') or complaints procedure would be more suitable than litigation, and if so, endeavour to agree which to adopt. Both the claimant and defendant may be required by the court to provide evidence that alternative means of resolving their dispute were considered. Parties are warned that if the protocol is not followed (including this paragraph) then the court must have regard to such conduct when determining costs. However, parties should also note that a claim for judicial review should comply with the time limits set out in the Introduction above. Exploring ADR may not excuse failure to comply with the time limits. If it is appropriate to issue a claim to ensure compliance with a time limit, but the parties agree there should be a stay of proceedings to explore settlement or narrowing the issues in dispute, a joint application for appropriate directions can be made to the court.

It is also clear that the courts consider judicial review to be a 'last resort' and that alternative dispute resolution (ADR) should always be employed before initiating a judicial process. In other words the courts would wish to see impartial arbitration had taken place and failed before allowing a judicial review. There are also significant financial implications for both disputing parties if ADR had not been employed; again emphasizing the financial implications to the public of judicial review proceedings. In contrast to the public costs incurred by government or public authorities are of course paid by the tax payer; there is no financial implications for the individuals involved.

As it was the public and independent participants in the Review only learned by implication of the Welsh Government's decision to not go ahead with arbitration via a NRW newsletter that stated the Review had been 'concluded'; the newsletter being made public in December 2014 [submitted previously to the Secretariat].

Regarding 'internal appeals' - repeated written appeals were made to both the WG and NRW; these appeals were made by both the communicant & other independent participants in the

Science Review, and our political representatives. The WG & NRW brushed aside these appeals and reneged on their commitment to arbitration.

Respondent's Annex 9:

The respondent suggests that Annex 9 substantiates the statement (respondent's item 54.) that the Welsh Minister 'properly' reached a 'view' that arbitration was not necessary. I have commented in detail on the content of Annex 9 in an annotated copy enclosed with this submission.

The public view is that the decision to avoid alternative dispute resolution (impartial, independent arbitration) denied the public environmental justice and that the disputed key conservation issues remain unresolved.

Enclosed documents:

- 2012 Dune habitat assessment reports (4) + two Annex 11 plant species rpts
- Dr Craig Shuttleworth's complaint to the EU
- Newborough councillor, Pete Roger's letter to NRW's CEO (2009)
- Respondent's Annex 9 with comment and explanation