

Further United Kingdom submissions on

ACCC/C/2014/115 (United Kingdom)

2 March 2016

1. We note the communicant's comments of 13 January 2016 on the United Kingdom's response to the above communication. Given the pressures on the Committee, protracted correspondence prior to any discussion of the issue is unlikely to be welcomed. However, because the communicant has decided to make further submissions at this stage, we feel that in order to ensure that the Committee is given the complete picture, we need to respond to those further submissions.

Pillar I

2. Paragraph 8 of the United Kingdom submissions of 26 November 2015 note that the communicant did not make use of the internal Natural Resources Wales ("NRW") review mechanism. The communicant asserts in their further submission of 13 January 2016 this "was hardly a viable option when the communicant only had a suspicion that the documents were being withheld" (page 1). The communicant provides no support for this assertion on 'viability'. It is difficult to see how a free and relatively quick process that would have assessed whether or not the documents were being withheld was not a "viable option".
3. The communicant goes on to mention "[t]he emails saying the documents were in a draft form and would shortly be available". This is a reference to emails from NRW of 23 September 2013 ("the monitoring reports for Abermenai-Aberffraw SAC¹ should be ready by early October, and we'll pass these onto you then") and 18 October 2013 ("we hope that these will be completed in the next few weeks and passed onto you then"). NRW received a further request from the communicant dated 4 March 2015. The communicant had been alerted to the NRW review mechanism (and the information about an appeal to the Information Commissioner) on 14 August 2013. The timeline suggests a period between 18 October 2013 and 4 March 2015 (just over 16 months) during which time the communicant had the opportunity to use the NRW review mechanism and the appeal to the Information Commissioner, but chose not to. The communicant's further comments therefore do nothing to rebut the United Kingdom's argument that the communicant made no attempt to use or exhaust domestic remedies and that their allegations should be considered inadmissible. The communicant (page 2) quotes the Information Commissioner's statement that they "*will not usually investigate concerns where there has been an undue delay ...*" asserting

¹ Special Area of Conservation, under the EU Habitats Directive

that this is an unequivocal statement and does not suggest that there is discretion or leeway in the time limit. Such a position is clearly at odds with what can be understood by the ordinary meaning of the term “usually” and the discretion given to the Information Commissioner under the relevant legislation. We note, with regard in particular to article 4(3)(c) of the Convention, that the communicant does not dispute that at the time of the original request (17 July 2013) the reports were incomplete.

4. The communicant makes comments, on page 3 of their further submissions, regarding the dune habitat assessment reports concerning petalwort and shore dock. The communicant describes these reports as “two Habitats Directive Annex II plant species reports”. The communicant states that:

“[t]he 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”.

5. In terms of petalwort and shore dock, the Forest Management Plan (“FMP”) 2010-15 (page 11) clearly states that shore dock is an SAC/SSSI qualifying feature and describes it as a “[d]istinct SAC feature found only within the forest and needs specific consideration within this management plan”. The FMP also states “petalwort, also a SAC feature, does not occur within the forest”. Thus both shore dock and petalwort are qualifying features of the SAC. The assessments of the petalwort and shoredock features were entirely relevant to this request as they are sometime components of, and dependent upon, the habitat features. Their conservation status is likely to influence the management of dune habitats and forest. The reports were properly included as part of the suite of dune habitat assessment reports. They are therefore also included within the scope of the communicant’s original request (17 July 2013) which referred to “information concerning the dune habitats and forest at the Newborough site within the Abermenai to Aberffraw dunes SAC. In particular any reports, surveys, monitoring, consultants reports and planning documents that relate to the conservation status & management of dune habitats and the future structure and planned management of the forest”.
6. The FMP (page 15) states the following:

“The SAC citation defines shore dock (*Rumex rupestris*) as a qualifying feature and key species within the management area of the forest. The SSSI citation also lists a large number of plant species – including dune helleborine (*Epipactis dunensis*) for example – which are also important and need to be considered as part of the management of the forest. This management plan will therefore regard these SSSI species as factors impacting on the management of the plan features, not as features in their own right. Shore dock is treated as a feature as this species only occurs within the forested area of the SAC. Petalwort (*Petalophyllum ralfsii*), although defined a SAC feature, does not generally occur within the forest and is therefore not considered further in this management plan.”

Pillar II

7. The communicant attempts to summarise part of the United Kingdom's response to the communication on page 4 of their further submission, as being that "the Forest Management Plan is not a 'plan' and therefore article 6.1 b) does not apply". This statement illustrates the communicant's apparent confusion on this point.
8. As the Committee is aware, article 6(1)(b) of the Convention applies to "decisions on proposed activities not listed in annex I which may have a significant effect on the environment." The United Kingdom's position is not that the FMP is not a "plan" for the purposes of article 6(1)(b) – that question is irrelevant in that context – but that it does not, of itself, permit or allow any decisions to be taken on whether specific activities are to be carried out.
9. The FMP states its purpose in the following terms:

"This management plan fulfils the function of a formal Forest Design Plan (FDP), a requirement for the management of all woodlands within the Assembly Woodland Estate (AWE). An FDP is also required for compliance with the UK Woodland Certification Scheme (UKWAS), a standard that enables FCW to market its range of products as certified under its two certification schemes: The Forestry Stewardship Council Scheme (FSC) and the Programme for the Endorsement of Forest Certification Schemes (PEFC)";

"The EU Habitats Directive guidance recommends using management plans to help establish dialogue between all interested parties and to communicate practical management solutions. This plan will be used to keep the Newborough Liaison Partnership (NLP) – and in due course its successor group – informed of developments and to seek the group's comments and guidance. The NLP was established in 2005 and initially met with a facilitator to debate the community aspirations from Newborough Forest, producing its recommendations in December 2006. These recommendations inform this management plan and where possible are incorporated within it. It is expected that the NLP will reform itself into a further liaison group to assist the management of the forest and dunes once this management plan is approved. This point will be explored further by the NLP in due course".

10. The communicant argues at pages 4-5 of their further submissions that the FMP "is a 'decision' to proceed with forest removal" and that the licence was "merely a facilitating legal requirement to allow the FMP decision to proceed". The communicant fails to acknowledge that, in the absence of that licence, felling would not have legally been able to proceed. The decision on felling was made at the point that the licence was granted. Up until that point, the felling was merely a proposal within the FMP and not a decision. Indeed, the FMP (section 6.2, Page 46) describes the felling under the heading of "Proposed Actions for the Sand Dunes Feature" (emphasis added).

11. Returning to article 6(1)(b) of the Convention, its focus is not on “proposed activities” but on “decisions on proposed activities not listed in annex I which may have a significant effect on the environment” (emphasis added).
12. In terms of the significance of the effect on the environment, the communicant states that: “the felling is above the significant threshold”. As is noted in the United Kingdom’s response to the communication at paragraph 28, this is a reference to fact that the threshold for consideration of possible significant effects for deforestation within a protected area is 0.5 ha (under the relevant Regulations); i.e. whether (or not) consideration of possible environmental effects is necessary under the Regulations prior to issuing a licence. It is not a determination that deforestation above such a threshold is a significant effect – the emphasis is on the “*consideration of possible* significant effects”.
13. The communicant makes reference to the EIA Checklist (Annex 4 to the United Kingdom response to the communication) at page 4 of their further submissions. They state the following: “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”.
14. We draw the Committee’s attention to the actual sentence on the checklist for Environmental Impact Assessment which reads “Deforestation is part of SAC restoration project”. The checklist asks the question “If the project will have an effect or impact on the environment, is this significant enough to require a formal assessment under these regulations?” in answer to which the box marked “no” has been ticked. This is the objective, scientific, evidence-based view of the Forestry Commission Wales. Thus the sentence “Deforestation is part of SAC restoration project” is a statement of the reason for the proposed felling, and is not a statement that indicates that “the impact is significant but irrelevant” as the communicant suggests. The issue about the significance of the impact is answered (negatively) in response the question that immediately follows.
15. The communicant does not in their further submissions dispute the degree of public participation that occurred, as evidenced in the three main reports provided in the United Kingdom response to the communication and in the schedule of meetings included at Annex 5. The communicant states at page 5 of their further submissions that “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, the evidence does not support this assertion by the communicant. It lists, for instance, nine meetings of the Habitats and Species specialist group of the Newborough Liaison Partnership which discussed such issues in detail as well as other face to face meetings and events at which opinions were aired.

16. For example, the report provided as Annex 6 to the United Kingdom response to the communication includes the following on page 20:

“2.5.4 What would happen if we took a 100 yard swathe of forest off the front of the dunes?”

Felling edge trees would expose a new line of taller trees to wind and salt, and there would be visible signs of die-b back. Wind-throw is not likely, but it would be wise to develop a new “ramp” of scrub, say 100 metres back, before any felling on the front occurred, to protect the wider forest. Shifting dunes with marram grass would re-establish, helping to deflect some salt and wind in the process. Removing root-plates on the dune cliffs would allow the sand to establish gentler slopes (“strandline and foredunes”) which would colonise with natural vegetation. Some local sand movement would occur as dunes form on the forest edge, but planting of marram grass would stop key access routes being blocked.”.

17. This report also includes the following at page 28, indicating that the engagement with the public did in fact include forest management options and issues, and was not limited to, in the words of the communicant’s baseless assertion, “anodyne, uncontroversial issues”:

“6.3 Differences in opinion

In addition to the broad areas of interest and concern above, some significant differences in opinion were held over the following:

- Wanting more **dunes** vs wanting to keep/enhance forest...”.

18. The communicant states at page 5 of their further submissions that:

“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”.

19. This is a reference to the report of comments received on the public consultation included at Annex 8 to the United Kingdom response to the communication. This reported comments from the public on a number of options, including, at page 5 of Part IV:

“7.3 Shift the focus of the forest landward. In principle, and subject to landowner consent, tree planting on adjacent land could enable the total area of the forest to be maintained while benefiting the warren and improve the linkage between woodland throughout Anglesey”.

20. The report records a variety of comments and, overall:

“Agree 264 Disagree 59 No or mixed views 57”.

21. There are, furthermore, other references in this report to forest removal including:

“7.1 Create and undulating edge between the dunes and forest (but maintain existing access) through gradual small scale changes

“Agree 236 Disagree 60 No or mixed views 74“; and

“7.2 Any removal of trees on the shoreline should not result in a new linear tree line and the unique visitor experience currently provided by the access along the road to the residents car park should be maintained.

“Agree 318 Disagree 25 No or mixed views 39”.

22. It is therefore clear that the communicant’s assertion that the Agencies failed to consult honestly and openly about the forest management issues is unsupported.

23. As noted in paragraph [9] above, the FMP itself make reference to the input made by the Newborough Liaison Partnership. Indeed, a paper on the Save Newborough Forest website² (the website that reflects the views of the Newborough Liaison Partnership of which the communicant is a part), dated September 2013, states:

“While the Science Review was underway FCW issued a Newborough Forest Management Plan for 2010-2015. (FMP). This followed long consultations with the NLP³, CCW⁴, IoACC⁵ and other interested parties”

24. We also note that the communicant has not disputed that fact that they have made no allegation of breach under article 7 of the Convention.

Pillar III

25. The communicant states at page 8 of their further submissions that “the 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”. While we welcome the communicant’s attempts to clarify this part of the communication, we still see no basis for the assertion that a decision not to carry out arbitration is “clearly a breach of the Convention requirements regarding justice in environmental matters”. We maintain the position that such proceedings, or decisions about proceedings, are outside the scope of article 9 of the Convention, and refer the Committee to paragraphs 50 to 52 of our submissions of 26 November 2015.

²<http://www.savenewboroughforest.org.uk/Summary%20of%20Controversies%20at%20Newborough%20Forest.pdf> at paragraph 7.

³ Newborough Liaison Partnership

⁴ Countryside Council for Wales

⁵ Isle of Anglesey County Council.

26. The communicant has also provided “comment and explanation” on Annex 9 to the United Kingdom’s response to the communication. It is not of course for the Committee to reach a view on the accuracy of the underlying scientific analysis or the correctness of a ministerial decision based upon it.⁶ However, the points raised by the communicant warrant further comment.
27. The reports referenced in Annex 9 were prepared in response to the conclusion of the Chief Scientific Adviser that “further scientific work, including on-site trials and research, should be undertaken to help guide future management”. These reports support the view that the decision-making on the management of Newborough Forest was based on the science-led objective body of evidence and that arbitration on the science was no longer considered necessary (see paragraphs 54 and 59 of the United Kingdom submissions of 26 November 2015).
28. We must also note that the communicant makes a baseless assertion that Ken Pye Associates were “not competent to advise on whether artificially creating additional areas of dunes (zonation) and more mobile bare sand are dune conservation requirements”. Our understanding is that the Welsh Government disagrees with this assessment and point to their reports as evidence of their demonstrating their understanding of the issues.
29. Those reports are summarised in the Annex to this further submission. The full reports – which are lengthy – can be provided to the Committee if this would be of assistance.

⁶ ACCC/2006/16 (Lithuania) at 79; ACCC/2008/24 (Spain) at 82; ACCC/C/2009/38 (United Kingdom) at 68.

ANNEX

Summary of reports prepared following Chief Scientific Adviser's conclusion to undertake further scientific work to help guide future management

1) K. Pye and S.J. Blott: *A Geomorphological Survey of Welsh Dune Systems to Determine Best Methods of Dune Rejuvenation*; CCW Science Report No. 1002 (2012)

In terms of the objectives of the report, the executive summary states (page ix):

“Of the ten dune habitats and species recognized as being features of European importance within the Welsh *Natura 2000* sites, nine are currently considered to be in *Unfavourable* condition on at least one site and there is an urgent requirement to address the problem.

Sand dune over-stabilization is not unique to Wales. Many other British and continental European dune systems have also experienced a reduction in dune mobility over the past 60 years. Some dune fields have become completely stabilized by vegetation and in many others the proportion of bare sand has fallen below 5%. This trend has given rise to international concerns about the impacts on biodiversity.

Against this background, this study has been carried out with funding from the Welsh Government to identify ways in which the pattern of decline might be reversed through a programme of dune rejuvenation. Ten dune sites were selected for study: Gronant Dunes & Talacre Warren, Tywyn Aberffraw, Newborough Warren, Morfa Harlech, Morfa Dyffryn, Broomhill & Kilpaison Burrows, Brownslade & Linney Burrows, Laugharne & Pendine Burrows, Whiteford Burrows and Llangennith, Hillend & Broughton Burrows. Nine of the sites are Sites of Special Scientific Interest (SSSI) and have Special Area of Conservation (SAC) status, while four contain National Nature Reserves (NNR).”

The Newborough analysis is contained at pages 123- 175 and considered by the Welsh Government to be comprehensive, the chapter containing 32 references. It states at page 130:

“Newborough Warren is classified as a ‘Coastal Assemblage’ GCR site which is of particular geomorphological interest because (i) the processes of dune building and migration have been intensively studied, (ii) there is a marked contrast between the beaches to the NW and SE of Ynys Llanddwyn, and (iii) Braich Abermenai provides a good example of a spit which has grown, been breached and rebuilt (May, 2003). However, in recent decades the processes of dune building and migration have been significantly curtailed, and a January 2010 assessment concluded that the overall GCR Conservation Status is *Unfavourable Declining*.”

(NB GCR = geological conservation review)

The report identified 11 options to increase the coverage of bare sand and pioneer, mobile dune habitat at Newborough Warren. However it stated that (page 172):

“...the most effective way of re-creating large areas of dune habitat would be to remove a large part of the coniferous plantations.”

It also noted that:

“A major reason for planting the forest was to provide wind shelter and prevent sand incursion towards Newborough village. It has been very successful in this respect, but the consequence has been the total cessation of natural dune processes within the forest boundary.”

2) *Thoughts on felling at Newborough from the perspective of possible direct impacts on the Warren area; Laurence Jones, Centre for Ecology & Hydrology*

This paper noted that direct impacts on the Warren are likely to include:

1. Hydrological impact on groundwater levels and regime below the Warren, caused by:

- a) Effects of forest on recharge
- b) Impacts of drainage ditches

2. Geomorphological impacts, mediated by:

- a) Wind speeds and direction
- b) Sediment supply

It concluded (as stated in Annex 9 to the United Kingdom response to the communication) that clearing within this area (around the boundary between Newborough Warren and Newborough Forest (Zone 1 east)) would be most likely to benefit the Warren through benefits from both changes to hydrology and wind-speeds.

3) *Kenneth Pye and Simon J. Blott: Newborough Forest – Proposed Methods for Dune Remobilisation and Rejuvenation; External Investigation Report No. EX1258 (30 August 2013)*

This report (which contains 19 references) states in the executive summary:

“Newborough Forest, which forms part of the Newborough Warren - Ynys Llanddwyn Site of Special Scientific Interest (SSSI) and the Abermenai to Aberffraw Dunes Special Area of Conservation (SAC), was planted with pines mainly during the period 1947-65. Prior to that time the area consisted of mobile, semi mobile and fixed sand dunes which extended up to 3 km inland. In 2004-05 the Countryside Council for Wales described the SAC feature condition as *Unfavourable declining*, partly because the required range of habits from embryo dunes through semi-mobile

'yellow' dunes to fixed dune grassland ('grey dunes') is not present along the required 95% of the SAC frontage. On the Newborough frontage the natural zonation of dune habitats is truncated by the presence of forest trees close to the shore. An assessment of GCR feature condition in 2010 also concluded that the overall conservation status is *Unfavourable declining* due to a marked decline in bare sand and active aeolian processes.

This report presents the recommendations of a study commissioned by Welsh Government (WG) to provide guidance on methods by which limited tree-felling, de-stumping, surface litter removal and other measures might assist in moving the site towards *Favourable* conservation status. An important contribution towards this objective will be to increase the extent of bare, mobile sand in areas near the beach (Zones 1 West and East identified in the Newborough Forest Management Plan (FMP) 2010-15). The degree of success towards this objective will need to be quantified through regular monitoring.

This report is based on (a) review of published / unpublished literature and background environmental data, (b) analysis of -historical maps, aerial photography and LiDAR imagery, (c) field discussions with representatives of Natural Resources Wales and Welsh Government, (d) field surveys, and (e) analysis of sediment samples.

A combination of measures will be required to achieve the conservation objectives, including tree felling, de-stumping, litter removal, surface scarification and enlargement of existing blowouts to enhance wind flow and sand transport into the hind-dunes."

4) Newborough: Review of proposals 2013-2015; Welsh Government

This review concludes:

"In the opinion of the Welsh Government the proposed, phased work is in compliance with the requirements of the Habitats Directive. It is important to emphasise that the proposed works will not be undertaken at the expense of other Annex I & II Habitats Directive features present on the site, and works are aimed at restoring FCS of habitats for which the SAC was notified as made explicit under Article 6(1) of the Directive.

The importance of embryonic and shifting dune habitats is recognised in section 4.2 ('Quality and Importance') of the Natura 2000 standard data form, where it receives special mention as being considered rare, since its total extent in the UK is estimated at less than 1000ha. The phased proposal would serve to restore the natural dynamism of the targeted area and create open dune habitat where it would naturally have occurred, restoring the condition, extent and functionality of the natural open dune Annex I habitat components in accordance with the aims of the Habitats Directive."