

Jeremy Wates  
United Nations Economic Commission for  
Europe  
Room 330  
Palais des Nations  
CH-1211  
GENEVA 10  
Switzerland

Our Ref: FMcC/ROAS001/001

Your Ref:

Date: 21 December 2009

Dear Sirs,

### **Complaint from Road Sense**

We would be grateful if you could accept this supplementary submission which falls in two parts. We firstly wish to raise some preliminary points and then respond to the points raised in your letter of 27 July 2009. Lastly we wish to supplement our client's original complaint by clarifying a number of points and expanding on others.

### **Preliminary matters**

1.1 We would be grateful if you could note the following preliminary matters.

1.2 Firstly we refer to a number of government agencies in our submission. You should note that Transport Scotland is a direct agency of the Scottish Government. Whenever we refer to Transport Scotland we are, in effect, referring to actions of the Scottish Government. Transport Scotland exercises powers and duties in respect of both public transport and the provision of major roads on behalf of the Scottish Government.

1.3 We also refer to Scottish Natural Heritage (SNH) in our submission. SNH is a non-departmental public body of the Scottish Government. This means that the Scottish Government can give Directions to SNH on particular matters, but the day to day running of SNH is overseen by a Board which is independent of government. SNH have powers and duties in respect of nature conservation and associated issues within Scotland.

1.4 The Scottish Government is itself a devolved government and certain powers and functions have been given to it by the Scotland Act 1998. All decisions concerning this submission, in the field of transport, nature conservation, access to justice and the court system are within the competence of the Scottish Government.

## **Points raised in your letter of 27th July 2009**

In relation to the six points raised in your letter of 27 July 2009 we would respond as follows:-

### Pearl mussel information and privilege

2.1 In relation to pearl mussel information and privilege, Road Sense is a voluntary community group and has the legal status of an unincorporated association. We attach a copy of their constitution. An unincorporated constitution in Scots Law is effectively a group of individuals who come together. However, for some purposes in Scots law, individual members of the group are named to represent the association.

2.2 The Environmental Information Request was made by Professor Hawkins as an individual, but acting for and on behalf of the group. Prof. Hawkins is a biological scientist with considerable experience of freshwater ecology and has carried out work for, amongst others, the European Commission, the Scottish Government and the River Dee Trust. He was fully authorised by Road Sense to agree to signing an undertaking not to release any information in relation to the location of breeding sites to other parties. Road Sense is not a public body and is not subject to any obligations under Environmental Information (Scotland) Regulations 2004 or the Freedom of Information (Scotland) Act 2002. Road Sense or Prof. Hawkins would not have been under any further obligation to provide the information to any other party. Effectively, Prof. Hawkins would have been in control of the information and would have been able to prevent its release to any other party.

2.3 It is understood that Prof. Hawkins would not have intended to release the information to any others in Road Sense. However, the position was never fully explored as Scottish Natural Heritage (SNH), the public body which held the information, declined Prof. Hawkins' request without further discussion.

### Information on freshwater pearl mussels

3.1 Road Sense learned about the status of the freshwater pearl mussel population in the River Dee primarily from their members' local knowledge. This knowledge was limited to knowing that pearl mussels were in the River Dee and such mussels might be located around the proposed route of the AWPR but no detailed information was held on their precise location. Subsequently the issue of freshwater pearl mussels arose during the public inquiry when it became clear that the proposers of the route, Transport Scotland (an agency of the Scottish Government) and their agents, Jacobs (a private consultancy employed by Transport Scotland) had specific information regarding the status and distribution of the freshwater pearl mussel population. We attach a copy of the relevant part of the Report to Inform the Appropriate Assessment regarding the River Dee. This

was prepared by Jacobs as Transport Scotland's consultant. You will see that paragraph 5.1.1 indicates that the species is under threat. Crucially you will see that the report indicates that the threat to the population is due to pollution and not overfishing. Indeed, there are published scientific papers which attest to the particular sensitivity of juvenile freshwater pearl mussels to low levels of environmental contaminants. General information on the freshwater pearl mussel was obtained from SNH which has responsibility for certain nature conservation duties. SNH publishes reports on the health or otherwise of various species from time to time, and further general information regarding the threats to the freshwater pearl mussel in Scotland as a whole was obtained through this source. Further, a report from the Commission itself, covering the status of European Protected Species (of which the freshwater pearl mussel is an example), over the period 2001-2006, provides information on the status of the freshwater pearl mussel in the UK and other European countries. The future prospects of this species are assessed as 'bad'; the overall assessment for this species is 'bad and deteriorating'. There is no dispute about the very poor state of freshwater pearl mussels within the River Dee SAC or indeed within UK or Community rivers.

3.2 We contend that the ability of Road Sense to present evidence at the Public Inquiry into the AWPR on the threat posed by the development was significantly impaired by the lack of information on the distribution and condition of mussel populations in the vicinity of the proposed bridge across the River Dee SAC. We comment further on this issue in paragraph 7.6 of this document.

#### The badger report

4.1 The Badger Report sets out information regarding the habitats of badgers, the location of particular colonies and family groups, their foraging sites and their numbers. We consider this falls within the definition of environmental information as set out in Article 2 of the Aarhus Convention.

4.2 Road Sense sought to obtain and lodge at the Public Inquiry into the AWPR a report on badgers along the route of the AWPR, prepared by agents of Transport Scotland. The "badger report" was withheld from Road Sense on the grounds that if the information was divulged to the public it would increase the risk of persecution of badgers. Subsequently, the Reporters conducting the Public Inquiry for Scottish Ministers would not allow evidence to be given on the badger report by Road Sense, and did not wish to have the report itself presented to the Inquiry. The absence of the report prevented Road Sense witnesses from arguing that insufficient mitigation measures were proposed to protect badgers from the effects of the route. It seemed to Road Sense that there were issues in relation to the separation of badger setts from foraging and feeding areas by the construction of the road but specific details of adverse impact could not be presented without reference to the report itself. Moreover, Road Sense was unable to question effectively the adequacy of the mitigation measures proposed by Transport Scotland.

4.3 There were several badger reports prepared by consultants to Transport Scotland (Jacobs); there was a report for each leg of the route. For example, the ‘Environmental Assessment Southern Leg’ refers to “Appendices for Part C: Southern Leg. A25.2 Badger (Confidential Report)”. It is evident that detailed maps from a Badger Activity Survey and a Badger Habitat Survey were included in these reports, for each of the 3 legs of the AWPR.

4.4 A copy of the detailed report on badgers for the Southern Leg was requested by Road Sense from the Managing Agents for the AWPR (Aberdeen City Council), but this request was refused. One Road Sense representative was permitted to see the report under closely controlled conditions, but no photocopies could be taken. Road Sense then sought to have the report lodged as evidence at the public inquiry but this was refused by the Inquiry Reporters. At the inquiry Road Sense presented its own evidence on the impact of the AWPR on badgers especially for Kingcausie estate, where there are some historically well established family colonies. Road Sense witnesses argued that it was inherently unsatisfactory to allow the AWPR to divide up family groups. Although the Transport Scotland/Jacobs report was not released, a local landowner at Kingcausie estate was able to rely on his own personal knowledge to advise on locations of badgers. The evidence of such separation was relevant particularly as badgers are known to be sociable animals. It was also argued that it was damaging to separate badgers from their foraging and feeding areas. In the case of one family group it is believed that a large proportion of their foraging area would no longer be accessible to them. As reference could not be made to distribution of badgers shown in the badger report, these arguments were significantly weakened and could only be made where it there was local knowledge amongst the group or their supporters. This evidence could only cover a fraction of the overall route and even this evidence was limited in its scope.

4.5 In addition, as Transport Scotland prevented the report itself from being introduced as evidence and referred to in detail at the Inquiry, it was not possible for Road Sense to properly cross examine on any flaws and errors within the report. It was evident from limited examination of the report by one member of Road Sense that little time had been afforded for survey and assessment of impacts and mitigation for the southern Leg of the AWPR. Assessment of potential impacts was undertaken in a qualitative manner only. No quantification of impact magnitude or significance was undertaken as part of the assessment, and the mitigation strategies presented seemed to be entirely generic. However, those criticisms could only have been upheld by reference to the text of the report itself and in any event it was impossible to cross-examine on these points when only one member of the group had seen the report, and the Advocate presenting the case on behalf of Road Sense had not.

4.6 Road Sense appreciates that there is a risk of persecution of badgers if sett locations are revealed, but no attempt was made to find procedures which would allow participation in the public inquiry by Road Sense whilst allowing the information to be treated as confidential. Instead the Reporters chose to block the submission of evidence on badgers and on the quality of the badger report. Road Sense was unable to present

information on the distribution of family groups of badgers in relation to the route of the AWPR or to criticise the report. That was an unreasonable restriction on Road Sense's ability to mount a case. If the AWPR goes ahead along the proposed route there will be a severe and unavoidable impact on badger families. That damage will far outweigh any hypothetical risk to individual badgers from persecution.

#### Discussion over the five possible routes

5.1 The Aberdeen Western Peripheral Route (AWPR) is a 46 km dual carriageway proposed jointly by the Scottish Government, Aberdeen City Council and Aberdeenshire Council. The route, running to the West of Aberdeen, comprises three sections:

- Northern Leg (Blackdog to North Kingswells)
- Southern Leg (North Kingswells to Charleston)
- Fastlink (Cleanhill to Stonehaven)

A map is lodged at Appendix A.

5.2 The AWPR, as currently proposed, crosses the River Dee Special Area of Conservation (SAC) – a Natura 2000 site established under the Directive 92/43/EEC (the 'Habitats Directive').

5.3 A report published in November 1994 by Grampian Regional Council<sup>1</sup> considered 21 possible routes for the AWPR and recommended three possible routes to be taken forward for further consideration. Route 14, which subsequently became known as the Murtle Route, was recommended as the preferred route by Grampian Regional Council in 1996 and this route was later endorsed by Aberdeen City Council and Aberdeenshire Council.

5.4 In autumn 2001 the North East of Scotland Transport Partnership (NESTRANS) took forward development of the Northern Leg for the AWPR. Route corridors were presented in May 2002 and subsequently went out to public consultation. The views of the public were subsequently published. A further public consultation was held presenting three alternative routes as the preferred options for the Northern Leg. A final assessment was made, and on 21<sup>st</sup> March 2003 a preferred corridor was recommended. Aberdeen City Council adopted the preferred Northern Leg corridor option on 16<sup>th</sup> April 2003. Aberdeenshire Council adopted the preferred Northern Leg corridor on 24<sup>th</sup> April 2003. No equivalent appraisal was conducted on the route options for the Southern Leg .

---

<sup>1</sup> The statutory local authority now abolished and replaced by Aberdeen City Council and Aberdeenshire Council

5.5 The AWPR was identified in 2003 by NESTRANS as a key element in their integrated transport strategy for Aberdeen - “the Modern Transport System” (MTS).

5.6 In March 2003 Scottish Ministers announced that the AWPR would be taken forward as a National Trunk Road project by a funding partnership of the Scottish Executive (now the Scottish Government), Aberdeen City Council and Aberdeenshire Council.

5.7 In October 2003 the Managing Agent (Aberdeen City Council) for the AWPR appointed contractors to develop the Southern Leg of the route, which crossed the Aberdeenshire River Dee Special Area of Conservation (SAC). A particular route had already been identified by Grampian Regional Council as the preferred route for the Southern Leg - Route 14 - the Murtle Route.

5.8 Between October 2003 and August 2004 further development and assessment of the Murtle Route was undertaken. However, concern over the impact of this route upon the Camphill School for children with special needs resulted in the Transport Minister in September 2004 asking contractors to reassess the route selection decision. Four alternative route options were reviewed in addition to the preferred route. All five of these crossed the River Dee SAC, at four alternative crossing points. The Northern Leg was common to all the route options.

5.9 The five routes for the Southern Leg were the subject of a major informal public consultation exercise in spring 2005 intended to enable the general public to view, understand and consider the key issues for each route option. The consultation was informal in the sense that there was no statutory requirement to consult on the route at that stage. The Murtle Route was identified as the preferred option in the pamphlets and posters presented by the AWPR Team and by members of the AWPR Team themselves at public meetings during the consultation.

5.10 A workshop in July 2005 attended by government and council officials identified the Murtle Route as marginally preferable to a route closer to the City - the Pitfodels Route; both were considered superior to other more western routes. Overall, the workshop found that the Murtle route was cheaper and presented potentially less deliverability issues.

5.11 In October 2005, the Chief Road Engineer provided advice on the selection of a preferred option to the then Minister for Transport, in which he affirmed that he was bound to continue to recommend the Murtle option.

5.12 On 1 December 2005 the Minister, announced that the AWPR would follow a route that was not one of any of the five routes considered during the public consultation. The new route was further to the west than the preferred Murtle route, and was much longer (see Figure). It ran very close to the first major tributary of the River Dee Special Area of Conservation (the Crynoch Burn, also designated part of the SAC) and therefore posed additional risks to the River Dee SAC. The new route included a new Fastlink connecting the AWPR to the A90 trunk road at Stonehaven, 15 km south of Aberdeen. There had been no previous public intimation of a proposed Fastlink, and accordingly no public consultation in respect thereof.

5.13 Enquiries made under the Freedom of Information (Scotland) Act have since revealed that no minutes exist of the meeting in November 2005 at which the decision by the Transport Minister on the choice of a new route was taken. There was no recognition then or since that the new choice of route presented an increased risk of damage to the environment, including much greater adverse effects upon the River Dee SAC.

5.14 The December 2005 announcement anticipated that the design of the route and subsequent Road Orders would be ready by the end of 2006 with the scheme completed by 2011. Road Orders provide the necessary legal authority to build trunk roads and motorways in Scotland. An indicative corridor map was published depicting the 'preferred' route corridor. The Northern Leg was not affected by the December 2005 announcement.

#### A90 trunk road and relief of traffic

5.15 The change in route, with the addition of a 15km Fastlink duplicating the existing A90 trunk road to the south of Aberdeen, was subsequently justified by Transport Scotland on the basis that the transport planning objectives for the AWPR had now changed. An additional, retrospective, strategic transport objective was introduced:

*“Provide traffic relief (including the removal of long distance heavy goods vehicle traffic) on the existing congested A90 route through and to the south of Aberdeen.”*

Up until the announcement of the new route in December 2005 the main stated objective for the AWPR was the relief of traffic congestion within the City of Aberdeen. The new strategic transport objective was concerned with a different issue; relieving traffic congestion on the 15km long stretch of dual carriageway trunk road to the south of Aberdeen, which had not previously been of concern.

5.16 Although the relief of traffic on the A90 was a major change to the objectives of the strategic transport plan (the MTS) no Strategic Environmental Assessment was performed on the revised plan. No consideration was given to alternative routes which would achieve the new objectives (although this was a requirement under the Scottish Government's own Scottish Transport Appraisal Guidance - STAG). No documented justification was provided for taking the Fastlink (a 15 km dual carriageway) as far south as Stonehaven to reduce the congestion which occurs close to Aberdeen. Road Sense has pointed out in a complaint to the European Commission that this major change to the objectives of the strategic transport plan for the area required a Strategic Environmental Assessment (SEA) under the European SEA Directive. No SEA has yet been carried out.

5.17 Subsequently Transport Scotland expanded their proposed alignment to a corridor. The AWPR project team thereafter carried out landowner consultations, survey and development work to identify and to refine the alignment of the preferred route within that corridor. The preferred alignment was announced by the Minister on 2<sup>nd</sup> May 2006. No consideration was given to alternative route corridors which would have reduced impact upon the River Dee SAC.

5.18 Draft Road Orders for the entire AWPR, including the Fastlink, were first published on 14<sup>th</sup> December 2006. An accompanying Environmental Statement was issued in January 2007. Another set of Draft Orders, Compulsory Purchase Orders and a new replacement Environmental Statement for the AWPR were then published in August, September and October 2007. Certain of these draft Road Orders replaced those previously published and included additional land required for environmental mitigation. No reason was given for the substitution of a new Environmental Statement. However, the first ES stated that the AWPR, together with other major proposals would serve to open up the Aberdeen hinterland to further development. The second changed the emphasis to state that the AWPR and other major proposals could in future significantly change the rural land use context of the region.

5.19 Publication of the Road Orders was followed by a statutory consultation. The consultation concerned a single route – the one for which the Road Orders had been presented. About 10,000 objections to the proposals were lodged.

5.20 The Scottish Government then announced on 12<sup>th</sup> October 2007 that a Public Local Inquiry would be held into its proposals for the AWPR. Reporters from the Scottish Government were appointed to conduct the inquiry and report to Ministers. At the Pre-



Inquiry meeting on the 13<sup>th</sup> May 2008, the Reporters stated that Scottish Ministers had accepted the need in principle for the road and did not wish to be advised on the justification for the principle of the scheme in economic, policy or strategic terms. The Ministers considered that strategies and policies referring to the scheme were only relevant to the inquiry insofar as these set out the context for the AWPR. The Ministers also directed that they only wished to be advised on the technical aspects of the route choice, including the environmental statement and any opinions expressed on it. In response to these instructions the Reporters decided to disallow any evidence which had, as its objective the calling into question of the need for the scheme. In addition, while acknowledging the intention of certain objectors to present evidence “on alternative routes and alternative designs” the Reporters specifically commented that the inquiry was into the scheme proposed by Transport Scotland and “cannot turn itself into an inquiry into a series of assumed alternative proposals”.

5.21 The draft National Planning Framework for Scotland, published in January 2008, stated that "Transport infrastructure commitments to 2012 include... construction of the Aberdeen Western Peripheral Route". It also stated that the "completion of the Aberdeen Western Peripheral Route in 2012 will relieve congestion in Aberdeen”.

5.22 The Public Inquiry into the AWPR started on the 9<sup>th</sup> September 2008 and terminated with closing submissions in February 2009. The findings of the Inquiry have yet to be announced.

### Public consultation

6.1 The publication of the Road Orders was followed by a statutory consultation. About 10,000 objections to the proposals were lodged. This consultation period was, however, after the route of the road had been chosen. The inquiry process, as illustrated above, was not prepared to consider alternative routes to that proposed by Transport Scotland.

### Supplementary submissions

7.1 We would also wish to make the following points:-

7.2 Firstly, the original submission refers to the Freedom of Information (Scotland) Act 2005 as being the framework for obtaining environmental information. In fact it is the Environmental Information (Scotland) Regulations 2004 which provide the statutory framework for obtaining environmental information.

7.3 It may also be helpful to outline why our clients did not proceed through the appeal procedure at the time of the original request to SNH for information on the pearl mussel population.

7.4 Prof. Hawkins on behalf of Road Sense made the first request for information on 14th July 2008. On 15th July 2008, an acknowledgement was sent from SNH and at the same time our client by either e-mail or telephone requested the Freshwater Pearl Mussel Report 2005. There were a number of e-mails between our client and SNH, clarifying the information sought. Our client was also seeking information as to whether an Appropriate Assessment had been carried out in terms of Directive 92/43/EEC. However, on 5 August 2008, our client received a reply from SNH refusing to release the Freshwater Pearl Mussel Report. The Public Inquiry began on 8 September 2008. It is the requirement of Public Inquiries in Scotland that statements of case and precognition are lodged usually 6 weeks in advance. Given the other pressures of preparation required for the Inquiry, and the fact that there would need to be an internal appeal within SNH, followed by an appeal to the Scottish Information Commissioner, the appeal procedure was not followed at that stage.

7.5 We also wish to emphasise the connection between the withholding of information and our client's inability to properly present their objections to the public inquiry process. In particular, our clients were significantly disadvantaged by Transport Scotland having access to information which was not before our clients at the Public Inquiry. In addition, our clients could not properly test the strength of various aspects of the case put forward by Transport Scotland on mitigation and other measures. The withholding of the information should not just be seen as an issue of environmental information, but also a breach of the participation aspects of the Convention.

7.6 The disadvantaged status of the Road Sense witness in relation to evidence regarding the vulnerability of freshwater pearl mussels was acknowledged by Counsel for Transport Scotland in her closing submission, where she contended that "Apart from a generalised comment by Professor Hawkins that the freshwater pearl mussel population in the River Dee were vulnerable, he provided no evidence to support any conclusion that there would be an adverse effect on the integrity of the SAC in respect of this species". In the circumstances, having been denied information on the status and distribution of the mussels in relation to the AWPR, it was not possible for Professor Hawkins to be more specific in presenting his evidence.

7.7 A further request was made to SNH by Prof. Hawkins for information on freshwater pearl mussels in 2009, after closure of the Public Inquiry. This request was again refused. After appeal to SNH, which was refused, the case was appealed to the Scottish Information Commissioner. That case is currently under consideration.

### Access to Justice

8.1 In terms of access to justice, we would also wish to clarify some of the points regarding Judicial Review. Although it is possible that a decision in respect of this application may be challenged by judicial review, it is more likely that the decision to approve the road itself would be challenged by a statutory appeal under the Town and

Country Planning (Scotland) Act 1997. The test for who can apply under the statutory appeal is broader than the test under judicial review, and all 'persons aggrieved' by the planning decision are entitled to proceed to court. Ordinarily those who have taken part in an inquiry process are considered to be persons aggrieved. However, as our clients are an unincorporated association, they are not given the same recognition in law to take forward challenges. It may be that the Court will allow the officer bearers (Chair, Treasurer, Secretary etc) to take forward any appeal on behalf of the organisation, but that will have to be dealt with at a later stage.

8.2 In relation to costs, again we anticipate there may be major issues as to the practicalities of how our clients can challenge any decision to approve the road. Legal aid is not available for groups in Scotland, and by and large legal aid is generally not available for public interest environmental issues. Again, we anticipate that this may have to be dealt with at a later stage.

We hope this information is helpful and look forward to hearing from you in due course.

Yours sincerely,

Frances McCartney  
Solicitor

McCartney & Co at the  
Environmental Law Centre Scotland Ltd (SC040000)  
65 George Street  
Paisley PA1 2JY

[www.elcscotland.org.uk](http://www.elcscotland.org.uk)

Tel 0844 335 6741  
Mob 078112 70559