

**DRAFT FINDINGS OF THE COMPLIANCE COMMITTEE WITH REGARD TO
COMMUNICATION
ACCC/C/2009/38 CONCERNING COMPLIANCE BY THE UNITED KINGDOM**

I. INTRODUCTION

1. On 7 May 2009, Road Sense (hereinafter the communicant) submitted a communication to the Committee, alleging non-compliance by the United Kingdom with its obligations under the preamble and articles 1, 3, 4 and 5, paragraph 1, article 6, paragraphs 2, 4, 5, 7, and 9, and article 9, paragraphs 2 and 3 of the Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (Aarhus Convention or Convention) in respect of the procedures adopted in the promotion of the proposed construction of a road bypass around the Scottish city of Aberdeen, known as the Aberdeen Western Peripheral Route (AWPR). The proposed AWPR involves the construction of 46 kilometres of offline dual-carriageway, typically of two lane standard, with junctions connecting it to the existing network of trunk and non-trunk roads around Aberdeen.

2. The communication alleges that the Party concerned has breached articles 1, 3 and 4 of the Convention by failing to provide information on the state of the environment and the status of protected species which would be impacted by the AWPR. It alleges that the Party concerned failed to ensure that the environmental information provided in the Environmental Statement for the AWPR and the Report to Inform Appropriate Assessment for the crossing of the River Dee Special Area of Conservation was fit for purpose, and thereby failed to meet the requirements of the preamble to the Aarhus Convention and article 3. It also alleges that the Party concerned has breached article 5 by not providing information which could enable the public to take measures to prevent or mitigate harm arising from a threat to those protected species.

3. Moreover, the communication alleges that the Party concerned has breached article 6 by failing to seek public comment on the proposed route for the AWPR in an open way, failing to provide information on new objectives for the proposal and failing to invite the public to submit any comments, information, analyses or opinions on the proposed route. It alleges that the introduction of a new objective for the regional strategic transport plan without any public participation was in breach of article 7. It alleges that the Party concerned restricted the scope and circumstances of a public inquiry into the AWPR in a manner contrary to the principles of justice enshrined in articles 7 and 9. Finally, it alleges that the lack of access for the public in Scotland to an open and inexpensive review procedure before a court of law and/or another independent and impartial body established by law to challenge the substantive and procedural legality of the proposed AWPR is in breach of article 9.

4. At its twenty-fourth meeting (30 June – 3 July 2009), the Committee determined on a preliminary basis that the communication was admissible. Pursuant to paragraph 22 of the annex to decision I/7, the communication was forwarded to the Party concerned on 27 July 2009 together with

a number of questions seeking further information. Also, on 27 July 2009, the Committee wrote to the communicant with a request for clarification on certain issues.

5. The communicant and the Party concerned addressed the questions raised by the Committee on 21 December 2009 and on 4 January 2010 respectively.

6. At its twenty-sixth meeting (15-18 December 2009), the Committee agreed to discuss the content of the communication at its twenty-seventh meeting (16-19 March 2010).

7. By letter dated 1 March 2010 and its attachments, the communicant provided additional written submissions and documentation for consideration by the Committee seeking to clarify certain aspects of the Party concerned's response of 4 January 2010 and to update the Committee on recent developments.

8. The Committee discussed the communication at its twenty-seventh meeting, with the participation of representatives of the Party concerned and the communicant. At the beginning of the discussion the Committee confirmed the admissibility of the communication.

9. By letters dated 31 March 2010, the communicant and the Party concerned each provided further documentation and information requested by the Committee during the discussion at its twenty-seventh meeting.

10. On 15 April 2010, the Party concerned provided additional information about all documentation that had been disclosed by the Scottish Natural Heritage to the communicant, and on 20 May 2010, the Party concerned responded to the points made by the communicant in its letter of 21 March 2010.

11. On 4 June 2010, the communicant as well provided additional information to the Committee. On 13 July 2010, the Party concerned responded to the points made by the communicant on 4 June 2010.

12. By letter dated 27 October 2010 the Committee sought further clarification from the communicant and the Party concerned. The communicant and the Party concerned responded to the questions raised by the Committee on 21 and 24 November 2010 respectively.

13. The Committee began to prepare draft findings at its twenty-seventh meeting and completed the preparation of draft findings at its thirtieth meeting (14-17 December 2010). In accordance with paragraph 34 of the annex to decision 1/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 12 January 2011. Both were invited to provide any comments by 9 February 2011.

14. The Party concerned and the communicant provided comments on [...].

15. At its [...] meeting, the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they

should be published as an addendum to the report. It requested the secretariat to send the findings to the Party concerned and the communicant.

II. SUMMARY OF FACTS, EVIDENCE AND ISSUES¹

A. Legislative framework

Roads (Scotland) Act 1984

16. In accordance with section 54 of the Scotland Act 1998, competence for transport is devolved to the Scottish Government. Transport Scotland is an executive agency of the Scottish Government. The Roads (Scotland) Act 1984 sets out the procedure for new roads, including the promotion of draft orders and compulsory purchase orders.

17. In accordance with Part 1 of the Schedule 1 to the Roads (Scotland) Act 1984, the authority promoting the road is obliged to publish notice of its intention to make an order under that act. Interested parties then have a period of at least six weeks to object to the draft orders.

18. The draft orders must be accompanied by an environmental statement produced in accordance with section 20A of the Roads (Scotland) Act 1984 which provides, inter alia, that: “The Scottish Ministers shall publish notice of the environmental statement so as to ensure that members of the public who are likely to be concerned are given a reasonable opportunity to express an opinion before they decide whether to proceed with the project, and they shall not make any such decision without taking into consideration any opinion so expressed to them within a period of 6 weeks from the date of publication of the notice of the environmental statement.” The environmental statement must be accompanied by a non-technical summary.

19. Paragraphs 5 and 6 of Schedule 1 to the Roads (Scotland) Act 1984 requires a public local inquiry to be held to consider objections received by the Secretary of State (now the Scottish Ministers by virtue of section 53 of the Scotland Act 1998) from any person on whom copies of the draft Orders are required to be served or from any other person appearing to be affected, unless the Scottish Ministers are satisfied in certain circumstances that the holding of an inquiry is unnecessary.

20. Paragraph 7 of Schedule 1 to the Roads (Scotland) Act 1984 describes the duties incumbent upon the Scottish Ministers when determining whether or not to confirm the Schemes and Orders which were the subject of the public local inquiry. After considering the objections to the proposed AWPR and the report of the Reporters appointed to hear the public local inquiry, the Scottish Ministers may approve the draft Schemes and Orders as promoted, with modifications which they see fit to impose, or may refuse to confirm the Schemes and Orders. In reaching this decision, the Scottish Ministers must have regard to the Environmental Statement published in relation to the project and any opinion on the Environmental Statement or project which is expressed in writing by any consultation body or other person. The Roads (Scotland) Act 1984 does not prescribe a timescale within which this decision is to be taken.

¹ This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

21. In the event that the Scottish Ministers decide to confirm the Schemes and Orders, the Schemes and Orders will be subject to the affirmative order procedure, which means that to come into force they must be approved by resolution of the Scottish Parliament.

22. The validity of the Scottish Ministers' decision may be challenged under the provisions of Schedule 2 to the Roads (Scotland) Act 1984 and Part 4 of the First Schedule to the Acquisition of Land (Authorization Procedure) (Scotland) Act 1947 by application to the Court of Session. This application must be made within 6 weeks of the date on which the notice that Parliament has passed a resolution approving the instrument is first published.²

B. Background of facts³

Preliminary studies (1990s)

23. The first work on the AWPR was started by Grampian Regional Council in the early 1990s. After a public consultation exercise on various route options, Grampian Regional Council recommended an option known as the Myrtle option as its preference for the southern section of the route in early 1996. That route was later endorsed by Aberdeen City Council and Aberdeenshire Council, the local authorities formed to succeed the Grampian Regional Council.

Development of the Modern Transport System (2000 – 2003)

24. In September and October 2000, 10,000 questionnaires were sent to households and businesses regarding a proposed Modern Transport System for the North East. Following this public consultation exercise and studies in 2002 and 2003, a route for the northern section of the AWPR was also adopted by the councils. At that time both local authorities, working through NESTRANS (North East of Scotland Transport Partnership) developed the Modern Transport System for the North East (MTS). The AWPR was considered a key element of the MTS which also included passenger and freight rail, public transport, park and ride, cycling and walking measures. In 2003 the Scottish Executive confirmed that it would take forward the AWPR as a strategic trunk road.

Route options investigated (2003 – 2004)

25. In 2004 the then Minister for Transport commissioned a study to review the work undertaken in the 1990s on the Myrtle route and consider a range of alternative options for the southern leg. A private engineering firm was appointed to carry out this work and produce designs for the route. The study assessed four alternative route options in addition to the preferred Myrtle route corridor.

Public exhibitions (2005)

26. The results of the 2004 study into options for the AWPR were presented to the public for their comments in spring 2005. This took the form of a series of public exhibitions in communities

² Para. 30, page 8 of the Scottish Ministers' Decision letter dated 21 December 2009, forwarded by the communicant on 1 March 2010.

³ This background is drawn from the timeline on the AWPR website (see www.awpr.co.uk).

situated close to the potential routes. The exhibition was run in a roadshow format and staffed by engineers from the AWPR project. Indicative maps and graphic illustrations were available to be viewed by the public and information packs with feedback forms were provided. More than 7,000 responses were received following the consultation.

Decision on the route corridor (2005)

27. Following the spring 2005 exhibitions and the studies by the private engineering firm, the Transport Minister took a decision on the optimum corridor for the AWPR. On 1 December 2005 the Minister announced that the best strategic route would be a combination of the Milltimber Brae and Peterculter / Stonehaven routes presented at the public exhibitions. This would consist of a peripheral route around the city of Aberdeen and a fast-link from the A90 at Stonehaven.

Environmental studies (winter 2005 – ongoing)

28. In winter 2005, the results of environmental studies on flora, fauna and various species of wildlife were compiled in an Environmental Statement and summarized in the Non Technical Summary document.

Definition of route corridor (southern section) (spring 2006)

29. In the period of winter 2005 – spring 2006, the AWPR team investigated a variety of route options around the proposed southern leg of the route in order to identify a narrower route corridor which could be taken forward for further study. The findings of these studies were produced in the Initial Assessment Stage Report.

30. In May 2006, the Minister for Transport made public the narrower route corridor within which the final road would lie. The Minister's decision was documented in the Final Assessment Stage Report, available on the website www.awpr.co.uk.

Draft orders (winter 2006 - spring 2008)

31. In December 2006, the Scottish Ministers published the draft Special Road Orders for AWPR along with supporting documents. The documents were sent to statutory consultees and were made available in local libraries, council offices and on the web. Public exhibitions were held locally to present the detailed proposals to the public during January 2007. The documents published included the draft Special Road Orders which show the main line of the new road, an Environmental Statement setting out the impact of the route on the environment in and around the route corridor, a Non Technical Summary of that document, and draft de-trunking orders for the existing trunk road. The publication of these documents marked the start of the statutory consultation process, during which any person could make formal objections or representations about the proposals. The consultation closed on 9 February 2007.

32. In September 2007, an updated Environmental Statement showing the proposed environmental mitigation measures intended to reduce the impact of the road was published. A second round of

formal public consultation on the proposed route, including a series of public exhibitions, took place following the publication of the orders and closed in late October 2007.

33. In light of the status of the Dee Special Area of Conservation (SAC), Transport Scotland determined that an Appropriate Assessment was required in order to meet the provisions of the European Union (EU) Habitats Directive.⁴ Consultants commissioned by Transport Scotland completed the Report to Inform Appropriate Assessment (RIAA) in April 2008. The RIAA concluded that, subject to appropriate mitigation, the construction and operation of the AWPR would 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.

34. By letter dated 8 August 2008, Scottish Natural History advised Transport Scotland, and subsequently the Scottish Ministers, that it had formed the view that provided the proposals were undertaken in accordance with the proposed conditions/legal modifications, the proposed AWPR would not adversely affect the integrity of the River Dee SAC.

Public local inquiry (winter 2008-09)

35. The Scottish Ministers appointed Reporters to conduct a public local inquiry into the AWPR in April 2008. The Reporters were to consider all evidence presented at the inquiry, prior to making recommendations to Ministers for their consideration. If Ministers thereafter decided to proceed with the scheme, it would go before Parliament for final approval. The public local inquiry began on 9 September 2008 and concluded on 10 December 2008 and closing submissions were lodged during January and February 2009. The report of the public local inquiry is available on the public local inquiry website <http://awpr-pli.net/>.

The communicant's request for the report on freshwater pearl mussels

36. In July 2008, Mr. Hawkins, a member of the communicant, requested a copy of the report relating to the site condition monitoring of freshwater pearl mussels in the River Dee from Scottish Natural Heritage (SNH), the independent government advisor on nature conservation and landscape matters in Scotland. Although Mr. Hawkins offered to sign an undertaking not to release any information in relation to the breeding sites of freshwater pearl mussels to other parties, SNH decided not to release the report and a redacted version was provided to Mr. Hawkins in August 2008. The decision to withhold the requested information was made under Regulation 10(5)(g) of the Environmental Information (Scotland) Regulations 2004, which provides:

“A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially –

(g) the protection of the environment to which the information relates”

⁴ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, p. 7, as amended from time to time.

on the grounds that “any release of this data could increase the risk of persecution. If SNH was to release this data to you we would also be obliged to release it to any other person who asked for it, reducing the current level of protection afforded to fresh water pearl mussels in the Dee”.

Making of orders

37. Following consideration of the Public Local Inquiry Reporters’ Report and all outstanding objections not withdrawn, the Scottish Ministers announced their decision on 21 December 2009, to make the Schemes and Orders subject to a number of detailed modifications to the published draft Schemes and Orders. The Schemes and Orders show the precise line where the new road will be built. In accordance with previous commitments given, a Direction was issued under Section 143A of the Roads (Scotland) Act 1984 confirming that the Schemes and Trunk Road Orders would be subject to the Affirmative Procedure in the Scottish Parliament, meaning that they would not come into force until approved by resolution of the Scottish Parliament.

38. In January 2010, the Scottish Parliament approved the Schemes and Trunk Road Orders by resolution on 3 March 2010 in accordance with the Affirmative Procedure process. The Schemes and Trunk Road Orders came into force on 31 March 2010.

Appeal to the Scottish Information Commissioner

39. Mr. Hawkins, on behalf of the communicant, appealed to the Scottish Information Commissioner regarding SNH’s decision to withhold the information regarding the freshwater pearl mussels. In his decision dated 25 May 2010, the Scottish Information Commissioner found that SNH was entitled to withhold information contained in certain documents identified during the investigation, where the information related to the location of the freshwater pearl mussel populations. In relation to the remaining information, SNH had indicated that it no longer sought to apply the exception contained in Regulation 10(5)(g) of the Environmental Information (Scotland) Regulations 2004. The Commissioner held that SNH had incorrectly applied the exception earlier and required it to disclose the information thereby excepted to Mr. Hawkins. The Commissioner also held that SNH failed to provide the advice and assistance reasonably expected of it by providing a misleading impression to Mr. Hawkins of the nature and extent of the information that had been withheld. Thus, the Commissioner found that SNH had failed to comply with its duty under Regulation 9(1) of the Environmental Information (Scotland) Regulations 2004 in those respects.⁵

Statutory appeal under the Road (Scotland) Act 1984

40. In April 2010, the communicant lodged a statutory appeal under the Roads (Scotland) Act 1984. In summary, the basis for the appeal was:

- i. The Ministers in coming to their decision to build the AWPR failed to have regard to all the findings of the Public Inquiry, in particular with respect to the acknowledged levels of environmental damage that would be caused.
- ii. Ministers attributed economic benefits to the road, and these provided the main justification for building the AWPR, yet the public were excluded from challenging those claimed benefits at the Public Inquiry.

⁵ Decision 073/2010 Mr. A D Hawkins and Scottish Natural Heritage, dated 25 May 2010.

- iii. In coming to a decision with respect to European Protected Species Ministers ignored the provisions of the European Habitats and Species Directive.

The communicant also sought an order to cap the potential liability for expenses, which application was to be heard on 16 and 17 December 2010. The full hearing was set down for 22 February 2011 for six days.

C. Substantive issues

Report to Inform Appropriate Assessment not fit for purpose - preamble and article 3, paragraph 2

41. The communicant identifies a number of alleged deficiencies in the April 2008 Report to Inform Appropriate Assessment commissioned by Transport Scotland in accordance with the EU Habitats Directive. These alleged deficiencies inter alia include that appendix 9 to the Report, concerning River Dee Salmon, is significantly flawed and it cannot be concluded beyond reasonable scientific doubt that the project will not adversely impact the integrity of the Dee SAC. Second, that the Habitats Directive requires an “in combination procedure” so that all developments which might affect a protected site are included in an in combination assessment, and not just those concurrent with the subject development as assumed by Transport Scotland. Moreover, the Report gives few details of the mitigation measures proposed, and much of the mitigation is left to contractors to perform. The communicant alleges that these deficiencies negate any significance which might be attached to the Report’s findings or to the response of SNH dated 8 August 2008. In addition, the communicant objects to the procedure whereby the environmental statement and the Report to Inform Appropriate Assessment were commissioned from consultants by the promoter of the route. It alleges that the commissioned reports presented information especially tailored to the needs and requirements of Transport Scotland and that in effect, the consultants were acting at the behest of Transport Scotland and supporting its case for the AWPR, rather than providing independent advice to the public and to the Scottish Government on the environmental impact of the route.

42. The communicant submits that by providing inadequate and inaccurate environmental information the Party concerned adversely affected the ability of the public to oppose a public decision with adverse effects upon the environment and to enable informed environmental decisions to be made. It contends that this is contrary to the preamble of the Convention which recognises “the importance of fully integrating environmental considerations in governmental decision-making and the consequent need for public authorities to be in possession of accurate, comprehensive and up-to-date environmental information.” The communicant alleges that the Party concerned failed to fulfil its obligation under article 3, paragraph 2, to endeavour to ensure that its officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters.

43. In relation to the communicant’s allegations under article 3, paragraph 2, the Party concerned submits that it has taken the necessary legislative and regulatory measures required to implement the Convention’s obligations. Regarding the preamble, the Party concerned submits that the preamble is intended to act as an aid to interpretation of the operative provisions of the Convention, and does not represent a binding or operative provision of the instrument. Notwithstanding this, however, the

Party concerned submits that the broad interpretative principles found in the preamble have been observed.

44. Moreover, the Party concerned submits that the substantive issue of whether the environmental information contained in the Environmental Statement and the Report to Inform an Appropriate Assessment is fit for purpose is a matter of fact, and a matter on which evidence was presented by the communicant at the public local inquiry. Given that the communicant made its allegations to the Committee before the Reporters had reported their recommendations following the public local enquiry, and before the Scottish Ministers had yet undertaken an appropriate assessment of the proposed AWPR, the Party concerned submits that the communicant's allegation that the information in the Environmental Statement and RIAA was unfit for purpose was made prematurely.

Refusal to provide details of breeding sites of freshwater pearl mussels- articles 1, 4 and 5

45. The communicant claims that the refusal to provide information on the state of the environment by an agency of the Scottish Government is a breach of articles 1 and 4 of the Convention and fails to take account of the provisions of article 3. It alleges that lack of access to the information on freshwater pearl mussels contained within the report has prevented it from taking action in several respects. Firstly, without the report it has been unable to query the adequacy of measures taken by the Scottish Government and its agents to avoid deterioration of habitats for the freshwater pearl mussel within the Aberdeenshire River Dee SAC and to hold the Scottish Government to account for its failure to act. The communicant alleges that on this point the Party concerned is also failing to comply with article 5, paragraph 1(c) of the Aarhus Convention, which requires in the event of any imminent threat to the environment (in this case to freshwater pearl mussels) there should be access to information which could enable the public to take measures to prevent or mitigate harm arising from the threat. Secondly, the communicant contends that failure to provide the report, which includes information on the distribution of freshwater pearl mussels in relation to a new bridge proposed for the AWPR, has impaired the communicant's ability to oppose effectively the construction of the AWPR. This refusal has been compounded by the willingness of SNH to provide that report to consultants assisting Transport Scotland in making their case for the construction of the AWPR. Thirdly, the communicant reports that it has brought a complaint to the Commission of the European Union alleging that the promoters of the proposed AWPR route have failed to comply with the Habitats Directive and SEA Directive. The communicant contends that unless it has access to the report commissioned by SNH, which points to deterioration in the status of freshwater pearl mussels, it will be unable to draw the attention of the European Commission to the lack of enforcement of the Habitats Directive by the Scottish and United Kingdom Governments.

46. The Party concerned submits that its decision not to disclose the report was in accordance with article 4, paragraph 4(h) of the Convention. It submits that freshwater pearl mussels are an endangered species throughout Europe, with populations declining due to overfishing, changes to water quality from engineering and other river works as well as illegal pearl fishing. Scotland is considered a stronghold for the species. The population in the River Dee has been subject to illegal pearl fishing in the past. The Party concerned states that the Public Local Inquiries Procedures and Rules require all parties including the Reporter to be able to have access to all material presented and there is no power to restrict evidence. The Party concerned states that the dissemination of any information in relation to freshwater pearl mussels is carefully risk assessed to ensure full protection

of the species at all times. It contends that the release of the detailed information requested by the communicant could have led to publication of the location and status of all known freshwater pearl mussel populations within the River Dee, making these locations more vulnerable to targeted illegal pearl fishing. It notes that its decision not to disclose this was affirmed by the Scottish Information Commissioner in his decision of 25 May 2010.

47. With respect to the communicant's allegation under article 5, paragraph 1(c), the Party concerned submits that that provision relates to situations in which there is an imminent or immediate threat to the environment, which is not the case with the proposed AWPR. It submits that the environmental impacts of the proposed AWPR have been assessed and reported in the Environmental Statement in any event. It submits that the communicant has provided no examples of the Scottish Government having failed to provide information which could enable the public to take measures to prevent or mitigate harm arising from a threat to a protected species within the meaning of article 5, and the allegation is therefore unfounded.

Refusal to release "Badger Report" – article 1, 4 and 5

48. The communicant contends that the Party concerned has also breached articles 1 and 4 of the Convention in relation to its refusal to release a report prepared by agents of Transport Scotland on badgers along the route of the AWPR on the grounds that if the information was divulged to the public it would increase the risk of persecution of badgers. It claims that subsequently, the Reporters conducting the Public Inquiry for Scottish Ministers would not allow evidence to be given on the badger report by the communicant, and did not wish to have the report itself presented to the Inquiry. The communicant alleges that the absence of the report prevented its witnesses from arguing that not enough was being done to protect badgers from the effects of the route and it was unable to question effectively the adequacy of the mitigation measures proposed by Transport Scotland. The communicant claims that the short time remaining until the Public Inquiry meant that it was not possible for it to make a request under the Freedom of Information (Scotland) Act 2002.

49. The Party concerned contends that the communicant's allegation that there has been a failure, in breach of article 4 of the Convention, to provide information on the state of the environment and the status of protected species impacted by the proposed AWPR is unfounded. The Party concerned states that badgers and their setts are legally protected by the Protection of Badgers Act (1992) and other relevant legislation. The Environmental Impact Statement published in 2007 included an assessment of a range of protected species, including badgers. Assessment results are provided as technical appendices to the Environmental Statement, with information summarized in the main body of text. Appendix 10.2 details the assessment on badgers. The Party concerned contends that, similar to the freshwater pearl mussel highlighted above, the precise locations of badger setts were not published within the Environmental Statement as it was considered that disclosing the information would put this protected species at increased risk of badger baiting and snaring. The Party concerned notes that the communicant did not make a request under either the Freedom of Information (Scotland) Act 2002 or the Environmental Information (Scotland) Regulations 2004 for Appendix 10.2 to the Environmental Statement (the badger assessment appendix).

Inadequate public participation regarding the proposed AWPR option - article 6

50. The communicant alleges that 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 combined elements of an original Milltimber Brae route with the addition of a Fast Link connecting the AWPR to the A90 trunk road at Stonehaven, 15 km south of Aberdeen. The communicant alleges that by doing so, the Scottish government effectively consulted on five route options and then chose a sixth. Parties affected by the changes to the route of the AWPR were unable to comment upon the new route or its increased environmental impact either during the consultation in the spring of 2005 (which did not include the route finally selected) or during the subsequent consultation in 2006 on route alignment (where consideration was not given to the choice of the route itself).

51. The communicant alleges that there had been no previous public intimation of a proposed Fast Link, and accordingly no public consultation in respect thereof. Moreover, at the time of the announcement on 1 December 2005, the Fast Link was to be a conventional single carriageway. Subsequently, the promoters proceeded to refine the alignment of the chosen route and to upgrade the Fast Link to a dual carriageway.

52. With respect to the Party concerned's obligations under the Convention, the communicant alleges that the public were not informed in advance of any proposal for a Milltimber Brae/Fast Link route option, or invited to comment on that route option, as required under article 6, paragraph 2. Effective public participation on all options in an open way was not provided as required under article 6, paragraph 4. The public were not informed of new objectives established for the route (which were defined only after the route had been selected), although this is required under article 6, paragraph 5. The public were not able to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions on the final choice of route, although this is required under article 6, paragraph 7.

53. Under the Freedom of Information Scotland Act, the communicant asked the Scottish Government to provide information on the reasons for choosing the Milltimber Brae/Fast Link route. That information was not provided. Asked for minutes of the meeting recording that decision, a representative of the Scottish Government indicated that no notes or minutes were kept. The communicant contends that this is an extraordinary situation for any meeting at which an important decision, with heavy financial implications, was taken. The communicant submits that in failing to provide evidence on the reasons for the change in the route of the AWPR announced on 1 December 2005 the Scottish Government has failed to meet its obligations under article 6, paragraph 9 of the Convention.

54. The Party concerned responds that the Milltimber Brae and Fast Link corridor option was a combination of two options presented during the spring 2005 public consultation (i.e. a combination of the Milltimber Brae and Peterculter/Stonehaven options presented at the exhibitions in spring 2005). Following the announcement to adopt the Milltimber Brae and Fast Link corridor option on 1 December 2005, letters were issued to statutory and non-statutory consultees (including community councils) in early 2006. The Party concerned accepts that these letters were the first occasion when the combined option comprising both the Southern Leg and the Fast Link were issued for consultation purposes. However, the public and interested parties were subsequently given the opportunity to comment on the entire scheme including the Southern Leg and Fast Link following

the publication of the draft Schemes and Orders in December 2006 and autumn 2007. The Party concerned states that the publication of the statutory documentation in accordance with the Roads (Scotland) Act 1984 allowed the public and interested parties the opportunity to examine the proposed alignment for the Scheme (including the Southern Leg and Fast Link) and offer comment in the form of support, objection or other representation. Formal public exhibitions were also held at specific locations along the route to coincide with the publication of the draft Schemes and Orders. The Party concerned states that the Roads (Scotland) Act requires the Scottish Ministers, upon making their decision whether or not to confirm the draft Schemes and Orders, to make available the content of their decision and any conditions which are to apply.

Narrow scope of public inquiry and not all options open – article 6, paragraph 4

55. The communicant contends that the public inquiry that was held between September 2008 and January 2009 was into a proposal which the Government stated had already been confirmed as a matter of policy. The communicant contends that the scope of the inquiry, as set by the Reporters acting under direction from the Scottish Government Minister, was too narrow and thus unfairly prejudiced those parties, including the communicant, objecting to the scheme. No discussion was permitted of a no-bypass option or other forms of traffic management - nor any discussion permitted of an option to the east of the city – since the starting point for the inquiry was that the Minister had already taken the decision that in principle there was to be a bypass to the west of the city. The communicant notes that the impact of this restriction is made clear by some of the Reporters’ findings and conclusions – for example the Reporters concluded that the selected route would be very damaging to the long established woodlands at Kingcausie and to nearly all of the ‘Local 3 Landscape Character Areas’ – but felt powerless to find against the scheme on these grounds as there was no alternative scheme available. The communicant contends that in light of the above, the public inquiry cannot be considered to fulfill article 6, paragraph 4, which requires early public participation when all options are open.

56. The communicant contends that no consultation was carried out on the southern leg of the route in relation to the MTS. Further, the communicant alleges that the consultation on the northern leg does not seem to have included information on the crossing of the River Dee. The communicant also states that the questionnaires regarding the MTS sent to 10,000 households in September and October 2000 cannot be equated with an open consultation as those not selected to obtain a questionnaire must also be able to give their views. Finally, the Party concerned has not provided information on the geographic locality of the households consulted.

57. The Party concerned contends that the communicant is incorrect in alleging that the Scottish Government has failed to seek public comment on the route proposals for the proposed AWPR in an open way. It states that considerable consultation has taken place throughout the development of the AWPR. It contends that public consultations for the southern leg were conducted in the 1990s, when it was known as the western leg. It does not accept that the Public Inquiry did not comply with article 6, paragraph 4. Moreover, it states that the statutory scheme of the Roads (Scotland) Act, 1984 allowed the public the opportunity to express objections in writing as well as participate at local enquiries. Formal public exhibitions were also held at specific locations along the route. The Party concerned contends that it was open to persons objecting to the draft Schemes and Orders to argue for an alternative route. It contends that a number of objections to the draft Orders raised

alternatives to the proposed AWPR route and thus these were considered at the public local inquiry. It notes that the communicant participated in the public local inquiry and presented evidence to the inquiry on a range of matters.

Change to Modern Transport System – article 7

58. The communicant contends that the change in route was subsequently justified by Transport Scotland on the basis that the transport planning objectives for the AWPR had now changed to introduce an additional, retrospective strategic transport objective: “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”. The communicant states that the introduction of a new objective regarding the relief of traffic on the A90 was a major change to the objectives of the strategic transport plan (the MTS) and that, in amending the strategic transport plan to introduce a new and far-reaching objective without any discussion or public participation, the Scottish Government breached article 7 of the Convention.

59. The Party concerned contends that the objectives for the MTS have not changed since it was published in 2003. It states that the revised objective the communicant refers to is in fact a revision of one of the objectives of the AWPR project itself, and is not an objective of the MTS. It states that the objectives for the AWPR project were reviewed and consolidated in 2005 as part of the process of identifying the preferred corridor.⁶

Access to justice – article 9

60. The communicant contends that the Party concerned has breached article 9, paragraphs 2 and 3 of the Convention, on the grounds that there is effectively no access for the public in Scotland to an open and inexpensive review procedure before a court of law and/or other independent and impartial body established by law to challenge the substantive and procedural legality of the proposed AWPR.

61. The communicant alleges that the public local inquiry into the proposed AWPR cannot be considered to provide an independent and impartial body through which to challenge the legality of the decision to construct the AWPR, having regard to its scope and the acquiescence of the Reporters with the instructions of a Scottish Minister regarding the scope of the inquiry. It notes that this particular problem may well apply in all cases where a Public Local Inquiry is held into projects promoted by the Scottish Government itself. It contends that such an Inquiry could not possibly be regarded as independent, or fair to the interests of the public and those affected by the proposal.

62. In addition, the communicant argues that there is restricted ability to seek justice through the Scottish system of judicial review. Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the actual merits of the case.

63. The communicant also contends that the very high cost of seeking judicial review in Scotland effectively precludes any individual or small organization seeking environmental justice through this

⁶ Available at <http://www.awpr.co.uk/d/Documents%20and%20Reports/Project%20Development%202005%20-%202006%20Consolidation%20Report.pdf>

procedure. In this respect, the communicant contends that the principles governing the right to obtain Protective Expenses Orders are unclear. It also noted that the Scottish Government had refused to engage in discussions to reduce the £30,000 cap set in an earlier Protective Expenses Order.

64. The communicant alleges that regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002, together with the Scottish Legal Aid Board's guidance effectively prohibit a grant of legal aid in public interest environmental cases.⁷ The communicant contends that in order to meet the requirements of regulation 15, an applicant must show that they will suffer serious prejudice if the application is refused. However, the Guidance states that "the criteria for a wider public interest will not be met ... where we consider the interest is, in fact, a private interest." The communicant claims that it appears to be an impossible argument to win. If the individual does not have a substantial impact from the issue then regulation 15 is not satisfied and legal aid will be refused. However, if the interest and connection to the individual is real, then the applicant may be told that the interest is in fact a private interest and no wider public benefit can be taken into account.

65. Moreover, although in Scotland there is no formal time limit within which judicial review proceedings must be commenced, there is a time limit of 6 weeks to appeal a Ministerial decision with respect to Road Orders. The communicant believes that this is insufficient time to mount an effective challenge against a Ministerial decision with respect to the environmental impact of a major road.

66. The Party concerned contends that the public local inquiry was not intended to represent the independent and impartial body through which the communicant was entitled under article 9 to challenge the legality of the decision to construct the AWPR. In particular, it notes that a public local inquiry, which is designed to inform a decision which has not yet been taken, is inadequate as an independent and impartial body through which to challenge the legality of the decision to construct the AWPR. Rather, the Party concerned contends that once the decision to proceed with the AWPR was taken, there was a statutory procedure for challenging the decision under paragraph 2 of Schedule 2 to the Roads (Scotland) Act 1984. It notes that the Scottish Ministers' decision approving the draft Schemes and Orders was required to include information on the right to challenge the validity of the decision. The public was then able to take steps to challenge either the substantive or procedural legality of the decision via the procedure provided for under statute. In respect of the communicant's allegations regarding the limited scope of judicial review, the Party concerned contends that, while the principle function of judicial review is to examine the procedural and legal propriety of a decision, a petition for judicial review can call into question the proportionality or irrationality of a decision or examine any question of error in relation to that decision and that this is wholly consistent with article 9, paragraph 2, of the Convention.

III. CONSIDERATION AND EVALUATION BY THE COMMITTEE

General considerations

67. The United Kingdom deposited its instrument of ratification of the Convention on 23 February 2005. The Convention entered into force for the United Kingdom on 24 May 2005.

⁷ Text of oral presentation on behalf of Road Sense, at the hearing of the Committee on 17 March 2009.

Report to Inform Appropriate Assessment not fit for purpose - preamble and article 3, paragraph 2

68. In respect of the communicant's allegations that the Report to Inform Appropriate Assessment was not fit for purpose, and thus in breach of the preamble and article 3, paragraph 2 of the Convention, the Committee notes that the preamble, while being an important aid to interpreting the Convention, does not in itself create binding legal obligations. With respect to the communicant's allegations in respect of article 3, paragraph 2, the Committee is not in a position to assess the factual accuracy of the Report to Inform Appropriate Assessment. It does not consider that the communicant's allegations give rise to a breach of article 3, paragraph 2 of the Convention.

Information on location of freshwater pearl mussels – article 1, 4, paragraph 4(h) and article 5

69. The Committee notes that since the discussion of the communication at its twenty-seventh meeting, the Scottish Information Commissioner (SIC) has released his decision regarding Mr. Hawkin's application for access to the information on the location of the pearl mussels. The Commissioner found that SNH should have disclosed the Freshwater Pearl Mussels reports, redacted only for the locations of the freshwater pearl mussels.

70. As a result of the Commissioner's decision that all information except the locations of the mussels should be released, the Committee's now only needs to consider whether the withholding of the remaining redacted information is in compliance with article 4, paragraph 4 (h) of the Convention.

71. Having not seen the redacted information, for present purposes the Committee must assume that the redacted information indeed relates to the location of the freshwater pearl mussels. The Committee notes the Party concerned's submission that the mussels have been subject to illegal fishing in the past.

72. On that basis, the Committee finds that the redacted information relates to the "breeding sites of rare species" under article 4, paragraph 4 (h), being in this case the breeding sites of rare freshwater pearl mussels.

73. However, that is only the first step. Article 4, paragraph 4, requires the grounds for refusal to be "interpreted in a restrictive way, taking into account the public interest served by disclosure".

74. The Committee notes that SNH accepted that "its stance in no way reflected upon Mr. Hawkin's own suitability as an individual to obtain access to the requested information" (paragraph 30, SIC Decision 073/2010 Dr A D Hawkins and Scottish Natural Heritage). However, SNH took the view that if it disclosed the redacted information to Mr. Hawkins, the information would thereafter be in the public domain and SNH would not be able to refuse to disclose the information to any other member of the public, some of whom may use the information in ways harmful to the ongoing survival of the mussels.

75. The Committee notes that the Commissioner considered whether SNH could or should have provided the withheld information to Mr. Hawkins in return for an undertaking that he not disclose the information to any other person (para. 33, SIC Decision 073/2010 Dr A D Hawkins and Scottish Natural Heritage). The Commissioner held that the Environmental Information Regulations (EIRs) provide a general right of access to environmental information, which applies equally to all people. They contain no provision for the supply of information only to qualified people, or to those who give an undertaking not to distribute that information further (para. 31 of the decision). Therefore, the Commissioner held that he had no power to require or enforce any licensed or conditional release of information under the terms of the EIRs (para. 32 of the decision). He noted that this does not prevent a public authority choosing to provide information to certain individuals on a confidential or licensed basis. However, any such arrangements would be a matter for those parties alone, and is not required under the EIRs.

76. The Committee notes that article 4 of the Convention refers to the "public", whereas article 6 of the Convention to the "public concerned". However, the Convention makes no further distinction between members of the public concerned. Thus, all members of the public concerned are equally entitled to enjoy the rights under the Convention.

77. Thus, if the exception in article 4, paragraph 4(h) is to be read restrictively to allow Mr. Hawkins to have access to the redacted information in order that he might exercise his right to participate under article 6, then other members of the public concerned would be entitled to the same right. The problem is that while SNH does not question Mr. Hawkins' suitability to receive the redacted information, there may be others among the public concerned who would be less trustworthy. However, disclosing the redacted information to Mr. Hawkins would mean that all members of the public concerned would be entitled to such disclosure. Recognizing the possibility that disclosure to the wider public concerned may result in adverse effects on the breeding sites of the mussels, the Committee finds that the Party concerned was not in non-compliance with article 4 by withholding the redacted information in the circumstances of this case.

78. With respect to the communicant's allegations under article 5, paragraph 1(c), this provision conveys an obligation on Parties to actively disseminate information on imminent threats to members of the public that may be affected by that threat, rather than to respond to information requests, which is the subject of article 4. The Committee finds that the communicant has not substantiated that the elements set out in article 5, paragraph 1(c) are met in the circumstances of this case.

Badger report – articles 1, 4, paragraph 4(h) and 5

79. The communicant has indicated that it does not intend to make a request under the Scottish Freedom of Information (Scotland) Act or the Environmental Information (Scotland) Regulations for access to the report on the location of badger setts as it is now too late to utilize any additional information on badger setts. While noting the reason for the communicant's decision not to make such a request, the Committee considers that in choosing not to do so, the communicant has failed to have recourse to the available domestic remedies. In the circumstances, the Committee decides that it should not consider this allegation further.

Restricted scope of public inquiry – article 6, paragraph 4

80. The Committee finds that the AWPR is an activity covered by annex I of the Convention and thus subject to article 6, paragraph 1(a) of the Convention for two reasons. First, the AWPR involves the construction of a new road of four lanes of more than 10 kilometres in length (paragraph 8(c) of Annex I). Second, the AWPR is an activity regarding which national legislation (section 20A of the Roads (Scotland) Act 1984) requires that public participation be provided under the environmental impact assessment procedure (paragraph 19 of Annex I).

81. In respect of the communicant's submission that, due to the fact that the Reporters' terms of reference did not require them to hear evidence regarding whether the road was needed, the Party concerned failed to meet the requirement of article 6, paragraph 4, that all options be open, the Committee notes that there has been an ongoing public participation process regarding the AWPR for more than a decade. In this respect, the Committee recalls its findings on communication ACCC/C/2006/16 (Lithuania):

“The requirement for ‘early public participation when all options are open’ should be seen first of all within a concept of tiered decision-making whereby at each stage of decision-making certain options are discussed and selected with the participation of the public and each consecutive stage of decision-making addresses only the issues within the option already selected at the preceding stage.”⁸

82. In light of the above, the relevant issue is to ensure that there was public participation regarding all options, including the “zero option”, at some previous stage. Considering the chronology set out in paragraphs 23 to 40 above, the Committee finds that at several stages, e.g. during the development of the Local Transport Strategies and Modern Transport Strategies and the Aberdeen & Aberdeenshire Structure Plan as well as the spring 2005 consultations, the public had opportunities to make submissions that the AWPR should not be built and to have those submissions taken into account. In this regard, the Committee notes that it is not empowered to examine events that, in some cases, significantly predate the entry into force of the Convention for the Party concerned. The Committee considers that the public had a number of opportunities during the ongoing participation process over the years to make submissions that the AWPR not be built, and to have those submissions taken into account. The Committee therefore finds that the Party concerned is not in non-compliance with article 6, paragraph 4.

No public participation on route chosen – article 6, paragraphs 6 and 7

83. Based on the evidence presented, the Committee finds that the selected route differs from the options the public was invited to consult upon during the informal consultations conducted in spring 2005 in at least two respects. First, the Fast Link is some distance to the east from the Peterculter/Stonehaven route. Second, all the options consulted upon during the spring 2005 consultation were presented as alternatives. However, the route selected actually adopts two of these options, to create a southern leg with two different feeder roads, one route leaving the A90 at Stonehaven heading north, and the other leaving the A90 at Charleston and heading west. To the Committee's understanding, the first occasion on which statutory and non-statutory consultees were

⁸ ECE/MP.PP/2008/5/Add.6, para 71.

formally consulted on the route selected was when letters were sent to them in early 2006. The Committee understands that the wider public was not formally consulted on the possibility of a southern leg incorporating two routes (i.e. both a southern leg and a Fast Link) until the Draft Special Road Orders were published in December 2006 as part of the statutory authorization process.

84. In addition to not being subject to the spring 2005 consultation, the Committee notes that the Fast Link that was presented in the 1 December 2005 decision by the Minister was a single carriageway and that subsequent to the Minister's decision, a decision was taken to make it a dual carriageway instead.

85. The Committee notes with some concern that the route finally selected, and the dual carriageway character of the Fast Link were not subject to the informal consultation process. It finds that the decision to increase the Fast Link from a single to a dual carriageway is not, as submitted by the Party concerned, a purely technical matter. It however finds that these aspects were ultimately subject to public participation through the statutory authorization process following the publication of the Draft Schemes and Orders in December 2006. In light of the subsequent statutory consultation that did provide for public participation on these aspects, the Committee can not conclude that the Party concerned is in non-compliance with article 6, paragraph 6 and 7.

New strategic objective in the Modern Transport System – article 7

86. The communicant alleges that the reason given by SNH for the new route was in order to comply with a new transport objective of the Modern Transport System. The Party concerned denies that the MTS was changed. The Committee notes the disagreement between the parties as to whether the MTS was changed to introduce a new transport objective.

87. Having reviewed the documentation referred to by the parties, including the MTS and the AWPR Project Development 2005-2006 Consolidated Assessment Report⁹, the Committee finds that the objective referred to by the communicant is to be found in the latter document only. The Committee does not consider that this document is a plan subject to the requirements of article 7 but rather a document relating to a specific activity subject to article 6 and notes that it has already considered the communicant's allegations under article 6 above. It will therefore not consider this allegation further.¹⁰

Access to justice – articles 9

⁹ Available at <http://www.awpr.co.uk/d/Documents%20and%20Reports/Project%20Development%202005%20-%202006%20Consolidation%20Report.pdf>

¹⁰ In reaching this conclusion, the Committee refers to footnote 6 in its findings and recommendations with regard to compliance by Albania (ECE/MP.PP/C.1/2007/4/Add.1) and the definition of "plans" in the European Commission Guide for Implementation of Directive 2001/42 on the Assessment of the Effects of Certain Plans and Programmes on the Environment. This states that "a plan is one which sets out how it is proposed to carry out or implement a scheme or a policy. This could include, for example, land use plans setting out how land is to be developed, or laying down rules or guidance as to the kind of development which might be appropriate or permissible in particular areas." The definition of "program" is "the plan covering a set of projects in a given area... comprising a number of separate construction projects..." See also http://www.unece.org/env/sea_ec_guide/sect3.htm#Ref/7

88. The Committee notes the communicant's indication in its letter of 21 November 2010 that it has brought a Statutory Appeal under the Roads (Scotland) Act 1984 in respect of the Scottish Parliament's approval of the Schemes and Trunk Road Orders on 3 March 2010. The hearing of the Statutory Appeal is set down for six days commencing 22 February 2011. The Committee also notes that the communicant has applied for an order to cap its potential liability for expenses with respect to the appeal, and that application was to be heard on 16 and 17 December 2010.

89. In light of these developments, the Committee finds that it would be premature for it to consider the communicant's allegations regarding access to justice at this stage while both the communicant's applications are still pending. It therefore decides to conclude its findings in respect of the other aspects of the communication.

IV. CONCLUSION

90. Having considered the above, the Committee does not find that the matters examined by it in response to the communication establish non-compliance by the United Kingdom with its obligations under articles 3, paragraph 2, article 4, article 5, paragraph 1(c), article 6 or 7 of the Convention.