COMMUNICATION TO THE AARHUS CONVENTION'S COMPLIANCE COMMITTEE

RE: ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS- FAILURE TO IMPLEMENT THE CONVENTION ACCORDING TO THE PROVISIONS OF ARTICLES 9(4) and 9(5) OF THE UNECE CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS (THE CONVENTION)

Secretary to the Aarhus Convention
United Nations Economic Commission for Europe
Environment and Human Settlement Division
Room 332, Palais des Nations
CH-1211 Geneva 10, Switzerland

public.participation@unece.org

1) COMMUNICANT

Organisation Name:	Greenpeace Limited
Contact:	John Sauven
Position:	Executive Director
Registered Address:	Canonbury Villas, London N1 2PN
Telephone:	020 7865 8180
Fax:	020 7865 8201
Email:	john.sauven@uk.greenpeace.org

2) STATE PARTY CONCERNED

United Kingdom

3) FACTS OF THE COMMUNICATION

1) On 26 August 2011, the Communicant, Greenpeace submitted a claim for Judicial Review of the designation by the Secretary of State for Energy and Climate Change of the National Policy Statement for Nuclear Power Generation in the United Kingdom.

2) On 12 December 2011, the Communicant was informed that its application for permission to apply for Judicial Review had been refused. Costs were awarded against the Communicant on the same date, to be paid by the Communicant to the State Party Defendant in the sum of £11,813.00 ("the Costs"). This sum represents the costs incurred by the State Party Defendant in preparing the Acknowledgement of Service to the Judicial Review claim submitted.

3) On 22 December 2011, the Communicant disputed the Costs awarded against it by way of written submission to the Court on the grounds that:

   (i) the amount of £11,813.00 is excessive; and

   (ii) the case falls within the scope of the Aarhus Convention.

4) As set out in the Communicant's Submission on the State Party Defendant's Claim for his costs of preparing the Acknowledgement of Service dated 22 December 2011 (the Submission), Article 9 of the Convention guarantees access to justice in environmental matters. Article 9(4) of the Convention provides that access to judicial review procedures relating to environmental matters must be "fair, equitable, timely and not prohibitively expensive" (emphasis added).

5) The Submission states further, "the vast majority of the claimed costs are Counsel's fees. The engagement of 2 QCs (Michael Beloff QC and Jonathan Swift QC), in addition to an experienced Junior (10 years' Call, specialising in environmental and planning law), is manifestly far beyond anything contemplated in *Ewing v Office of the Deputy Prime Minister* [2005] EWCA Civ 1583, [2006] 1 W.L.R. 1260 Carnwath LJ, as representing the level of costs/effort to which a defendant was required to go to comply with the duty to file an Acknowledgement of Service.

6) Likewise, the length and detail of the State Party Defendant's summary grounds (a document of 46 pages / 119 paragraphs) is in excess of being the kind of short summary that the Court of Appeal in the case referred to above had in mind".

7) The Submission adds that regard must also be had to the public interest and environmental character of the issues raised by the claim. This is not commercial litigation. The Communicant is an environmental NGO which relies on donations from private citizens to fund its work. The claim raised issues as to the operation, and associated practical consequences, of the planning regime for new nuclear power stations and the assessment of nuclear safety. Given the potentially huge ramifications of a nuclear accident for human health and the environment, those issues were ones of the highest public interest and concern.

8) Fundamentally, Justice Ouseley agrees with the contention above and states in his Order (referred to in paragraph 18 of this Section III below) that the "Claimant asserts rightly that it [the application for judicial review] raised issues of the highest public interest and concern. It was obviously important to the parties and to the public".

9) In addition, the Submission adds that the Costs claimed by the State Party Defendant are unjustified in view of the fact that the claim focussed upon legal issues and did not require consideration of matters of particular technical or scientific complexity (and did not require consideration of such matters at the permission stage).

10) As explained in the Summary below and in the Submission, the State Party Defendant did not provide a substantive response to the Communicant's pre-action letter before the date by which the Communicant had to issue the claim. In this regard, it is noted that the costs recoverable by a defendant as costs of filing an Acknowledgement of Service do not include prior costs, such as those of responding to a pre-action letter. The fact

that the State Party Defendant did not respond to the pre-action letter is likely to have loaded additional costs onto the Acknowledgement of Service which would otherwise have incurred at a prior stage and could not then have been recovered in the present circumstances, i.e. where permission has been refused.

11) As noted above and in the Submission, "Article 9(4) of the Aarhus Convention provides that access to judicial review procedures relating to environmental matters must be "*fair, equitable, timely and not prohibitively expensive*" (emphasis added). In addition, Article 9(5) requires States to, "*in order to further the effectiveness of the provisions of [article 9]*", consider "*the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice*". The Convention is an international treaty to which the United Kingdom is a party. It is binding upon the United Kingdom in international law. Judicial discretion in relation to costs should therefore be exercised compatibly with that provision".

12) Further support of the statements in paragraph 11 of this Section III is provided in the Lesoochranárske zoskupenie VLK (*Case C-240/09*), paragraph 52. The Court of Justice of the European Union clarified the status of the Convention in EU law as follows: "In those circumstances, the answer to the first and second questions referred is that Article 9(3) of the Aarhus Convention does not have direct effect in EU law. It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by EU law, in order to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law."

13) To expose claimants to the State Party Defendant's costs of almost £12,000 in relation to the Acknowledgement of Service alone would not be compatible with the United Kingdom's obligation to ensure that access to judicial review in matters relating to the environment is *"not prohibitively expensive*". An award of such an amount against the Communicant in the present circumstances would serve as a serious deterrent to NGOs and individuals wishing to seek judicial review in environmental matters.

14) The Submission argues that in *R (Garner) v Elmbridge Borough Council* [2010] EWCA Civ 1006 "the Court of Appeal stated that the question as to whether costs were "*prohibitively expensive*" imported a standard that was not – or was at least not wholly – a subjective one. The Court should therefore "*consider whether the potential costs would be prohibitively expensive for an ordinary member of 'the public concerned'*" (*per* Sullivan LJ, at [46]). The question as to whether the standard is subjective or objective was subsequently referred to the ECJ by the Supreme Court in *R (Edwards) v Environment Agency (No. 2)* [2011] 1 WLR 79. Lord Hope opined that there was "*no clear and simple answer… to the question as to what is the right test*" but that "*the balance seems to lie in favour of the objective approach*" taken in *Garner"* . The judgment of the Court of Justice of the European Union is awaited.

15) Applying the objective test, it is submitted that most ordinary members of the public would be deterred from bringing proceedings if they were told they would be exposing themselves to costs approaching £12,000 as in the present case, in relation to the per-

mission to apply for Judicial Review alone. But even applying the subjective test – i.e. looking at the position of an NGO such as Greenpeace – it is apparent that exposure to such costs at that stage only would have a strong "chilling" effect on the bringing of claims by NGOs reliant on voluntary donations from individuals. That would be so even in relation to claims which, like the present claim, relate to matters of very great environmental significance".

16) For the reasons set out in this Section III, the Communicant requested in its written submission that the State Party Defendant be permitted to recover its Acknowledgment of Service costs confined to an amount which:

(i) does not exceed a fair approximation of the costs that the State Party Defendant would have to incur to provide a succinct summary of the grounds for resisting the claim; and

(ii) complies with Article 9(4) of the Convention.

17) Further to the points set out in this Section III, the Communicant requested that an award of Acknowledgement of Service costs set at a maximum of £1,500.00 would be appropriate.

18) On 19 March 2012, the Communicant was informed by the Court that its request for a reduction of the costs awarded against it to £1,500.00 had been refused. Instead, an order was granted on 5 March 2012 that the Communicant pay £8,000.00 to the State Party Defendant by way of costs for the Acknowledgement of Service ("Order").

19) The Order states that the Aarhus Convention is irrelevant to these proceedings. The Order adds that the Aarhus Convention has only been incorporated into the UK law to the extent that an EC Directive is involved and as EC Directives were not directly involved in this case, it was considered that Aarhus was irrelevant.

20) We disagree with the statement in paragraph 19 of this Section III. As detailed in paragraph 12 of this Section III, the Court of Justice of the European Union in Case C-240/09 points out that national courts must interpret their national law in accordance with the objectives of Article 9(3) of the Convention. Further, in the matter of Morgan (1) Baker (2) v Hinton Organics (Wessex Ltd) & CAJE (intervener) [2009] EWCA Civ 107 (paragraph 44) Carnwath, LJ confirmed that the Aarhus Convention can apply in private law cases. For the reasons set out above, we contend that the points set out in paragraphs 4 -16 of this Section III (inclusive) should still apply

21) In addition, the Compliance Committee should take into account the following:

(i) In December 2008, ClientEarth, the Marine Conservation Society and Mr Robert Latimer (the communicants), submitted a communication to the Compliance Committee (*ACCC/C/2008/33*). They claimed the UK was in breach of Article 9 of the Convention because UK law and jurisprudence imposes prohibitive costs which impact on access to justice.

(ii) The Compliance Committee determined that (a) the UK had failed to ensure that the

costs of litigation in environmental matters are not prohibitively expensive and neither the UK government nor the UK courts had given "clear legally binding directions to this effect" and (b) that the UK had not established a "clear, transparent and consistent framework" implementing the relevant provisions of Article 9 of the Convention.

(iii) In February 2008, Mr Morgan and Mrs Baker (the communicants) submitted a communication to the Compliance Committee (*ACCC/C/2008/23*). The communicants claimed the UK was in breach of its obligations under Article 9 of the Aarhus Convention as it had "failed to ensure the availability of fair, equitable, timely and not prohibitively expensive review procedures in ... private nuisance proceedings."

(iv) The Compliance Committee determined that although the interim costs order made against the communicants was not prohibitively expensive under Article 9(4) of the Convention, it was still unfair and inequitable under Article 9(4) that the communicants were required to pay all of the costs and the defendant was not required to make any contribution. Accordingly, the UK was in breach of Article 9(4) of the Convention.

(v) In August 2008, the Cultra Residents' Association (the communicant) submitted a communication to the Compliance Committee, claiming the UK failed to comply with Article 9 of the Convention when it was ordered to pay the full costs of approximately £40,000, after its application for judicial review was dismissed.

(vi) The Compliance Committee determined that the amount of costs awarded against the communicant made the application for judicial review prohibitively expensive and the manner of allocating the costs was unfair. The UK was therefore in breach of Article 9 of the Convention.

(vii) On 18 March 2010, the European Commission (the Commission) issued a Reasoned Opinion to the UK government about the unfair cost of challenging environmental decisions in the UK. The Commission was concerned that legal proceedings were too costly and that this represented an obstacle to pressure groups and individuals from bringing cases against public bodies.

(viii) On 6 April 2011, the European Commission announced that it was referring the UK Government to the European Court of Justice for failing to ensure that claimants can challenge decisions affecting the environment in a way that is fair,

equitable, timely and not prohibitively expensive as required under the Convention.

(ix) As far as this particular matter is concerned, the Communicant's application for permission for Judicial Review was refused. The matter did not progress past the application stage as the Communicant decided not to seek a renewal of its application for permission. However, if it had done, the State Party Defendant would have likely incurred significant additional fees in excess of the £12,000 already incurred. Should the matter have proceeded to the Court of Appeal to appeal a refusal of the Judicial Review application, costs would have been exorbitant.

(x) In the light of the foregoing, we invite the Compliance Committee to acknowledge that:

(i) the UK has failed to comply with Articles 9(4) and 9(5) of the Convention by preventing NGOs and individuals from having access to justice in environmental matters in failing to ensure that the costs of litigation are not prohibitively expensive; and

(ii) that the Costs awarded are in breach of Article 9(4).

(xi) We further invite the Compliance Committee to recommend that a cost award of £1,500.00 should replace that already issued.

4) NATURE OF ALLEGED NON-COMPLIANCE

Violation of the right to access to justice in accordance with Articles 9(4) and 9(5) of the Convention.

5) PROVISIONS OF CONVENTION RELEVANT TO THE COMMUNICATION

Article 9(4)

Article 9(5)

6) USE OF DOMESTIC OR OTHER INTERNATIONAL PROCEDURES UTILISED

1) On 22 December 2011, the Communicant disputed the Costs awarded against it by way of written submission to the High Court of Justice, Queen's Bench Division Administrative Court, United Kingdom.

2) On 19 March 2012, the Communicant was informed that its request for a reduction of the Costs awarded to £1,500.00 had been refused. Instead, an Order was granted that the Communicant pay £8,000.00 to the State Party Defendant.

7) SUPPORTING DOCUMENTATION

(a) Pre-action Protocol Letter attaching draft Statement of Facts and Grounds dated 16 August 2011.

(b) Letter from the Treasury Solicitor, acting for the State Party Defendant dated 22 August 2011.

(c) Letter from the Communicant's solicitors dated 24 August 2011 responding to the Letter dated 22 August 2011.

(d) Communicant's Claim Form and Statement of Facts and Grounds for Judicial Review dated 26 August 2011.

(e) Decision to refuse permission to apply for Judicial Review dated 5 December 2011.

(f) Communicant's Submissions on the State Party Defendant's Claim for his costs of preparing the Acknowledgement of Service dated 22 December 2011.

(g) Order requiring payment of £8,000.00 by the Communicant to the State Party Defendant dated 5 March 2012.

8) SUMMARY OF COMMUNICATION

1) As set out in the Submission, prior to issuing its claim for Judicial Review, the Communicant sent the State Party Defendant a pre-action protocol letter attaching a draft of its proposed Statement of Facts and Grounds. This letter was sent on 16 August 2011 and the Communicant requested a response by 22 August 2011 due to the requirement set by the legislation under which the challenged decision was taken which requires any challenge to be brought within a tight timeframe: pursuant to section 13 of the Planning Act 2008, the Court may entertain a challenge to a National Policy Statement only if it is brought within 6 weeks.

2) As a result, environmental NGOs and other persons have only a very short period within which to consider what may be a detailed and lengthy document with multiple annexes (as was the position in the present case), and decide whether or not to bring a challenge.

3) On 22 August 2011 the Treasury Solicitor, acting for the State Party Defendant, sent a holding reply stating that the response deadline proposed by the Communicant did not allow the State Party Defendant sufficient time to answer the points raised. The final paragraph of the letter stated that the State Party Defendant would "*respond substantively in due course*".

4) On 24 August 2011 the Communicant's solicitors responded to that letter, noting that the Communicant was "*bound by statute to submit a claim by Friday 26 August 2011*". "*You state that you are not able to respond this week but have not given us any indication of when we can expect a response.*"

5) At the time when the Communicant issued the claim on 26 August 2011 (i.e. the last possible date), it had still not received the State Party Defendant's substantive response to the proposed grounds of claim.

6) The State Party Defendant's Acknowledgement of Service was filed on 20 September 2011. In his summary grounds, he stated that:

"*each of the matters referred to at Grounds 1(a)-(c) (i.e. safety of a site from risk of flooding; security of off-site electricity supply; and the adequacy of on-site emergency controls) are matters that would be considered by the [Office of Nuclear Regulation (ONR)] when deciding whether or not to grant the consents/licence necessary to build and operate a nuclear power station*".

7) On 5 December 2011 (order sent to the parties on 12 December 2011) Ouseley J refused permission on the papers, stating as follows:

"*The case is not arguable for the reasons given in the AOS. The claim does not in reality recognise the role of the ONR and site licensing in dealing with flood protection, off-site supplies and communications. The potential for the 8 sites to be protected against flooding does not prevent a later decision by the ONR or by IPC on its advice that any one cannot be protected, nor does it prevent a decision by IPC that the as yet undefined measures have planning implications which tell against a site. The claim that a comparative safety exercise was required ignores the fundamental judgment that all were potentially safe, and a decision that no examination of the degree of margin was required is not irrational. The consultation was lawful.*"

8) Ouseley J awarded the State Party Defendant his "*costs of preparing the Acknowledgment of Service*". The original amount claimed by the State Party Defendant as acknowledgement of service costs was £11,813.00, of which £8,585.00 was in respect of fees for two Queen's Counsel and one junior Counsel.

9) The Communicant was given 14 days within which to file written submissions disputing that award either in principle or in relation to the amount. The State Party Defendant was ordered to file any response within seven days thereafter.

10) On 22 December 2011, the Communicant submitted a written submission requesting that an award of acknowledgement of service costs be set at a maximum of £1,500.00.

11) On 19 March 2012, the Communicant was informed by the Court that its request for a reduction of the costs awarded against it to £1,500.00 had been refused. Instead, an order was granted that the Communicant pay £8,000.00 to the State Party Defendant by way of costs for the Acknowledgement of Service.

12) In light of the foregoing, we invite the Compliance Committee to acknowledge that the UK has failed to comply with Articles 9(4) and 9(5) of the Convention by preventing NGOs and individuals from having access to justice in environmental matters in failing to ensure that the costs of litigation are not prohibitively expensive; and that the Costs awarded are in breach of Article 9(4).

9) SIGNATURE

John Sauven, for and on behalf of Greenpeace Limited

21 August 2012