UNECE – AARHUS CONVENTION COMPLIANCE COMMITTEE

Statement on behalf of the John Muir Trust

Introduction

1. This statement is submitted to the UNECE Aarhus Convention Compliance Committee on behalf of the John Muir Trust ("JMT"), a non-governmental organisation and charity registered in Scotland under charity number SC002061 and having its registered office at Tower House, Station Road, Pitlochry, Perthshire, Scotland.

2. JMT's main focus is on promoting the environmental protection of wild places and landscapes. JMT's Memorandum of Association as adopted at their AGM in 1997 is "to conserve and protect wild areas with their indigenous animals, plants and soils for the benefit of present and future generations and in particular to conserve wild places and their landscapes…" The JMT's work includes environmental education, sustainable land management, policy work and advocacy to help protect wild land in the United Kingdom.

3. JMT has first-hand experience of the Protective Expenses Order ("PEO") system in Scotland, having sought unsuccessfully on three occasions to obtain a PEO in the Court of Session. All three instances relate to JMT's challenge to the development of an on-shore wind farm at Stronelairg in the Monadhliath Mountains in Inverness-shire, Scotland. JMT had objected to the developer's application for consent in order to help protect the wild qualities of the mountain landscape. The protection of that wild land was considered by Scottish Natural Heritage (advisors to the Scottish Government) to be of national importance.

4. These examples illustrate the severe difficulties that have been encountered by an NGO acting in the public interest in Scotland. We are concerned at the ways in which (a) the term "prohibitively expensive" is assessed by the Court of Session in Scotland with particular reference to NGOs and their role in helping to protect the environment, and that (b) an NGO may not be given certainty of the potential liability of a litigation in advance. As a result we respectfully consider the approach of the Court in these instances to be a major deterrent to NGOs seeking to litigate in the public interest in Scotland in the future, and as a result we believe that the aims of the Aarhus Convention and Directive 2011/92/EU ("the EIA Directive") are threatened.

Background

5. The first application for a PEO was in a judicial review against the local planning authority, Highland Council, in 2013 in respect of the planning process for the wind farm at Stronelairg. That judicial review sought to challenge an early stage of the decision-making process following consideration of the application by Highland Council at regional level. A PEO was refused by the Lord Ordinary (Lord Bannatyne)

on 18 October 2013 on the basis that the Court did not consider the litigation to be prohibitively expensive for JMT. As a result, JMT withdrew from those proceedings and the litigation did not proceed further.

6. On 6 June 2014, Scottish Ministers (at a subsequent stage of the planning process) granted consent for the construction and operation of an on-shore wind farm comprising 67 wind turbines at Stronelairg in terms of section 36 of the Electricity Act 1989. JMT petitioned the Outer House of the Court of Session in Edinburgh for judicial review. At an early stage of proceedings, JMT applied to the Court of Session for a PEO in terms of Rule 58 A of the Court of Session Rules.

7. The PEO hearing before the Lord Ordinary (Lord Philip) lasted two days, with parties appearing before the Court on a third day for the decision on a PEO to be delivered verbally, prior to a written decision being issued in due course. A copy of the written decision of the Lord Ordinary ([2014] CSOH 172) is attached for the Committee's reference. The PEO was refused by the Court on the basis that the estimated costs of litigation of £160,000 were not considered prohibitively expensive.

8. Notwithstanding that decision, JMT decided to proceed with the judicial review without a PEO. The parties were heard in a three-day hearing before the Lord Ordinary (the late Lord Jones). JMT was successful in the Outer House of the Court of Session, and the Lord Ordinary ruled that the consent for the wind farm should be reduced.

9. The decision in the Outer House was appealed by Scottish Ministers and the developer to the Inner House of the Court of Session. An application was made by JMT to the Court for a PEO. This was on the basis that the estimated costs for a three-day appeal hearing were anticipated to be around £150,000. This was in addition to the estimated costs for proceedings in the Outer House to have increased to around £228,000. The Court refused to grant a PEO.

10. The Court decision was split on the matter, with Lord Drummond-Young dissenting from the majority decision. A copy of the written decision of the Court ([2016] CSIH 33) is also annexed for the Committee's reference. The decision of the Court is contained within paragraphs [38] – [45] of the Opinion.

11. It is noted, nevertheless, that the Court at paragraph [44] commented that the refusal of a PEO did "not in any way foreclose the consideration of whether and how any ultimate award of expenses accords with article 11 of the EIA".

12. We refer the Committee to the approach adopted by Lord Drummond-Young in his dissenting Opinion (paragraphs [47] – [60]). We respectfully consider that approach to be the correct application of Court of Session Rule 58A in implementation of the Aarhus Convention and the EIA Directive.

13. The appeal in the Inner House lasted three days in June 2016. During that appeal, JMT sought to cross-appeal the decision from the Outer House not to grant a PEO.

14. JMT were ultimately unsuccessful in the appeal in the Inner House, and their cross-appeal was also refused.

15. JMT does not yet know its expenses liability for this litigation, however its potential exposure (including its own costs) is presently understood to be significantly in excess of previous estimates intimated to the Court and in excess of £450,000.

Conclusion

16. The experience of JMT highlights the difficulties that can be faced by NGOs in Scotland wishing to litigate in the public interest to protect the environment.

17. The level of potential costs exposure is an obvious concern for an NGO/charity seeking to protect the environment in the public interest.

18. It would be very valuable, in our view, if clarification could be issued by the Committee as to whether or not NGOs should be expected to bear the full risk of costs in judicial proceedings up to the limit of their own capacity, and if, when assessing whether proceedings are prohibitively expensive, due account should be taken of the public interest being represented (please see paragraphs [40] and [42-44] of Advocate General Kokott's opinion in *R (Edwards) v Environment Agency (No 2),* [2013] 1 WLR 2914).

19. In *R (Edwards) v Environment Agency* [2014] 1 WLR 55, the UK Supreme Court supported the position stated by the Advocate General, where Lord Carnwath said at paragraph 28 that the following should be taken into account:

> "(iii) The importance of what is at stake for the protection of the environment. Conversely, and again following the Advocate General's approach, this is likely to be a factor reducing the proportion of costs recoverable, or eliminating recovery altogether. As she said, the environment cannot defend itself, but needs to be represented by concerned citizens or organisations acting in the public interest."

20. It is JMT's position that the Scottish Courts have failed to have regard to this important factor in refusing PEOs in their cases.

21. We are also concerned, as evident from this case, that an NGO in Scotland may not be given certainty of its potential liability of litigation in advance.

22. Clarifying the foregoing points is in our view essential for NGOs in Scotland seeking to litigate in the public interest, and is important to help ensure the protection of the environment.

Jamie Whittle
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