



Scottish Environment LINK
2 Grosvenor House
Shore Road
Perth PH2 8BD

T 01738 630804
E enquiries@scotlink.org
W www.scotlink.org

Paul Wheelhouse MSP
Minister for the Environment and Climate Change
The Scottish Government

5 November 2013

Dear Paul

An environmental court or tribunal in Scotland

Thank you for your letter of 13 August.

We welcome Scottish Ministers' commitment to appropriate structures to protect our environment and enable the best decision-making impacting on it.

A number of matters raised in our correspondence have moved on since the summer, and therefore we urge you to consider again establishing an Expert Working Group to look into options for an environmental court or tribunal for Scotland, as a means of providing for Aarhus compliance.

We are aware of the ongoing reforms to planning, regulation and civil justice and that aspects of these reforms will impact on the implementation of environmental justice. However, despite Government assurances that it takes Scotland's legally binding Aarhus obligations seriously, there has been no coherent overview of access to justice in environmental matters to date, rather the approach has been to tackle compliance in a reactive and somewhat piecemeal fashion.

As you will be aware, the CJEU is expected to hand down a decision in *European Commission v United Kingdom of Great Britain and Northern Ireland* before the end of 2013. It is clear from the Advocate General's opinion published in September that the ruling is very likely to go against the UK. While the case focuses only on the issue of prohibitive expense in cases under the Public Participation Directive (PPD), we note that previous rulings of the European Court have indicated that access to justice provisions of the Aarhus Convention not facilitated by directives are of indirect effect.

Therefore we anticipate that unless the Scottish Government takes comprehensive action to comply with Aarhus, in particular the requirement to ensure that access to justice in all environmental cases – not just those under the PPD – is not prohibitively expensive, and that communities and individuals have access to substantive review as well as procedural review, the UK will continue to face the threat of protracted EU infraction proceedings, and ultimately costly fines.

We note that the Aarhus Compliance Committee will report to the 5th Meeting of Parties in summer 2014 on the progress of the UK in implementing compliance recommendations. Its Chair confirmed to



LINK members at a recent meeting that the Committee could issue a new decision against the UK for continued non-compliance. We consider this is the likely outcome of that meeting given the lack of any progress in the UK beyond the limited introduction of Protective Expense / Cost Orders.

We note that the Taylor Review, which reported in September, did not have a remit to look at Aarhus compliance, and as such its recommendations do not tackle the specific issues regarding prohibitive expense in environmental cases.

We also note, and welcome, discussions regarding the creation of a new tribunal to hear appeals against civil penalties introduced in the Regulatory Reform (Scotland) Bill. We are aware that a decision on this tribunal must be made before the new appeals can be implemented, and therefore strongly urge Ministers to see this as an opportunity to streamline the way all environmental appeals are dealt with by bringing them under the same tribunal. Setting up an Expert Working Group now would help expedite that process, and fulfil the Government's manifesto commitment to exploring an environmental tribunal.

Environmental law and litigation is increasingly technical, complex and high-value, and will only get more so as we make progress towards de-carbonising our society. The Scottish Government has a timely opportunity to not only comply with our international Aarhus obligations, but establish a robust specialist tribunal that can draw upon relevant scientific expertise and give the judiciary greater authority and confidence in examining matters which relate to some of the most important challenges faced by humanity.

We emphasise that this suggestion is offered constructively, and do hope you will consider it positively. LINK's members would be very pleased to meet to discuss this further and nominate eNGO representatives to take part in an Expert Working Group.

I am copying this letter to Roseanna Cunningham MSP, Minister for Community Safety and Legal Affairs, as I understand this issue overlaps with her responsibilities and interests.

Yours,

A handwritten signature in black ink that reads "Deborah Long". The signature is written in a cursive, flowing style.

Deborah Long
LINK Chair

cc Roseanna Cunningham MSP, Minister for Community Safety and Legal Affairs.