

AARHUS CONVENTION – ALLEGED NON-COMPLIANCE

PUBLIC PARTICIPATION IN UK ENVIRONMENTAL DECISION-MAKING

In mid-December 2016 an email was sent to the Environmental Law Foundation to which a reply has recently been received – with apologies for the late response. Here is the text of my original letter (apologies for its length!): The ELF response follows.

My concerns arise from the lack of opportunity for any public participation in environmental affairs at a local level – specifically nationwide agri-environmental schemes (the current one being Countryside Stewardship – formerly known as NELMS) – in the far west of Cornwall

In August 2014, I sent a list of questions to my local Natural England office in Truro (Cornwall) about this new scheme. The questions relevant to my present inquiry are:

(1) *Question:* The extensive public consultation in the autumn of 2013 [for NELMS]: which organisations and individuals were consulted – county, town, parish councils, MPs? And why were neither CASPN [Cornish Ancient Sites Protection Network] nor SPM [Save Penwith Moors] made aware of it until long after the event and given the opportunity to have an input since they now represent some 1500 members of the public? Was the ‘consultation’ merely with those in general agreement with the new scheme?

Answer: It is not possible for Natural England or DEFRA to directly address every group or interest party when undertaking this type of consultation. Details relating to the consultation undertaken in the autumn of 2013 can be found at the following location <https://www.gov.uk/government/consultations/common-agricultural-policyreform-implementation-in-england>. The report indicates the extent of stakeholder engagement and the following link gives details of the locations where public events were held https://consult.defra.gov.uk/agricultural-policy/capconsultation/consult_view [this link is no longer active - Ed].

(8) Question: It seems that no public consultations with local affected communities are likely to take place unless the proposed scheme is affected by any statutory approvals (common land, scheduled monuments). How does "we do not expect holding public consultations of all applications" comply with the Aarhus Convention, particularly when target areas are Open Access Areas in which the public are a major stakeholder? I am somewhat surprised and disappointed that NE continue to disregard the Convention in relation to the new agri-environment schemes and have learnt nothing from the opposition towards aspects of the HEATH Project and Higher Level Stewardship agreements.

Answer: Natural England does not consider individual land management agreements to be within the scope of the Aarhus Convention.

The Aarhus Convention [UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters] was ratified by the UK Government in February 2005.

As well as other matters, the Convention provides the right of the public to participate in environmental decision-making. Arrangements are to be made by public authorities to enable the **public affected** and environmental non-governmental organisations to comment on, for example, proposals for projects affecting the environment, or plans and programmes relating to the environment, these comments to be taken into due account in decision-making, and information to be provided on the final decisions and the reasons for it. [Ref: European Commission – Environment - The Aarhus Convention
<http://ec.europa.eu/environment/aarhus/>]

In 2014 the UK Government produced an updated National Implementation Report on the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matter
[<file:///C:/Users/Ian/Documents/DOCUMENTS%202016.11.02/Aarhus%20Convention%20National%20A0Implementation%20A0Reports.html> (2014)]

This Report makes a statement that is at odds with the attitude of Natural England in their recent ‘consultation process’ for Countryside Stewardship [formerly NELMS] as well as being in alleged breach of the Aarhus Convention. The Report states: “Public participation in

the preparation of plans that affect the environment is current practice in the UK.” This has most certainly never happened to affected communities in West Penwith.

A guide to new consultation principles was produced by the Government in the summer of 2012 that was intended to outline what the public can expect from the Government when it runs formal, written consultation exercises on matters of policy or policy implementation. Key areas of the new Principles are **early and sustained stakeholder engagement**. The Guide also states: “Consultation lies at the heart of Strategic Environmental Assessments (SEAs) and all public strategies, plans and programmes that are likely to result in significant environmental effects once implemented, must have their likely effects assessed under the relevant regulatory regime.” [<https://www.gov.uk/government/publications/consultation-principles-guidance>]

Asked whether NE would consider affected local councils and regular local users (walkers, horse riders) of the moorland areas in question as being stakeholders? NE responded that: “Natural England takes a broad view of who its stakeholders are. They include all members of the public as they derive direct and indirect benefits from the outcomes that we deliver through our work.” [email dated 26 April 2011 to myself from C. Gannon, Natural England Director, Integration]

I would suggest that the members of the public in West Penwith (the Land’s End Peninsula) have never been given the opportunity to comment on the current Environmental Stewardship schemes nor the new Countryside Stewardship scheme – the Higher Tier of which, I am told

by Natural England – has applications covering two heathland locations that are probably open access land.

While I can accept the premise that it may not be ‘possible for Natural England or Defra to directly address every group or interest party when undertaking this type of consultation’ when considering the overall national strategy of this new scheme, I would like advice on whether further consultation should be carried out once specific locations have been decided upon so that affected local communities – as major stakeholders in a particular location – might have an input before being faced with a fait accompli ‘on the ground’ (i.e. new fencing, gates, cattle grids etc on previously unenclosed areas). Such a move would also be in accord with the provisions of the Localism Act 2011 whereby the Government is committed to devolving decision-making down to the most appropriate level, which in turn means that local councils and communities have a greater mandate to work together to shape the communities and services locally that they want to see. And that new community rights are key to this, providing for example, a right for a community group to challenge the way in which a service is delivered if they feel it could be done better.

[https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/5959/1896534.pdf]

I consider that specific local consultation with affected local communities/groups would be in accord with the Aarhus Convention’s Pillar (1) Public access to information about the environment and (2) Public participation in certain environmentally relevant decisions.

Could you therefore please advise me on whether any action can be taken to ensure that the UK Government, through Defra, hold public consultations with LOCAL AFFECTED COMMUNITIES while, in the interests of environmental democracy, it is still possible to have an input and affect decision-making.

I look forward to your comments and advice.

This is the reply from ELF:

I am so sorry for the very late reply. Please excuse me.

I have asked my colleague to have a look at this one for me as he knows a bit about Aarhus. He says this:-

The basic question appears to be whether the public participation elements of the Aarhus Convention apply to countryside stewardship schemes. Mr McNeil Cooke from Save Penwith Moors is concerned about the impact of these schemes, such as the introduction of stock-proof fencing, on the moors. It looks as though he has had dialogue with Natural England over a number of years about the lack of public participation prior to the introduction of these schemes. The information he supplies shows that Natural England's view is that the Aarhus Convention doesn't apply to individual land management agreements.

It is certainly arguable that article 7 of Aarhus would apply to the overall countryside stewardship programme as one very clearly relating to the environment and although the links in Natural England's response to his first question in the letter supplied by Mr McNeil Cooke no longer work, it is likely that this was covered by the consultation that was carried out in 2013. However, we are concerned here with the individual agreements reached under that programme for particular activities. These activities are unlikely to be caught by article 6 unless they have a significant effect on the environment. Of course it could perhaps be argued that these agreements are not so much about activities as 'schemes' which are more like 'plans'...

There is a caveat that this is not advice. However on this basis, I suggest that we see what Counsel thinks about this and will send it to a set of ELF member chambers by the end of the week to see if there is anyone available to give us a pro-bono opinion.

Sorry once again for the terrible delays and thanks for your patience.

18 April 2017