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To: Ceri Morgan (Aarhus National Focal Point, DEFRA),
by e-mail to: aarhus.convention@defra.gsi.gov.uk

RE: DRAFT UK 2013 AARHUS NATIONAL IMPLEMENTATION REPORT CONSULTATION

UKWIN was founded in March 2007 to promote sustainable waste management. As part of fulfilling our aims and objects UKWIN works to help facilitate access to environmental information, public participation in environmental decision-making, and access to justice in environmental matters. UKWIN currently has more than 100 member groups and regularly takes part in consultations run by various Government bodies.

UKWIN welcomes this opportunity to provide feedback to Defra regarding the Draft UK 2013 Aarhus National Implementation Report ('the Draft Report').

At present, communities in the UK are denied effective participation in key decisions that have a profound effect on the local and wider environment, and their access to environmental justice and environmental information is impeded.

The current procedures in place in the UK not only fail to effectively prevent disadvantaged communities from being disenfranchised, but serve to deprive even the most affluent communities of their Aarhus rights, in particular for matters that relate to waste incineration.

We recognise that the Draft Report sets out to document steps taken towards meeting the requirements of the Aarhus Convention, and does not set out to provide a detailed assessment of the extent to which these steps have, in practice, met Aarhus requirements or other steps the Government considers remain to be taken.

We note that the Draft Report details some of the difficulties that have been encountered in meeting the requirements of the Aarhus Convention. UKWIN's submission offers further references to difficulties encountered and points towards relevant considerations and possible solutions.

1. UKWIN general comment on Aarhus Article 3 (Draft Report Paragraph 25)

1.1. UKWIN notes the Draft Report comment at Paragraph 25 that: "No obstacles have been encountered". We believe that a number of obstacles exist, and have detailed some relevant examples in relation to Article 3, Paragraphs 2, 4 and 7, below.

1.2. For UKWIN's comments regarding Article 3, Paragraphs 2 and 7 (Draft Report Paragraphs 4 – 11, and Paragraph 20), see comments on Aarhus Article 9, below.

2. UKWIN comments on Aarhus Article 3, Paragraph 4 (Draft Report Paragraphs 16 – 19)

2.1. In the UK at present there is a failure to provide for appropriate recognition and support to not-for-profit associations, organisations and groups promoting environmental protection that do not qualify for registered charity status, e.g. because their turnover is too low, or because they seek to improve Government policy.

2.2. No environmental organisation receives sufficient UK Government support with regard to the removal and reduction of financial and other barriers to access to justice. See our comments on Aarhus Article 9, below.

3. UKWIN general comment on Aarhus Article 4 (Draft Report Paragraph 35)

3.1. UKWIN notes that the Draft Report comment at Paragraph 35 is out of date and fails to take account of more recent Information Commissioner decisions and ICO advice and guidance.

4. UKWIN comments on Aarhus Article 4, Paragraphs 1, 2, 6 and 7 (Draft Report Paragraphs 28 - 37)

4.1. Due to various factors within the Government's control, including the under-resourcing of the ICO and the time given to local authorities to respond to ICO complaints, incidents where local authorities withhold environmental information that should clearly be released necessitate complaints to the ICO that cause significant delays to the release of environmental information.

4.2. The fact that the ICO has ruled that various local authority decisions to withhold environmental information relied on improper grounds indicates that at least some local authorities are not fully fulfilling their Aarhus Convention responsibilities.

4.3. For example, in FER0445318 (request made March 2012, decision issued January 2013) the Information Commissioner determined that Hertfordshire County Council was "not correct to apply" various exemptions. Hertfordshire County Council was therefore required to release, in full, the information requested.

4.4. This is also a case where the whole document was improperly withheld by the local authority simply because a portion was claimed to be exempt, where clearly Hertfordshire County Council could have safely released at least a redacted version straight away with "the remainder of the environmental information requested" to follow.

4.5. It is conceivable that the situation would be improved were local authorities to face financial penalties in circumstances where it transpires that they have improperly withheld environmental information. One potential unintended consequence of such an approach could be the inadvertent encouragement for local authorities to appeal adverse (but correct) decisions, in order to avoid such penalties. Therefore such an arrangement might require additional measures to discourage meritless appeals by local authorities that would further delay the release of environmental information that people have a right to see without delay.

4.6. In UKWIN's experience, generally speaking, local authorities do not provide the requested environmental information "as soon as possible", and it can also be a long time before a requestor receives a final refusal notice (not least due to lengthy internal review procedures).

4.7. In many cases local authorities treat EIR requests as if these were FoI requests, taking weeks or even months to provide a response.

4.8. As a result, the release of environmental information is being delayed to the disadvantage of environmental organisations and the public, for example those seeking to question the justification behind a planning proposal and/or to offer more sustainable alternatives.

4.9. Concerns regarding the timely review of requests to access environmental information are also detailed in our comments on Article 9, below.

5. UKWIN comments on Aarhus Article 5, Paragraphs 2(c) and 3 (Draft Report Paragraph 38 onwards)

5.1. UKWIN notes the Draft Report comment at Paragraph 49 that: "No obstacles have been encountered". UKWIN cannot agree with this statement.

5.2. UKWIN notes that information comprising the Environment Agency's Public Register, such as annual incinerator reports, is not available on the Environment Agency website, and electronic copies of such information is sometimes subject to a prohibitive financial charge.

6. UKWIN comments on Aarhus Article 6 (Draft Report Paragraph 52 onwards)

6.1. UKWIN notes the Draft Report comment at Paragraph 60 that: "No obstacles have been encountered". Once again, UKWIN cannot agree with this statement.

6.2. UKWIN notes that the incineration of municipal waste is listed as a specified activity within Annex I(5) of the Aarhus Convention. The second bullet reads: "Installations for the incineration of municipal waste with a capacity exceeding 3 tons per hour".

6.3. Additionally, other forms of incineration would be scoped in by virtue of Article 6(1)(b) of the Aarhus Convention.

6.4. UKWIN also notes the reference in the Aarhus Implementation Guide (Second Edition) to the fact that: "Article 6 can apply, for example, to spatial-planning decisions, development consents and construction and operating permits, including secondary decisions such as those relating to safety and emissions".

6.5. Before a waste facility can be built it must secure planning permission. The consideration of a planning application highlights the disparity of resources available to the community compared to the vast resources typically available to the applicant.

6.6. Planning applications for waste incinerators are often thousands of pages long, covering complex technical matters, meaning that those without access to expert technical and planning knowledge are severely disadvantaged.

6.7. There is currently no system in place in the UK to ensure that communities can effectively participate in the planning system.

6.8. Arrangements that existed in the past, such as the Planning Aid service, have been degraded to the point where they are no longer in a position to fulfil their originally intended support function. In any case, Planning Aid was never designed to provide the sort of sustained and detailed support needed to facilitate effective public participation in planning cases as complex as those associated with waste incinerators.

6.9. Even the poorest communities are not granted legal aid or equivalent support for assessing and commenting on planning applications, or for taking part in public inquiries or strategic plan-making processes. Incinerator applications often touch upon matters of law, with the interpretation of European and domestic legislation being potentially decisive in the resulting decision.

6.10. As such, it is especially important to ensure that the Aarhus Article 6(2) requirements that "...public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making procedure, and in an adequate, timely and effective manner..." are met.

6.11. Such time-scales are rarely reasonable when it comes to the planning case officer's committee report that informs many development control decisions made by planning committees.

6.12. Firstly, it is usually only available around a week in advance of a committee meeting and is not advertised to the public, providing people with little time to comment on any inaccuracies, omissions or points of contention that could be crucial to the ultimate environmental decision.

6.13. Secondly, communities are generally not aware that they are able to submit comments after the usual "consultation deadline" has passed, and this can result in the public failing to comment on material not available at the time of the original consultation, including the committee report and anything obtained through delayed Environmental Information Regulations requests. This runs contrary to Article 6(2)(d)(ii and v).

6.14. Furthermore, it is UKWIN's experience that, despite local authorities having the power to make Regulation 22 requests, many incinerator applications end up being decided without adequate information regarding the nature and effects of the facility being made known by the applicant, contrary to the requirements of Aarhus Article 6(6)(a and b).

6.15. Aarhus Article 6(4) requires provision of "early public participation, when all options are open and effective public participation can take place". This requirement is usually violated in relation to waste incinerators.

6.16. Long-term waste contracts that include incineration are often written in such a way as to create significant financial risk to a local authority in the event planning permission for a waste incinerator is refused. The threat of financial penalties is then used to prejudice subsequent environmental decisions, impeding effective public participation.

6.17. For example, when considering planning applications for waste incinerators the decision-maker is usually informed that the local authority has contractual obligations that would place them in an untenable position were planning permission to be refused.

6.18. It is often exceedingly difficult to challenge such claims, as the financial information that purportedly underpins the claim is not made available to the public in time to inform the decision-making process.

7. UKWIN comments on Aarhus Article 7 (Draft Report Paragraph 63 onwards)

7.1. UKWIN notes the Draft Report comment at Paragraph 74 that: "No obstacles have been encountered". Yet again, UKWIN cannot agree.

7.2. Article 7 requires that Parties "make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public."

7.3. The participation of communities in the consultation on a local waste strategy requires extended investment of resources over a prolonged period of time, e.g. five years or more.

7.4. Many communities simply do not have the resources to take part, and if they do not enter the process near the beginning then they are specifically excluded from taking part later in the process.

7.5. In any case, the resulting waste strategy often does not decide the specific sizes, locations and technologies to be used for waste management, meaning that even if such decisions are based upon a waste strategy then those important decisions will not be subject to public consultation.

7.6. Waste strategies can easily become out of date, and no effective processes are in place to allow public participation in the decision regarding whether or not the plan should be updated.

7.7. Procurement of waste contracts often begin without an up-to-date waste strategy in place, and/or give the strategy little weight in the decision making process, meaning that any resulting contract may be inconsistent with the strategy.

7.8. There are then no mechanisms in place to ensure public consultation on going to tender for waste infrastructure and services, or on the content/scope of any tender, or the weighting to be given to factors used to assess the bids, or the ultimate decision regarding the awarding of the waste contract. This is despite the fact that these contracts often encompass environmental decisions that have already been made behind closed doors, including the use of specific technologies, sites, treatment capacities, etc. without any prospect of public participation in these choices.

7.9. Indeed, Paragraph 5.25 of the Planning Supporting Statement for Veolia's planning application for an incinerator at the Former Rufford Colliery in Nottinghamshire stated that: "The Municipal Waste Management Strategy for Nottinghamshire was approved in 2001. This has effectively however been replaced by the provisions of the PFI contract for waste management services". Despite petitions from the public, that PFI contract cited by Veolia was not subject to public consultation.

7.10. Local authority procurement decisions, such as the decision to award a waste contract, are invariably made without public consultation and without giving communities either sufficient information or sufficient time to evaluate that information, to allow them to make appropriate comments and effectively participate in the environmental decision-making process.

7.11. Environmental decisions have economic consequences, and many citizens rightfully take an interest in helping to ensure that their local authority is getting good value for money. However, lack of access to financial information and the lack of ability to challenge environmental decisions make this impossible when it comes to waste incineration contracts.

7.12. Environmental decisions are inevitably made based upon a set of assumptions, but in most cases these assumptions are not made public, even though public money is being spent. A local authority might, for example, decide to opt for waste management that is worse for the environment based on an assumption that it would be cheaper financially, but it is possible that either these assumptions are incorrect or that communities have different values about what is more important.

7.13. Many UK local authorities are developing waste infrastructure using 25-30+ year multimillion-pound waste contracts such as Private Finance Initiative (PFI). Without access to the financial and environmental information in sufficient time to be able to comment on them before environmental decisions are made, communities are deprived of their ability to effectively participate in these decisions.

7.14. Waste management contracts are often the most expensive, long-lasting and complicated contracts that the local authority ever enters into, and yet the process by which the decision is made is often the least democratic.

7.15. So, for both environmental and economic reasons, citizens have an interest in participating in their council's choice of waste management methods, and to put the arguments for a greener, cheaper approach. Yet the voices of citizens are not easily heard, not least because the public's Aarhus rights are denied.

8. UKWIN comments on Aarhus Article 9 (Draft Report Paragraph 84 onwards)

8.1. Arguments regarding access to environmental justice in the UK have often focussed primarily on the prohibitive cost to applicants. While this is a matter that needs to be addressed, in addition to the other barriers outlined in this submission, it is also important to focus on why the public find it necessary to turn to the courts to seek environmental justice in relation to environmental decision-making. The fact that they do should raise the question 'why?'

8.2. UKWIN suggests that failings in respect of the implementation of Articles 3 – 8 of the Convention quite reasonably result in applications for judicial remedy. Similarly, it is understandable that communities will wish to challenge environmental decisions (e.g. in relation to planning and procurement decisions, and the Government policies, regulations and legislation that lie behind them) where either the process or the ultimate decision is seen to be manifestly unfair and/or improper, e.g. because the process is not focussed on finding the best environmental solution and does not adequately involve the community in key environmental decisions.

8.3. In the context of local authority waste management, and in particular schemes involving proposals for waste incineration capacity, members of the public often feel that decisions are made without due diligence.

8.4. In 2008 the Audit Commission's Well Disposed report advised that:

8.4.1. "...If WDAs [Waste Disposal Authorities] overestimate the amount of waste they will need to process, both the overall cost and the cost per tonne of waste processed are likely to be higher than they would have been had estimates proved accurate..." (Paragraph 80);

8.4.2. "...Some WDAs have found that they continued to bear risks they thought they had allocated to a contractor..." (Paragraph 179)

8.4.3. "...WDAs might buy too much disposal infrastructure if they: overestimate future volumes of waste arising (including other authorities' waste or trade waste). They may also achieve a worse environmental solution if, by building large disposal facilities, they reduce their own financial incentive to pursue waste reduction or recycling initiatives..." (Paragraph 151)

8.4.4. "...where authorities have been shocked into taking action, there is a risk that they become desensitised to costs by the scale of the task and the huge sums of money involved..." (Paragraph 164)

8.5. Given the above, it is quite sensible that communities should wish to play the role of citizen watchdog in relation to waste management decisions, aiming to ensure that local authorities pursue a course of action that would deliver both good value for money and the best environmental outcome.

8.6. However, all too often the local authority fails to convince the public that the scheme proposed is a good idea, and in many cases the information that is available shows that if only a few of the underlying assumptions prove to be wrong then the whole rationale for the proposal unravels. Indeed, many waste contracts now look quite out of step with reality.

8.7. The lack of transparency associated with such decisions further exacerbates the public's sense of injustice, as does the community's lack of a symmetrical right of appeal regarding planning decisions.

8.8. The preamble to the Aarhus Convention recognises that "every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations" and considers that "to be able to assert this right and observe this duty, citizens must...have access to justice in environmental matters", acknowledging that "in this regard...citizens may need assistance in order to exercise their rights".

8.9. Because of this, and for the reasons set out in more detail below, the matter of legal aid for environmental cases is relevant to the UK's implementation of the Aarhus Convention.

8.10. In this context, UKWIN draws attention to the comments made by Lord Neuberger, President of The Supreme Court, speaking at the Tom Sargant Memorial Lecture 2013 on the topic of 'Justice in an Age of Austerity' on Tuesday the 15th October 2013, including his statement that: "Cutting the cost of legal aid deprives the very people who most need the protection of the courts of the ability to get legal advice and representation. That is true whether one reduces the types of claim which qualify for legal aid or increases the stringency of the requirements of eligibility for legal aid. The recent changes have done both. If a person with a potential claim cannot get legal aid, there are two possible consequences. The first is that the claim is dropped: that is a rank denial of justice and a blot on the rule of law. The second is that the claim is pursued, in which case it will be pursued inefficiently, and will take up much more of the court staffs' time and of the judge's time in and out of court. So that it means greater costs for the court system, and delay for other litigants".

8.11. There is an urgent need to give the public sufficient and timely access to the details of waste contracts and other information that could inform significant environmental decisions. This is necessary to enable citizens to decide whether or not to challenge these decisions through judicial review.

8.12. At present it can take years to gain access to even heavily redacted portions e.g. of waste contracts, by which time it is too late to judicially review the associated environmental decision.

8.13. And even if politicians are successfully persuaded that the decision, e.g. to enter into the contract, was unwise, penalty clauses can make it nearly impossible to back out of the contract once signed. Thus, there is neither a democratic nor a legal remedy.

8.14. To challenge an environmental decision effectively the public must be aware that a decision has been made, the substance of that decision, and the reasons for that decision. There are instances in the UK where the public is not informed that a significant environmental decision has been made.

8.15. For example, Nottinghamshire County Council Waste Officers have been involved in making environmental decisions regarding a waste contract revised project plan without informing the public that such environmentally significant decisions have been made. Because the decision was not made at a Council meeting there are no minutes that record the fact that these decisions have been made.

8.16. Furthermore, decisions are made by the Environment Agency regarding the 'recovery' or 'disposal' status of a proposed or operational incinerator, known as either R1 (recovery) or D10 (disposal) status respectively, without any mechanism whatsoever to involve the public in this decision-making process or to set out the case-specific basis for these decisions.

8.17. In relation to Article 9, Paragraph 4, UKWIN notes the Aarhus Convention requirement that "the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive..."

8.18. Aarhus Article 9, Paragraph 5 states that Parties to the Convention must: "...consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice".

8.19. Aarhus Article 9, Paragraph 5 is linked to Aarhus Article 9, Paragraph 4. As The Aarhus Convention: An Implementation Guide, Second edition, 2013 [Text Only Version] ('the Implementation Guide') explains on page 218: "It is essential for access to justice under article 9 that the review procedures in question are affordable for members of the public. In this regard, there is a clear link between the requirement in article 9, paragraph 4, that access to justice procedures not be prohibitively expensive and the obligation on Parties in article 9, paragraph 5, to consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers".

8.20. Page 59 of the Implementation Guide states that: "Another important form of support under the Convention is in the context of access to justice. Such support might include regulations entitling environmental associations, organizations and groups to apply for legal aid, or measures exempting them from court fees or litigation costs..."

8.21. As noted elsewhere, organizations are not eligible for legal aid in the UK, and current exemptions from paying costs are inadequate to prevent access to justice being prohibitively expensive.

8.22. Page 217 of the Implementation Guide includes a table of "Potential barriers to access to justice". Issues highlighted as possible barriers under Article 9 that are occurring in the UK include:

- Financial barriers;
- Limitations on standing;
- A lack of information;
- Difficulty in obtaining legal counsel; and
- Unclear review procedures.

8.23. Problems with the UK's existing legal aid and Costs Protection regimes include the facts that:

• Not everyone is eligible for legal aid. For example, legal aid does not cover community groups and Environmental NGOs, and legal aid will not be granted to those with relatively modest means who do not qualify, even if their claim is for wider public and environmental benefit;

• Not all cases benefiting from legal support are eligible for legal aid, e.g. in relation to participation in planning inquiries;

• The relatively small amount paid to lawyers under legal aid discourages some lawyers from participating in the scheme, e.g. environmental law specialists may be unwilling to take up cases, especially complex cases, which prevents some cases from going forward;

• The Community Contribution sometimes required under legal aid can be prohibitively expensive;

• Cost recovery for successful claims can be impeded if not all grounds are successful;

• Aarhus Cases are eligible for a £5,000 - 10,000 cap on costs for the claimants in exchange for reducing the recovery of costs to £35,000. The £5 - 10k cap may still be prohibitive, and the cap on reclaiming costs may discourage more complex cases;

• Various environmental claims do not benefit from the Aarhus cap, such as private law environmental claims and challenges under s288 of the Town and Country Planning Act; and

• In our understanding, costs and potential costs associated with injunctive relief may fall outside the cost protection regime, making it less likely that injunctions will be sought, making injunctive relief prohibitively expensive to members of the public.

8.24. Other problems with judicial review include the facts that proposed changes would limit the ability of claimants to have an oral hearing of their claim; the time limits for bringing claims can often be prohibitively restrictive, especially if one has to secure legal aid or to raise sufficient funds; and the impossibility of challenging an improper decision when one does not know that it was made improperly, e.g. because the fact or details of the decision were not made public in a timely manner (as detailed above).

8.25. As discussed above in relation to UKWIN's comments on Article 4, due to under-provisioning of local authority information officer staff, if not for other reasons, it can often take a long time for local authorities to process EIR requests, and there are even further delays if there is an internal review (which must be done before the ICO will step in). This runs contrary to the Article 4(2) expectation that "the environmental information referred to in paragraph 1 above shall be made available as soon as possible" and the Article 4(7) expectation that "The refusal shall be made as soon as possible..."

8.26. The procedures for challenging a refusal are slow as the ICO is itself heavily under-resourced, and for other reasons (e.g. allowing various interested parties to take their time submitting responses, etc.).

8.27. Furthermore, ICO decisions are more or less frozen in time, i.e. based on the circumstances at the time of the original request and not able to take account of subsequent factors in favour of release, including the passage of time (which diminishes the public interest in withholding the information to protect the confidentiality of commercial information).

8.28. Additionally, as aforementioned, the requirement for internal review prior to ICO intervention can add significant delay.

8.29. Such delays run contrary to Article 9 which requires that provisions to challenge EIR requests to be timely. Article 9(1) states that: "Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law..." and Article 9(4) states that: "In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive".

8.30. Such delays to people accessing information to which they are entitled can adversely prejudice their participation in environmental decision-making as their views cannot be informed by information that they cannot see; and in some cases it prevents them from being able to challenge/refute information that could be the very basis for a significant environmental decision.

8.31. Such delays can also prevent people from knowing that a decision was made improperly in time to be able to challenge the decision through the courts, and thus deprives them of access to environmental justice.

8.32. As such, not only are people denied their right to environmental information, but such delays can deny people their rights to participate in environmental decision-making and to justice in relation to environmental decisions.

Thank you for your consideration of the points raised in this submission. Please do not hesitate to contact UKWIN if you wish to discuss any aspect of our concerns, including potential ways forward.

Kind regards,

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