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CONVENTION ON THE CONSERVATION OF EUROPEAN WILDLIFE  
AND NATURAL HABITATS

**Standing Committee**

30<sup>th</sup> meeting  
Strasbourg, 6-9 December 2010

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**Complaint in stand-by**

**Aberdeen Western Peripheral Route  
(United Kingdom)**

***REPORT BY THE NGO***

*Document prepared by:  
Aberdeen Greenbelt Alliance*

# ***Aberdeen Greenbelt Alliance***

*An Alliance of Aberdeen Communities protecting the Greenbelt*

*64 Cranford Road*

*Aberdeen AB10 7NP*

*greenbeltalliance@btinternet.com*

24 February 2010

Secretary of the Bern Convention / Secrétaire de la Convention de Berne  
Biological Diversity Unit / Unité de la diversité biologique  
Directorate General IV / Direction Générale IV  
Council of Europe / Conseil de l'Europe  
F-67075 Strasbourg Cedex

Re: Complaint: Aberdeen Western Peripheral Route (AWPR), United Kingdom  
Response by Aberdeen Greenbelt Alliance to a letter from UK, DEFRA of 16 Feb 2010 under the heading: **Aberdeen Western Peripheral Route (United Kingdom)**

The letter of DEFRA is quoted (indented & this font) with the intention of aiding the context of the comments by Aberdeen Greenbelt Alliance (AGA):

DEFRA Quote:

1. I refer to your letter dated 11 December 2009 seeking up-to-date information regarding Scottish Ministers' decision about the above project, the information being required by the Bureau for consideration at its next meeting.
2. We have been informed that the Scottish Ministers have decided to proceed with the Aberdeen Western Peripheral Route (AWPR), subject to a number of detailed modifications to the published draft Schemes and Orders as specified in Annex A and Annex B of their Decision Letter dated 21 December 2009 (link below). In coming to their decision the Scottish Ministers carefully considered:
  - all objections to the draft Schemes and Orders which were made and not withdrawn;
  - all of the evidence presented to the Public Local Inquiry, including the written submissions, the Report including the Reporters' findings of fact and their conclusions and recommendations thereon;

Unquote

## **AGA response:**

'the Reporters', as referred to above, are the Scottish Government employees from the "Inquiry Reporters Unit", a division of the Scottish Ministers (Government). The Reporters chair Public Inquiries, they are/have taken their remit from the Scottish Ministers, and they produce an 'Inquiry Report' with findings of fact, conclusions and recommendations.

In the case of this Scheme, the Scottish Government Scheme of the Ministry of Transport (now Transport Scotland), the MINISTERS provided a REMIT (see below) for the Public Inquiry to the REPORTERS; the Reporters, as employees of the Government, made recommendations to the Ministers. The Reporters now habitually, whenever they saw a problem (*inter alia*, with matters of Environmental Protection, the Habitats Convention), advised their Ministers, that the Ministers needed 'to satisfy themselves', that they had assessed the situation correctly.

This is aptly summarised by the Scottish Ministers Decision letter (see link <http://www.scotland.gov.uk/Resource/Doc/935/0092586.pdf> )

Decision letter, item 9) (highlighting by AGA)

Quote

“Consideration by the Reporters

9. In their conclusions and recommendations (Chapter 11 of the Report), the Reporters concluded that, subject to certain modifications which are outlined in Annex 8, the proposal is generally acceptable both technically and environmentally. They also highlighted a **number of issues upon which the Scottish Ministers should satisfy themselves** before reaching a final decision. As stated in paragraph 11.8 of the Report, these relate to:

- The restricted nature of the inquiry, and whether the scheme is to be treated as a national development by virtue of sections 143 and 143A of the Roads (Scotland) Act 1984;
- The requirements of the EU Habitats Directive and the Conservation (Natural Habitats &c) Regulations 1994, with respect to the River Dee Special Area of Conservation and European Protected Species;
- The requirements of the Wildlife and Countryside Act 1981, with respect to national protected species;”

Unquote

**AGA response:**

It is further summarised by the extract from the Scottish Ministers Decision letter in DEFRA’s letter under 4) below:

DEFRA continued, Quote:

- Firstly, the Ministers are satisfie[d]
- Secondly,[M]inisters are satisfie[d]
- Thirdly, [M]inisters [consider] that the details of the decision letter provide the necessary conditions for ensuring arrangements can be put in place to protect affected wildlife.

Unquote

**AGA response:**

Thus, in the end, none of the consultation process with the general public and none of the proceedings, conclusions and recommendations of the Public Inquiry matter in any form or fashion. The only deciding factor on whether this Scheme is a lawful Scheme in the eyes of the authorities of Scotland is whether the Ministers are satisfied that their own Scheme meets the requirement of the law, *inter alia*, the Habitats Convention.

When the Ministers provide a Decision letter without detailed justification as to why they are satisfied (that they are not breaking the law; Habitats Directive), it can only be seen as gross Misfeasance in Public Office.

DEFRA continued, Quote:

- the Environmental Statement; and

Unquote

**AGA response:**

The authorities, in their Environmental Statement, have simply ignored the consideration of alternative routes and have simply (but illegally) limited their environmental ‘effort’ to mitigation measures of the Scheme of their choice, without making any comparison with ALTERNATIVE ROUTES that might cause less damage. The only aspect in relation to alternatives they have considered is alternatives in relation to mitigation measures within the limits of their Scheme.

DEFRA continued, Quote:

- all opinions on that statement or the scheme expressed in writing by a wide range of consultation bodies and by any other person.

3. The Scottish Ministers Decision Letter can be found via the following link, and the main points of interest can be found within the first eight pages.

<http://www.scotland.gov.uk/Resource/Doc/935/0092586.pdf>. Copies of the letter were sent to all parties who appeared or were represented at the inquiry and to all those who made objections or representations within the objection period.

4. The following is an extract from the Scottish Government's press release on the Scottish Ministers Decision and provides an overview with regard to consideration of the key issues:

- Firstly, Ministers are satisfied that the remit of the inquiry was appropriate. The need for the scheme was well established in principle and justified in policy and strategy terms, and the processes involved were fully open and transparent

Unquote

#### **AGA response:**

Firstly, with respect to the appropriateness of the REMIT:

The Scottish Ministers have specifically ruled it inadmissible to submit evidence to the Public Local Inquiry into the Scheme, which did not specifically relate to **their** proposed Scheme.

As such no alternative, less environmentally damaging, schemes were considered.

AGA argues, that the failure to consider alternative **routes** constitutes a failure to comply with the Habitats Directive. The Habitats Directive requires the consideration of the least damaging alternative.

Thus, AGA considers the remit of the Inquiry unlawful.

Incidentally, AGA does **not** argue that there is a 'failure to consider alternative solutions'. AGA is well aware that different solutions, within the context of the single proposed Scheme, were considered. However, these different solutions were all within an extremely narrow corridor –say a 100 to 400 metre corridor-, solutions that therefore do not materially alter the impact on the environment and on (strictly) protected species.

Transport Scotland, during the Public Local Inquiry, specifically argued that they were not required by the legislation to consider alternative – possibly less damaging – routes, such as partially tunnelled routes.

AGA argues that the omission to consider alternative routes constitutes a breach of European Environmental Legislation, in that AGA argues that the Environmental Assessment should contain three stages:

- a) In case of Strictly Protected Species, an overriding benefit for the population needs to be established,
- b) A number of alternative solutions (routes in the case of road schemes) requires to be studied, and the least damaging route requires to be chosen, given comparable financial outlays, etc.
- c) For the chosen scheme, solutions have to be put in place for maximum environmental mitigation.

The Scottish Ministers let it be known during the publication of their Decision letter in December 2009, that they would only know the cost of the Scheme once they had received tenders (after approval by the Scottish Parliament). This fact, in its own right, means that the process fails the first 2 conditions of the Environmental Assessment process, and hence fails the Habitat Convention:

1. Without knowing the cost, an overriding benefit for the population can not be established,
2. the least damaging route can not be established for comparable outlays without knowing the cost of the Scheme.

Thus, AGA contends that the Environmental Statement for this Scheme does not address the prerequisite elements a) and b) (above).

The British authorities, rather than taking a pro-active environmental protection approach, always seem to wish to interpret the Statutes, in a way that provides the least obstacles for any development.

The authorities, in their Environmental Statement and in their refusal to allow consideration of alternative routes simply (but illegally) limit their environmental 'effort' to mitigation measures of the

Scheme of their choice, without making any comparison with alternative routes that might cause less damage.

Secondly, the NEED:

The need for the Scheme was never properly established. Various tentative suggestions for the need of the Scheme were produced over time by Aberdeen City Council & Aberdeenshire County Council. The main aim of the Scheme was to create a **development corridor** around the City for development of housing, factories and retail parks. Because the funding for the Scheme had to come from the Government, i.e. Transport (Ministry of Transport, later named Transport Scotland), the development aim was sometimes more implicitly than explicitly mentioned.

In 1998 the renowned transport, infrastructure & town planning consultancy OSCAR FABER CONSULTANTS were asked by both Councils to produce a study report into the traffic effects of an Aberdeen Western Peripheral Route, as well as other traffic measures in the City.

Oscar Faber concluded that Aberdeen is mainly an end destination for the vast majority of traffic and as a consequence, such a route would lead to a reduction in Inner City traffic of only 2 percent !

If augmented with other traffic measures, such as bus lanes, pedestrianisation, cycle lanes, traffic calming, the overall effect could be expected to be an 8 percent reduction in Inner City traffic.

Because of the Aberdeen City & Shire Councils' desire to create the aforementioned development corridor, as their main (if not only) motive for the Scheme, surely in an ACT of MISFEASANCE in PUBLIC OFFICE, they set about promoting the Scheme by different means: the 1998 OSCAR FABER was quietly ignored.

The City & Shire then set about putting the Scheme on the map, quite literally: although the need for the Scheme was only a political ambition of the creation of a development corridor in the Greenbelt, without any proof that the Scheme would provide benefit to the population at large, commensurate to the environmental damage.

The need of the Scheme in terms of the Environmental Legislation:

The Berne Convention and the Habitats Directive specifically ask for 'an overriding benefit for the population needs to be established'

DEFRA, 4. continued, Quote:

- Secondly, on the question of the EU Habitats Directive, Ministers are satisfied the issues have been addressed by the undertaking of an appropriate assessment, endorsed by Scottish Natural Heritage

Unquote

#### **AGA response:**

With respect to an 'appropriate assessment' –the Environmental Statement-- is completely silent about any environmental requirements other than mitigation measures (see under 2.: Environmental Statement, above)

Scottish National Heritage (SNH) is a Scottish Government paid Quango

Quango is an acronym (variously spelt out as quasi non-governmental organisation, quasi-autonomous non-governmental organisation, and quasi-autonomous national government organisation) used notably in the United Kingdom [to] label colloquially an organisation to which government has devolved power.

The Director of SNH in Aberdeen indicated to AGA that SNH considers **itself wholly unable to provide impartial advice to the Scottish Government**, since the Scottish Government are the employers of SNH staff.

AGA categorically stands by their above statement. Not only do SNH feel unable to provide advice to Scottish Transport which would endanger the execution of the Scheme. SNH is also the body that is responsible for the provision of Licenses for the derogation of protection of strictly protected species in the public interest.

Effectively, the Scottish Government is **providing permission to itself** to progress a major infrastructure project without proper regard to European Strictly Protected Species.

DEFRA continued, Quote:

- Thirdly, on the question of Compliance with the Wildlife and Countryside Act, that the requirement that an appropriate obligation is placed on the promoter (Scottish Ministers) to ensure the necessary legislative arrangements are in place addresses this issue. Ministers consider that the details of the decision letter provide the necessary conditions for ensuring arrangements can be put in place to protect affected wildlife.

Unquote

**AGA response:**

The Scottish Ministers in their Decision Letter quoted under 3.) above, say the following:

Quote:

The requirements of the EU Habitats Directive and the Conservation (Natural Habitats &c.) Regulations [1994]:

19. The Scottish Ministers have to be satisfied that the requirements of legislation are fully met and this includes the impact on National Protected Species under the Wildlife and Countryside Act, 1981, as amended by the Nature Conservation (Scotland) Act 2004. The Scottish Ministers accept that in making this decision the promoters will have to ensure, prior to commencing any operations, that they have in place the necessary statutory consents or licences that are required under domestic legislation.

Unquote

**AGA response:**

Thus, the Scottish Ministers actually admit, as, incidentally, is done in the Environmental Statement, that in their opinion the issue of disturbing and/or killing of Strictly Protected Species can simply be dealt with by means of:

the issuing of Licenses to disturb or kill Strictly Protected Species by the licensing authority Scottish National Heritage (SNH).

AGA suggests that it is wholly inappropriate for the Ministers to effectively **give themselves permission to disturb or kill** Strictly Protected Species (Annex IV species).

AGA strongly suggest that were the Ministers to consider this course of action of asking a Quango, that is wholly dependent on them. To issue such Licenses for their own Scheme would represent a *prima facie* case of Misfeasance in Public Office

DEFRA continued, Quote:

- Fourthly, Ministers [are]

**AGA: no further comments.**

DEFRA continued, Quote:

7. A copy of the Public Local Inquiry Reporters' Report, Appropriate Assessments and the Decision Letter is available from the Scottish Government's website at <http://www.scotland.gov.uk/Topics/Transport/Road/AWPR>.

Signed B A Stevens, Aberdeen, 24 Feb 2010

Bruce Stevens

Chair,

Aberdeen Greenbelt Alliance