



Friends of the Earth Scotland Supporter Briefing

Access to Environmental Justice Explained

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Decisions are made by public authorities every day that impact on individuals, communities and our shared environment. It might be the decision to approve a planning application for a grand new development or to grant a license for toxic waste disposal.

Sometimes these decisions are poorly made. Perhaps communities are not adequately consulted, a particular angle is not examined in the planning decision, or the company's track record in waste disposal not properly considered.

Bad decisions like these can have a serious impact on our environment, and therefore on our human rights. But the environment can't take a public authority or company to court, to put right such a wrong, so it depends on people to take action on its behalf, and stand up for our right to a healthy environment.

Environmental rights

The good news is that there is an international treaty – the Aarhus Convention – that enshrines the right of people not only to be informed about and involved in decision-making that impacts on their environment, but also to have access to justice if they suspect a bad decision has been made, or an environmental law been broken.

The right to be informed about and involved in planning decisions is particularly important, as when people are enabled to take part in decision making – and listened to – this helps to shift the balance of power away from well-resourced and experienced developers, towards the communities who are affected by these decisions. In the context of climate change, affected communities can mean all of us when it comes to dirty developments like new coal fired power stations.

However individuals, communities and NGOs often feel that they haven't been properly engaged in decision-making, and this is where access to justice comes in. If people have easy, affordable access to the courts to challenge poor decisions, then not only can such decisions be over turned, but simply the threat of such challenges tends to ensure public authorities make better decisions in the first place.

The bad news is that we are failing in this respect in Scotland. We have freedom of information legislation, and regulations that demand community consultation and strategic environmental assessments of developments, but we do not have broad and affordable access to the courts.

Barriers to accessing justice

All kinds of barriers stand in the way for people, communities and NGOs who want to challenge poor decision-making. For example, if you want to judicially review a decision, you have to prove to the court that you can pay the other sides' – and your own – legal costs should you lose. These costs can amount to over £80,000, as in the ongoing case challenging the development of a new coal fired power station at Hunterston.

You also have to convince the courts that you have 'standing' – the right to have your case heard. In Scotland we have a particular restrictive test of 'title and interest' that means even apparently clear-cut cases can fail on this point. For example, the court ruled that Mary Forbes, whose home

is under threat from Donald Trump's golf course development, did not have standing to seek review of the decision to grant him planning permission.

In fact, the odds are so stacked against the ordinary citizen who wants to challenge an environmentally damaging decision or act, that going to court to defend a healthy and clean environment has become a luxury that effectively only the very time and money rich can afford.

Effectively, this means there is less incentive for public authorities and developers to inform, consult, engage and generally make decisions that are good for people and the environment.

What we are calling for

Our Access to Environmental Justice campaign is calling on the Scottish Government to make it easier for individuals, communities and NGOs to go to court by introducing changes to ensure:

- that the process of challenging breaches of environmental law or poor decision-making is free or inexpensive, so that people and communities aren't put off taking action by the threat of huge costs
- that people, communities and NGOs are able to take cases to court if they demonstrate 'sufficient interest' in the issue, or are acting in the collective interest of people and the environment
- that the merit, or substance of decisions can be examined by the courts, not just whether 'due process' has been followed
- that public legal education is improved, and the court system made more user friendly, so that people learn to recognise problems and injustices which may have a legal solution, and aren't put off by an archaic system

Campaign to date

Our biggest campaign success to date is the result of an 'intervention' in a high profile case at the UK Supreme Court. We worked with the Environmental Law Centre Scotland to demonstrate to the Court how access to justice in the Scottish Courts was extremely restricted by an archaic technicality known as 'title and interest', which made it almost impossible to take public interest environmental cases to court.

Supreme Court judges Lord Reed and Lord Hope agreed with us and expressed the opinion that 'title and interest' had "no place" in public interest litigation, and that a broad new 'sufficient interest' test must be introduced. The ruling was damning about the negative effect that years of judge-made law has had on the development of public law in Scotland.

Since handing in our campaign petition – with over a thousand signatures – to the Scottish Parliament in 2010, the Public Petitions Committee have taken up the issues we raised with the Scottish Government. Following a detailed correspondence with the Government, who ultimately claim to be in full compliance with the Aarhus Convention in spite of all the evidence to the contrary, the Committee passed our petition to the Equal Opportunities Committee for further action.

We are liaising with the Committee on how best to proceed, and continuing to put pressure on the Scottish Government to ensure that the broader moves they are planning to reform our justice system take account of the distinct problems and needs relating to environmental justice.

Find out more

You can download our 'Tipping the Scales' report at www.foe-scotland.org.uk/tippingthescales or for more information contact Mary Church at mchurch@foe-scotland.org.uk