Complaint to the Aarhus Convention Compliance Committee against the UK Member State's (Department of the Environment for Northern Ireland) violation of the Convention.

Our Organisation

1. The River Faughan Anglers Ltd (RFA) is a cross community, not-for-profit organisation managing the fishing rights on the River Faughan, County Londonderry, Northern Ireland (part of the UK Member State). Our organisation is run entirely by volunteers and the Directors and Committee are guided by the key principles of serving the entire Community and protection of the environment.

Our River

2. The River Faughan is a Special Area of Conservation (SAC) designated under Directive 92/43/EEC for its site selected features / species of populations of Atlantic Salmon, otter and native oak woodlands. The EC Site Code is UK0030361.

Our Complaint

3. Our complaint is against the Planning & Local Government Group (DOE Planning) Millennium House, 17-25 Great Victoria Street, Belfast, BT2 7BL, which is an organisation within the Department of the Environment for Northern Ireland (part of the UK Member State), which we believe, by its action, has breached Articles 1, 3, 4, 6, and 9 of the Aarhus Convention by:

- denying RFA access to environmental information,
- refusing to engage with RFA on environmental issues affecting our river,
- refusing to provide answers to our reasonable environmental questions,
- inviting RFA to take Judicial Review of its planning decision A/2008/0408/F, in the knowledge that this was likely to be prohibitively expensive.

Background to Complaint

4. On 21 May 2008, DOE Planning received a planning application (reference A/2008/0408/F) for the retention of unauthorised settlement lagoons associated with a concrete production plant located in the flood plain and immediately adjacent to the River Faughan Area of Special Scientific Interest (as designated by DOE), and the soon to be declared candidate SAC. The address of the property is 91 Glenshane

Road, Drumahoe, Londonderry, Northern Ireland BT47 3SG. (See photograph at appendix 1 showing the relationship of this development in relation to the River Faughan SAC)

5. At that time, DOE Planning carried out an Environmental Impact Assessment determination under Regulation 9 of the *Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 1999* (Extract of legislation attached at Appendix 2) and determined that the environmental effects would not be significant. (see DOE Planning's EIA Screening attached at Appendix 3) In reaching this negative EIA screening decision, it did **not** consult with other competent authorities, such as the Northern Ireland Environment Agency (NIEA) which was responsible for designation of the ASSI and recommendation of the candidate SAC. At this point it is worth noting that NIEA and DOE Planning are two parts of the one department – the Department of the Environment. Subsequent to the negative EIA screening, NIEA advised DOE Planning on 23 March 2010 that the retrospective development seeking development consent under planning application A/2008/0408/F would fail an Article 6 Assessment under the *Conservation (Natural Habitats etc) Regulations (Northern Ireland) 1995,* as transposed from the Habitats Directive, as it represented a *"serious risk of water pollution"* to the SAC. (see NIEA letter dated 23 March 2010 attached at appendix 4)

6. In July 2011, DOE Planning accepted a revised proposal to application A/2008/0408/F. This now proposed the removal of the existing highly contaminated settlement lagoons and construction of new settlement lagoons at another part of the site some 40m away from the SAC and outside the flood plain. On 25 June 2012 (11 months later) DOE Planning carried out a further EIA screening under the *Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2012* and again determined that the environmental effects would not be significant. (see extract of EIA Regulations 2012 (Regulation 10) and second DOE Planning EIA screening at appendix 5)

7. On 13 September 2012, DOE Planning granted development consent adjacent to the River Faughan and Tributaries SAC for the *"Retention of extension of offices, extension to vehicle maintenance shed and improved wash out facilities. Relocation of settlement lagoons, site drainage works. Associated landscape and environmental improvements"* at 91 Glenshane Road, Londonderry, Northern Ireland BT47 3SG. (see development consent notice attached at appendix 6)

8. Prior to approval of this planning application, on 25 July 2012, RFA wrote to DOE Planning challenging what we believed was its fundamentally flawed EIA

determination dated 25 June 2012 (attached at appendix 5). In our detailed letter, RFA raised specific environmental concerns and asked specific environmental questions of DOE Planning in an attempt to understand how it was meeting the requirements of its EIA Regulations and to afford it the opportunity to engage with RFA in environmental decision making. (see RFA letter dated 25 July 2012 attached at appendix 7)

9. Instead of responding to our environmental concerns and reasonable questions, DOE Planning advised on 2 August 2012 that *"the Department does not consider it appropriate to engage in extended and expansive correspondence in light of your stance and there is an appropriate route for remedy through Judicial Review."* (see DOE Planning letter dated 2 August 2012 attached at appendix 8)

10. So concerned is our organisation with the way DOE Planning has mishandled development consent A/2008/0408/F and the serious environmental threat this poses to the River Faughan and Tributaries SAC, that on 12 December 2012 RFA reluctantly launched Judicial Review proceedings in the High Court against the Department of the Environment (Northern Ireland). The High Court hearing began on 23rd May 2013 and will resume on 17 June 2013. RFA is challenging the Department of the Environment's failure to recognise that planning approval A/2008/0408/F represents EIA Development and required the submission of an Environmental Statement. As well as challenging the Department of the Environment's approach to Environmental Impact Assessment, it was our intention to challenge how we believe it is failing to properly transpose both the EIA and Habitats Directives, by making unauthorised EIA development lawful on the basis that it has failed to enforce against it and which under its national planning legislation, has been allowed to become immune from enforcement action. Even though these retrospective development consents falls within the description of development in Schedule 2 of the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2012, (as transposed from Annex II of the EIA Directive), the Department considers it appropriate not to assess these applications under those regulations, if by its failure to act, it has permitted that unauthorised development to become immune from enforcement action. It has confirmed this position to the Northern Ireland Assembly when the Minister advised that *"the statutory process providing for a Certificate of Lawful Use or Development is set out in Article 83A of the Planning (Northern Ireland) Order 1991. This specifies precisely when a use or operation is lawful (83A(2)). As a result of this the Department is directed solely to the question of whether the activity constitutes development and enforcement action can still be taken within the statutory timeframes, or whether an Enforcement Notice is in place which the use or development contravenes. Once this information is obtained and considered for compliance, the Department must issue*

the Certificate. *There is no provision in Article 83A to require that the environmental effects of the development inform the issuing of the Certificate of Lawful [Use or] Development."* (See extract from the Planning (NI) Order 1991 – Article 83A and the Minister for the Environment's response to Assembly Question AQW/12859/11-15 attached at appendix 9) Furthermore, the Planning Appeals Commission (PAC), also adopts this interpretation of national legislation in the hearing of planning appeals against DOE Planning decisions or enforcement notices. (See PAC decision attached at appendix 10) RFA believes this to be in direct contravention of the EIA Directive and is currently in the process of formulating a complaint to Europe. However, RFA is also of the opinion that DOE Planning also operate a deliberate policy of using the prohibitively expensive judicial review process as a deterrent to those individuals or groups, who raise concerns over how it takes environmental decisions.

11. To date our environmental legal challenge of the impugned development consent A/2008/0408/F has cost our voluntary and not-for-profit organisation over £80,000 (95000 Euro) and we have outstanding invoices of around £30,000 (36000 Euros) still to be paid, for which we presently do not have the money. Also, we expect additional invoices from our solicitor and ecologist which have yet to be submitted. Should the Courts rule against our legal challenge, RFA will also be liable for the Department of the Environment's legal costs. As a result we have had to make redundant our two full time river watchers and our part-time river watcher, and there is now a strong possibility that our organisation will have to be declared bankrupt as a result of having to mount this legal challenge at the invite of DOE Planning.

12. As a result of this considerable expense, RFA has had to take the difficult and reluctant decision that the Department's failure to properly transpose the EIA and Habitats Directives into national policy will not for part of our legal challenge as advice from our Legal Counsel indicates that taking on the Department in its stance on allowing unauthorised development to become immune from enforcement action and thereby negating the need to assess such developments for EIA (as would normally be required by the Directive), is likely to be strongly opposed and potentially appealed by the Department, leading to significant delay and additional expense, which our voluntary organisation simply cannot afford.

13. Presently in Northern Ireland only an applicant for planning permission has the right to appeal DOE Planning's decisions to the appellate body – The Planning Appeals Commission. This right of appeal for applicants not only extends to refusals of planning permission, but any planning conditions attached to planning permissions, which the applicant / developer considers restrictive to the development. Objectors

to planning proposals are not afforded the same equality of opportunity to appeal DOE Planning's decisions, and the only opportunity open to those who have objected to development consents on planning and environmental grounds, is to take the prohibitively costly route of Judicial Review. This is acknowledged on the DOE Planning web site under the section *"Advice and Guidance - Appealing a decision"* which states *"There is currently no 'third party' right of appeal against a planning decision. This means that objectors or other parties who may have an interest in the proposal cannot make an appeal if they are unhappy about the decision.* (link htpp://www.planningni.gov.uk) RFA believes that the Department of the Environment exploits this position on the basis that it is aware that very few individuals or voluntary organisations have the financial resources to mount such a legal challenge. However, in a number of cases where such a challenge has been taken on environmental grounds, the Courts have ruled against the Department and quashed the planning decisions. Two recent examples are Cavanacaw Gold Mine (2012) and Sandale (2010) judgements. The former was a case were the Department insisted that it had correctly applied the EIA Regulations when granting development consents to a mineral extraction operation, but immediately conceded the case (before going to court) after a formal legal challenge was initiated. The latter, was a case, like the subject of this complaint, where the Department failed to screen the proposed project as EIA Development and subsequently granted a fundamentally flawed development consent. When challenged in the courts, the impugned permission was quashed because of the serious failings in the Department's approach to EIA. In quashing the decision, the High Court Judge concluded that *"In view of the information available about the site it is inconceivable that there could be development without an environmental impact assessment. That it could have been determined that this was unnecessary is a reflection of the inadequate approach that exists in relation to the making of such determinations."* RFA has not provided details of these cases, however, if needed, the Sandale judgement can be found at the following link: www.courtsni.gov.uk, followed by a search of the following reference WEA7765.

14. RFA believes that the case of development consent A/2008/0408/F is a case in point and that DOE Planning's letter dated 2 August 2012 demonstrates how it is prepared to negate its environmental responsibilities as set out under Aarhus Convention and instead force those seeking to participate in environmental decision making into taking a prohibitively costly judicial review, which many simply cannot afford.

15. Also, conveniently for the Department of the Environment, it does not hold details of the number of environmental challenges that it faces (and loses) as has recently been confirmed by a question to the Minister of the Environment (AQW/20076/11-

15) from Alex Easton, an elected Member of the Local Assembly (MLA). (see Minister's answer to AQW/20076/11-15 attached at appendix 11)

Breaches of the Aarhus Convention.

16. There is a requirement under Article 1 of the Convention that Member States, *"shall guarantee the rights of access to information, public participation in decision making, access to justice in environmental matters in accordance with the provisions of the Convention."* By refusing to engage with RFA and address our reasonable environmental questions as set out in our letter at appendix 7 and its response at appendix 8 on the basis that we have recourse to Judicial Review, we consider that DOE Planning is consciously and deliberately infringing our rights of access to information and impeding our ability to participate in environmental decision making.

17. Under Article 3(2) of the Convention there is a requirement on *"…each party to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision making and in seeking justice in environmental matters."* However, by its actions DOE Planning has failed to include the level of environmental information in its EIA screenings (see appendices 2 and 4), and when asked to justify its negative EIA screenings it declined to do so and invited RFA to take Judicial Review. Furthermore, Article 3(8) requires that the authority *"…shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalised…"* Given the prohibitively costly nature of Judicial Review proceedings, and the Northern Ireland Government's refusal to introduce "third party" rights of appeal against planning decisions, this RFA believes, is an injustice which unfairly penalises individuals and voluntary groups, such as ourselves, who are being affected and have raised legitimate objection to development proposals on environmental grounds.

18. Article 4 of the Convention requires public authorities in response to a request for environmental information, to make such information available to the public. Rather that engage with RFA on how it has assessed the environmental effects of A/2008/0408/F, DOE Planning has chosen to invite our voluntary organisation to take a Judicial Review, in the likelihood that this would prove prohibitively expensive.

19. Article 6 of the Convention states that *"…the public concerned shall be informed, either by public notice or individually, as appropriate, early in an environmental decision making procedure, and in an adequate, timely and effective manner, inter alia of: Proposed activity and the application on which the decision will be taken, Opportunities for the public to participate, Public participation procedures shall include reasonable time frames, allowing sufficient time for the public to prepare and participate effectively during environmental decision making."* By operating a practice of allowing EIA developments to commence and continue without the necessary development consents, and where these consents can be applied for retrospectively, does not allow the public to become involved in environmental decision making at an early stage. As in the case of A/2008/0408/F, the settlement lagoons adjacent to the River Faughan had already been constructed and operating before the planning application for their retention was eventually submitted in May 2008. By the time DOE Planning served enforcement notices to have them removed, they had already become immune from enforcement action, as confirmed by the PAC at appendix 10.

20. Furthermore, on 4 September 2012 DOE Planning informed Derry City Council of its intention to approve application A/2008/0408/F. On 5 September 2012 RFA called at the Northern Area Planning Office and requested a copy of the case officer report and Development Management Report as there is a requirement for this information to be available to the public prior to any recommendation being presented to Council. Our River Watcher was advised that these reports were not ready and that it would be sent to him once it became available. On the 6 September 2012, a copy of these reports were requested in writing by RFA. On 11 September 2012 a copy of these reports were once again requested in person by our River Watcher and once again he was turned away from the Planning Office after being advised that the reports were still being finalised. Eventually they were posted to him on 17 September 2012, four days after the development consent was issued. Incredibly, these reports, when received, were dated 24 August 2012 (attached as appendix 12) This is clear evidence of non-compliance with Article 6 of the Convention in that RFA was clearly and deliberately denied the opportunity to participate in environmental decision making as these reports approving the development were withheld from us until after the decision was made.

21. As previously stated at paragraph 19 above, it should also be noted that planning application A/2008/0408/F was initially for a retention permission for development (unauthorised settlement lagoons) that had already been constructed adjacent to the River Faughan without any development consents. Presently the Department of the Environment consider it appropriate to allow unauthorised EIA Development (i.e. development that has already commenced and which has been deemed to require

the submission of an Environmental Statement) to continue in the absence of any development consent. Two examples of this are retrospective planning applications A/2009/0400/F and A/2011/0210/F for mineral extraction affecting the SAC. RFA has not provided details of these cases in order to avoid potentially extraneous or superfluous documentation (in line with section VIII of the checklist for communications with the ACCC), but can do so on request. Furthermore, it considers it appropriate for such unauthorised development to be regularised at a later date through the submission of a retrospective planning application. Although perhaps not germane to this complaint, RFA feels it is important for the ACCC to be aware of the context of our complaint and that we firmly believe that the Department of the Environment for Northern Ireland is failing to properly transpose the requirements of the EIA Directive and uses the prohibitively expensive judicial review process (the only challenge mechanism open to individuals and voluntary groups) to negate its environmental responsibilities.

22. Article 9 of the Convention relates to access to justice. In Particular Article 9(4) requires provision for *"adequate and effective remedies including injunctive relief as appropriate, and to be fair, equitable, timely and not prohibitively expensive."* As the Northern Ireland Government continues to stall on introducing of "third party" rights of appeal for those members of the public objecting to development proposals, the only alternative available to challenge the public authority's environmental decision making is through Judicial Review, which is prohibitively expensive, for all but the wealthiest of challengers. For the public authority to openly invite Judicial Review in the full knowledge of the true costs of these legal actions, is unjust and violates the Aarhus Convention.

Conclusion

23. RFA would respectfully request the Aarhus Convention Compliance Committee to consider our complaint against DOE Planning:

a) In relation to its treatment of our voluntary organisation in regard to development consent A/2008/0408/F, which we believe has resulted in the aforementioned breaches of the Convention

b) To consider, in general, whether the Northern Ireland Government's continued failure to enact the proposed introduction of third party rights of appeal, and reliance on the prohibitive expense of the Judicial Review process to discourage legal challenge on environmental grounds, is impeding the public's ability to effectively engage in environmental decision making in Northern Ireland.

24. Should you require additional information, please do not hesitate to contact me at the address below.

Dean Blackwood

[Address redacted on request]

Northern Ireland