2012 No.

Affidavit of Dean Blackwood (1st)

Dated: 3 May 2013

For Applicant

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY RIVER FAUGHAN ANGLERS LIMITED FOR JUDICIAL REVIEW

IN THE MATTER OF A DECISION BY THE DEPARTMENT OF THE ENVIRONMENT FOR NORTHERN IRELAND (PLANNING SERVICE) ON 13TH SEPTEMBER 2012 TO GRANT PLANNING PERMISSION

AFFIDAVIT OF DEAN BLACKWOOD

I, Dean Blackwood, Aged 18 years and upwards, of [redacted] make oath and say the following in response to Adrian Brown's affidavit made on Behalf of the Department of the Environment.

Introduction

1. I am a Director and the Chairperson of the River Faughan Anglers Ltd ("RFA"). I have fished and walked the river for as long as I can remember, a period of over 45 years, and accepted an invite from RFA to take on the role of Director in 2005. I have held this position ever since and carry out this role on an entirely voluntary basis. I am a Chartered Town Planner, holding membership of the Royal Town Planning Institute. Before I retired on 31 March 2013, I worked as a Town Planner for the Department of the Environment for 34 years. My last eleven years in employment was at the grade of Principal Professional & Technical Officer. I have a wide range of experience in development management (formerly referred to as development control) and enforcement. From 2006 I headed the Compliance, Improvement & Review Team (formerly known as the Planning Service Audit Team).

2. At some time in late 2002, when walking along the River Faughan at Drumahoe I noticed the recent construction of a large settlement lagoon, containing grey/green liquid very close to the edge of the River Faughan. So shocked was I at the scale of the unauthorised land filling and construction of these lagoons that as a private citizen I wrote to both the Planning Service and Environment and Heritage Service (as it was at the time) alerting them to what I considered to be a significant environmental threat to the River Faughan.

3. Following my retirement, I now make this affidavit having read the affidavit of Adrian Brown and reviewed the relevant papers, including the planning approval A/2008/0408/F. Below I rebut the Department's claims that it has acted to ensure the proper environmental protection of what is a finite and sensitive environmental asset afforded the highest environmental protection, namely the River Faughan Area of Special Scientific Interest (ASSI) and Special Area of Conservation (SAC).

Rebuttal of Affidavit of Adrian Brown, DOE Planning.

4. My evidence below should be read in conjunction with the paragraphs from the affidavit of Mr Brown as referred to below. The evidence of Mr Brown deals first with the approach taken by Planning Service to the initial screening of the application under EIA procedures, and my rebuttal evidence deals with this in the first instance.

Paragraph 6

5. It is notable that Mr Brown starts the substance of his affidavit by reciting the historic nature of the operation conducted by Chambers Concrete Products ("Chambers"). However, Mr Brown is incorrect in stating that the River Faughan was designated an ASSI on 02 September 2008 and is in direct conflict with paragraph 11 of Mr Keith Finegan's affidavit which correctly states that the ASSI was designated on 9 May 2008. The Court should not be given, even inadvertently, the incorrect impression that the original (unsigned and undated) negative EIA screening for A/2008/0408/F [AB1 Tab 2] was conducted prior to the designation of the River Faughan ASSI. As the planning application was validated on the 12 June 2008 (as confirmed on the Department's Planning Portal – Public Access) it is clear that the ASSI designation was in place at that time. As a professional planner, it is inconceivable to me that this should have not have featured in any consideration of the EIA screening, or that other competent authorities with responsibilities for the environmental protection and fisheries conservation should not have been consulted prior to the Department making a

(negative) EIA determination under Regulation 9 of the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 1999, as were in force at that time (the EIA Regulations 1999).

Paragraph 10

6. Mr Brown claim's that the Department took into account all of the existing development at 91 Glenshane Road in determining the development as Category 5 – "installations for the manufacture of cement" only establishes that the Department considered that this retrospective development fell within Schedule 2 of the EIA Regulations and, therefore required EIA screening. There is no dispute that this development was required to be subject of EIA determination. However, what Mr Brown does not address is whether the retrospective development being applied for under A/2008/0408/F was adequately assessed to identify likely environmental effects.

7. Given the location of this development adjacent to the River Faughan ASSI, and soon to be declared candidate SAC (as that time), it should have been abundantly clear to the Department that the selection criteria referred to in Article 4.3 of the EIA Directive and Schedule 3 to the EIA Regulations 1999 should have been of paramount importance. However, the ASSI did not feature in the original EIA screening consideration, indicating that the Department may not have been aware of this designation. Further, the Department did not consider it necessary to consult with the competent authorities who were best placed to advise, namely NIEA and Loughs Agency, before making a flawed negative EIA screening. The fact that in March 2013 Mr Brown in his affidavit still appears to be under the misapprehension that the ASSI had not been designated, at the time he claims the original EIA screening was carried out for retrospective application A/2008/0408/F, reinforces RFA's belief that consideration of the likely environmental effects on this environmental designation and the priority species therein did not feature in the initial negative EIA screening.

8. The evidence which follows clearly shows that, at the time the negative EIA determination was carried out on retrospective planning application A/2008/0408/F, the Department was not in possession of sufficient environmental information to inform an adequate EIA screening decision as was required by Regulation 9. Furthermore, I demonstrate that subsequent environmental information provided by competent authorities, who were not consulted until after the Department unilaterally carried out a negative EIA screening, clearly points to the likelihood of environmental effects being significant and adverse, thereby demonstrating the inadequacy of the Department's screening exercise.

9. Furthermore, Mr Brown appears to be using *"previous engagement with other statutory bodies"* as a substitute for properly fulfilling the requirements of Regulation 9, yet he fails to identify those statutory bodies which he claims informed this original negative EIA screening. As this *"previous engagement"* is now being used to justify why no formal consultation was necessary before Planning Service made a negative EIA determination, I would have expected to see this articulated in the unsigned / undated EIA determination furnished to the Court by Mr Brown as exhibit [AB1 Tab 5]. The simple fact is that there is no evidence contained within this EIA determination to support Mr Brown's justification or claims.

10. In essence, the Department's decision to screen for EIA was correct, but I contend that its reasoning why this application was not considered to be for EIA Development requiring the submission of an environmental statement is inadequate and manifestly flawed. Whilst the Department argues that this is a judgment that it is entitled to reach, the subsequent comments from competent authorities as part of the planning application process and the Department's own subsequent actions in recommending refusal and serving of enforcement notices, all indicate that Planning Service got this initial negative EIA screening seriously wrong.

Paragraph 11

11. Mr Brown provides no explanation why the EIA determination is unsigned and undated. Established practice is that any EIA determination must be corporately considered and signed off by at least three officers, including an authorised officer. The evidence would tend to suggest that this EIA screening may not have been available on the application file A/2008/0408/F until 11 August 2011, as the copy of the EIA Determination and corresponding letter to the applicant advising of the negative EIA Determination has a hand written note from Mr Brown stating *"this has been printed of by IT from the defunct 20/20. A nil determination was carried out"* [GQ1 Tab 7, page 146]. This suggests that in August 2011 the Department, in particular those officers dealing with the file, including Mr Brown, may not have been certain if an EIA determination had been carried out on this development. Having to request a copy to be retrieved off the old IT system indicates that they did not have a copy on file, which may also also explain why it is not signed. However, Mr Brown now argues that the Department fully complied with its obligations under EIA, including *"previous engagement with other statutory bodies"* despite the absence of evidence to support this claim.

Paragraph 12

12 To be clear, the *"consultation process"* referred to by Mr Brown, was **not** carried out to inform the Department's negative EIA screening process under Regulation 9 of the EIA Regulations 1999, but was undertaken **after** the Department unilaterally made the negative EIA determination. The consultation referred to by Mr Brown was part of the normal planning application process, and was not consultation on screening. Given the ASSI designation and impending declaration of the SAC, it is inconceivable that other competent authorities would not be consulted at the Regulation 9 screening stage to help inform the Department's determination. The planning section of the Department is not the competent authority with the scientific grounding to make such serious environmental judgements in isolation. The subsequent planning consultation responses from NIEA, Loughs Agency and Rivers Agency, all of which raise the potential for likely significant adverse effects, sufficient to fail an Article 6 Assessment, clearly indicate that the Department got this original screening decision very wrong, and as such erred in law.

Paragraph 13

13 In this paragraph Mr Brown states that the Department *"re-consulted"* with NIEA Natural Heritage based on Rivers Agency's consultation response of 14 January 2010. This creates the impression that the Department had previously engaged with this competent authority. Indeed, Mr Brown has sought to rely on *"previous engagement with other statutory bodies"* as justification for the original negative EIA screening decision. However, this is in direct contradiction to Mr Keith Finegan's affidavit, paragraph 13, where he confirms that *"NIEA Natural Heritage was first consulted by Planning Service on this application on 25 February 2010."* It is also in direct contradiction to a letter dated 6 October 2011 to RFA from a Ms Sandra Close, Head of the Development Management Team, NIEA Natural Heritage [Exhibit DB1 Tab 1], where she clearly states that *"NIEA was first consulted on 1 March 2010 and our response of 23 March 2010 state concerns with regard to the potential impact of the SAC."*

14 This would suggest that:

a) NIEA Natural Heritage was not one of the *"statutory bodies"* which Mr Brown claims to have been *"previously engaged"* with and which informed the negative EIA screening in 2008; and

b) the Department was not re-consulting with NIEA Natural Heritage as part of the planning application process, as Mr Brown's paragraph 13 states, but was only getting round to consulting with NIEA, some 20 months after it validated retrospective planning application A/2008/0408/F. That the Department apparently did not consult with NIEA Natural Heritage immediately on validation of the application would suggest that at that time it either did not consider it necessary, or did not know that it was required, to do so. Again, such actions would suggest that the Department was unaware of the ASSI and SAC designations, or the potential significance of the effects, when it negatively EIA screened this retrospective development.

15 The fact that NIEA Natural Heritage responded to the Department on 23 March 2010 [AB1 Tab 9][GQ1 Tab 8] with such serious concerns including, *"the potential for serious water pollution to occur"* and that this development *"would have failed the Article 6 Assessment"*, is evidence of the serious environmental concerns it had in regard to the likely significant effects of this retrospective development. It is also irrefutable evidence of the Department's failure to properly screen this retrospective planning application as EIA Development and exposes the inaccuracy of its claim that *"previous engagement"* with other competent authorities helped inform its unilateral negative EIA determination.

Paragraph 14

16 Mr Brown, when referring to NIEA Natural Heritage's consultation response misleadingly refers to the *"potential risk of pollution to the river."* However, what NIEA actually stated was *"the potential for **serious** water pollution to occur from the site"* [AB1 Tab 9][GQ1 Tab 8]. Mr Brown's omission of the word "serious" and his failure to refer to the fact that NIEA also advised that the development would fail an Article 6 Assessment can either be interpreted as an attempt to downplay the significance of likely effects on the River Faughan ASSI / SAC, or an indication of the Northern Area Planning Office's continued inability to grasp the environmental significance of the environmental effects of this development, which has led it to err in law. Under the Habitats Regulations, failure of Article 6 Assessment suggests significant adverse effects, having regard to the precautionary principle, however the evidence of Mr Brown is to the effect that these same effects should not be considered significant for the purposes of EIA. As a professional town planner, I really struggle to understand how the Department can consider the environmental effects from a development to be so significant and adverse as to warrant failure of an Article 6 Assessment under the

Habitats Regulations, but not significant for the purpose of EIA. The Department's insistence that this retrospective development does not represent EIA development is made all the less credible by the fact that it subsequently recommended the retrospective development for refusal to Derry City Council in February 2011, on the grounds that it would cause harm to the ASSI/SAC, and (unsuccessfully) served enforcement notices to have this serious environmental threat from the unauthorised settlement lagoons removed.

Paragraph 15

17 It is clear that the Department's request to have the lagoons removed from the *"flood risk area"* is on the basis of the likely significant and adverse effects identified by Rivers Agency, Loughs Agency and NIEA, yet Mr Brown still maintains in his affidavit that the environmental effects as assessed by the Department in its unsigned/undated EIA determination were not considered to be significant. For the Department to argue that the environmental effects of this retrospective development for EIA purposes are not significant, when under the Habitats Regulations, that same retrospective development applied for under A/2008/0408/F, not only warranted an Appropriate Assessment, but would have failed one, strikes me as frankly perverse.

Paragraph 17

18 It is clear from this paragraph that NIEA in February 2011 were concerned that the capacity of the existing lagoons was inadequate and would need to be increased to prevent overflow and serious pollution of the ASSI/SAC. As recorded by NIEA Natural Heritage in its 23 March 2010 consultation response [AB1 Tab 9][GQ Tab 8], *"such an event has the potential to cause overflow from the lagoons onto the adjacent river bank and pollution of the River Faughan and Tributaries ASSI/cSAC"* [AB1 Tab 9]. This was reiterated on February 2011 [AB1 Tab 13]. This is reinforced by the fact that on 7 February 2011, RFA River Watchers photographed these lagoons on the verge of overflowing into the River Faughan SAC and reported this incident to NIEA [Exhibit DB1 Tab 2]. The case officer report [AB1 Tab 14], when recommending refusal of A/2008/0408/F, specifically recorded that *"NIEA Natural Heritage had concerns that there would be the potential for the lagoons to overflow during a storm event or spill on site. Such an event has the potential to cause overflow from the lagoons onto the adjacent river banks and pollution of the River Faughan and Tributaries."*

19 However, the capacity and risk of overflow from the amended proposal to create new lagoons outwith the flood plain, does not seem to have been considered in any re-evaluation of the likely effects of the amended proposal. This is despite there being a concern, first raised by the applicant's consultant in the Flood Risk Assessment (see paragraph 50 of Dr James O'Neill's affidavit) that the capacity of the new lagoons will be reduced and therefore less effective than that of the existing settlement ponds. It is inconceivable that a significant effect identified by a competent authority, and supported by actual evidence of the risk posed, should not be adequately assessed or addressed by the Department for the amended proposal. Moving the lagoons out of the flood plain does not reduce the risk of overflow as the proposed lagoons will remain at a higher level above the river, be receptacles for contaminated waste, and in the event of overflow, risk polluting the ASSI/SAC. If anything, reduced capacity increases that risk first raised by NIEA Natural Heritage on 23 March 2010 and reiterated on 7 February 2011. Being located a few metres further away from the river and out of the flood plain will afford no protection to the ASSI/SAC in the event of overflow from the new lagoons if the capacity is inadequate.

Paragraphs 18/19

20 It is clear that the Department initially sought to refuse this application for the retention of the lagoons on the basis of the significant environmental threats it posed to the River Faughan ASSI / SAC [AB1 Tab 14]. This is reiterated by the note of the meeting held on 16 March 2011 [AB1 Tab 15] which clearly states that *"…if the application had been a proposal rather than an application for retention they* [NIEA] *would have offered refusal reasons based on potential impact on the River Faughan SAC"*. However, Mr Brown would have the Court conclude that the Department did not err when it determined that the effects of this development, which would warrant refusal on environmental grounds, were not likely to be significant in EIA terms.

21 Notwithstanding the fact that this note indicates that the Department is prepared to treat retrospective development differently (and without justification), it is obvious that such a decision to refuse would only have been necessary because the likely environmental effects were considered to be significant and indeed, significantly adverse. That being the case, it is perverse for the Department to still insist that the environmental effects of this original development contained in retrospective planning application A/2008/0408/F were not likely to be significant. The Department's position is made all the more indefensible in that it did not actually identify any likely environmental effects in the EIA screenings it seeks to rely on.

22 As a professional planner I accept that judgement on EIA determinations is to be exercised by planning authorities focusing on the circumstances of the particular case and that planning authorities have a degree of freedom in appraising whether or not a particular project must be made subject to an assessment. However I do not accept that this allows for what can only be described as a wholly inadequate approach to the initial negative EIA screening on A/2008/0408/F, which has led to a manifest error of assessment. This is clearly exposed by the subsequent and various consultation responses from competent authorities, such as NIEA, Loughs Agency and Rivers Agency. The fact that the Department considered itself able to assess the significance of effects on behalf of these bodies demonstrates that its approach was fundamentally flawed. The Department has not sought to explain why the EIA determination remains unsigned and undated, which planning officers were responsible for this initial negative EIA screening, or what qualified them to take decisions which were not informed by the views of the competent authorities. None of this provides me with any assurance that the degree of freedom accorded to decision-makers as part of the screening process was exercised reasonably or correctly.

23 From the subsequent consultation responses from competent authorities, and the Department's subsequent actions in response to those comments, it is clear that the retrospective development applied for in planning application A/2008/0408/F, at the time, represented unauthorised EIA development and as the Department appears to have invited the planning application [see Mr Brown's affidavit – paragraph 39(a)], would have required the submission of an Environmental Statement. Given the ASSI and cSAC designations and subsequent comments from consultees, serious questions have to be raised over why the Department did not consider it necessary to take the views of competent authorities before it determined that the likely effects would not be significant. It is clear from the subsequent consultation responses of NIEA, Loughs Agency and Rivers Agency as part of the normal planning process, that had they been consulted under Regulation 9, their answers would have pointed to significant and adverse effects being likely.

Paragraph 20

24 Mr Brown again refers to the consultation process which he ultimately uses to justify the negative EIA screening carried out on 25 June 2012. It is important to draw the distinction between re-consultation as part of the normal planning application process and consultation to allow the Department to fulfil the requirements of Regulation 9 of the EIA Regulations 1999, particularly as the Department is seeking to rely on the planning application consultation process with Rivers Agency and NIEA Natural

Heritage to inform its revised negative EIA screening carried out on 25 June 2012 on the amendment. The processes are different in that in the latter, competent authorities, when consulted, are being specifically asked if they consider the environmental effects of the project to be significant, within their field of expertise. As already established, this was not done with either the original unsigned / undated EIA determination, or the revised screening carried on 25 June 2012 for A/2008/0408/F. As a result no competent authority was ever specifically asked if it considered the likely environmental effects of the development to be significant for EIA purposes.

25 Below, by way of example, is an extract from a consultation sent out by the Department to competent authorities on 6 August 2012 in relation to a current retrospective planning application A/2011/0636/F, for the purpose of allowing it (the Department) to fulfil its obligations under Regulation 9 of the EIA Regulations 1999 (albeit that it should, of course, have been referring to Regulation 10 of the EIA Regulations 2012) [Exhibit DB1 Tab 3]:

> "The Department is currently re-assessing whether this application should be accompanied by an Environmental Statement. Accordingly, could you please re-consider if you think the proposed development is likely to have significant effects on the environment. If so, please detail what the environmental effects are likely to be in your area of expertise. Your response will inform the Department in making an EIA determination under Regulation 9 of the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 1999 on whether an Environmental Statement is required for this application."

26 Interestingly, in regard to A/2006/0043/CA – the unsuccessful enforcement case to have the lagoons removed [GQ1 Tab 9], NIEA has since been avoiding answering the question of whether the effects of the original lagoons is considered to likely be significant in terms of EIA. On 29 May 2012 RFA asked NIEA (again) *"given that NIEA has already gone on record and stated this development would fail an Article 6 Assessment; why at the time of the enforcement notice was served [did] your department … not consider the unauthorised development to fall within the definition of EIA Development as defined in the EIA regulations?"* [Exhibit DB1 Tab 4].

27 The response RFA received from Mr Bob Davidson of NIEA on 24 August 2012 [Exhibit DB1 Tab 5] stated *"NIEA, if consulted on the need for an EIA, may request information that may be submitted as part of an EIA as requested. If no ES is required under the regulations and further information is required to undertake an assessment of the environmental implications (including those on designated site) NIEA can request such*

information as part of the planning process. ***NIEA did not request an EIA in this instance"*** [my emphasis].

28 The issue NIEA is avoiding is whether it was actually asked by Planning Service if the effects were likely to be significant for the purposes of properly fulfilling the requirements of Regulation 22 of the EIA Regulations 1999 (EIA determination in relation to enforcement), before the Department served enforcement notices in May 2011. Also, if it had been asked this specific question, could it have said anything other than the likely effects would be significant, or could Planning Service have reasonably interpreted NIEA's comments to as anything other than being significant, given that it had already advised that this same development would fail an Article 6 Assessment?

29 In my opinion, the reason why NIEA is being evasive is not that it *"…did not request an EIA in this instance"*, but that it was never consulted on the likely effects before the Department made negative EIA determinations under Regulation 9 (original negative screening under EIA Regulations 1999), or under Regulation 22. Secondly, if the Department had consulted NIEA under Article 22 of the EIA Regulations 1999, and given its already stated position in relation to A/2008/0408/F that the development *"would fail an Article 6 Assessment"* [GQ1 Tab 8], it is simply not reasonable or credible that the Department could have interpreted such comment as meaning that the likely effects of these existing lagoons were not likely to be significant.

30 This is complicated further by the fact, that at the time of the service of the enforcement notices in May 2011, and for the purposes of EIA, the Department recorded on the 15 May 2011 that *"this unauthorised development does not fall within Schedule 1 or 2 of the above* [EIA Regulations 1999] *Regulations therefore an EIA is not required as part of the Deemed Application"* [Exhibit DB1 Tab 6]. This statement, which is signed by Mr Brown, the author of the Department's affidavit, seems to be saying that the development being enforced against (the unauthorised settlement lagoons) does not require EIA screening as it does not fall within Schedule 1 or 2.. . However, Mr Brown at paragraph 10 of his affidavit already confirms that the Department had already carried out a negative EIA screening in 2008 under A/2008/0408/F, and in respect of which NIEA had already advised on 23 March 2010 that this same development would *"fail an Article 6 Assessment".* I find it difficult to understand, or accept how, having previously engaged the EIA Regulations 1999, a development which the Department deems to be so unacceptable that it has to be removed by the service of an enforcement notice because to the environmental threat posed to the ASSI/SAC, no longer falls within Schedule 2 for the purpose of EIA screening. I believe this to be further evidence of the Department's confused approach to EIA.

31 I pause at this stage to emphasise that I make these points in relation to the screening determinations referred to above to respond to the explanation advanced by Mr Brown of the overall approach followed by the Department when considering development at this site. A fair assessment of that approach illustrates what I regard as consistent failures by the Department when addressing the development of the site the subject of these proceedings. These failures continued when dealing with subsequent screening issues regarding the proposed relocation of the lagoons, as I explain further below when responding to other aspects of Mr Brown's evidence.

32 In relation to the planning application consultation process, whilst the Department *"…sought the views of Rivers Agency and NIEA Natural Heritage on the proposed relocation"* of the lagoons, as stated by Mr Brown, it did not re-consult with Loughs Agency, the body responsible for the protection of inland fisheries, which had raised significant environmental concerns in its initial consultation response [JKO1 Tab 17]. Nor does it appear that it re-consulted with Roads Service, despite the fact that the earthworks generated by the amended proposal would result in the transportation of significant volumes of contaminated waste and soil from the site, with no clear indication of how this material is to be dealt with once it leaves the application site.. This is dealt with in more detail under the assessment of the decision notice and approved drawings in my consideration , under the heading - **"**Review of the planning decision and approved drawings"

Paragraph 21

33 Mr Brown points out that the further Article 6 Assessment carried out on 31 May 2011 *"concluded that significant adverse effects on the integrity of the River Faughan and Tributaries SAC are unlikely provided appropriate mitigation is adhered to."* The point Mr Brown misses here is that at the time it granted the planning approval on 13 September 2012, no mitigation had been applied, therefore the effects from the existing retrospective development already were, and still remain, not just potentially significant but also significantly adverse so as to fail an Article 6 Assessment. However, the likely effects of removing the existing contaminated lagoons also require consideration as part of any EIA screening and cannot simply be disregarded by the Department on the basis of any perceived environmental benefits from the amended scheme to relocate the lagoons outwith the flood plain [see the first affidavit Dr JK O'Neill, paragraph 31]. Failure to identify and address significant effects by way of EIA before granting a "development consent" is not permitted by the EIA Directive (Article 2.1), but this is exactly what the Department has done in this case. In other words, as presently the effects from the retrospective development are considered to be significant (and adverse), the planning process cannot and should not be used as a substitute for EIA to assess, reduce and remove those effects. Regulation 4(1) of the

EIA Regulations 1999 specifically prohibits the granting of planning permission for EIA development unless the Department has first taken into consideration environmental information in the form of an Environmental Statement. If the effects of the initial proposal are recognised by competent authorities to be significant (and adverse), it is manifestly wrong for the Department to have concluded through the EIA determination process that those same effects are not likely to be significant so as not to warrant EIA, particularly when they relate to settlement lagoons which have to be decommissioned and moved as part of the proposals . To do so is allowing those who carry out development without the benefit of planning permission to circumvent the requirements of the EIA Directive.

Paragraph 23

34 Mr Brown says that the consultation process was *"re-opened"* with Rivers Agency and NIEA Natural Heritage. However the question is why the consultation process was not *"re-opened"* with the Loughs Agency, the competent authority responsible for the safeguarding of inland fisheries; and, as mentioned above, why was Roads Service not re-consulted when it became obvious that a haul route and potentially new access on to the protected route would be needed for the removal of materials including contaminated waste, from the site? It is not clear from the planning approval how the likely earthwork requirements generated by the proposals are to be addressed, including how this material is going to be removed from the site, given that the proposed works on decommissioning of the lagoons can only be effected from a narrow opening at the south east corner of the development and immediately leaves the red line of the site into the adjoining field, over which the Department has no control as it does not form part of the planning application. This is covered in more detail below under the heading - **"**Review of the planning decision and approved drawings".

Paragraph 27

35 Mr Brown refers to the *"second EIA determination"* carried out on the 25 June 2012, which *"was based on the application as amended on the P1 dated 22 July 2011"* [AB1 Tab 20]. Amended plans seeking to relocate the lagoons and subsequently described in the P1 form mentioned were in fact received by the Department on 19 July 2011. Further, on 20 July 2011 the Department advised RFA in writing that *"the Department is of the opinion that the proposal, including the amendment, does not fall within the*

description of development that requires the submission of an environmental statement" [GQ1 Tab 11]. The second formal negative EIA determination was only carried out on 25 June 2012, eleven months after his Department had concluded that the relocation of the lagoons did not warrant an environmental statement. The Department appears to have carried out its second negative EIA screening on 25 June 2012 to fit with its conclusion of 20 July 2011 that the amended proposal did not require an environmental statement.

36 This can be illustrated by considering Exhibit JKO1 Tab 11, which is purportedly the same letter as that provided at Exhibit GQ1 Tab 11. As can be noted by comparison of the two, the former makes specific reference to the phrase *"…including the amendment…"* when the Department advises that an environmental statement was not required, whereas the latter does not contain that phrase. It is noted that both versions of the letter appear on the Department's Planning Portal Public Access and I do not believe that there was any attempt by the Department to amend the letter to remove reference to the *"the amendment"* after RFA pointed out how it had erred in law by when it determined that an environmental statement was not necessary without applying the formal EIA screening process [GQ1 Tab 11 – RFA letter dated 31 October 2011]. I suspect that the letter [JKO1 Tab 11] was an earlier draft that may have been posted in error and that following consideration, the letter was redrafted in its final form [GQ1 Tab 11]. What this does very clearly indicate, however, is that consideration was specifically given as to whether the amendment requires the submission of an environmental statement and the ongoing failure of the Department to act consistently with the requirements of the EIA regime before the flawed second screening decision in 2012.

Paragraph 28

37 The second EIA determination referred to by the Department did not take into account the fact that it was starting from the point where effects from the existing lagoons were already acknowledged as, and known to be significant and adverse. Nor did it properly consider the environmental effects that could arise from the removal of contamination and significant earth works from the flood plain adjacent to the ASSI/SAC. Nor did it establish what the potential environmental consequences of the significant earthworks would be. This will be addressed in more detail later.

38 Mr Brown's last sentence of this paragraph relies on NIEA's Article 6 Assessment conclusion *"…that the amended proposal would not have significant adverse impact on the River Faughan and Tributaries SAC and ASSI."* NIEA in fact determined that there would not be significant effects if mitigation measures were adhered to.This is

different to Mr Brown's statement in this paragraph in that without those mitigation measures, there remain significant and adverse effects. In any event the mitigation relied upon by NIEA would only be in place once the planning conditions are implemented and for reasons explained in the evidence, these conditions are inadequate to protect the SAC. Not only do the risks from this existing development remain, but the effects of implementing the proposed mitigation have not been properly assessed.

39 Further, the Department sought to rely on an Article 6 Assessment carried out in May 2011, yet the revised EIA determination was not carried out until 25 June 2012 and the decision not issued until 13 September 2012. Notwithstanding the fact that Stage 2 of a Habitats Regulation Assessment (previously referred to by the Department as an Article 6 Assessment) is only carried out if significant effects cannot be discounted, over a year had elapsed between the May 2011 Appropriate Assessment relied on by DOE Planning which was used to inform its 25 June 2012 negative EIA determination and the planning permission granted on 13 September 2012. In between that time there was a landslip from another part of the site into the River Faughan ASSI/SAC. Although the Department is now discounting the effects of this pollution incident, it did record in January 2012 that a pollution incident occurred in late 2011 and that there was a *"distinct possibility"* that further incidents would occur in the future.

40 It is worthy of note that Lee Jones, NIEA, who is the author of the Appropriate Assessment referred to by Mr Brown, is also the author of the January 2012 report to the Planning Appeals Commission (PAC) detailing the pollution incident which is now being discounted by the Department. [GQ1 Tab 12]. In his statement, which is a matter of public record, Mr Jones said *"To highlight the risk to the River Faughan and Tributaries SAC/ASSI, it should be noted that NIEA became aware of a pollution incident on 6 December 2011 in relation to the current site. Investigation by NIEA Water Management Unit concluded that this was as a result of a previous landslip onsite some time previously and that an amount of suspended solids would have been released as a result. NIEA Water Management Unit consider that a further landslip is a distinct possibility."*

41 Therefore, despite the Department being aware of a pollution incident and the real threat posed by further landslips, which in January 2012 NIEA acknowledged posed a *"risk"* to the SAC, this real effect, and the potential for future likely effects, did not feature in the second EIA determination of 25 June 2012 as part of any consideration of the cumulative effects of the development as a whole, once modified. It is accepted by NIEA that this pollution incident which took place was *"in relation to the current site"*, i.e. the Chambers concrete production plant [GQ1 Tab 11, page 193] and

occurred from the steep slope supporting the Chambers Yard located between the River and the site of the Certificate of Lawful Use or Development (CLUD) A/2007/1061/LDE as marked by the Heavy black line on approved drawing 02Rev5 and entitled "site plan". [AB1 Tab 26] Although outside the red line of the planning application and CLUD, it is clear that this slope, which is made up from landfill deposited in order to raise the level of the yard, forms an integral part of this overall industrial development. This is confirmed by the Minister in his response to Assembly Question AQW/12846/11-15, where he stated *"the majority of the business use at 91 Glenshane Road is an established use and either benefits from Planning permission or is immune from enforcement action. This includes the land between the western boundary of the of the Certificate of Lawful Development and the bank of the River Faughan*". [DB1 Tab 7] This is from where the land slip took place [DB1 Tab 8] and where a *"distinct possibility"* of further land slips is considered likely by NIEA. [GQ1 Tab 12, page 193] Why this did not feature as a consideration in the 25 June 2012 EIA determination [AB1 Tab 27], or for that matter the May 2011 HRA [KF15] is unclear and represents a serious error by the Department. Given the above, it is therefore clear that this second EIA screening is neither accurate, nor reliable in terms of its claim to have taken into account the cumulative effects of the development. This is all the more contentious, as the HRA of 31 May 2011, still concluded that significant effects on the integrity of the ASSI/SAC could not be discounted from **existing** development, unless **proposed** mitigation was adhered to. However, no mitigation has ever been considered or proposed to address the *"distinct possibility"* of future land slips from *"the current site"*. This being the case, further risk to the SAC by way of future landslips can only increase the potential and significance of the already identified likely significant effects recorded in the May 2011 Appropriate Assessment

Paragraph 30

42 In this paragraph Mr Brown sets out the process the Department followed in determining how the revised proposal received in July 2011 was considered to fall within Schedule 2, Category 5 of the EIA Regulations 2012. What he does not make clear is why it took almost a year after the amendment was received until it carried out this revised EIA screening on 25 June 2012, particularly as it advised RFA on 20 July 2011 that the amendment did *"not fall within the description of development which requires an environmental statement."*

43 After RFA pointed out on 31 October 2011 [GQ1 Tab 11 – RFA letter dated 31 October 2011] the flaws in the advice from the Department of 20 July 2011 , the Department fell silent. Whilst it refused to respond to RFA's letter, , in essence, it would appear that

it effectively carried out a retrospect EIA determination on 25 June 2012 to reflect the position it adopted on 20 July 2011.

Paragraph 32

44 Before going on to addressing each of Mr Brown's points in regard to "Characteristics of development", "Location of development" and "Characteristics of the potential impact" as contained in Schedule 3 of the EIA Regulations 1999 and 2012, it is important to attempt to establish what the Department means when it addresses each selection criteria in the 25 June 2012 EIA determination with a "N" or a "Y"? It is not abundantly clear whether it means 'No' and 'Yes' in terms of whether each criteria needed to be, and was considered, or if it means that each criteria was considered and the effects are not, or are likely to be significant? This is complicated by the fact that is possible to deduce from the EIA Determination itself and from Mr Brown's affidavit, that he may, on occasion, be applying a different approach to EIA determination than the officers who were responsible for conducting the screening, in order to better represent the Department's case.

Characteristics of development

45 For example, if the officers carrying out the EIA determination meant 'No' and 'Yes' in regard to whether these characteristics of development simply needed to be considered, then the EIA screening is fundamentally flawed in that characteristics which clearly apply such as, to name but two, the *"production of waste"* and *"pollution and nuisances"* [Schedule 3, 1(d) and (e) respectively], would then not have been taken into account. It would also mean that Mr Brown, in his affidavit, (paragraph 32) would be contradicting this position as he is clearly claiming that each of these characteristics were considered as part of the EIA screening exercise, but that the effects were not considered to be significant. Therefore, his interpretation of the "N" and "Y" must relate to the significance of the effect of that characteristic of development.

46 If Mr Brown's interpretation is the same as that of the officers carrying out the EIA determination, in that they also meant 'No' and 'Yes in relation to the significance of impact of each of the characteristics of development, then the EIA screening has identified that *"the cumulation with other development"* and *"the use of natural resources"*[Schedule 3, 1(b) and 1(c) respectively] are both deemed to have been significant [AB1 Tab 27, page 1020] However, Mr Brown in his affidavit [paragraph

32(b)] has drawn a different conclusion to those officers. For example, under *"the cumulation with other development"* he has stated, this *"was unlikely to have a significant environmental impact"*, yet the officers who answered "Y" against that characteristic would appear to be saying that, 'Yes', it was likely to have a significant environmental impact.

Location of development

47 In relation to Schedule 3 – *"Location of development",* EIA screenings are required to consider the environmental sensitivity of geographical areas likely to be affected by a development. Continuing with the theme that "N" and "Y" relate to significance of impact, it would seem that category 2c)(v), which clearly relates to areas protected under European law, is not considered by the Department to be significantly impacted upon as the officers carrying out the EIA screening have answered "N". Mr Brown in his affidavit is clear that the Department was fully aware of the SAC designation and some reference to it is made in the determination sheet. It could therefore be argued that the officers responsible for the negative EIA screening and Mr Brown are in agreement on this specific point. At this point it is worth reflecting back to the fact that the existing retrospective development of the highly contaminated lagoons, which both the negative EIA screening and Mr Brown find not likely to have significant effects on the ASSI/SAC, would in NIEA's opinion *"fail an Article 6 Assessment".* [AB1 Tab 9]

48 It does seem inconceivable that the officers carrying out the EIA screening, which included the case officer, would not have been aware of the SAC designation, thereby giving greater likelihood to the premise the "N" and "Y", in the Department's view relates to the likely significance of impact on the environmental sensitivity of the various categories identified under Schedule 3, 2 (a) to (c). However, confusingly this all seems to unravel for the Department when considering Schedule 3, 2(a) - *"the existing land use",* where Mr Brown in his affidavit (at paragraph 33(a)) implies that the existing land use, a concrete production plant, has not had significant impact on the ASSI/SAC based on the fact that *"the existing business has been operating since the 1950's with no report of significant pollution…".* However, Mr Brown presents the Court with evidence that the officers who carried out the EIA screening [AB1 Tab 27, page 1020] have answered "Y" to this category in contradiction to Mr Brown's Affidavit. If Mr Brown is right in his interpretation, then as with the *"characteristics of development*" above, the EIA screening as articulated by the three planning officers is defective. Alternatively, Mr Brown is now qualifying the significance of effects acknowledged by officers who carried out the EIA screening. Either way, there appears to be a direct contradiction between the EIA determination in relation to this element of the screening (and those raised in paragraph 46 above) and what Mr Brown is now claiming in his affidavit.

Characteristics of the potential impact

49 Mr Brown's affidavit attempts to justify why there will be no potentially significant effects in regard to the criteria set out in Schedule 3, 3(a) to (e). However, this is simply not reflected in the negative EIA determination of 25 June 2012. In the absence of such detail that would have allowed RFA to understand the Department's thinking on EIA, I note it requested answers to what were reasonable questions in its letter dated 25 July 2012 [Exhibit GQ1 Tab 11]. Instead of engaging with RFA, the Department instead advised RFA through the Area Planning Manager on the 2 August 2012 [GQ1 Tab 13] that *"the Department does not consider it appropriate to engage in extended and expansive correspondence in light of your stance as there is an appropriate route for remedy through Judicial Review."* The Department's reluctance to engage meaningfully with RFA has forced it down the route of judicial review, particularly as the Department has declined to explain how it could justify negative EIA screenings in light of the fact that the existing lagoons, which are to be decommissioned and moved, are contaminated and currently pose a risk of serious water pollution.

Specific points in relation to the criteria referred to in Mr Brown's affidavit.

Paragraph 32, point (a)

50 Schedule 3, 1(a): Here the Department took the view that the size of the development only related to the development falling within the red line of the application site. However, having already accepted that Category 13(a) of schedule 2 of the EIA Regulations 2012 applied, it would seem appropriate to take into account the size of the overall development as a whole, once modified or extended.

Paragraph 32, Point (b)

51 Schedule 3, 1(b): Mr Brown, for the purposes of EIA, is now limiting the interpretation of cumulative effects as only relating to the operations contained within the Chambers site. Notwithstanding RFA's contention that it did not even consider this element of cumulative impact correctly [GQ1 Tab 11 – RFA letter dated 25 July 2012], Mr Brown's articulation of DOE Planning's view is also at odds with the May 2011 Habitats Regulation Assessment which he claims informed the negative EIA screening, where it (the HRA) has concluded that the environmental effects of this amended proposal, when considered in combination with other plans and projects, *"…are considered likely to be significant."* [AB1 Tab 17, page 991] It is recorded in NIEA's HRA that other cumulative effects from mineral extractions at Mabouy Road, Campsie, featured as

part of the assessment, yet Mr Brown, by limiting his consideration of cumulative effects to the Chambers site, does not appear to be aware of this, or consider it relevant for EIA purposes.

Paragraph 32, Point (d)

52 Schedule 3, 1(d): both Mr Brown and the 25 June 2012 negative EIA determination considers the *"production of waste"* selection criteria not to be significant in terms of likely significant effects. However, the original 2008 unsigned and undated EIA screening did consider this to be of significance. There is no explanation in the second EIA determination to explain this deviation from the original EIA screening. Although it is not articulated in the first EIA screening, the production of waste is likely to have related to the existing settlement lagoons, and at that time the Department considered this to be a significant likely effect. These lagoons continue to operate and therefore, presently, the effects from the production of waste assessed as part of the initial EIA screening remain significant as physical circumstances are unchanged. However, it seems that this significant effect(s) is being discounted on the basis that at some stage in the future it is proposed to remove these lagoons that and therefore, their effects do not need to be taken into account for the purposes of EIA. For the Department to adopt such an approach is a direct breach of EIA requirements when the decommissioning and movement of the lagoons engages consideration of the potential effects which the Department has already regarded as significant.

53 Notwithstanding the errors and omissions of the initial 2008 unsigned and undated negative EIA screening, it was clearly correct to identify the characteristic of development (Schedule 3, 1(d), *"production of waste"* as likely to have a significant environmental effect [AB1 Tab 5, page 907]. This was subsequently confirmed by the fact that at least one lagoon is *"highly contaminated",* as recorded by NIEA in its consultation response to DOE Planning dated 16 March 2012 [Exhibit DB1 Tab 9]. The Department has not produced this important NIEA consultation response within its evidence. Although being aware that its previous EIA screening did consider the production of waste to represent a significant effect, and also being made aware in March 2012 that the site remained *"highly contaminated"*, the Department on 25 June 2012 now determined that the effect from the *"production of waste"* was no longer significant. That being the case, it would be reasonable for the 25 June 2012 EIA screening to justify why the impact from the production of waste, had gone from being significant in 2008 to not being considered significant in June 2012. This is important as the process of removing the contaminated lagoons from the flood plain, immediately adjacent to the ASSI/SAC had now become an additional environmental effect to be considered as part of the EIA screening process under *"the production of*

waste". However, there simply is no evidence contained in the 25 June 2012 negative EIA screening, to explain the Department's justification of how the production of waste went from being a significant effect in 2008, to not being significant in June 2012.

54 I consider it a reflection of the extent of the Department's failings, , that when a new and previously unconsidered likely effect (i.e. the actual process of removing contaminated waste from a flood plain immediately adjacent to an ASSI/SAC), when assessed in conjunction with an already existing significant effect (i.e. the production of waste from the functioning lagoons), cumulatively, are no longer considered to represent a significant environmental effect for the purpose of EIA.

Paragraph 32, Point (e)

55 Schedule 3, 1(e): to reiterate the point; without the proposed mitigation, the effects according to the HRAs, remain potentially significant and adverse, therefore, a negative EIA screening was inappropriate, particularly where proposed mitigation has not been properly assessed and itself could have significant effects.

Paragraph 32, Point (f) –

56 Schedule 3, 1(f) : Mr Brown states that the *"stepwise manner in which it is proposed to remove the existing lagoons and construct new lagoons will ensure that such a risk is reduced to insignificance and that no significant environmental impact is likely."* This once again reinforces the admission by Mr Brown that presently in the absence of proposed mitigation, the effects are significant . The likely effects of actually removing contaminated waste from the flood plain immediately adjacent to the ASSI/SAC has simply not been considered or assessed for the purpose of EIA. Further, any legal defects in the conditions imposed on the impugned permission will undermine any proposed mitigation and dispel the claim that all matters can be dealt through the development control process. This will be addressed later in this affidavit.

Paragraph 33, Point (a)

57 Schedule 3, 2(a) : Here the 25 June 2012 EIA screening acknowledges the impact on the environmental sensitivity of the site is of likely significance. However, in his affidavit, Mr Brown reduces likely significance, to *"relevance"*. I would contend that Mr Brown's role is to defend this EIA screening and not to seek to amend or correct it where it would better suit the Department's case.

Paragraph 33, Point (c)

58 Schedule 3, 2(c) : Mr Brown, in reference to NIEA's clear guidance, effectively ignores that in every instance the NIEA advises that there are presently significant and adverse effects which cannot be discounted.

Paragraph 34. Point (d)

59 Schedule 3, 3(d) & (e) : This only considers the perceived reduction in impact once the existing lagoons are removed from the flood plain. However, it does not assess the potential impact from the actual process of removal of *"highly contaminated"* waste so close to the ASSI/SAC. Nor does it address the risk from overflow of the proposed lagoons. Although this was a significant risk identified by NIEA for the existing lagoons, it has not been assessed for the proposed lagoons, the capacity of which appears significantly less than what is currently on site, as explained above (and in the evidence of James O'Neill). Moving the lagoons out of the flood plain will not prevent overflow if the capacity is inadequate.

Paragraph 35

60 To reiterate points made earlier in this affidavit, this EIA screening of 25 June 2012 was carried out to reflect what was a flawed conclusion of the Department on 20 July 2011, to the effect that the amendment to relocate the lagoons did not require the submission of an Environmental Statement.

Paragraph 36

61 To reiterate the point again; consultation with NIEA as part of the normal planning process is not the same as consultation to help inform an EIA determination.

62 At this point of Mr Brown's affidavit, he turns to deal with specific points raised in Mr Quinn's evidence and I now address Mr Brown's responses to specific matters raised by Mr Quinn.

Paragraph 38

63 Mr Brown considers that it was not expedient to take enforcement because the River *"…did not have the environmental designations in force today."* Notwithstanding the fact that in 1984 it saw fit to refuse further extension of the Chambers site [AB1 Tab 3],

the Department was still required to comply with the requirements of the Environmental Regulations, such as the Planning (Assessment of Environmental Effects) Regulations (Northern Ireland) 1989, and all subsequent EIA Regulations, particularly as the Derry Area Plan 2011, published in May 2000, recognised under "Policy ENV 8 – The Water Environment" [Exhibit DB1 Tab 10] that the River Faughan and other bodies of water "are important not only as valuable habitats but also as a source of drinking water supply …" [emphasis added]. This would have been known to the Department, well in advance of this publication in 2000, as it formulated the Derry Area Plan through its various stages, including public consultation, which would have stretched back into the late 1990s. Irrespective of environmental designations, any likely environmental effect on human health should also be considered as a requirement of the Assessment of Environmental Effects, and subsequently of EIA.

64 Mr Brown does not say when the Department took the decision not to *"instigate formal enforcement action".* However, what can reasonably be established from the Department's own records is that the latest phase of unauthorised expansion most likely began in 1995 when it was first reported to Planning Service by the public, and seemed to continue until at least 28 December 2006 when *"the Department sent a warning letter to Chambers and their agent seeking an immediate written assurance that there would be a cessation of the unauthorised change of use and infilling of the land and the removal of the infilled material."* [GQ1 Tab 2, paragraphs 1.1 – 1.9]. Therefore, only after that date would the Department have considered the unauthorised development to have become acceptable and taken the conscious decision not to enforce at a time when the EIA Regulations 1999 were in effect, and in the knowledge that the Derry Area Plan recognised the importance of the River Faughan through Policy ENV8 . Therefore, the Department clearly would have been aware of the environmental sensitivity of the River Faughan, irrespective of the fact that it was yet to be designated an ASSI and SAC.

65 Furthermore, in essence what Mr Brown is stating in this paragraph of his affidavit is that the Department was setting aside the Planning Appeals Commission's (PAC) decision to dismiss the Chambers planning appeal, by subsequently declining to take formal enforcement action and allowing the unauthorised development to become immune. To similar effect, Mr Brown, later at paragraph 44 of his affidavit, when referring to the PAC decision to quash the enforcement notices, states that *"the PAC, an independent body, made its decision which the Department cannot overturn."* However, in deeming it *"inappropriate"* to take enforcement action against unauthorised development, which the PAC had already established was unacceptable in principle and planning policy terms, the Department effectively overturned the Commission's decision, contrary to Mr Brown's assertion that it cannot act in such a manner.

Paragraph 39, point (a)

66 In this paragraph Mr Brown is claiming that the Department met with representatives of the business in 2007 to discuss how the *"…environmental quality of the river would be maintained having regard to the protections now afforded to the river as a candidate SAC."* The cSAC was not declared until September 2008 and the ASSI only designated in May 2008, therefore, Mr Brown's statement is incorrect.

67 In paragraph 38 as addressed above, Mr Brown claims past decisions were justified on the basis that environmental designations did not exist at that time, yet in the next paragraph 39 he claims that the Department was taking into account environmental designations that had not yet been designated. Earlier on in his affidavit at paragraph 6 he incorrectly claimed that the ASSI was designated in September 2008, when in fact it was designated on 9 May of that year. Now he is telling the Court that the cSAC was already designated and considered in the Department's deliberations on the effects of the Chambers site in 2007, a year before it was actually declared and before any retrospective planning application had been submitted. If Department was aware in 2007 that the River Faughan was to be designated a SAC at some time in the near future, yet still formulated that it was not expedient to enforce against development that would fall within Schedule 2 to the EIA Regulations 1999 and, by inference, allowed it become immune from enforcement action without screening for likely environmental effects.

Paragraph 39, point (b)

68 Whilst Mr Brown claims that *"the Department reasoned that on balance the majority of the operations both lawful and unlawful did not pose an imminent threat to the river and enforcement action was not immediately necessary",* it did not carry out any EIA determination on A/2007/1061/LDE before granting a Certificate of Lawful Use or Development; it had not consulted with competent authorities before carrying out a negative EIA screening on A/2008/0408/F, and did not heed the complaints and environmental concerns raised by the public and RFA since 1995. Irrespective of what the Department reasoned, the subsequent significant concerns of NIEA, Loughs Agency and Rivers Agency when they were first consulted as part of planning application consultation process on A/2008/0408/F clearly indicated that the Department was wrong to have assumed that this development posed no imminent threat to the River Faughan.

69 Mr Brown's statement that *"the best way forward was to seek a planning application and control the business through the imposition of planning conditions if necessary"* confirms RFA's concern at the time that the Department had made its mind up that this unauthorised development was acceptable and should be approved. However, its subsequent actions clearly demonstrate that:

a) at the time the application was validated in June 2008, the Department was not aware of the potential for significant environmental effects when it made a negative EIA screening;
b) it erred in not seeking the views of competent authorities before making that negative determination, as it subsequently had to recommend refusal of a retrospective development on the grounds of the potential significant adverse environmental impact on the ASSI/SAC;
c) the Department did not appear to have an understanding of the requirements of its own EIA Regulations 1999 as it issued enforcement notices in May 2011, seeking the removal of the settlement lagoons, which it had previously determined under A/2008/0408/F, were not likely to have significant effects on the ASSI/SAC;
d) at the time of serving the enforcement notices in May 2011, the Department had already carried out a negative EIA determination on A/2008/0408/F and was in possession of NIEA's consultation that this retrospective development would fail an Article 6 Assessment, yet it (the Department) was then maintaining that these unauthorised settlement lagoons no longer fell within Schedule 1 or 2 of the EIA Regulations 1999. . RFA had unsuccessfully attempted to have the Department disclose its EIA determination carried out under Regulation 22 of the EIA Regulations 1999, despite a request under the Environmental Information Regulations 2004 [GQ1 Tab 11 – RFA letter dated 31 October 2011 (question 12)] going unanswered. This was only made available to RFA on 17 April 2013 and is referred to as [DB1 Tab 6]

70 Mr Brown states that *"during the processing of the application it became apparent that the unauthorised settlement lagoons posed a potential risk to the river".* Although he neglects to say it, this potential risk was both significant (enough to warrant EIA) and adverse, as confirmed by other competent authorities. The purpose of EIA screening is to establish the significance of such effects, at the earliest possible stage and by Mr Brown's own statement, this significant effect was only picked up *"during the processing of the application"* and **after** the Planning Service had unilaterally carried out a negative EIA screening. By Mr Brown's own statement, this is a clear indication that this EIA screening was fundamentally flawed. As Mr Brown, in his last sentence, is actually acknowledging that the existing lagoons posed a *"danger"* to the river, it should be obvious to the Department that this should have been recognised as a likely significant effect as part of any EIA determination. As it was not and the Department

failed to address these matters, the entire EIA process in relation to this application is fatally compromised for the outset. What the Department is now seeking to do is offset this *"danger"* to the river by amendments to the application process, and side step the requirements of EIA by negating the need to consider the existing significant effects on the basis that at some stage they will be removed.

Paragraph 39 (c)

71 Mr Brown has stated in paragraph 38 that *"enforcement action is at the discretion of Planning Service and that in relation to previous unauthorised expansion of this industrial business, it would be inappropriate to instigate formal enforcement action in this instance."* This is markedly different to the approach of the Department to seek the removal of the settlement lagoons through service of enforcement notices in May 2011. Enforcement notices are served only when unauthorised development is considered to be unacceptable, as set out in Chapter 6.0 of Planning Policy Statement 9 "The enforcement of planning control" and this must be taken as the Department's recognition that this retrospective development of lagoons represented unacceptable and significant environmental threat to the ASSI/SAC. If the existing lagoons were considered so unacceptable that they needed to be removed as they would have failed an Article 6 Assessment, and are considered to be "highly contaminated", it is inconceivable that Mr Brown can continue to claim that the likely effects on the ASSI/SAC, arising from the process of decommissioning and relocating the lagoons, are not significant for the purposes of EIA. In any event the negative EIA determination undertaken by the Department on 25 June 2012 fails to record any likely effects, whatsoever. In his affidavit Dr James O'Neill demonstrates, at paragraphs 86 – 92, how the final HRA carried out by NIEA failed to consider the potential for the decommissioning of the extant lagoons to impact upon the SAC by means of localised changes in ground water composition and flow, contamination of ground water and soils. As the Department places heavy reliance on the HRA to inform its negative EIA Determination [AB1 Tab27], and the HRA has been shown to be deficient in its assessment of likely environmental effects, then it stands to reason that the negative EIA screening is also defective.

Paragraph 39 (d)

72 It is misconceived for the Department to contend that it did not allow a substantial part of the development to *"…become immune although this may have been a*

consequence if enforcement action was not taken", because *"it was never the intention of the Department to instigate formal enforcement action against a business that was deemed acceptable in principle, providing substantial employment and was not causing any environmental damage". T*he Department had already refused any further expansion of this industrial development into the Green Belt in 1984 and successfully defended that decision at planning appeal in 1985. It is all the more so as future expansion of this industrial business had already been refused planning permission by both the Department and subsequently, the Planning Appeals Commission.

Paragraph 41

73 The claim that, at some unknown time after A/2008/0408/F was submitted in mid-2008, the Department determined that the development was not likely to have significant effects and that this was *"a considered, informed and reasonable judgement",* is perverse in light of the content of that EIA screening and subsequent consultation responses from competent authorities.

Paragraph 42

74 Whilst the Department might refute the assertion that the 2008 EIA determination [AB1 Tab 5] was defective, the facts speak for themselves:

a) in response to the question "what are the likely environmental effects of the project" the Department answered *"Site drainage and settlement lagoons for the process."* This is a description of the development not identification of the likely environmental effects.
b) the Department did not consider consultation with competent authorities necessary to inform it determination as required under Regulation 9 of the EIA Regulations 1999 and Regulation 10 of the EIA Regulations 2012. Subsequently consultation responses clearly indicate that the environmental effects are significant (enough to trigger EIA) and adverse.
c) in response to the question "are the environmental effects significant", this was **not** answered.
d) the justification for why an environmental statement is not required is that *"all aspects of the application can be dealt with through the development control process."* However, where significant environmental effects are likely as per competent authorities' subsequent consultations, it is not permissible in law to rely on planning conditions as a surrogate for the EIA process. [I refer to Dr J K O'Neill's first affidavit, paragraph 30]

e) the box required to be completed as to why an EIA determination was necessary has **not** been completed.
f) the EIA determination is unsigned and undated. As previously referred to at paragraph 10 there is doubt as to when this EIA screening appeared on the application file.
g) many of the criteria as per schedule 3 are blank giving doubt as to whether they were considered at all.

75 As noted at paragraph 64 above, RFA would contend that the Department improperly concluded on 20 July 2011, outside formal EIA procedures, that the amendment to relocate the lagoons *"did not fall within the description of development that requires the submission of an environmental statement."* The actual second EIA determination carried out on 25 June 2012 has, therefore, been drafted to retro-fit the flawed decision on 20 July 2011. As with the original EIA determination, the second screening failed to identify any environmental effects but rather concluded that there were *"no environmental issues with the proposed siting of the lagoons which are an improvement on the current situation".* In essence this EIA screening has not identified any likely significant effects as was required in this case by the EIA screening process. RFA's detailed criticism of this EIA screening is contained in our letter dated 25 July 2012 [GQ1 Tab 11].

Paragraph 43

76 What Mr Brown seems to be saying here is whilst the Department did not consider the environmental effects of the existing lagoons to represent a risk of *"significant harm to the SAC"*, it nonetheless, felt they posed enough of a significant risk as to warrant their removal. In any event, at the time the Department served the enforcement notices it would have been in possession of NIEA's opinion that this retrospective development represented a risk of *"serious water pollution"* and would have *"failed an Article 6 Assessment.*" Mr Brown is asking the Court to accept that failing an Article 6 Assessment" because of risk of *"serious water pollution*" to an ASSI/SAC, which would warrant formal enforcement action as a result, is not a significant effect that would warrant EIA

Paragraph 44

77 See my comments above re paragraph 658. Mr Brown is inconsistent in that he stresses in relation to the PAC decision to quash the enforcement notice, that the

Department cannot overturn a PAC decision, yet this is exactly what his Department did when it did not consider it expedient to take formal enforcement action against the unauthorised expansion of this industrial operation after the PAC dismissed the appeal for an extension to the site in 1985.

Paragraph 45

78 See my comments regarding paragraph 39(d).

Paragraph 46

79 Mr Quinn of RFA explains at paragraph 18 of his affidavit that the Department effectively carried out an EIA screening outside of the formal EIA procedures, when it advised RFA on 20 July 2011 that the amendment did not fall within the description of development that would require the submission of an environmental statement. It only undertook a formal second EIA screening a year later on 25 June 2012 which matched the determination it expressed to RFA on 20 July 2011.

Paragraph 47

80 Contrary to Mr Brown's claim, the existing bund, part of which slipped into the SAC in November 2011, did **not** form part of the CLUD as it is located on the steep slope down to the river, clearly outside the western boundary line of the CLUD A/2007/1061/LDE[AB1 Tab 26, drawing 02Rev5]. How Mr Brown can claim otherwise is inexplicable as RFA specifically drew this fact to the attention of his Department in our letter of 31 October 2011 [GQ1 Tab 7]. In response to an Assembly question posed on 12 June 2012 (AQW 12846/11-15) (previously mentioned at paragraph 41), the Minister confirmed that the site of the bund where the land slip occurred, lies between the western boundary of the CLUD and the River Faughan and specifically states that *"although the developer did not include this land in the application for the Certificate of Lawful Development, the Department is satisfied, having regard to the planning history of the site and aerial photographs available, that any illegal land fill had been deposited prior to May 1992 and is therefore immune from enforcement action."* [Exhibit DB1 Tab 7]

81 Although Mr Brown states that NIEA has since confirmed that no adverse pollution of the river resulted from the slippage, he does not provide proof of this. His claim is also

contrary to the evidence presented to the PAC by NIEA in January 2012 as detailed at paragraph 38 above. Also Mr Brown fails to take into account the *"distinct possibility"* of further land slips as recorded by NIEA and which represents a clear and potentially significant threat to the ASSI/SAC and would have needed to have been considered as a cumulative effect, as described above [GQ1 Tab 12, page 193][Exhibit DB1 Tab 8 (photos)].

Paragraph 49

82 Whilst the Department maintains that it considered all potential effects of the proposed development, it did not record any on the EIA determinations. Also, as PPS2, paragraph 40 makes clear *"the environmental assessment required under the Habitats Regulations does not correspond to an environmental assessment as required by the Planning (Assessment of Environmental Effects) Regulations 1989",* and the subsequent EIA Regulations [Exhibit DB1 Tab 11]. Therefore, for the Department to rely on HRA, which in itself identified significant effects, as a basis for justifying a negative EIA screening is questionable.

Paragraph 50

83 Although Mr Brown claims that the relocation of the lagoons is not the only justification for justifying a negative EIA screening, there is no evidence on the EIA determination to support his claim.

Paragraph 52

84 Again the Department is mistakenly relying on "significant adverse impact" as the test for EIA as opposed to likely significant effects. Furthermore, it is unclear what information informed the original negative EIA screening as the first HRA was not carried out until 2 years after that determination.

Paragraph 54

85 This does not address how the Department came to advise the Minister that a second EIA determination was not required and that the Minister, as a result subsequently gave an answer to the Assembly which was inconsistent with the later advice issued by the Department [GQ1 Tab 4, page 94]. It could only be that up until the time it advised the Minister that a revised EIA determination was not necessary, the Department was

itself mistakenly of the opinion that a second EIA screening was not required This is further supported by the point made at paragraph 30 outlining the Department's confused approach to EIA screening before service of enforcement notices, where it appears to claiming that the unauthorised settlement lagoons did not fall within either Schedule 1 or 2 of the EIA Regulations 1999. The Department has failed to clarify this point.

Review of the planning decision and approved drawings

Paragraph 56

86 Mr Brown considers approved drawing 07Rev3 [AB1 Tab 26] to represent adequate control to ensure phased construction and lagoon management. However, this was clearly not the view of NIEA in its consultation dated 8 August 2012 [Exhibit DB1 Tab 12] when, only a month before the approval issued, it asked for a planning condition to be imposed seeking a *"lagoon management and maintenance plan relating to the existing lagoons and implementation of new lagoons shall be submitted in writing and approved by the Department prior to implementation*". This was in order "*to prevent pollution to the River Faughan and Tributaries SAC/ASSI."* This clearly suggests that NIEA did not consider the level of detail provided on drawing 07Rev3 in regard to lagoon management to be adequate to discount pollution or harm to the ASSI/SAC, i.e. that it could not be certain at that time, that the mitigation being proposed would adequately safeguard the river. Perhaps more importantly, what it also indicates is that NIEA, by seeking to impose a condition, considered it appropriate to grant a planning consent in the absence of adequate environmental information, which it was seeking to be submitted in writing and approved at a later date.

87 This approach ignores the requirements of the EIA and Habitats Directives on the Department's part, as both Directives specifically forbid the granting of development consent before all environmental considerations have been taken into account (Article 2(1) and Article 6(3) respectively).

88 This approach is a further example of the flawed process adopted by the Department, including the earlier error of concluding that the effects of the existing lagoons would not be significant for EIA purposes, when the same development would fail an HRA according to the advice of NIEA. It is clear from the European Commission's

publication "Assessment of plans and projects significantly affecting Natura 2000 sites", that there is an expectation that the requirement for Article 6 Assessment will likely trigger EIA [Exhibit DB1 Tab 13]. Chapter 2.4 of that document specifically states that *"MN2000 makes clear that where a project is likely to have significant effects on a Natura 2000 site it is also likely that both an Article 6 assessment and an EIA, in accordance with Directives85/337/EEC and97/11/EC, will be necessary"*.

89 Returning to the planning application, as it so happened, the Department declined to include NIEA's proposed planning condition for additional environmental information and issued the planning approval without it [AB1 Tab 1]. Nor did it seek to address NIEA concerns by getting the required information from the applicant before approving A/2008/0408/F. This indicates that it went ahead and granted a development consent without all the necessary environmental information required to ensure that no harm would be caused to the ASSI/SAC.

90 The Department may consider that it had enough environmental information on the drawings and planning conditions to protect the ASSI/SAC. However, the following paragraphs below will demonstrated why this is not the case.

Paragraph 57 -

91 Contrary to Mr Brown's denial, it is abundantly clear that existing lagoon 1, which NIEA records as being *"highly contaminated"* [DB1 Tab 10] runs under where the new lagoons 1 and 2 must first be constructed. This is clearly demonstrated on the attached drawing and photographs [Exhibit DB1 Tab 14] and from the aerial photograph provided at [GQ1 Tab 1]. First, this photograph clearly shows the top lagoon extending back towards the eastern boundary of the site into the area where the proposed lagoons are to be constructed. To further demonstrate this point, the coloured drawing at DB1 Tab 15, which has been prepared by simply overlaying the existing "site plan" provided by the applicant on 9 March 2011 as part of planning application A/2008/0408/F and approved drawing 02Rev5 [AB1 Tab 26], shows the extent of the works covered by planning condition 01 outlined in red and the extent of the exiting top, "highly contaminated" lagoon, coloured green, which is covered by planning condition 02.

92 This demonstrates that a significant degree of overlap occurs and that the eastern portion of this top lagoon will be affected by the construction of the new lagoons. The photographs provided as part of [DB1 Tab 14] clearly indicate that this narrower eastern part of the top lagoon retains waste water and appears contaminated. These new lagoons cannot be built without affecting this highly contaminated top lagoon, yet

planning condition 02 does not allow for its decontamination / decommissioning until after the new lagoons are built as per planning condition 01. For the Department to claim that *"there is no overlap"* is erroneous, thereby putting the River Faughan SAC at unnecessary risk of environmental harm should attempts be made to carry out the works proposed. I consider this to be a reflection of the inadequacy of the assessments carried out by the Department on this planning application.

93 As a consequence, conditions 01 and 02 cannot be sequentially implemented as was intended by the Department and, therefore, fail the required tests of precision, enforceability and reasonableness. Whilst Mr Brown considers that *"it would be illogical to permit decommissioning of the existing lagoons before the proposed lagoons are complete*", building over the highly contaminated top lagoon while it is still in operation poses a serious environmental threat which the Department has failed to address.

Paragraphs 58 and 59 –

94 103. Once constructed, the siting of the new lagoons will also restrict any subsequent decommissioning works to a narrow gap in the south east corner of the application site [Exhibit DB1 Tab 15]. Planning condition 02 requires that *"The existing lagoons shall be decommissioned and removed from the site…"* It goes on to state *"The decommissioning and removal of existing spoil shall be effected from the Glenshane Road side of the development towards the River Faughan and no heavy plant works or spoil storage shall take place within 10 metres of the banks of the River Faughan."* Again these parts of the condition are imprecise in that it is simply not clear how decommissioning can take place *"from the Glenshane Road side"* with such significant differences in ground levels between the existing yard and the limited accessibility to the site after the new lagoons are constructed, as marked by the heavy black arrow on [DB1 Tab 15]. The hatched red line marks phase 1 construction of the new lagoons and the green line provides a diagrammatic indication of the extent of decommissioning required after the construction of the new lagoons. The solid blue line marks the *"existing sheough"* draining directly to the river as identified on approved drawing 02Rev5 [AB1 Tab 26] and the hatched blue line indicates the proposed *"infiltration trench"* to take run off from the adjoining field. Furthermore, it is acknowledged in the condition that there may be the need for *"spoil storage"*, but it is just not clear where any spoil remaining after the contents of the interior of the lagoons is disposed of to a licensed waste site, will be removed to.

95 The reason for this condition is *"to prevent potential sediment loading of the adjacent River Faughan and Tributaries SAC/ASSI which may impact on the fish cycle particularly at the most sensitive time of year."* It is clear that when contaminated waste from the interior of the lagoons is disposed of to a licensed waste disposal site (condition 04),

there will remain significant contaminated spoil from the external structures of the lagoons. As it is to be removed from the application site to comply with condition 02, it can only be stored outside of that site, yet this aspect of the process does not feature in the planning application. Nor is it adequately controlled by condition 02 whichonly allows for the removal of the existing settlement lagoons after the construction of the new lagoons, but fails to recognise that this will impact on the , "highly contaminated" lagoon which partly lies underneath the proposed site of the new lagoons. In addition, condition 02 only informs the applicant where he is to remove this waste *from* (the site), but does not inform the applicant where he is to remove it *to*. This is of significant concern as the condition fails to achieve what it set out to do - protect the ASSI/SAC and could result in the movement of this contaminated waste in the applicant's field immediately east of the application site and siting above and in close proximity to the ASSI/SAC, where it could give rise to significant harm.

96 The construction of the new lagoons themselves will require the removal of significant volumes of earth (up to 7 metres deep) and it is not clear where this earth is to be stored or disposed of. There is no requirement to remove it off site and it cannot be used in proposed re-grading if ground levels are to be restored to existing levels, as this will require removal, rather than infilling of materials.

97 Condition 03 requires development to be carried out in accordance with the stamped approved drawings O7 Rev3 received on 30 September 2011 [AB1 Tab 26]. This drawing specifically states *"side slopes of lagoons moved out of historic flood plain",* but it does not say to where. As previously stated above, unlike the contaminated waste contained in the interior of the lagoons and covered by condition 04, there is no planning requirement to remove the contamination making up the sides of the lagoons to a licenced waste disposal site. There is only a requirement as per condition 02 to remove it from the site; this site being the red line of the application. When applying these planning conditions, the Department was already alert to the fact that contaminated waste not only was contained within the settlement lagoons, but also formed the exterior walls of these lagoons. This is confirmed by the Northern Area Planning Office's statement of evidence to the PAC in defence of the Department's serving of enforcement notices to have these lagoons removed [GQ1 Tab 2]. Paragraphs 1.10 and 1.14 of this statement of evidence confirm that contamination was not confined to the interior of the lagoons, yet only the disposal of the contamination removed from the interior of these lagoons is controlled by planning condition 04 and will be removed to a licensed waste disposal site. As there is no requirement for the remaining contaminated waste from the walls of the lagoons to be disposed of in the same manner, it could well be intended that it is to be used to re-grade the adjoining land, which is outside the red line of the application site, but within the ownership of the applicant. This is simply not clear.

98 The facts of the matter are that the Department does not know, has neglected to consider, and has failed to control how this element of the contaminated waste (and the surplus spoil remaining following the construction of the new lagoons) is to be dealt with when it leaves the red line of the site. The potential environmental effects of this are likely to be compounded by the fact that the proposed new lagoons works shown on drawing 02Rev5 [AB1 Tab 26], to be carried out before any decommissioning works approved by the Department can take place, include a new "infiltration trench" along the south eastern boundary of the new lagoons. This trench, the purpose of which is to accommodate drainage from the steeply sloping field to the east, is to be connected to an "existing sheough" which empties directly into the ASSI/SAC. Once the contamination from the sides of the lagoons is removed from the site to comply with condition 02, there is nothing by way of planning condition to stop the applicant storing or spreading it in this field and any run off as a result of heavy rain could make its way directly into the ASSI/SAC by way of the trench approved by the Department as part of this development.

99 Once this *"existing spoil"* is taken through the small gap in the south eastern side of the site, (the only area from where it can be removed) it will be considered to have been removed from the site as it will be outside the red line of the application, thereby fulfilling the requirement of the condition 02. However, at that stage it will remain in the adjoining field close to the ASSI/SAC and with no indication of how, or by what route it will be transported, where it will be stored, or if it is intended to re-grade the existing field to accommodate this surplus spoil. Although the fact is that much of this spoil from the sides of the lagoons will be contaminated and the risk of damage to the integrity of the SAC cannot be discounted, the Department has failed to control where this contaminated waste goes after it leaves the application site and has made no provision for it to be disposed of. Why it is differentiating between contaminated waste remaining within the interior of the lagoons, and contamination that has been removed from the interior of the lagoons, is not explained or assessed for the effects this could have on the SAC.

100 Approved drawing 02Rev5 [AB1 Tab 26] states *"sediment extracted from the interior of the lagoons must not be used in proposed regrading works…".* Condition 04 of the planning approval only forbids the use of contaminated waste removed from the interior of the lagoons to be used in re-grading works. The former would suggest that the applicant intends to use surplus materials in regrading works and the latter suggests that the Department find this acceptable. However, there is no indication where these re-grading might take place, and as the construction of the new lagoons and removal of the existing will result in a significant net surplus of spoil material, as is evident from the approved cross-sections on drawing 07Rev3, it is simply not feasible for this proposed regrading to take place within the confines of the application site boundary. Nor is there

any requirement to dispose of that surplus spoil, or indication if it is intended to store it in the adjoining field where it could pose a significant risk to the ASSI/SAC. It is obvious from the proposed works to facilitate Phase 1 – the construction of the new lagoons, that this will require major excavation up to depths of over 7 metres. Given what has been permitted to take place on this site over many years of illegal land filling and unauthorised industrial expansion, there has been no environmental assessment as to the extent of potential contamination before the Department approved this significant ground disturbance, excavation and construction works in close proximity to the ASSI/SAC.

101 Also, stamped approved drawing 02Rev5 received 30 September 2011 [AB1 Tab 26] identifies an *"existing sheough"* running along the southern boundary of the site which drains directly into the ASSI/SAC. It further proposes to construct a new *"infiltration trench"* immediately east of and bounding the new settlement lagoons to intercept overland flow from the adjoining steep field to prevent it flowing into the new lagoons which will be at a lower level. This new infiltration trench is to be connected into this existing sheough, where it will redirect run-off from the adjoining field directly into the River Faughan ASSI/SAC. In order for this new trench to prevent run off into the new lagoons it will have to be constructed and in operation at phase 1 of the development as required by Condition 01 and will therefore be in place before decommissioning works begin. Its construction does not figure in the construction methodology included on approved drawing 07 Rev3 and none of the planning conditions are sufficiently precise to control the phasing of this infiltration trench construction, yet the risk for pollution and suspended solids to make their way into the ASSI/SAC could be very significant if this trench is constructed prior to decommissioning of the existing lagoons , which what appears to be proposed.

102 This is all the more concerning as all decommissioning works for the removal of contaminated waste will have to cross over this infiltration trench, yet the Department has failed to establish control over the phasing of this trench. To compound the risk from pollution, initial decommissioning of the contaminated settlement lagoons will have to take place in very close proximity to the existing sheough on the southern boundary of the site (as identified on approved drawing 02Rev5) and all contaminated waste and spoil will have to be transported within metres of this sheough, which drains directly into the ASSI/SAC. Again, the construction and decommissioning methodology makes no provision for the protection of this sheough from the risk of pollution at this point. Of greater concern is that the Department has made no environmental assessment of this real and significant risk to the ASSI/SAC and appears to have failed to pick up this preferential pathway for pollution, either as an effect as part of the EIA screening or HRA process.

103 Although condition 04 requires to have the contamination from the interior of the lagoons disposed of to a licenced waste disposal site, once this contamination leaves the

application site in the lower part of the adjoining field there is no indication as to how it will be transported up this steep field, or how it would access onto the A6 road, a Protected Route. Nor is there presently any scope for it to access back into the existing site as this is at a different, and by and large, significantly higher level to the existing field. In all likelihood this would require the construction of a haul route as the existing track used to access the settlement lagoons will no longer exist - the new settlement lagoons are to be built over it, removing the only access to the yard before the decommissioning of the settlement lagoons can take place. However, this did not form part of the planning application or assessment of environmental effects. Furthermore, it appears Roads Service was not re-consulted when the amendment was received, therefore, its comments and condition 06 would be based on use of the existing access to Glenshane Road, and would not have accounted for the increase in heavy traffic movements as a result of having to remove contamination from the adjoining field, outside of the red line of the application site. The Department simply does not know, and has failed to exercise any control over what route the removal of contaminated waste will take across the adjoining steep field to the Glenshane Road, once it leaves the south east corner of the application site, close to the ASSI/SAC.

104 All of the above effects, which could be significant, should rightly have been considered under EIA. However, the Department has taken a different view and in its EIA screening, justifies why an environmental statement was not required on the basis that *"all aspects of the application can be dealt with through the development control process".* However, it is now clear that it has failed even to consider all aspects of the development as part of the normal development control process, leaving planning conditions 1,2,3,4 and 6 unreasonable and unworkable

Paragraph 60 –

105 Mr Brown states that *"if the planning permission is set aside the Department has no mechanism under its powers to secure removal of the existing lagoons from the flood plain."* The Department had already compromised its ability to secure the removal of the existing lagoons:

a) by failing to enforce when it first became aware of their existence over a decade ago;
b) by adopting a position where it considers it acceptable to effectively grant a "development consent" by taking a conscious decision not to enforce against unauthorised development, that at the very least would have required EIA screening under the EIA Regulations, thereby setting aside the requirements of the EIA Directive;
c) by adopting a position where it considers that unauthorised EIA development can be allowed to become immune from enforcement action;

d) by making fundamental errors in the service of enforcement notices leading the PAC to nullify one and quash the other;
e) by failing to properly recognise the serious environmental threats posed by this unauthorised development;
f) by imposing planning conditions that could either not be implemented, or because of their imprecision, could lead to serious environmental harm to the ASSI/SAC, if implemented;
g) by providing the applicant with strong ground to appeal A/2008/0408/F because of the inadequacies of the planning conditions;
h) By failing to recognise that this operation represented unauthorised EIA Development and subsequently failing to properly assess the environmental effects of the decomissioning and decontamination of the site of the existing lagoons as previously set out in this affidavit and that of Dr O'Neill.

106 Whilst the Department might consider that it has no mechanism to remove the existing lagoons if the decision is quashed, it fails to recognise, that its failure to require EIA and its subsequent errors in the formulation and application of planning conditions could have serious implications for the ASSI/SAC if this development was permitted to go ahead on the basis of a manifestly flawed planning approval. Whatever the Department's view on not having any other mechanism to have this serious environmental threat removed from adjacent the ASSI/SAC, it must realise that, by its actions and decisions, it has created this situation.

Paragraph 69 –

107 Mr Brown states "the Department also recognised that the new lagoons' location could also have environmental impacts…" This is in direct contrast to the 25 June 2012 negative EIA screening which actually states *"No environmental issues with the proposed siting of the lagoons…"* Mr Brown again appears to provide contradictory evidence as regards the Department's view of how it should have considered the likely environmental effects.

Affidavit of Mr Keith Finegan, Northern Ireland Environment Agency

108 Although Dr James O'Neill will deal in detail with the affidavit of Mr Finegan, as a professional planner, I comment where I consider that Mr Finegan has missed the point or failed to grasp the environmental concerns being raised by Gerry Quinn of

RFA. As with my rebuttal of Mr Brown's affidavit, my comments should be read in conjunction with Mr Finegan's paragraphs as listed below.

109 Mr Finegan, acknowledges that *"…if the settlement lagoons were not in place before the designation, the proposal would not pass an HRA."* This is a recognition of the significant and adverse effects this unauthorised development could have on the ASSI/SAC. The fact is that significant contamination remains and needs to be removed from the flood plain, but has not been properly assessed in terms of EIA. It should also be remembered that this is the same development that Mr Brown in his affidavit (paragraph 39), considered *"enforcement action was not immediately necessary."* Whilst it is now clear that the Department belatedly finds the settlement lagoons an unacceptable and significant threat to the ASSI/SAC, it was its inaction and inability to grasp the seriousness of the threat which has given rise to this unacceptable situation.

110 Also in this paragraph, Mr Finegan makes clear that part of the consideration of HRA is the *"…risk of unplanned events."* I would consider that such an unplanned event would be a land slip from the site similar to that which occurred in November 2011 [DB1 Tab 11], particularly as in January 2012 NIEA acknowledged the *"distinct possibility"* of what could be described as further *"unplanned events".* However, neither the EIA determination carried out on 25 June 2012, nor the HRA carried out on 1 August 2012 [KF19] take any account of risk from unplanned events, even though the November 2011 land slip demonstrate that this risk remains.

Paragraph 18

111 For the reasons set out above, I would contend that Mr Finegan's claim that the planning conditions are *"legally enforceable"* is misguided and incorrect.

Paragraph 20

112 Mr Finegan refers to the review of the HRA carried out in August 2012 [KF19]. The first point to note here is that this HRA report is dated 1 August 2012, and on 2 August 2012 the author Mr Lee Jones, Mr Finegan and Mr Bob Davidson of the Department of the Environment all agreed that the development was *"likely to have a significant effect on an N2K site". However,* only 5 weeks earlier on 25 June 2012, the same Department determined that the environmental effects were not likely to be significant for the purpose of EIA [AB1 Tab 27, page 1017 and 1018].

Paragraph 22

113 Mr Finegan claims that following reports of a pollution incident and inspections by Water Management Unit and Natural Heritage Compliance Team, *"…no evidence of damage to the site selection features of the River Faughan and Tributaries SAC/ASSI were identified during either of these investigations."* However, this is at odds with what was reported to the PAC by NIEA in January 2012 [GQ1 Tab12, page 193]. Also, like the HRA, it also conveniently ignores the threat from future pollution incidents which are considered to be a *"distinct possibility"*. There is also a question over whether NIEA Natural Heritage Compliance Team actually inspected the correct location following the report of the incident, casting doubt over the credibility of Mr Finegan's statement. In an Assembly Question AQW/12845/11-15 tabled on 12 June 2012, specifically in relation to the November 2011 landslip, the Minister mistakenly addressed the issue of the settlement lagoons [DB1 Tab 16]. However, the landslip, although associated with the Chambers Concrete Production Plant, is unrelated to the settlement lagoons and outside the site of application A/2008/0408/F as previously expalined at paragraph 41.

Paragraph 23

114 For the reasons set out in this affidavit,, I consider that the planning conditions *"…imposed via NIEA's HRA..."* are inadequate. In addition, I would again draw attention to the HRA [KF19, page 842] where under the section describing mitigation, *"maintenance works relating to the existing lagoons during the period after granting of planning permission and commissioning of new lagoons must be submitted in writing and approved by the department prior to implementation."* The reason for this mitigation, as contained in NIEA's consultation response [DB1 Tab 12] which the Department did not provide to the Court, was *"to prevent pollution of the adjacent River Faughan and Tributaries SAC/ASSI."* Notwithstanding that the Department did not impose this condition requested by NIEA, the fact that it was requested indicates that NIEA was not in possession of all environmental information at the time to adequately inform its HRA and safeguard the River Faughan SAC

Paragraph 24

115 Unlike Mr Finegan, I see no contradiction between Mr Quinn's letters [KF21 (pages 853-857) & KF22 (page 858)] and the action being taken through this judicial review. Whilst it is clear that RFA has been persistently calling for this significant threat to the SAC to be removed, the Department's inadequate approach to EIA screening of A/2007/1061/LDE and A/2008/0408/F, and its subsequent inability and careless attempts to control all aspects of this development through the development control process has resulted in the imposition of planning conditions that are neither precise, implementable, nor enforceable. Any attempt to implement this development as

approved by the Department, could in itself, pose a serious risk of environmental harm to the River Faughan SAC. That DOE Planning and NIEA still fail to realise their serious failings in relation to EIA and actually assessment of the planning application is worrying.

SAVE AND EXCEPTING AS where otherwise appears, I depose to the foregoing from facts within my own knowledge, information and belief.

_____

SWORN at

this day of

before me, a Solicitor empowered

to administer oaths

_____

This affidavit is filed on behalf of the Applicant by its solicitors, Tughans, Marlborough House, 30 Victoria Street, Belfast, BT1 3GG.

2012 No.

Affidavit of Dean Blackwood (1st)

Dated: 3 May 2013

For Applicant

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY RIVER FAUGHAN ANGLERS LIMITED FOR JUDICIAL REVIEW

IN THE MATTER OF A DECISION BY THE DEPARTMENT OF THE ENVIRONMENT FOR NORTHERN IRELAND (PLANNING SERVICE) ON 13TH SEPTEMBER 2012 TO GRANT PLANNING PERMISSION

EXHIBIT DB1

_____ _____

Solicitor Deponent

2012 No.

Affidavit of Dean Blackwood (1st)

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1. Letter from Ms Sandra Close, NIEA dated 6 October 2011.
2. Photographs taken on 7 February 2011 showing the lagoons on verge of overflow.
3. Example of DOE Planning consulting with competent authorities to inform its EIA determination dated 6 August 2012.
4. Letter from RFA to NIEA dated 29 May 2012.
5. Response from NIEA dated 24 August 2012 to RFA letter included at Tab 4 above.
6. Planning Service's assessment of offending development dated 13 May 2011 under Regulation 22 of the EIA Regulations 1999, before the service of enforcement notices.
7. Northern Ireland Assembly Question AQW/12846/11-15 tabled on 12 June 2012
8. Two photographs of the land slip from the Chambers site, the first taken in November 2011 shortly after the slip occurred, and the second taken in April 2012.
9. NIEA consultation response dated 16 March 2012

10. Extract from the Derry Area Plan 2011 – Policy ENV8
11. Extract from Planning Policy statement 2 : Planning and Nature Conservation, published in June 1997.
12. NIEA Natural Heritage consultation response to DOE Planning dated 8 August 2012.
13. Extract from "Assessment of plans and projects significantly affecting Natura 2000 sites" published November 2001.
14. Photographs showing the top "highly contaminated" lagoon and drawing clearly indicating how it partially lies under the proposed lagoons.
15. Drawing showing how the proposed sequencing of development restricts access to and from the application site for removal of contaminated waste.
16. Northern Ireland Assembly Question AQW/12845/11-15 tabled on 12 June 2012