Word copy of Party's answers to the Committee's questions, with the Communicant's responses in red.

Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by the United Kingdom in connection with provisions of the convention in relation to settlement lagoons adjacent to the River Faughan (ACCC/C/2013/90)

General background

1) Please provide a chronological outline of the planning history of the W & J Chambers site (i.e. the activity/site at issue in this case), including any enforcement action taken against the developer/operator and the outcome of any such enforcement action. Please specifically indicate:

(a) All planning permissions granted for this site over the years since the development/activity first began operating on this particular site;
(b) The precise nature of the activities carried out on this site over the years;
(c) Any current (live) enforcement activity concerning this site.

A chronology is set out to the best of the Department's knowledge at Annex A.

Refer to RFA comments at Annex A. See also comments and link below to W&J Chambers website for list of activities.

On-site operations
Taken from the W&J Chambers website:

"the business was initially established to produce concrete blocks, but in recent years has expanded into some new product areas: specifically aggregates, sand, ready to use mortar, pre-mixed concrete and pre-packed sand/gravel.

W & J Chambers can now offer a wider range of building and concrete products to an expanding customer base. These new product areas have provided a boost to the company's sales levels."

http://www.wjchambers.com

At a time, the business also stored fertilizers on site – see paragraph 1.2 of RFA TAB3.

The settlement lagoons are used to capture water-run-off from the site and are known to contain water with very high pH levels up to 11.6 as recorded by Northern Ireland Environment Agency. Water drains from the lagoons to a sump on the river bank (again constructed without planning permission or environmental assessment) where it is pumped back to the site for re-use. NIEA records a concern that these lagoons are at risk of over-spilling into the River Faughan and Tributaries SAC, as reported in its initial Appropriate Assessment dated 9 March 2010, page 1 (which RFA expects the Party will provide in its awaited attachments). Here, the environment agency states:

"The existing levels appear dangerously close to the top of the embankment and represent a serious risk of water pollution to the River Faughan and Tributaries ASSI / SAC…"

RFA believes that the erosion / structural collapses of the lagoon walls recorded on 1 September 2017 (refer to Annexes 5a – 5d of the Communicant's submission uploaded to ACCC/C/2013/90 on 28 November 2017) was likely a result of overflows / over-spills during a storm event on 22 August 2017.

2) Please provide details of any landfilling, authorised and/or unauthorised, which has taken place on the site either recently or in the past.

RFA alleged that application A/2008/0408/F was to regularise unauthorised landfilling amongst other matters. The Party concerned wishes to emphasise that this allegation is simply incorrect. The description of the application was for "*Retention of extension to site office, extension to vehicle maintenance shed and improved wash our facilities. Relocation of settlement lagoons, site drainage works. Associated landscape and environmental improvements*". The application did not seek development consent retrospectively for alleged, historic landfilling operations.

RFA comment: the development to be retained under A/2008/0408/F, as described by the party, was constructed on top of significant landfilling, of unknown composition. This landfilling represents an inherent part of the overall development. Like the unauthorised development to be regularised by A/2008/0408/F, the landfilling was undertaken without planning permission or Environmental Impact Assessment. It is an integral part and essential to facilitate the works approved under the impugned planning permission. The landfilling was necessary in order to raise the level of the land to expand the yard on which the buildings, wash-out facilities were constructed. This matter was specifically raised with the Department by RFA on 31 October 2011 – points 1, 2, 5, 6, 15 and, particularly 16 of RFA's letter (contained in Annex V, TAB 36 of the Party's submission uploaded to ACCC/C/2013/90 on 27 November 2015. See also TAB 39, Rivers Agency letter, points 5 and 14; TAB 40).

If the Party's claim that it did not authorise / regularise illegal landfilling is to be accepted, this indicates that it approved built development on top of what it would have known to be an unauthorised and unregulated landfill site, which was still operating at the end of 2006. Evidence of this is provided below in RFA TAB3.

Notwithstanding other regulatory requirements which were not complied with, landfilling is clearly classified as operational development requiring planning permission under what was then Article 11 of the Planning (Northern Ireland) Order 1991. Here at Article 11(1) the meaning of development is set out as:

"…the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of a material change in the use of any buildings or other land."

In claiming that planning permission A/2008/0408/F did not authorise the landfilling, the Committee is asked to note that the Party remains silent on the legal status of the extensive landfilling which was carried out in conjunction with the other unauthorised developments subsequently applied for under A/2008/0408/F and, before that, declared lawful on under Certificate of Lawful Use or Development (CLUD) A/2007/1061/LDE issued on 5 March 2008 (see the Party's Annex A). Yet the Department and Party will be aware that the grant of planning permission can implicitly authorise other development directly associated with it, as in the case of an appeal against a planning enforcement notice to cease a clay pigeon shoot, at Coagh, County Tyrone, Northern Ireland in 1999 - **RFA TAB1**.

Having listened and considered significant legal arguments, the Planning Appeals Commission (PAC) reached the conclusion that the granting of full planning permission for a small shelter and toilet block (buildings), implicitly and effectively gave unfettered planning permission to an unapproved clay pigeon shoot that was operating on that land. The Department accepted this position and decision of the PAC as lawful. If it had disagreed, it could have exercised its right to judicially review the PAC. Instead, in light of the PAC decision, the Department subsequently moved to discontinue the clay pigeon shooting operation it inadvertently and implicitly gave planning permission to. In granting permission to A/2008/0408/F the Department implicitly, but effectively granted permission to the unauthorised landfilling on which it was built. Indeed, it would be impossible for the Department to taken enforcement action against unauthorised landfilling which lay directly beneath and provided the base on which A/2008/0408/F was built and subsequently granted permission.

The Department's argument is further flawed in that it neglects to address the implications of not having taken enforcement action against the extensive unauthorised landfilling witnessed at this site over a prolonged period without enforcement action. Indeed, the Party appears to confirm that it was prepared to turn a blind eye to this unauthorised landfilling, without ever having considered the likely significance of the environmental effects generally, and on the River Faughan and Tributaries Special Area of Conservation (SAC), specifically.

If the Committee accepts that this complaint engages Article 6 of the Aarhus Convention, then the failure of the Department to enforce against this unauthorised development / landfilling, essentially amounts to a development consent and should have been preceded by Environmental Impact Assessment. That the Department was aware of the extent of unauthorised and unregulated landfilling taking place at this site, but did not initiate formal enforcement action against it, amounts to a breach of its obligations under Article 2(1) the EIA Directive. This is clearly set out in the case of Aardagh Glass Ltd-v-Chester City Council [2009] EWHC 745 (Admin), paragraphs 103-107 and 110. **RFA TAB2.**

The Party's position that it has not regularised extensive unauthorised landfill at the site, yet has failed to regulate it, or appraise itself of the likely environmental impacts, is simply untenable in the context of Article 2(1) of the EIA Directive and Articles 6(2) and 6(3) of the Habitats Directive.

The Department can advise that it previously dealt with planning permission application number A/1980/0813 for filling of land to provide extension to existing brickworks on the W & J Chambers site at Glenshane Road, Drumahoe. This "*filling of land*" was authorised by virtue of the planning permission granted on 19 June 1981.

RFA comment: first, this paragraph confirms that the Party accepts that landfilling requires planning permission. Yet in its preceding paragraph it seeks to divorce planning permission A/2008/0408/F from the landfilling which formed an integral part of the development, both in terms of planning and the requirement to consider the likely significant environmental effects. The Committee will note that no consideration of the effects of the landfilling, cumulatively, with the development contained in A/2008/0408/F have been addressed in either of the negative EIA determinations on which the Party relies as evidence to support its position that RFA's complaint does not engage Article 6 of the Convention.

Two further points are relevant here in regard to the Party's comments on A/1980/0813.

(i) This planning permission was granted on 19 June 1981 prior to the implementation of Directive 85/337/EEC.

(ii) It does not grant permission to the extensive unauthorised landfilling which took place between 1995 and 2006/2007, which extends beyond the boundaries of the permissions granted on 19 June 1980 and 15 December 1983 (A/1983/0516), and refused on 11 September 1984 (A/1984/0451).

A subsequent enforcement case was commenced by the Department in 2006 (planning reference A/2006/0043CA) against W & J Chambers for the site at 91 Glenshane Road, Drumahoe in respect of "unauthorised change of use, infilling and lagoons".

This case eventually led to the serving of two enforcement notices (ENs) in May 2011 – one operational and one for a material change of use (MCOU) (EN/A/2006/0043/CA/1 and EN/A/2006/0043/CA/2). These ENs were subsequently appealed to the planning appeals commission (PAC) (references PAC 2011/E017 and PAC 2011/E018). At appeal the MCOU EN was found to be a nullity and the operational notice was legally immune from enforcement.

RFA comment: It was the Department's neglectful approach to enforcement at this site which led to the PAC declaring one enforcement notice a "nullity" and quashing the other notice due to it not being served within the statutory time frames. This was despite RFA raising concern in August 2008 that the Department's inaction would lead to immunity and the Department's unwillingness to give an assurance that it would not allow the settlement lagoons to become immune from enforcement action (refer to the Party's Annex V, TABs 11 and 12, respectively - uploaded to ACCC/C/2013/90 on 27 November 2015).

Otherwise, the Department has been unable to find any record within its planning files of the occurrence of the historic landfilling activities alleged by the Communicant to have taken place at the Chambers site.

RFA Comment: The full extent of the Department's neglect at this site is masked by its poor record keeping. The planning enforcement case was first opened in December 1995 after reports of unauthorised landfilling taking place at the site – **RFA TAB3**, paragraphs 1.1 and 1.2. The unauthorised lagoons became operational circa 2002 and were immediately reported to the Department by myself. Given the serious nature of the breaches of planning control the Department deemed it appropriate for the enforcement case (opened in 2002 not 2006) to be managed by a specialist team in Planning Headquarters, Belfast. For reasons that remain unclear, in 2005 the decision was taken to close the enforcement case and pass it to the local planning authority for action. However, only the latter happened. This inter-departmental *"breakdown in communications"* is set out in the Party's Annex V, TAB 7, uploaded to ACCC/C/2013/90 on 27 November 2015.

In relation to recent activity associated with the Chambers site Derry City & Strabane District Council is the local planning authority for the district within which the site is situated. On foot of recent engagement, the council has indicated that no permission has been granted for landfill since 1st April 2015 nor is it aware of any unauthorised landfilling having taken place since that date.

RFA Comment: After its failure to enforce against the lagoons in a timely manner, as far as the Department was concerned it would not be pursuing the matter of enforcement any further – see **RFA TAB4**.

Regarding the unauthorised / authorised landfilling, it is noted that the Party's inquiry has been restricted to the planning files. However, at the time this complaint was submitted in 2013, the planning authority and the environmental regulator, the Northern Ireland Environment Agency (NIEA), were two organisations within the same Department; namely, the Department of the Environment. Since 2003, NIEA has had statutory responsibility for controlling and regulating landfill. Therefore, it is somewhat surprising that the Party has not sought to elicit NIEA's position regarding what the Department has presided over at this site.

The position is as follows. Significant landfilling has taken place at this site over many decades, perhaps in excess of forty years. In planning terms, some of this has been authorised under planning permission A/1980/0813 granted in 1981 (pre-EIA Directive), as referred to in the Party's planning history at Annex A. Official records suggest that unauthorised landfilling appears to have re-commenced in 1995 (post-EIA Directive) and was still continuing eleven years later, in 2006 / 2007 – see RFA TAB3, paragraphs 1.2, 1.9 and 1.14.

Prior to 2003, the regulation of landfilling was the responsibility of the then Derry City Council. In June 2017, Derry City and Strabane District Council, confirmed that its predecessor did not grant any site licenses to W&J Chambers for landfilling up to 2003 **RFA TAB5**. Therefore, it can be ascertained that any landfilling taking place at the site between 1995 and 2003 was unauthorised and unregulated. It is worth pausing at this point to refer to the photograph in Annex 1 of RFA's submission uploaded to ACCC/C/2013/90 on 16 February 2017 as a reminder of the extent of this unauthorised landfilling, as recorded by the Department on 23 May 2000. This landfilling was still continuing in December 2006, when the Department considered it appropriate to issue a warning letter to the operator seeking its assurance it would cease dumping and remove the landfill – refer to RFA TAB3,

paragraph 1.9. Six months later and the Department now recorded that the contaminated material removed from the interior of the lagoons was being dumped on site – RFA TAB3, paragraph 1.14. In 2008 and 2012, RFA recorded photographic evidence of contaminated materials from the interior of the lagoons having been dumped on the site – refer to Communicant's previous submission uploaded to ACCC/C/2013/90 on 16 February 2017, pages 8-9 and Annexes 2, 3 and 4 (photographs). This indicates ongoing unauthorised dumping of contaminated materials on site which has never been addressed by the regulator.

After 2003, responsibility for regulating landfilling fell to the Department's NIEA under the Landfill Regulations (Northern Ireland) 2003. These regulations are designed to control the deposition of waste, requiring various suitability, environmental and stability criteria to be met, as well as containment engineering implemented under (lining) and over (capping) a waste mass. As recorded by the Department in RFA TAB3, unauthorised landfilling was continuing in December 2006, under the remit of the Department. Yet on 19 June 2017, NIEA confirmed that:

"No Site Waste Management Licence has been granted at this site for infilling." (**RFA TAB5, Annex** 1, point 3).

What this establishes is that the extensive landfilling (and dumping of contaminated waste from the lagoons) at this site has been conducted outside of the Department's landfill and waste management regulations. That the Party emphasises to the Committee that A/2008/0408/F *"…did not seek development consent retrospectively for alleged, historic landfilling operations"* further indicates that it was also allowed to take place outside of planning control, including environmental impact assessment. On 5 March 2018 (yesterday) the Chief Executive of NIEA has appointed a senior official to meet with RFA and investigate our ongoing concerns / complaint of the extent of unregulated landfilling which the Department presided over at this site and its obfuscation around the legal status of this dumping.

3) Please provide all documentation concerning the appropriate assessment for the purposes of the EU Habitats Directive undertaken by the competent authorities in connection with planning application A/2008/0408/F.

Matters related to Appropriate Assessment were addressed in the affidavits of Keith Finegan and Malachy McCarron, and to a lesser extent the affidavits of Adrian Brown, and the exhibits thereto as filed in the proceedings before the High Court. Copies are provided herewith at Annexes B - D. These should be read in conjunction with the Judge's comments as set out at paragraphs 15 – 27, 30 – 40, 42 – 45, 51 – 53, 72 – 75, 80 – 84, 86 - 92, 96, 98, and 109 – 120 of the judgment, attached for convenience again at Annex E.

RFA comment: the Committee will note the persistent and significant adverse environmental effects raised by NIEA in the Appropriate Assessments regarding the retention of the existing lagoons, as first applied for under A/2008/0408/F. Unfortunately, I am unable to direct the Committee to the precise references to these documents as these have not yet been made available by the Party. Nonetheless, these unacceptable adverse

effects recorded in the first Appropriate Assessment dated 9 March 2010 include the *"potential for serious water pollution"; "possible risk from erosion from the adjacent River Faughan during a flood event…"* that could *"…potentially compromise the structural integrity of the embankment leaving it unstable and liable to collapse with the release of polluted water directly into the River Faughan…"; "…existing water levels appear dangerously close to the top of the embankment and represent a serious risk of water pollution to the River Faughan and Tributaries ASSI / SAC…"*, etc.

The Committee is asked to note the stark contrast between the recurring concerns of significant adverse effects being raised by the NIEA (part of the Department of the Environment) and the negative (unsigned and undated) EIA determination carried out by the planning authority (part of the same Department of the Environment) for A/2008/0408/F. It is simply incomprehensible for the Party to contend that Article 6 of the Convention is not engaged, or that the unsigned / undated negative EIA screening decision is robust and correct in its determination that EIA was not required.

The final Appropriate Assessment dated 1 August 2012, relating to the revised proposal to construct new lagoons, have them operational and then, and only then, decommission and remove the existing lagoons, was predicated on mistaken professional assessment of there being no overlap between these existing and new lagoons. Indeed, the mitigation measures set out on page 12 of that Appropriate Assessment recognise the need for a planning condition to be imposed regarding maintenance works relating to the existing lagoons to *"reduce the risk of potential catastrophic collapse."* No such planning condition was imposed. Furthermore, in not realising that the proposed new lagoons required excavation (refer to page 7 of Appropriate Assessment) down through the most *"highly contaminated"* existing lagoon (refer to Annex 2 of Communicant's submission unloaded to ACCC/C/2013/90 on 28 November 2017), there was every likelihood of catastrophic collapse had the operator attempted to implement the permission and destabilise the upper, highly contaminated lagoon. Indeed, the Committee will note that the walls of this *"highly contaminated"* lagoon were subject to structural collapses in August 2017 (refer to Annexes 5a – 5d of the Communicant's submission unloaded to ACCC/C/2013/90 on 28 November 2017) reinforcing RFA's concern for the integrity of the SAC.

The Committee will further note on page 13 under the heading *"Explain how the measures will avoid the adverse effects on the integrity of the site"*, the Appropriate Assessment makes clear the requirement that *"the new lagoons are constructed and operational prior to the commencement of decommissioning and will prevent a significant pollution risk."* The Committee will further note at paragraph 57 of Mr Brown's affidavit dated 26 March 2013 that this senior planning officer was of the (mistaken) view that there was no overlap between the existing and proposed lagoons. Here, he states:

"The Department does not accept that conditions 1 and 2 are incompatible. Although the proposed lagoons are in close proximity to the existing lagoons there is no overlap and the site sections as indicated on approved drawing 07 Rev 3 demonstrates that the new lagoons can be constructed without interference with the existing lagoons. Furthermore, it would be illogical to permit the decommissioning of the existing lagoons before the proposed lagoons

are completed. In such a scenario there would be no facility to capture run-off of contaminants which would otherwise flow directly into the river."

However, this is simply impossible given the site of the new lagoons 1 and 2 lie beneath the existing *"highly contaminated"* lagoon (refer to Annex 2 – overlap map – of the Communicant's submission uploaded to ACCC/C/2013/90 on 28 November 2017). There can be no doubt that the Department is fully aware of this serious error of professional assessment, hence the persistent refusal of public officials to explain exactly how this Appropriate Assessment and planning conditions 1 and 2 of A/2008/0408/F could be implemented in the *"sensitive and stepwise"* manner required to safeguard the integrity of the SAC.

4) Is there a legal requirement in Northern Ireland, either pursuant to legislation or established administrative practice, to carry out a public participation procedure in relation to appropriate assessments undertaken for the purposes of the EU Habitats Directive?

The Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995, as amended, transpose the provisions of the EU Habitats Directive. The EU Directive does not include any mandatory requirement to carry out a public participation procedure in relation to appropriate assessments undertaken for the purposes of the Directive. No mandatory legislative or administrative procedures to consult the public on the appropriate assessment have been introduced in Northern Ireland. There remains a discretion to consult the public in any given case. In the present case, the Communicant was able to make representations on the potential impact of the proposed development on nature conservation interests. The appropriate assessment is taken into account by the planning authority and only after having ascertained that it will not adversely affect the integrity of the site, can the planning authority agree to the development and impose appropriate mitigation measures in the form of planning conditions. A development proposal which could adversely affect the integrity of a protected site may only be permitted in exceptional circumstances as laid down in the relevant statutory provisions.

RFA comment: the fundamental errors of professional assessment render the Appropriate Assessment inaccurate and unsafe and, if implemented, would have risked serious environmental harm to the SAC.

More generally, planning application A/2008/0408/F was subject to the legislative public participation requirements specified in the Planning (Northern Ireland) Order 1991 ("the 1991 Order"). Article 21 of the 1991 Order sets out the public participation arrangements for all planning applications. These included:

(a) Publication of a notice of the planning application in at least one newspaper circulating in the local area; and
(b) Publication of a notice of the planning application on a website maintained by the Department for the purpose of advertising planning applications.

In addition to the above legislative requirements, there were administrative procedures in place which required the Department to serve notice of the application to any identified occupier on neighbouring land.

RFA Comment: this is an accurate statement of process.

5) Please provide the detailed reasoning underpinning the two negative screening decisions in connection with planning application A/2008/0408/F (the first screening decision is undated and the second screening decision is dated 25 June 2012). In particular, please specify how the selection criteria were taken into account in arriving at the negative decisions.

This matter was addressed in the affidavits of Adrian Brown and the exhibits thereto as filed in the proceedings before the High Court. Copies are provided herewith at Annex D.

These should be read in conjunction with the Judge's comments as set out at paragraphs 13, 14, 41, 46 – 50, 53, 61 – 71, 76 – 79, 97, 102 – 108, and 114 - 120 of the judgment, attached for convenience again at Annex E.

RFA Comment: the Committee is asked to note the following points.

(i) At the times the two negative EIA determinations were conducted and, importantly, at the time A/2008/0408/F was granted permission on 13 September 2012, no detailed reasoning existed or was conducted regarding how the Schedule 3 selection criteria were taken into account, other than what is contained on the last two pages of each of the negative EIA screening decisions.

(ii) Failure to take adequate account of the selection criteria set out in Schedule 3 of the EIA Regulations (and Annex III of the EIA Directive) was a specific ground for legal challenge (refer to the judgment at the Party's Annex E, page 3, paragraph [4](c) iv), which the judge dismissed; erroneously so in RFA's view.

(iii) Prior to the grant of permission, the absence of detailed reasoning regarding how Schedule 3 criteria informed the negative EIA determination dated 25 June 2012 was specifically raised by RFA with the Department on 25 July 2012. This included a request for a copy of that detailed reasoning as it was the view of RFA that what existed on that screening decision in terms of "Y", "N" and "N/A" simply made no sense (refer to Annex V, TAB 57 of the Party's submission uploaded to ACCC/C/2013/90 on 27 November 2015).

(iv) The Department's short response to point (iii) above dated 2 August 2012 effectively confirmed that the extent of its assessment of schedule 3 criteria was as contained on the negative EIA Determination dated 25 June 2012 and that, in its opinion, this was sufficient to satisfy the requirements of the EIA Regulations (refer to Annex V, TAB 58 of the Party's submission uploaded to ACCC/C/2013/90 on 27 November 2015). It may be of interest for the Committee to note that the level of assessment of Schedule 3 criteria displayed in this case (or more

accurately the lack of it), is common established practice for the thousands of negative EIA determinations conducted by the Department between 1999 and 2013, and beyond. Evidence suggests this institutionalised bad planning practice has transferred to the new local planning authorities set up on 1 April 2015. By way of example, an inadequate negative EIA determination conducted in 2006 for a housing development (planning ref: A/2006/0269/F) hydrologically linked to the SAC by a significant tributary of the Faughan (the site is bounded by the Burngibbagh river which flows into the Faughan a few hundred metres away), was relied on by Derry City and Strabane District Council to approve 85 dwellings on 28 March 2017. See links below to negative EIA screening decision and decision notice, respectively.

http://epicdocs.planningni.gov.uk/ViewDocument.aspx?guid=c07540cc-f6fa-4280-966c-8556e582c75c

http://epicdocs.planningni.gov.uk/ViewDocument.aspx?guid=d21ff7fc-b392-4fc5-baf5-58aa0d65804b

The Committee will note the wholly inadequate assessment of Schedule 3 criteria on which the council based its negative EIA screening decision for A/2006/0269/F, approved on 28 March 2017. Furthermore, on 23 November 2017, the planning authority is insistent that *"Council is satisfied with its approach in relation to this matter."* Since permission was granted on 28 March 2017, work has commenced and this development has become a serial polluter of the River Faughan and Tributaries SAC. This is currently the subject of a formal complaint.

(v) Whilst the Party contends that the detailed reasoning underpinning the two negative EIA determinations is addressed in the affidavits of Adrian Brown, this reasoning is conducted six months **after** the permission was granted and has been retro-fitted to rationalise the inadequate EIA screening decisions, *ex post facto*.

(vi) The Party refers the Committee to specific paragraphs of the judgment, but excludes paragraphs 86 – 95, where the judge deals with Mr Brown's after-the-event explanation of how the Schedule 3 selection criteria were taken into consideration, despite no detailed reasoning being recorded on either of the negative screening decisions. For completeness RFA's affidavit countering Mr Brown's claims is attached at **RFA TAB6**.

(vii) There is a lawful requirement that the schedule 3 criteria are considered in the context of negative EIA screenings **before** granting development consent if the EIA Directive is not to be violated. Clearly this was not done in the case of A/2008/0408/F.

(viii) Mr Brown was not involved in the negative screening decision carried out on the 25 June 2012 – **RFA TAB7** – but was capable of telling a judge what was in the minds of those officers when they recorded "Y", "N" and "N/A" against the Schedule 3 criteria. Yet the simple exercise RFA invited the Committee to conduct (refer to the opening statement of the Communicant, paragraphs 19 and 20, uploaded to ACCC/C/2013/90 on 12 December 2017) demonstrates that the manner in which those officers conducted their assessment proves they, themselves, did not understand the EIA determination process or the Schedule 3 criteria which informed their negative screening decision. Please note, this un-redacted page (RFA TAB7) of the negative EIA screening is provided in support of this claim. However, to comply with Data Protection requirements I would request that the signatures are redacted before uploading to ACCC/C/2013/90).

Article 6

6) Please provide details of the specific arrangements for public participation that applied in respect of planning application A/2008/0408/F. Please also provide copies of all documentation published in relation to the public participation arrangements, including the notification(s) given to the public of this particular planning application (e.g. any notices published in the local newspapers) and the information provided to the public explaining how they were entitled to participate.

As set out above planning application A/2008/0408/F was subject to the legislative public participation requirements specified in the Planning (Northern Ireland) Order 1991 ("the 1991 Order"). Article 21 of the 1991 Order sets out the public participation arrangements for all planning applications. These included:

(a) Publication of a notice of the planning application in at least one newspaper circulating in the local area; and
(b) Publication of a notice of the planning application on a website maintained by the Department for the purpose of advertising planning applications.

In addition to the above legislative requirements, there were administrative procedures in place which required the Department to serve notice of the application to any identified occupier on neighbouring land. See further the reply to question 7 below.

Compliance with these requirements was not in issue in the proceedings. The Department has not retained copies of the relevant advertisements but attached at Annex G hereto a copy of a screenshot confirming initial advertisement of the application in two newspaper circulating in the local area on 17 and 18 June 2008 and advertisement of the revised proposal in the same two newspapers on 9 and 10 August 2011.

Although as stated above copies of the original newspaper advertisements for the application which is the subject of this complaint are not currently available a sample

advertisement relating to the same district council area is attached for information at Annex H.

RFA comment: there is no reason to believe these procedures were not followed.

7) Please explain the difference between the public participation arrangements for planning applications that are subject to environmental impact assessment and for planning applications not subject to environmental impact assessment.

This response is set within the context of planning application A/2008/0408/F which was received on 21 May 2008.
At the time the planning application was received, planning applications were processed in line with the legislative requirements specified in the Planning (Northern Ireland) Order 1991 ("the 1991 Order"). Article 21 of the 1991 Order sets out the public participation arrangements for all planning applications. These included:

(a) Publication of a notice of the planning application in at least one newspaper circulating in the local area; and
(b) Publication of a notice of the planning application on a website maintained by the Department for the purpose of advertising planning applications.

In line with Article 21 of the 1991 Order, before determining a planning application the Department was required to wait 14 days from the date the notice was first published in the newspaper or on the website, whichever was the later.
In addition to the above legislative requirements, there were administrative procedures in place which required the Department to serve notice of the application to any identified occupier on neighbouring land. This formerly administrative procedure has now been made a legislative requirement within the new two-tier planning system as set out in Article 8 of the Planning (General Development Procedure) Order (Northern Ireland) 2015.
Planning applications which required an environmental impact assessment were also subject to the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 1999, as amended1 ("the 1999 EIA Regulations").

The legislative requirements for public participation arrangements for any such planning applications were set out in regulations 12 and 15 of the Regulations and required:

1 By the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2008. SR 2008 No. 17
(a) Publication of a notice of the planning application in at least one newspaper circulating in the local area; and
(b) Publication of a notice of the planning application on a website maintained by the Department for the purpose of advertising planning applications.

The notice was to include:

(a) A statement that the planning application was accompanied by an environmental statement; and

(b) An address in the local area where a copy of the environmental statement could be obtained from the developer, so long as stocks last, and the charge, if any, of obtaining a copy.

The legislation also required the notice be sent to any person who may be affected by or have an interest in the planning application and who would be unlikely to become aware of the application through advertisement in the local newspapers or on the Department's website.

Regulation 12 of the 1999 EIA Regulations required a period of four weeks, from the date the notice was first published, to allow the public to make representations.

Under regulation 15 any further information provided by the developer on the environmental statement, or any evidence to verify the information in the environmental statement, was also required to be publicised.

The 1999 EIA Regulations prevailing at the time of submission of the application have been revoked and replaced. The current EIA regulations extant in Northern Ireland are the Planning (Environmental Impact Assessment) Regulations (NI) 2017 (S.R.2017 No.83) which transpose the requirements of the EIA amendment directive 2014/52/EU as they apply to the planning system.

RFA Comment: our organisation raises no issue with the procedures set out above by the Party. Rather, the Committee will be aware, RFA's concern is that because of the Department's inadequate inquiry into the likelihood of significant effects, as displayed by the two inadequate EIA screening decisions, EIA was erroneously ruled out. In so doing, RFA was denied the opportunity to participate in the EIA decision-making process and our river has been put at unnecessary and serious risk of harm as a result of bad environmental decision-making and an inadequate system capable of delivering environmental justice.

Article 9

8) Please provide an account of the current state of the jurisprudence in your legal system concerning the application of the *Wednesbury* test in the specific context of a challenge to a negative screening determination. In your reply, please focus on:

(a) The intensity of review undertaken by the courts when examining challenges to negative screening decisions;

(b) How the *Wednesbury* test was applied by the High Court in the communicant's judicial review proceedings.

The screening procedure for environmental impact assessment is the creation of successive editions of the EU Directive on the assessment of effects of certain public and private projects on the environment ('the EIAD'). The version of the EIAD in force at the date of the negative screening determination made in July 2012 was Directive 2011/92/EU. The 1999 EIA Regulations transposed the EIAD into Northern Ireland law. There is no issue as to effective transposition.

Recital (21) of Directive 2011/92/EU recites the requirements of article 9(2) and (4) of the Aarhus Convention. Article 11 of Directive 2011/92/EU gave effect to those requirements (Article 9 of the Aarhus Convention had previously been given effect through article 10A of Directive 85/337/EEC which was inserted by the EC Public Participation Directive).
At the dates, therefore, of the hearing before Treacy J and the decision of the High Court, the EIAD gave effect to the requirement that the public concerned should have access to a review procedure before a court of law (etc) to challenge the substantive or procedural decisions subject to the public participation provisions of the Aarhus Convention.

At paragraphs [88]-[92] of its judgment in Case C-508/03 *Commission v United Kingdom* [2006] QB 764, the CJEU stated that the test required by EU law for the purpose of judicial review of a negative screening determination is "manifest error of assessment". That test is substantially the same as the *Wednesbury* test.

In UK law as it applies both to Northern Ireland, the established principles are as follows:

(1) The assessment of the significance of an impact or impacts of a project on the environment is essentially a fact-finding exercise which requires the exercise of judgment on the issues of 'likelihood' and 'significance': see *Bowen-West v Secretary of State* [2012] EWCA Civ 321 at [40].

(2) Because the word 'significant' does not lay down a precise legal test but requires the exercise of judgment on planning issues and consistency in the exercise of that judgment in different cases, the function is one that the Courts are ill-equipped to judge for themselves: see *Jones v Mansfield DC* [EWCA] Civ 1408 at [17] and [61].

(3) The decision in *R (Loader) v Secretary of State* [2012] EWCA Civ 869 recognises that the test for determining whether a development is EIA development is meant to be one which is intended to be used quickly by people with the requisite experience and qualifications. The EU Guidance also recognizes that as the basis for the screening process.

(4) A proportionality test is inappropriate since the screening determination is essentially a fact-finding exercise rather than the exercise of a discretion which is susceptible to review on the basis of assessing whether the response to a particular aim is proportionate: *Bowen-West v Secretary of State* [2012] EWCA Civ 321 at [40].

(5) The test required by EU law is "manifest error of assessment" which is a test substantially the same as the *Wednesbury* test: see Case C-508/03 *Commission v United Kingdom* (above).

(6) *Wednesbury* should be seen as but one of the established heads of public law review: see *R(Evans) v Secretary of State* [2013] EWCA Civ 114 at [37].

(7) The case law (including Case C-508/03 *Commission v United Kingdom* (above)) was reviewed by the Court of Appeal in *R(Evans) v Secretary of State* [2013] EWCA Civ 114 at [32]-[43]. The Court considered the Aarhus Convention as part of that review: see [42].

These principles were correctly stated and applied by Treacy J in the present case: see paragraph [78] of the Judgment.
In summary, both the CJEU and the UK courts have confirmed that the appropriate basis upon which a negative screening decision falls to be considered by way of judicial review founds upon the *Wednesbury* principle. A proportionality test is inappropriate. The *Wednesbury* principle provides the flexibility to review the underlying legality and rationality of a screening decision on the facts of each individual case. Given the established position as outlined above, it is respectfully submitted that there is no proper basis upon which the Communicant may invoke the Committee's assistance in challenging the deployment of the *Wednesbury* principle.

RFA comment: At paragraph 78 of the judgment, Treacy J sets out the principles governing EIA screening decisions. However, contrary to the Party's contention, evidence indicates that the judge did not apply those principles to either of the negative EIA screening decisions. A simple comparison between what those principles require and the actual negative screening decisions illuminates this point. By way of example:

At paragraph 78(b) the judges accepts that *"…the decision maker must have regard to the precautionary principle and to the degree of uncertainty, as to the environmental impact, at the date of the* [screening] *decision."* The unsigned / undated negative screening is devoid of any such consideration. The degree of certainty subsequently expressed by NIEA that the development **would** give rise to adverse significant effects that **would** warrant failure of Appropriate Assessment, exposes just how unreasonable and perverse the initial negative EIA screening decision was. Similarly, the obvious confusion of the decision maker around the application of Schedule 3 selection criteria – confusion that exists to this day in terms of the actual meaning of "Y". "N" and "N/A" – similarly indicates the judge could not have applied the principle he sets out at Paragraph 78(b) of the judgment.

At paragraph 78(c) the judge accepts that *"all likely significant environmental effects are relevant and that it is legally erroneous to proceed on the basis that only negative effects are relevant to the screening exercise."* But the plain fact of this case is the unsigned / undated negative screening decision, neither identifies likely negative or positive significant effects. Indeed, so evident is the paucity of inquiry, that the decision maker does not even identify any likely environmental effects, save for the cryptic statement *"Site drainage and settlement lagoons for the process"*. It is not at all clear what this means and appears more of a description of an element of the impugned permission as opposed to being an actual likely environmental effect. In any event, none of the significant effects of serious risk of water pollution, etc., recorded in the subsequent Appropriate Assessment were identified or considered in this negative EIA screening decision.

Regarding the 25 June 2012 screening decision, again, the likely environmental effects are curtailed to the short statement; *"No environmental issues with the proposed siting of the lagoons, which are an improvement on the current situation."* At the time of this screening decision it would have been apparent to the competent authority that the removal of contaminated materials, decommissioning of *"highly contaminated"* lagoons, etc., should have been identified as likely environmental effects and, RFA would contend, likely significant effects for the purpose of determining whether EIA was required. The evidence is

clear from the screening decision that they were not. That they were not, is a clear indication that those likely effects were not plainly understood.

At paragraph 78(d) the judge accepts that a screening decision *"must demonstrate that the issues have been understood and considered."* Notwithstanding the failure to identify relevant likely and likely significant effects for either of the screening decisions, it is suffice to say that the confused manner in which the Schedule 3 selection criteria have been dealt with on both screening decisions, and the absence any detailed reasoning to accompany those negative EIA determinations, is the clearest indication that the issues were not understood by the decision maker, or the judge.

At paragraph 78(e) the judge accepts that *"a planning authority cannot rely on conditions and undertakings as a surrogate for the EIA process…"* Yet this is exactly what the planning authority did in this case. On 20 July 2011 the planning authority reached the conclusion 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."* [my emphasis] (refer to Annex V, TAB 31 of the Party's submission uploaded to ACCC/C/2013/90 on 27 November 2015). Over the next eleven months the Department set about devising mitigation by way of planning conditions outside of the EIA process. When this process was concluded, only then did it actually conduct its negative EIA screening decision on 25 June 2012 to fit with the decision it reached, indicating a pre-disposition to screen negatively. This was challenged by RFA on 31 October 2011 (refer to Annex V, TAB 36, 5th page of the Party's submission uploaded to ACCC/C/2013/90 on 27 November 2015). This was also a point of challenge raised in court - see paragraph 35 of RFA TAB7.

At paragraph 78(f) the judge accepts that *"if remedy measures are not plainly established and plainly uncontroversial the case calls for EIA."* As no such remedy was articulated, nevermind understood, within the context of either of the negative EIA screening decisions, the judge's acceptance of the Department's contention that EIA was not necessary, is simply impossible to understand or decipher from the court ruling.

At paragraph 78(g) the judge accepts that the *"…question of whether development proposals would be likely to have significant effects on the environment should not be considered on the basis of the application in isolation if in reality they could properly be regarded as part of an inevitably more substantial development."* Planning permission A/2008/0408/F clearly formed part of a more substantial development that was the W&J Chambers concrete plant. Yet the unsigned and undated EIA screening decision failed to consider Schedule 3 selection criteria 1(b) – *"the cumulation with other development".* In the context of this screening decision, some Schedule 3 criteria have been addressed with the word *"yes".* Others have been left blank. Whilst RFA cannot be certain, in the absence of any detailed reasoning, it would seem reasonable to assume that as it was determined that EIA was not necessary, *"yes"* must mean that a particular selection criteria was taken account of, but that it was not considered to be significant in terms of likely environmental effects. Therefore, in the absence of any *"yes"* recorded against selection criteria 1(b), the only logical conclusion the judge could have reached is that the Department did not take this criterion on cumulative development into account, or did not believe it was necessary

to take it into account before ruling out the need for EIA. However, as the Committee will have noted, the judge raised no fault with the screening decision.

Regarding the revised negative EIA screening decision dated 25 June 2012, the Schedule 3, 1(b) selection criteria is now addressed with a "Y". But, as with the previous screening, it is not clear exactly what "Y" means in the context of a negative EIA screening decision. Again, in the absence of detailed reasoning, logic would dictate that this would likely mean that the criteria was, somehow, taken into account but that it was not considered to significant for the purpose of requiring EIA. However, this is complicated somewhat by the addition of "N" and "N/A" against other Selection 3 criteria. This raised other questions. For example, if "Y" does mean that the criteria was taken into account, but was not considered to be significant in terms of effects, then "N" can only mean that other criteria were not considered. If this is the case, then this has particular connotations for selection criteria 2(c)(v) which specifically relates to directive 92/43/EEC (the Habitats Directive), against which is recorded a "N". A further question is also raised regarding what exactly is the difference between "N" and "N/A" in the context of a negative EIA determination? RFA has failed to elicit an explanation from the Department as to what it understood to be the meaning of "yes", "Y", "N" and "N/A" when it conducted the negative screening decisions for A/2008/0408/F. Instead, the Department fails back on the position that this matter has been dealt with by the Courts and that it is not appropriate for the Department to comment further.

Fortunately, as the use of "Y", "N" and "N/A" approach has been the long-established practice of dealing with the Schedule 3 selection criteria, RFA has been raising the same question with the Department and, subsequently the local council planning authority, on other negative EIA determinations for developments impacting the River Faughan and Tributaries SAC. Attached at **RFA TAB8** are four letters relating to negative EIA screening decisions for three different planning applications where the letters "Y", "N" and "N/A" have be used as a sole means of assessing Schedule 3 selection criteria.
The first two letters are from the Department and relate to port related activity (storage of scrap cars / metals), and a small housing development hydrologically linked to the SAC, respectively. In response to RFA's question as to what exactly "Y" and "N" means in the context of the negative EIA determinations, please note the evasive answers from the Department. The first letter dated 25 March 2015 is of particular relevance as it is signed by the most senior planning officer in the Northern Planning Division. This same officer attended court in defense of A/2008/0408/F but has since declined to provide clarification on the planning authority's position on the impugned permission (refer to Annex 1 of the Communicant's submission uploaded to ACCC/C/2013/90 on 28 November 2017).

Importantly, the third letter dated 4 March 2016, which relates to a major housing development on a flood plain immediately adjacent to the SAC, provides some insight into the Department's thinking as to the meaning of the letter "Y". Here, it states:

*"Please note "Y" does **not** mean that the impact is deemed to be significant but rather that this has been considered"* [my emphasis].

The Committee will note that the letter does not address the question of what "N" means in relation to that particular negative EIA screening decision. This is because there is no

logical, definitive or plausible explanation. The Committee, will further note that the fourth letter dated 12 April 2016, which is in response to a follow-up letter from RFA seeking further clarification, fails to address the issue of what "N" and "N/A" mean in the context of a negative screening decision. Essentially, those officials conducting and relying on these negative screening decisions to justify why EIA was not required, are unable to explain their assessment in the context of the Schedule 3 criteria. This is exactly the same position as manifests itself in relation to A/2008/0408/F.

In light of the facts that:

(i) There was never any detailed reasoning conducted in regard to how Schedule 3 selection criteria informed either negative EIA screening decision on A/2008/0408/F;

(ii) the approach adopted by the Department in terms of "Y", "N" and "N/A" is incomprehensible and cannot be explained by the Party;

(iii) the serious error of professional judgement which led the Department to mistakenly believe there was no physical overlap between the new and existing lagoons;

...all amount to *"manifest error of assessment".* That the judge failed to recognise this (and the Party is determined to defend such neglectful professional assessment when it occurs) is a warning that the Wednesbury test is far from the substantive test required of Article 9(2) of the Convention. Wednesbury is an unsafe test which provides citizens with little recourse to environmental justice. Rather, it perpetuates poor decision-making, effectively compounding failures of bad environmental governance.

9) Apart from lawyers' fees and experts' fees, what other costs may be incurred by an applicant in bringing judicial review proceedings in environmental cases? In particular, please specify the amount of the applicable court fees and any other similar charges that apply in this context.

The fee for judicial review in a matter concerning the Aarhus Convention is £200 on an ex parte application for leave and a further £200 upon the grant of leave.

RFA Comment: accepted.

10) Is it mandatory to have legal representation when litigating in the courts in Northern Ireland? In particular, it is possible for an applicant in judicial review proceedings to present the case to the court themselves (i.e. as a litigant in person)? If legal representation is mandatory, please specify what precisely is required in this regard in your legal system.

No, it is not mandatory to have legal representation when litigating in the courts in Northern Ireland. Yes, it is possible for an applicant in judicial review proceedings to present

the case to the court themselves (i.e. as a litigant in person)? The third question is therefore not applicable.

RFA Comment: The Litigant in Person (LiP) approach is increasingly, but reluctantly deployed by citizens seeking environmental justice in Northern Ireland (refer to examples Annexes 3b – 3e unloaded to ACCC/C/2013/90 on 28 November 2017 – this is not a complete list of LiP cases). This is as a direct result of the prohibitively expensive nature of challenging environmental decisions in Northern Ireland. However, this does not address the inequality of arms that exists between public authorities and the resources they have at their disposal, including, expert advice, Departmental Solicitors and experienced legal counsel, when pitted against the ordinary citizen with little money and no training or experience in matters of planning or environmental law. More importantly, this does not address the fundamental issue; namely, that the current system of challenge denies LiPs a right to a substantial, merits based challenge of an environmental decision; a right already afforded to developers by the Party through the established planning appeals process where hearings take place before the independent Planning Appeals Commission. It is noted that whilst the Party opposes the same rights for citizens, it does not convincingly address the disparity between the rights it affords to developers when compared to those its denies to third parties.

11) Is it possible for litigants in environmental cases to be represented in court by an NGO (i.e. without legal representation as such)?

A litigant can be supported in a general sense by an NGO particularly with respect to preparation for the case including the preparation of written arguments which can then be relied upon at hearing. There is also provision made for self-represented litigants to be supported by a McKenzie Friend. An NGO could of course also bring a claim or application in its own right or could apply to intervene in a case as an Interested Party in which case it could support the Applicant through active intervention, argument and by way of submission of evidence in its own right.

Practice Direction on Mckenzie Friends to be included within the bundle of annexes.

RFA Comment: limited financial resources, operational costs and capacity are limiting factors for some NGOs as for ordinary citizens. RFA's experience with Litigant in Person challenges is that the "McKenzie Friend tends to be a wife, husband, family member or friend.

Text of closing statement/remarks

12) Please provide the text of your closing statements/remarks (if available in writing) at the hearing on 12 December 2017 during the Committee's fifty-ninth meeting.

There is no pre-prepared text of closing remarks available. We attach at annex F a copy of the closing remarks based on notes taken as they were being delivered but it should be noted that, although accurate, the same do not represent a verbatim record of the remarks delivered.

ANNEX A

19/6/81	Planning Application Number A/1980/0813by W&J Chambers for filling of land to provide extension to existing brickworks at Glenshane Road, Drumahoe, approved.
15/12/83	Planning Application Number A/1983/0516 by W&J Chambers for continued use of agricultural land for extension to brickworks at Glenshane Road, Drumahoe, approved.
11/9/84	Planning Application Number A/1984/0451 by Mr William Chambers for change of use of part of agricultural field to yard for stocking agricultural products at Glenshane Road, Lismacarol, refused. Appeal dismissed.
1984 – 2006	The business operated at the site expanded without planning permission
2006	Enforcement proceedings regarding unauthorised change of use, infilling and lagoons at Glenshane Road, Drumahoe, commenced against W&J Chambers Ltd (reference number A/2006/0043CA)
5/3/08	Planning Application Number A/2007/1061/LDE seeking a certificate of lawful development was made seeking to regularise changes to the site. The Department issued a Certificate of Lawful Development for the existing use "Premises of concrete products & sand & gravel merchants including offices, weighbridge, canteen, drying shed, vehicle maintenance shed, bagging plant, concrete plant, storage (pipes, bagged sand, gravel bins), parking area, hardstandings for circulation & laying out of blocks and washing facilities" at lands to the south of 91 Glenshane Road, Drumahoe. No enforcement action could be taken on the above operations as the time for enforcement action had elapsed. It was also however also highlighted at the time that were further changes and operations to the south west of the site which were not exempt. This ultimately led to application A/2008/0408/F being made. **RFA Comment**: like A/2008/0408/F, the development made lawful under A/2007/1061/LDE, prior to the submission of the former, was built on top of extensive unauthorised and unregulated landfilling.
19/12/08	Application A/2001/0165/O seeking site for residential development included associated road improvements at lands between Glenshane Road and Fincairn Road, Drumahoe, Londonderry (majority of housing site zoning H25 to north and west of the Beeches determined. Permission was granted on 19 Dec 2008.
26/3/09	Application A/2001/0932/F seeking residential development of 33 No units comprising 29 No detached dwellings, 2 No apartments and 2 No townhouses for lands to the west of No 86 Glenshane Road, Drumahoe, and opposite 87

	and 89 Glenshane Road, Drumahoe, and east of 14,16 and 18 The Beeches, Drumahoe, Londonderry determined. Permission refused on 23 March 2009. 13/5/11
13/05/11	Department served 2 enforcement notices to have unauthorised settlement lagoons removed.
02/04/12	Department served 2 enforcement notices to have unauthorised settlement lagoons removed.
07/06/12	The PAC quashed the other enforcement notice on the basis that it was not served in time, thereby rendering the lagoons immune from enforcement action
13/09/12	Planning application A/2008/0408/F (as amended) granted to W&J Chambers Ltd for retention of extension to site office, extension to vehicle maintenance shed and improved wash out facilities, relocation of settlement lagoons, site drainage works, associated landscape and environmental improvements at 91 Glenshane Road, Drumahoe, Londonderry.
Current position	From recent correspondence with Derry City & Strabane District Council, the council responsible for the district within which the site is situated, we understand there is no current or recent enforcement activity concerning the site. Furthermore, the council has indicated that no permission has been granted for landfill since that date nor is it aware of any unauthorised landfilling having taken place since that date.