

Your ref: **ACCC/C/2013/90**

Date: 26 November 2017

Ms Fiona Marshall
UNECE - Palais des Nation

Room 429-4 CH-1211

GENEVA 10

Dear Ms Marshall

Communication to the Aarhus Convention Compliance Committee concerning compliance by the United Kingdom with the Convention on public participation in connection with the River Faughan (ACCC/C/2013/90)

Further to River Faughan Anglers (RFA) submissions to the Aarhus Convention Compliance Committee (ACCC), most recently on 15 February 2017, and in anticipation of the forthcoming 59th Meeting scheduled for December 2017, it was considered appropriate to provide the ACCC with a short up-date on events regarding this case.

Apologies, I had hoped to have this with you sooner. However, in the spirit of the ACCC invite to participate in the hearing and its encouragement to the Party / Communicant to consider "possible joint proposals", RFA wrote to the Chief Planner for Northern Ireland, Department for Infrastructure on 6 November 2017 in the hope of agreeing (with the Party) a joint professional planning assessment on the point of contention which is central RFA's complaint of injustice; namely the incompatibility of planning conditions 1 and 2 of the impugned planning permission and the correctness of the statement the Department provided the courts at Paragraph 57 of its affidavit on 26 March 2013, which our voluntary organisation could not afford to appeal. (This was previously drawn to the attention of the ACCC at page 20 and page 21 of the Communicant's 15 February 2017 statement).

RFA is unable to provide the ACCC with a full copy of its 6 November 2017 letter to the Chief Planner as it also contained reference to our claims of inaccurate / misleading information contained in the Party's detailed submission to the ACCC dated 27 November 2015 (please

refer to pages 1 and 2 of the Communicant's 15 February 2017 statement), which may contain potentially sensitive information. Rather, it had been hoped that the matters contained in our letter of 6 November 2017 would have received the urgent attention of the Department for Infrastructure and been relayed to the Party (DEFRA). However, as we have had no substantive response from the Chief Planner's Office (or the Party), either regarding our suggested "possible joint proposal", or our request for it to correct the misleading information / claims it presented to the ACCC, RFA must move forward on the basis that there is unlikely to be an agreement on any "possible joint proposal".

Below, in italic, is an extract from that letter setting out the "possible joint proposal" put forward by RFA to the Chief Planner in the hope that this could be agreed by the Party to assist the ACCC.

Extract from RFA letter to Chief Planner dated 6 November 2017:

Joint proposal

You will note that the ACCC suggests the communicant and party presentations should give consideration to "possible joint proposals". Therefore, RFA would ask the Department to consider the following joint proposal.

That the Department and RFA, prior to the ACCC hearing, undertake a professional planning assessment of the accuracy and truth of the claim at paragraph 57 of the former's sworn statement made to a court of law on 26 March 2017 and that the findings are made available to the hearing for consideration and scrutiny on 12 December 2017. The Department's sworn statement is replicated below for your convenience.

Affidavit extract – paragraph 57: "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."

To assist with the Department's deliberation, also attached is an overlay of the two approved drawings from the impugned permission A/2008/0408/F which show the juxtaposition of the interiors of the existing lagoons (shaded light blue) with the proposed lagoons numbered 1, 2 and 3. The heavy black line indicates the edge of the proposed lagoons which cut through (overlap) the existing top lagoon. Should it be unable to articulate or present a plausible interpretation of paragraph 57 of its affidavit above when considered in relation to the stamped approved drawings, the Department should acknowledge the inaccurate and misleading nature of the professional planning assessment presented to court of law on 26 March 2013 and set out how it intends to rectify the injustice and protect the River Faughan and Tributaries Special Area of Conservation from the potential threat from these "highly contaminated" lagoons.

RFA would welcome the Department's considered view and agreement on this proposition?

As of 26 November 2017, RFA has not heard from the Party on this matter, nor its intention on whether it proposes to correct inaccurate information it presented to the ACCC. Therefore, it is RFA's intention to address the former point at the ACCC hearing, including why professional planning officials involved with the case are not willing to provide an explanation of the statement presented to and relied on by the courts. In support of this assertion please see attached the then Area Planning Manager's curt dismissal letter of RFA's request for clarity dated 12 December 2014.

Regarding the inaccuracies presented in its 27 November 2015 submission to the ACCC, it is hoped the Party concerned will appreciate its duty of candour to the Committee and correct all misleading information.

Overlap Map

Along with RFA's submission dated 15 February 2017 the ACCC was provided with an "overly map" which appears at Annex 6 of the ACCC's electronic record. I would like to add this up-dated version (attached). The only alteration is a black line and annotation which shows more clearly the point and extent of the physical (three-dimensional) overlap between the proposed and existing lagoons; an overlap the competent authority advised a court of law does not occur and has, ever since, declined to explain how the proposed lagoons could be constructed without interference with the existing lagoons in the manner the Department led a judge to believe was possible. This up-dated version of the overlay map is the one referred to in extract of RFA's letter to the Chief Planner dated 6 November 2017 above.

Structural integrity of the "highly contaminated" lagoons.

In RFA's letter to the ACCC dated 12 June 2016, it highlighted concerns over the withholding of critical environmental information which our organisation was led to believe by the Minister of the Environment would be provided on completion of a structural engineer's report. First, I note that only part of the Department for Agriculture, Environment and Rural Affairs's letter of 2 December 2016 was up-loaded to the ACCC complaint page. My apologies if I did not provide a full copy of that letter. The relevant second page is now included for your record.

Subsequently, the Department has confirmed that it neither kept records of the decision to commission the structural engineers report, nor the subsequent decision to cancel the commissioning of the structural engineer's report (See letter dated 16 January 2017 points 1 and 3).

On 22 August 2017, the retaining walls of the top, “highly contaminated” lagoon suffered partial collapse, in two places (See RFA aerial and ground photographs).

RFA drew these collapses to the attention of the Department on 4 September 2017. Having previously considered a structural engineer’s report was no longer necessary, this Department advised on 7 September 2017 that lagoons are of “robust construction and extremely unlikely to rupture”. I draw these more recent events to the attention of the ACCC by way of emphasising the serious concerns RFA has regarding the real threat posed by the instability of these structures and the impact any release of contaminants might have on the River Faughan SAC.

Litigants in Person

Since RFA’s last communication, a number of Litigants in Person (LiP) cases have proceeded to court seeking environmental justice (or feel they have no choice but to proceed to court without legal representation) because they have not been able to afford the prohibitively expensive costs of litigation, even when Protected Costs Orders are secured. Some have provided statements about the unaffordability of challenging environmental decisions (see attached cases on Donnelly, Gibson, Murphy, Sands). These particular personal statements also highlight the inequality of arms brought about by the prohibitively expensive costs of bringing environmental justice cases in the UK.

Contrary to the claim of the Party that environmental legal challenges in Northern Ireland can be dealt with swiftly, and similar to the disjointed and prolonged nature of the judicial review process experienced by RFA, the cases of Friends of the Earth (FoE) and Woodburn (not LiP cases) and Donnelly highlight the how the process is neither coherent, nor swift. In the FoE case, it took five months for a judge to reach a flawed decision (later quashed at appeal), the original judge having erred in his understanding of the precautionary principle. This error allowed unauthorised sand extraction on a regionally significant scale to continue from the bed of a Special Protection Area and Ramsar site without planning permission, Environmental Impact Assessment and Appropriate Assessment (as it still does today). In the Woodburn case, the challenge to time-bound exploratory drilling for hydrocarbons in a protected water catchment took so long, in part due to changes of judges, that the by the time it got to hearing the judge decided it was no longer in the public interest to proceed as the drilling had already ceased. In the Donnelly case, the courts needed to be reminded by the LiP seven months after the close of the hearing that no judgement had yet been handed down.

In support of our argument previously made at pages 21-24 of the Communicant’s submission dated 15 February 2017, under “Other Matters”, RFA considers that this selection of examples call into question the Party’s unsubstantiated claim that environmental legal challenges in Northern Ireland are dealt with swiftly. It also demonstrates that those with genuine concerns over the quality of environmental decision making are having to take desperate measures and mount challenges without equality of arms due to the prohibitively expensive costs of litigation in the UK.

Should it be the intention of the ACCC to post these statements on the ACCC web page, please can any personal contact details of the Litigants be redacted.

Yours sincerely

Dean Blackwood

Director

River Faughan Anglers

[redacted]

Belfast

[redacted]

Copy to: Chief Planner's Office
DEFRA (as the Party concerned).