ACCC/C/2013/90 – FINAL SUMMING UP

1. In its submission of 27 November 2015, paragraph 94, the Party has informed this Committee that, and I quote: "…*it is more likely that it was the weakness of the arguments advanced by the communicant and its limited prospect of success that influenced its decision not to appeal".* One could reasonably expect that such a confident statement could be matched by a robust justification of why the Party considers this to be the case.

2. Certainly, given the Party's awareness of the specific grounds for legal challenge, it could not be confident in such a statement without having, first, considered the substantive merits of the impugned permission.

3. It would have had to understand and reach the conclusion that the negative EIA determinations initially conducted at; (i) some unknown date in 2008; and (ii) again on 25 June 2012 (for the revised proposal), adequately understood and addressed the likely significant effects of the development on the environment.

4. It would have to have understood how a development that would fail Appropriate Assessment because of significant adverse effects on a European site, had already have been negatively screened for EIA because those same effects were not deemed significant.

5. It would have to have been satisfied that conditions 1 and 2 of the impugned planning permission could actually have been implemented in

the stepwise manner the Department led a court to believe was possible in order to safeguard the River Faughan SAC.

6. It would have to have been satisfied that, in order to achieve this, the decision-maker's affidavit claiming that there was no physical overlap between the proposed and existing lagoons, and that one could be constructed without interference the other was, in fact, what the approved drawings actually indicated.

7. To be satisfied of all this, and given that most environmental challenges involve planning decisions, it could reasonably be expected that the opinion of a professional planner would have informed and supported such a confident statement by the Party. Indeed, the Party could have had one of the many professional planners in its employ attend this hearing today to counter the claims of RFA that the Department's substantive assessment of the impugned permission was infected by poor professional assessment and manifest error. Manifest error that could have given rise to serious environmental harm should the operator have attempted to construct a proposal that was not capable of implementation in the way the competent authority convinced a court was possible and, indeed, was necessary to safeguard a European site.

8. But nothing could be further from the truth that there were weaknesses in the arguments presented by the communicant. The EIA determinations lack adequate scrutiny, display little competence regarding the EIA screening process and are incomprehensible in terms of how Schedule 3 criteria were understood and applied by the

competent authority before ruling out likely significant effects. I would remind the Committee and Party of the simple exercise I invited each of you to conduct at paragraph 19 of my initial presentation.

9. Notwithstanding the reluctance of the Party to subsequently explain what was presented to a court of law – because it simply cannot without exposing its errors and subsequent attempts to mask its clearly flawed assessment – it will be obvious to this Committee that the evidence relied on by the judge to dismiss our challenge, was inaccurate, plainly wrong and incapable of implementation in the manner the Department led the court to believe was possible. This is evident from the visual representations previously submitted to the Committee which shows there is a significant overlap, at complete odds to the Department's sworn evidence on which the judge relied. (See Annex 6 uploaded to ACCC/C/2013/90 on 16 February 2017 and Annex 2 uploaded on 28 November 2017).

10. By seeking to understand and reaching a view on the; (i) adequacy of the level of inquiry which informed the (negative) EIA determinations process; (ii) compatibility of planning conditions 1 and 2; and (iii) the correctness and accuracy of the planning authority's statement regarding there being no physical overlap, the Committee will be able to appreciate, first-hand, how the substantive review of (planning) decisions envisaged by Article 9.2 of the Convention is not being facilitated by the Party.

11. What the River Faughan case shows is that the Northern Ireland Courts, in having little or no remit to examine the substantive merits of planning decisions, nor expertise in environmental or technical planning matters, provide citizens with little recourse to environmental justice. Rather, in its curtailed role of largely examining the procedural legality of a challenge, the judicial system is always in danger of perpetuating poor decision-making, effectively compounding failures of environmental governance. Something the Party here today seems content to maintain. And in so doing, the present and only mechanism of challenging poor decision-making; namely, judicial review, fails the ordinary citizen in attaining environmental justice.

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