ACCC/C/2013/90: River Faughan Anglers Speaking notes to the Committee hearing on 12 December 2017

Introduction

1. To begin, I would wish to briefly address the two points raised by the Party in its letter of up-date to the Committee dated 30 November 2017.

2. First, Recent amendments to the *Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2017*, whilst welcomed, do nothing to address a key point of this complaint.

3. Namely, that an applicant's own legal costs are prohibitively expensive and will continue to discourage UK citizens from challenging poor environmental decisions in the future, in the same way it deterred River Faughan Anglers (RFA) from appealing what is clearly a seriously flawed planning decision and subsequent unsafe court judgement. The outcome of which leaves a legacy of permanent threat to the integrity of the River Faughan and Tributaries Special Area of Conservation.

4. Second, in the spirit of the Committee's letter of invite of 4 November 2017 to participate in this hearing, the River Faughan Anglers' suggestion of a "possible joint proposal" with the Party was not, as it claims, to place this Committee in the role of a Court of Appeal. Rather, more fundamentally, it was in the interests of what we consider to be a duty of candour on **all** participants to provide this Committee with

correct, accurate and truthful information in an open and transparent manner to assist this Court.

5. To be clear, (i) the competent authority's flawed professional planning assessment of the impugned permission; (ii) its provision of inaccurate environmental information to a court of law; (iii); the potential environmental consequences of any attempt to implement the permission; (iv) its unwillingness to acknowledge neglectful professional practice; and (v) being unable to access justice, lie at the heart of this complaint of injustice.

6. I would respectfully suggest that for the Committee to fully appreciate our grievance, it must reach a view on the accuracy and correctness of the evidence the Department presented to a court of law. This is crucial because it is clear the competent authority's assessment of the likely significant effects of the development (as amended in 2011 to replace existing lagoons with new lagoons) was predicated on planners' misinterpretation of the approved drawings, both for the purposes of ruling out EIA and determining beyond scientific doubt that there would be no harm to a European site.

7. If, like RFA, this Committee cannot deduce a plausible explanation from the Party regarding its claims that, and I quote: *"…there is no overlap…"* and *"…the new lagoons can be constructed without interference with the existing lagoons",* the Committee is invited to draw its own conclusions as to why senior public officials, including professional planning officers find it so difficult and are so unwilling to elaborate or

elucidate on the accuracy and correctness of their professional assessment and the evidence the Department relied on in Court. (Note also the same reluctance of the most senior planner who actually presided over the case - see Area Planning Manager's letter dated 12 December 2014 at Annex 1 of the Communicant's up-date provided to the ACCC and up-loaded on 28 November 2017).

8. Evidence a judge accepted, not on any substantive assessment of the case – if it had been he would have found that planning conditions 1 and 2 of the impugned permission could never have been implemented in the manner the Department led the Court to believe was possible and that there **was** a significant three-dimensional overlap between the proposed and existing highly contaminated lagoons – but on the legal principle that it was not the role of the Court, and I quote: *"to carry out a merits based review"*. (see paragraph 119 of the Court judgement provided at Annex 1, email update from the Communicant uploaded to ACCC/C/2013/90 on 21 September 2014).

Breach of Article 3(2)

Each Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision making and in seeking access to justice in environmental matters

9. Regarding the breach of Article 3.2, we maintain that in persistently failing to respond to reasonable questions raising environmental matters during the processing of the planning permission, and instead

by inviting judicial review, the Party failed to fulfil its obligation of *"facilitating participation in decision-making"*. Indeed, the Party's claim of engaging in extensive correspondence is contradicted by the evidence it provides at Annex V of its own submission. Close examination indicates that no substantive responses to our reasonable questions were forthcoming. In particular, I would ask the Committee to note the words of the Area Planning Manager at Tab 58 where it was stated, and I quote: *"The Department does not consider it appropriate to engage in extended or expansive correspondence in light of your stance as there is an appropriate route for remedy through judicial review."* (Refer to Annex V of the Party's response uploaded to ACCC/C/2013/90 on 27 November 2015).

10. The facts are, that throughout the processing of this case the planning authority displayed a serious lack of competence and little understanding of European Union environmental law. By persistently ignoring the issues around EIA and Habitats that were being raised by RFA, it hindered our voluntary organisation's ability to understand the Department's thinking, masked its own shortcomings and undermined our ability to participate in the environmental decision-making process. (Refer to RFA's previous responses to the Committee including that uploaded to ACCC/C/2013/90 on 16 February 2017, pages 1-5)

Breach of Article 6

11. The Party denies that our complaint engages Article 6 of the Convention.

12. However, at Tab 23 of the Party's own submission, it provides actual evidence to this Committee that the development would give rise to significant adverse effects which would, and I quote: *"fail a Habitats Regulation Assessment"* (Appropriate Assessment). It cites the seminal European Court of Justice Case C-127/02 (Waddenzee) in support. (Apologies, this document was incorrectly referred to as "Annex IV, Tab 20" on Page 10 of the Communicant's submission to the Committee dated 15 February 2017. **This should have read Annex V, Tab 23** (2nd page) of the Party's response uploaded to ACCC/C/2013/90 on 27 November 2015).

13. Other evidence that this complaint engages Article 6.1(b) of the Convention is contained in the "Annexes" accompanying our original complaint (see "Annexes" of the original communication, page 13, uploaded to ACCC/C/2013/90 on 4 June 2013). Here, the Department again concluded on 23 March 2010 that the existing lagoons, and I quote: *"…would have failed Article 6 Assessment"* (Appropriate Assessment).

14. Given the evidence before this Committee where the competent authority determined on at least two occasions (notably after it had already conducted a negative EIA determination) that the subject of this complaint would fail assessment under Article 6 of the Habitats Directive, it is simply not credible for the Party to claim that Article 6.1(b) of the Convention, is not engaged (see paragraph 58 of the Party's submission dated 27 November 2015 and also RFA's submission uploaded to ACCC/C/2013/90 on 16 February 2017, pages 14-15).

15. Additionally, the extent of landfilling at this site and the evidence provided by RFA to the Committee that materials deposited are not inert, indicates that Article 6.1(a) is engaged as the landfilling likely falls within Annex 1(5) – "waste management". (See RFA submission to the Committee uploaded to ACCC/C/2013/90 uploaded on 16 February 2017, pages 8-11). However, so as the Committee and Party are in no doubt, I would refer to the photographs of the recent structural collapses at Annex 5b and 5c of our up-date of 28 November 2017. These photographs show bands of cement waste residue exposed following the recent landslips. This is the contaminated waste which has been periodically removed from the contaminated lagoons and dumped on site before being covered over by soil.

16. Evidently, Article 6 of the Convention is engaged. Evidently, the impugned retrospective planning permission for the retention of the unauthorised settlement lagoons and landfilling in 2008 (under application A/2008/0408/F) gave rise to significant environmental effects which warranted both EIA and Appropriate Assessment. Notwithstanding the rather sparse, unsigned and undated negative EIA determination reputedly undertaken some time in 2008 (see original EIA determination contained at "Annexes" of the original communication, pages 8-12, uploaded to ACCC/C/2013/90 on 4 June 2013), the competent authority's subsequent concerns of adverse significant effects from the original proposal to retain the existing lagoons, etc. (set out above in paragraphs 12-15) clearly expose the inadequacy of that negative EIA determination.

17. These subsequent concerns raise by the NI Environment Agency indicate that planners erred in law when they failed to screen positively for EIA. This failure denied RFA and the wider public the opportunity to participate in the procedures enshrined in Article 6, including breaching Article 6.2, 6.3, 6.4 and 6.6 of the Convention.

18. That being the case, it stands to reason, that subsequent amendments to the application A/2008/0408/F in 2011, that is, proposing to build new lagoons, then decommission and removing the existing lagoons, should have been dealt with as an addendum to what, should have already been deemed EIA development, rather than being subject to a revised negative EIA determination. In any event, whilst not specifically recorded on this second negative EIA determination, clearly the imposition of planning conditions 1 and 2 to mitigate adverse effects on the SAC were predicated on planners' mistaken assumption that the new lagoons could be constructed without interference with the existing highly contaminated lagoons. That they could not, means the revised negative EIA determination was also fundamentally flawed.

19. Furthermore, a simple examination of the revised negative EIA determination Schedule 3 criteria (last two pages) are testimony to the fact that the three planning officers who signed off this screening had little understanding of the EIA determination process. To demonstrate this, I would invite the Committee and the Party to consider what exactly the "Y", "N" and "N/A" recorded against each of the Schedule 3 criteria actually mean in the context of this negative EIA determination?

(See RFA's submission uploaded to ACCC/C/2013/90 on 4 June 2013, Annexes, 16th - 20th pages).

20. The professional and environmental assessment of the impugned permission, from the outset displayed a lack of professional competence, inadequate inquiry and was fundamentally and fatally flawed. That a judge could not recognise this, or did not consider these failures to fall within the scope of judicial review, is the clearest indication of the inadequacy of the courts as a mechanism to deliver environmental justice. In effect, the Judge in this case, has found convincing an EIA determination process that those conducting it clearly didn't understand and have since refused to explain.

21. Also, by permitting a development which was likely to have significant effects on the environment to be constructed without planning permission or EIA, and through neglect, allowing that unauthorised EIA development to become immune from enforcement action, the Department failed to facilitate public participation *"early in the decision-making process"*, contrary to Article 6.2.

22. Regarding the Party's claim that the withholding of the case officer's planning report, etc. was of no consequence and did not impede our ability to participate in the decision-making process, is simply not true. At the time of making this erroneous claim, the Party would have been aware of the directive issued by the Chief Planner reinforcing existing policy of ensuring such reports are made available to the public **before** any council meeting and before the decision is issued. The purpose of

this is to ensure the public is made aware of and understands the reasons for the decision **before** it is issued. The date of the report is 24 August 2012 and the planning permission was issued on 13 September 2012. However, despite two in-person visits to the planning office requesting release of this information (on 5 September and again on 11 September 2012), the case officer report was not made available to our River Watcher until 19 September 2012.

23. Clearly this environmental information was withheld at a crucial time, contrary to established policy and good practice. (See RFA's submission unloaded to ACCC/C/2013/90 on 16 February 2017, pages 5-8). Had we been fully informed of the Department's flawed reasoning there would have been scope to intervene, even at that late stage, to warn the planning authority of its error and to prevent it issuing what was obviously a seriously flawed and not implementable planning decision. Withholding this information until after the decision issued – information which was crucial to public participation in decision-making process and which was required to be in the public domain – prejudiced our participation in the environmental decision-making contrary to Article 6.6. It forced RFA down the route of legal challenge in order to prevent the implementation of a development that had not been properly assessed and posed significant risk to our river. (Refer to response to the Committee uploaded to ACCC/C/2013/90 on 16 February 2017, pages 5 - 8)

Breach of Article 9(2) and (3)

24. Article 9.2 (and 9.3) requires the Party to provide the public with access to a review procedure of the **substantive** and procedural legality of a decision. Repeatedly, the Courts make clear they do **not** provide the forum for a substantive, merits based review of planning decisions (see paragraph 8 above). In fact, the Courts have recognised, as in the case of Jones-v-Mansfield District Council, and I quote: *"that in the exercise of judgement on technical or other planning matters…that is a function for which the courts are ill-equipped."* R(Jones-v-Mansfield District Council [2003] EWCA Civ 1408, para.61).

25. As the courts are neither equipped, nor see their role as one of intervening in the merits of planning decisions, there is clearly a lacuna which denies the public their right as enshrined in Article 9. The fact is, there is presently no review procedure available to citizens of the UK which allows them to exercise their third party right of appeal into the substantive legality of a planning decision.

26. Arguably, and to a very limited degree, reviews of manifest error, or perversity, fall into the realm of substantive legality. However, as argued previously in our submission of 15 February 2017, the Courts consider this to be a high threshold to pass. This is amply demonstrated by this complaint, both in terms of the judge's reluctance to question a competent authority, but also in being ill-equipped to recognise manifest error when he failed to grasp the fact that the decision could never have been implemented in the manner required by the

permission to protect a European site. Of course, his understanding was not helped by the fact the competent authority was guilty of the same manifest error. An error planners failed to acknowledge, have declined to justify but, surely, are not so professionally unskilled as to remain ignorant of it? (See Party's update up-loaded to ACCC/C/2013/90 on 30 November 2017 – Letter from Chief Planner's Office).

27. The silence of professional planners (and their absence from this hearing) indicates the Party's willingness to avoid any substantive examination of this case which would expose, not just a manifestly bad decision – a decision that would never have passed the scrutiny of a substantive, merits based review – but the current limited scope of the Courts in reviewing environmental decisions.

28. In Northern Ireland, there currently exists the independent Planning Appeals Commission which affords those seeking planning permission (developers) with access to a substantive merits based review of planning decisions they are unhappy with. This same administrative structure could hear third party rights of appeal in exactly the same way as it operates presently.

29. As set out in our submission to the Committee, the political will to introduce third party rights of appeal already exists among the majority of political parties in Northern Ireland. (See RFA submission uploaded to ACCC/C/2013/90 on 30 August 2013, pages 11-17). Therefore, it seems a perversion of the democratic process that officials would seek to argue against providing citizens in that part of the UK with greater

access to environmental justice, against the wishes of the majority of elected representatives.

30. As planning decisions make up the majority of environmental challenges heard in the courts, the introduction of third party rights of appeal would actually afford the Party a real opportunity to comply with the Convention. In addition, citizen scrutiny would also contribute to better decision-making.

31. Lastly, on behalf of RFA I would wish to thank the Committee and the Secretariat for your patience, assistance, efficiency and the professional way you have engaged with our voluntary organisation.

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