Date: 15 February 2017

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

Ms Fiona Marshall
UNECE
Palais des Nations, 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)

Please see below River Faughan Anglers' response to the questions raised in your letter dated 27 September 2016. At the outset, I would wish to thank you and the ACCC for its patience on this complaint, which has been, and continues to be hampered by Government's attempts to withhold information and cover up serious failings which threaten the River Faughan and Tributaries Special Area of Conservation.

I respond to your questions in the order they arise.

Article 3, paragraph 2

1. By what specific action(s) or omission(s) did the officials or authorities of the Party concerned in your opinion fail to assist and provide guidance to you with respect to the procedures subject to your communication?.

Here under point (iv) of the UK's submission it states:

The Department engaged in extensive correspondence and provided considerable environmental information to the communicant over a protracted period of time including through the processing of the planning application.

The UK submission seeks to paint a picture of active engagement, provision of relevant information and facilitating participation in environmental decision making as is required of Article 3(2). However, a simple look at Annex V of the Department's submission will show that particularly after the planning application was submitted, many of its responses were standard acknowledgement letters which failed to address the reasonable questions raised by RFA. For example, the main objection to the impugned planning application (Tab 19) and the reminder (Tab 20) were never responded to. Neither was RFA's substantial letter contained at (Tab 21). Tab 29 contains a letter from RFA dated 24 June 2011 which complains that its letters dating back to 2008 had never been answered. Similarly, RFA's substantial letter at Tab 36 was never properly addressed. Once again Tab 57 contains a letter from RFA dated 25 July 2012 lamenting the Department's refusal to respond. The fact is that the substantial letters asking reasonable questions in an attempt to participate in the environmental decision making process between 2008 and 2012, after the planning application was submitted, went largely unanswered. That the Party's submission would seek to claim otherwise seems, on the face of it, misleading.

Furthermore, information when provided to RFA was often incorrect. For example, at Tab 65, the ACCC will note that the Northern Planning Division claimed that the settlement lagoons were constructed in 1998 (a year before the introduction of the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 1999. At the time it made this claim, the Department was actually in possession of an aerial photograph taken on 25 August 2000, clearly indicating that the lagoons were yet to be built. RFA is also in possession of a copy of this aerial photograph, but for reasons of copyright, is unable to provide a copy. Even though the Department retains a copy of this aerial photograph on its planning file (ref: A/2006/0043CA) it cannot explain why it is insisting that the lagoons were constructed in 1998.

Under point (v) it is claimed that:

The communicant was afforded the opportunity to participate in the process of determining the planning permission and did engage in the process, in particular making representations relevant matters that were taken into account.

What the UK submission fails to point out is that participation in the environmental decision making process is hindered when the development has already been constructed and subsequently allowed to become immune from enforcement action, as was the case with the existing unauthorised and highly contaminated settlement lagoons and landfilling. Clearly the matters raised by RFA were not taken into consideration as the Department did not require EIA even though this same Department subsequently confirmed that the same development (specifically the existing settlement lagoons) would fail Appropriate Assessment because of significant adverse effects on the River Faughan Special Area of Conservation. Despite numerous requests since, including questions tabled in the Northern Ireland Assembly, the Department has repeatedly refused to explain how an adverse significant effect for the purpose of the Appropriate Assessment, is considered not significant so as to negate the need for EIA.

As such, it is legitimate to question the appropriateness of the competent authority's current practice, both in relation to this case (and more generally), whereby the same development proposal can be simultaneously subject to both; (i) Appropriate Assessment, because significant effects have been identified; and (ii) negative EIA screening, which considers those same effects not to be significant, thus avoiding EIA. Notwithstanding the fact that the Department has been more than reluctant to engage on this issue, as is evidenced by the Minister's evasive responses to a series of written questions tabled in the Northern Ireland Assembly between June 2015 and March 2016,[1] RFA contends that its failure to require EIA

[1] Northern Ireland Assembly (2015/2016) Various Assembly questions URL: file:///Users/deanblackwood/Documents/RIVER%20FAUGHAN/HYDRO-ELECTRIC/Crocknahilly,%20Dreen/TABS/AQW47690-11-16.html URL: file:///Users/deanblackwood/Documents/RIVER%20FAUGHAN/HYDRO-ELECTRIC/Crocknahilly,%20Dreen/TABS/AQW48916-11-16.html URL: file:///Users/deanblackwood/Documents/RIVER%20FAUGHAN/HYDRO-

in the case of A/2008/0408/F, where it also acknowledged that the same development would fail Appropriate Assessment, constitutes a breach of Article 2(1) of the EIA directive 2011/92/EU. The public must not be discouraged or denied the right to challenge such failure because of the prohibitively expensive nature of the only challenge mechanism available to it; namely judicial review.

The reason why the Department refuses to clarify its position on the relationship between EIA and Appropriate Assessment, is that it has been confronted with evidence of its own error, backed by European Commission Guidance and seminal domestic case law in the form of Champion-v-North Norfolk District Council – Court of Appeal Ruling**.** This is dealt with in more detail on pages 14-15. The reason why it seeks to mask this failure is that the malpractice of negatively screening for EIA but requiring (and often failing) Appropriate Assessment is historic, widespread, and continuing into 2017. These attempts to mask failure is not conducive to facilitating participation in environmental decision making.

Some other specific examples of where the Department has breached Article 3(2) are set out below:

ELECTRIC/Crocknahilly,%20Dreen/TABS/AQW48917-11-16.html URL: file:///Users/deanblackwood/Documents/RIVER%20FAUGHAN/HYDRO-ELECTRIC/Crocknahilly,%20Dreen/TABS/AQW49411-11-16.html URL: file:///Users/deanblackwood/Documents/RIVER%20FAUGHAN/HYDRO-ELECTRIC/Crocknahilly,%20Dreen/TABS/AQW50121-11-16.html URL: file:///Users/deanblackwood/Documents/RIVER%20FAUGHAN/HYDRO-ELECTRIC/Crocknahilly,%20Dreen/TABS/AQW50123-11-16.html URL: file:///Users/deanblackwood/Documents/RIVER%20FAUGHAN/HYDRO-ELECTRIC/Crocknahilly,%20Dreen/TABS/AQW50390-11-16.html URL: file:///Users/deanblackwood/Documents/RIVER%20FAUGHAN/HYDRO-ELECTRIC/Crocknahilly,%20Dreen/TABS/AQW50517-11-16.html URL: file:///Users/deanblackwood/Documents/RIVER%20FAUGHAN/HYDRO-ELECTRIC/Crocknahilly,%20Dreen/TABS/AQW52234-11-16.html URL: file:///Users/deanblackwood/Documents/RIVER%20FAUGHAN/HYDRO-ELECTRIC/Crocknahilly,%20Dreen/TABS/AQW52373-11-16.html URL: file:///Users/deanblackwood/Documents/RIVER%20FAUGHAN/HYDRO-ELECTRIC/Crocknahilly,%20Dreen/TABS/AQW55211-11-16.html

At *paragraph 14* of the UK submission the Department seeks to rely on the "maintenance of its open file system…" However, this was not properly maintained. For example, the initial negative EIA screening reputedly carried out on 12 June 2008, did not appear on the file until 11 August 2011 and oddly, remains unsigned and only partially complete.

Paragraph 15 seeks to make out that the Department actively sought direct engagement with RFA. The invitation referred to here consists of a note (Tab 25) of one voice message left with the club secretary informing him that a meeting was to take place. It does not say whether that message was left at Mr Quinn's work place, his home or the RFA office. Mr Quinn has no record of receiving such a message. In any event, one phone message left over the entire processing of this application from 2008 to 2012 appears the only attempt at direct engagement. This also must be considered in the context of the repeated failures to respond to RFA's letters, as previously mentioned. Again, the UK submission attempts to embellish the extent of engagement.

Paragraph 16 – contrary to the claims made, as already stated under section (iv) above, many letters and requests for information still remain unanswered.

By repeatedly failing to respond to our voluntary organisation's reasonable questions over a protracted period, RFA considers that the competent authority failed to facilitate and undermined our ablitliy to properly understand and participate in the environmental decision making process in relation to this case.

Article 4

With reference to the information requests listed in Annex III and IV of the Party concerned's response to the communication:

(a) For which of these requests do you allege that you were unjustifiably denied the requested information contrary to the requirements of the Convention?

(b) For each such request that you consider was unjustifiably denied, please specify whether you exhausted all available domestic remedies to challenge the failure to provide the requested information? If so, which domestic remedies did you use? If not, why not?

Firstly, I would refer you to the failures to respond to RFA's letters seeking to engage in the environmental decision making process mentioned under Article 3 above. In terms of domestic remedies, the formal complaints process was followed, including to the Parliamentary Ombudsman. However, given that by that stage RFA had embarked on the legal challenge the Ombudsman declined to consider the complaint at that time.

Secondly, and of serious concern, is that the Case Officer's report was prepared and signed off by the planning authority on 24 August 2012. That being the case, RFA can only conclude that it was deliberately withheld from our River Watcher on two separate occasions on the day of the council meeting on 4 September 2012 and 11 September 2012 (please refer to the Party's submission at paragraphs 33 to 38). In light of the facts of this case, which should have been evident to the officials who prepared this submission, paragraphs 33 to 38 is clearly a misleading position that the Department presents to the ACCC.

The case officer's report and Development Control Group report endorsing the case officer's recommendation to approve are both signed and dated 24 August 2012. However, when RFA's River Watcher called at the planning office on the day of the council meeting on 4 September 2012 and requested a copy of this report, he was turned away after being advised that the report had not been finalised. Having returned on the 11 September 2012 seeking the report, he was again turned away empty handed after being advised that these reports were still not finalised. The planning decision issued on 13 September 2012. The report was posted to our River Watcher on the 19 September 2012 (proof of postage retained). That the report is dated 24 August 2012 suggests that the report was either deliberately back dated, or deliberately withheld from RFA until after the decision was issued. Either way, this is a serious matter which denied RFA access to important environmental information at a key time in the decision making process.

It has long been Departmental policy that no planning application should be presented to council without the case officer's report being publicly available at the time the monthly schedule is made available on line. This is usually at least one week before the council meeting. Therefore, as the council meeting took place in the first week of September 2012, there is the public expectation that these reports should have been available to RFA and the

public in late August 2012. Yet these reports on A/2008/0408/F were withheld from the electronic public record, and our River Watcher, despite it being the Department's policy to make them publicly available at the time the council schedule is published.

This policy was in force at the time planning application A/2008/0408/F was presented to Derry City Council for approval and has been reinforced, most recently, in a directive from the Chief planner to all staff on 4 October 2013.[2] In this directive the Chief Planner reiterates to all staff the reason and requirement to with her direction. You will note her emphasis on the "must be" in the following extract below.

> *"All case officer reports are not just on open files but must be available on the Planning Portal as soon as the schedule has been sent to Council. These documents are therefore in the public domain and it is critical that they are thorough, accurate and professional. Anyone reading the report, whether it be the applicant, agent,* ***objector****, Ombudsman or me* ***should be able to understand the reasons for the decision****."* [my emphasis]

The above instruction makes clear the importance attached to the content of the case officer report in helping objectors, amongst others, to understand the reasons for the decision **prior** to the council meeting taking place. It is explicit that this report "must be" made publicly available on the planning portal at the time the schedule of applications goes live a week before the council meeting. The UK submission at *paragraph 34* acknowledges the absence of these reports, but erroneously claims that their absence *"…did not prevent or affect the communicant's participation in the development management process*". This is simply untrue. Such reports are required to be available before any decision is presented for approval so as the public can *"…understand the reasons for the decision"* in accordance with Departmental policy and Chief Planner's instruction above.

The fact is, this report was withheld until after the decision was issued, significantly impeding RFA's ability to understand how the decision was reached. By the time our voluntary

[2] DOENI (2013) Internal directive from Chief Planner 4 October 2013 – obtained under Freedom of information January 2016.

organisation received the reports the planning decision had issued and RFA was left with the only option open to it, i.e. the prohibitively expensive judicial review process. Given the report is dated 24 August 2012, yet was not posted on the planning portal and was denied to RFA until after the decision was issued, it can only have been a deliberate attempt by the Northern Planning Division to withhold this information from RFA in order to prevent any questioning of the reasons for the decision prior to the issue of that decision on 13 September 2012. That it was subsequently released to the RFA River Watcher on 19 September 2012 means that its unavailability at the time was rectified. However, that does not rectify the fact that key environmental information was withheld from RFA at a key point in the decision making process, thereby, impinging on our right to access to environmental information at a time that it should have been made publicly available.

Thirdly, I would refer you to my response below in regard to Article 6.

Article 6

At paragraph 57 of its response to the communication, the Party concerned states that "It is denied that the development activity in question fell within the ambit of article 6 by being listed in annex I to the Convention or by being an activity which may have a significant effect on the environment". Do you consider that the activity or activities in question fell within the scope of annex I of the Convention, and if so, which paragraph of the annex and why?

Alternatively, do you consider that the activity or activities are within the scope of article 6, paragraph 1(b)? If so, please point the Committee to the Party concerned's determination that the activity was to be subject to the provisions of article 6.

According to the Department's own records unauthorised landfilling at this site began in 1995 and continued until 2006. The attached photograph was taken by officials on 23 May 2000. **TAB RFA1** – Note the scale of landfilling can be deduced from the lorry parked on top). On 23 May 2007 planning officials recorded:

"some piling up of white material in the vicinity of the lagoons. It appears the material has been piled up on the banks of the lagoons."

This "white material" referred to is the contaminated sludge from the interior of the lagoons which the site operator confirmed to the Department on 8 January 2007 was being periodically removed and deposited on the site, where it remains as part of the landfill and lagoons construction to this day. This is the same material which led to the Northern Ireland Environment Agency to record on 16 March 2012 (Its Ref: 17293-6) that:

"…the top pond is highly contaminated".

In regard to the significant illegal landfilling which took place at this site between 1995 and 2006 (and likely beyond), RFA considers that this falls within Annex 1 as this landfilling, in all likelihood, exceeds the 25,000 tonnes and, for the reasons above, could not be considered as inert. The depositing of this contaminated waste was also recorded by RFA on 6 August 2008 and on 27 April 2012. **TAB RFA2** - See photographs P1010014 (2008) and P1020296 & 317 (2012), respectively). Also, a landslip of the infill some time before 2008 showed that organic materials and plastics were dumped as part of this landfill (**TAB RFA3** – See photograph taken 6 August 2008). Clearly, this waste could not be described as inert. Furthermore, from the Department's 2000 photograph it is clear that the amount of deposited landfill is considerable.

On 27 April 2015 Minister of the Environment, Mark H Durkan MLA advised the Northern Ireland Assembly (AQW45142/11-16) that:

"NIEA neither agreed to the infilling of land nor advised the operator on the construction of settlement lagoons"

The Department has since confirmed that NIEA did agree to the infilling of a specific part of this site with inert materials in 2002. However, it is unable to provide any figure of how much infilling it actually agreed to. Nor is it able to provide a figure for how much infill was deposited (i) legally; and (ii) illegally. The admission of the site operator, planning officials

records and RFA photographs between 2008 and 2012 above, clearly indicates that what was deposited on site over a period of at least 10 years without the benefit of planning permission or any environmental assessment is not inert landfill. Furthermore, despite not knowing the amount of landfill deposited over a prolonged period of over ten years, the Party is claiming that this complaint does not fall under Annex 1 of the Aarhus Convention. RFA would contend from the photographs provided, that what took place at this site falls within Annex 1, Section 5 – Waste Management, and that the volume, whilst unknown due to the fact that NIEA has declined to provide any figures of what was landfilled, exceeds the threshold of 25,000 tonnes, stipulated to qualify as an activity covered by Article 6 of the Aarhus Convention. Given the serious neglect presided over by the regulator at this site, it is would seem to be in the Party's interest not to gather this information in an attempt to argue why Article 6 is not engaged.

At this stage it is important to remember that this complaint also refers to the settlement lagoons which currently remain within the flood plain and adjacent to an European site and not just the actual permission granted under A/2008/0408/F which proposed to remove these lagoons and construct new ones outside of the floodplain. Furthermore, it was the Department's neglect to take effective enforcement action which allowed these existing lagoons to become immune from planning enforcement action. Whilst the Party's submission claims these lagoons do not fall within the ambit of Article 6, clearly, by the competent authority's own records, these existing lagoons were determined not to have met the strictly precautionary requirements of Article 6(3) of the Habitats Directive because of likely significant adverse effects on the River Faughan SAC. For direct evidence of this please refer to the Party's own submission, Annex IV, Tab 20 which confirms in March 2010, that these lagoons would fail an Article 6 Assessment (Appropriate Assessment). This is further reinforced in the Competent Authority's Appropriate Assessments carried out on 15 October 2010 and 31 May 2011. It is noted that the Party has not furnished the ACCC with these documents.

The adverse significant effects on the SAC would only be eliminated, in the opinion of the competent authority, when the impugned planning application was amended to remove the offending lagoons out of the flood plain. However, the planning authority's failure to take

timely enforcement action has allowed these "highly contaminated" lagoons, which have polluted the river on numerous occasions, to become immune from enforcement action. It is these lagoons which the competent authority recorded on a number of occasions would fail Appropriate Assessment because of adverse significant effects, that remain in the floodplain today and are inextricably bound up in the subject of this complaint. Clearly, by failing Appropriate Assessment because of significant adverse effects, and remaining in-situ, this brings RFA's complaint under the remit of Article 6(1)(b) of the Aarhus Convention.

That the Party denies this is the clearest indication that it has, like the planning authority, been guilty of failure to properly understand the likely environmental effects from this existing development which it allowed to become immune from enforcement due to neglect.

Article 9

At paragraphs 8 and 9 of its response to the communication, the Party concerned argues that already before the substantive hearing of your appeal before the High Court, the Planning Permission in question was time expired, and therefore incapable of implementation. Do you agree and if so, for what reason(s) did you proceed with the case before the High Court?

Yes, it is correct that by the time of the substantive hearing, the planning permission had expired as the Department imposed a planning condition which required all works to be carried out within six months of the date of the permission. However, in making the claim that the "…planning permission is now time expired and so incapable of implementation" and that the complaint is "…of no legal or practical consequence", the Party avoids addressing a key point for challenge. The impugned planning application was initially to retain unauthorised settlement lagoons and significant landfilling which took place without planning permission or environmental assessment. This was subsequently amended to remove what are "highly contaminated" lagoons adjacent to the river and replace with new lagoons, to be constructed outside of the floodplain.

It was exactly this limited timescale for implementation, and the serious concerns RFA had for the impact of removing highly contaminated settlement lagoons from the floodplain only metres from the River Faughan SAC without requiring Environmental Impact Assessment, which drove our challenge. The impugned permission stipulated a stepwise development of the site where, first the new lagoons would be constructed and be brought into operation, before the existing lagoons could be decommissioned and removed from the floodplain. However, this was impossible to achieve as there was a significant three-dimensional overlap between the site of the proposed lagoons and the existing lagoons. Essentially, in order to get to the construction site of the new lagoons the existing "highly contaminated" lagoon would first need to be removed, but the planning permission stipulated that this needed to be retained and remain operational until the new lagoons located directly below it were constructed and operational. The planning authority made a serious error of assessment and professional judgement in this regard, both in terms of what it actually believed it was approving and its failure to adequately assess the environmental impact of conducting these works. As its understanding of how these works could be carried out was fundamentally flawed, this calls into question and fatally undermines its subsequent assessment of the likely environmental effects.

The attached overlay map **TAB RFA4** taken directly and superimposed from the approved drawings demonstrates this obvious overlap. The oddly shaped blue shaded area representing the **existing** "highly contaminated" lagoon with the site of the **proposed** lagoons 1 and 2 and their retaining embankments located directly beneath it. Yet the planning authority, claimed in paragraph 57 of its sworn affidavit dated 26 March 2013 that:

"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 Rev3 demonstrates that the new lagoons can be constructed without interference with the existing lagoons."

This was plainly untrue. Yet Lord Justice Treacy, in his judgement relied heavily on the Department's flawed professional opinion when at paragraph 94 of his ruling he reiterated:

"Regarding the ground that conditions 1 and 2 the evidence establishes that whilst the proposed lagoons are in close proximity to the existing lagoons 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."

However, the approved drawings established no such thing. Instead, the judge relied on the misleading statement provided by the competent authority. A substantive merits review in front of a suitable trained expert would have shown this up to be the plainly wrong and misleading statement that it is, as is evident from the overlay attached at TAB RFA4. Since the court ruling the Department has repeatedly declined to provide RFA with an explanation as to how the impugned permission could ever have been implemented in the stepwise manner it envisaged and conditioned. The plain fact of the matter is that it could not and its evidence to the court misled the judge. Furthermore, it has become evident that no professional planning official associated with the case, or employed within the Department now responsible for the Party's input to the ACCC, appears willing to provide RFA with a professional planning assessment of the correctness of this statement presented to the court. This is despite repeated requests for such an explanation from RFA.

RFA would invite the ACCC to specifically seek input from the Party concerned to provide a professional planning opinion from any one of the Department's professionally qualified planners involved in this case in regard to the accuracy of this sworn statement presented to the court on 26 March 2013 and how these works could have been implemented in accordance with the impugned permission. RFA can say with confidence, no professional planner employed in the Department would be prepared to stand over that statement, despite the fact that the court relied on its accuracy when dismissing RFA's legal challenge. Hence the Department's persistent refusal to provide RFA with a professional planning assessment of the above sworn statement, or to meet with our voluntary organisation to explain, despite repeated requests.

It was the real concern that the operator would attempt to implement the approval on the basis of a seriously flawed planning permission, which would have resulted in a serious threat of pollution to the SAC located only metres away, which drove RFA to intervene to try and

prevent implementation of the impugned and seriously flawed permission. In this regard our organisation was successful due to the six month time limit imposed for the implementation of the said works. However, withdrawing from the challenge at that stage would have meant that the existing and "highly contaminated" lagoons which, through the Department's neglect were permitted to become immune from planning enforcement action, would remain in the flood plain; as in fact they still do. Therefore, RFA had no option but to proceed with the challenge in the attempt to prove that these lagoons represented unauthorised EIA development and were, therefore, in breach of the EIA (and Habitats) Directives.

Withdrawing from the case because the impugned permission was no longer implementable would have been construed as an indication that RFA accepted that the existing highly contaminated lagoons, which had been allowed to become immune from enforcement action, could remain in such a dangerous location in a floodplain adjacent to the SAC. Whilst losing the court case has resulted in just that, these lagoons remain a serious threat to the SAC. RFA could not withdraw from the case and resign the River Faughan SAC to the permanent legacy of environmental threat. Nor will our voluntary organisation give up on exposing the serious mistakes and subsequent cover up by officials which has left our river with this legacy of permanent threat from these contaminated lagoons. Continuing with the court case and attempting to prove that these lagoons constituted unauthorised EIA development was our only hope, at the time, of protecting the SAC.

Notwithstanding the ruling of the courts in favour of the Department, RFA remains of the view that these existing settlement lagoons, which the planning authority deemed not likely to give rise to significant environmental effects from the purpose of EIA, do constitute unauthorised EIA development. In support of this argument RFA would point to the fact that despite the planning authority's initial negative EIA determination reputedly conducted on 12 June 2008, it was made clear during the processing of this planning application that the same settlement lagoons would fail Appropriate Assessment due to the threat of serious water pollution to the SAC. Furthermore, the European Commission's publication *Assessment of plans and projects significantly affecting Natura 2000 sites*, which would have been available to the competent authority at that time, specifies at page 12, para 2.4 that:

> *"MN2000 makes clear that where a project is likely to have significant effects on a Natura 2000 site it is also likely that both an Article 6 assessment* [Appropriate Assessment] *and an EIA will be necessary."*

Subsequently, the Court of Appeal ruling in the case of Champion-v-North Norfolk District Council stated that:

"For the purposes of the present appeal it can be assumed that there is no material distinction between the test for an EIA and the test for an Appropriate Assessment, both as regards the threshold of likelihood and as regards the relevance of proposed remedial measures in determining whether a significant effect is likely." [3]

It should be noted that the subsequent Supreme Court ruling [2015] UKSC52 took no issue with this position cited by the Appeal Court judges.

Given the above, it seems a real nonsense that the Department could claim in relation to the existing settlement lagoons, that environmental effects which are considered to be so significant and adverse so as to fail Appropriate Assessment under the Habitats Directive, were not considered to be significant for the purpose of EIA screening. The court, in its ruling, simply did not grapple with this point of challenge. Had it done so, it would have recognised that what was permitted to take place on this site without planning permission, represented unauthorised EIA development and was in breach of the European environmental directives.

Please comment on the Party concerned's submissions in paragraph 64-77 of its response to the communication that the Convention does not require the possibility of third party rights of appeal. In responding to the Party concerned submissions on this point, please do not focus on the issue of the costs of judicial review in Northern Ireland but on the other arguments made by the Party concerned in paragraphs 64-77 of its response.

[2][2013] EWCA Civ 1657, para. 15. URL: http://www.bailii.org/ew/cases/EWCA/Civ/2013/1657.html [Accessed: 19 May 2016].

The Party claims at paragraph 64 of its submission that the judicial review process meets the requirements of Article 9 in regard to challenges of both the substantive and procedural legality of the environmental planning decisions. However, RFA would contend that the Convention, including Article 6 must be given a broad and purposive interpretation, where substantive legality should encompass challenges on the merits of environmental planning decisions, if Article 9 is not to be violated. However, in practice generally, judicial review challenges are restricted to grounds of procedure and irrationality, the latter being a particularly high threshold to prove.

Nor should irrationality or (Wednesbury) unreasonableness be equated with a merits based review of environmental decision making, particularly as it is often the case with poor environmental decisions that the merits of the case are the core issues of concern and dispute. Yet the Party concerned has, in the past contended that any right to challenge is curtailed, in its opinion, to reviewing the "…legality of an authority's application of the law but not to challenge the merits or substance of the case."[4] Indeed, it states at paragraph 68 of its submission that "a complaint about the substantive merits of a decision to grant planning permission has never in itself been a proper ground for judicial review." That it is not, or considered not to be by the courts is precisely the problem, highlighting a lacunae where the substantive merits of environmental planning decision making are not addressed and, as such, give rise to poor environmental planning. Essentially, the more restrictive remit of the courts is being used to defend and uphold poor environmental planning decisions.

The Party is applying a restrictive interpretation of "substantive" legality which RFA believes is at odds with the spirit and intent of Article 9 of the convention. And it is clear, in relation to this specific case that the Party and the Courts are in agreement as to the narrow confines of permitted challenge. For example, in the court ruling at paragraph 100 the respondent forcefully asserts:

[4] DEFRA (2008) Aarhus Convention Implementation Report. Page 27, para.2

"…that the applicant is asking that the Court form its own opinion of the evidence and substitute that for the respondents. It is argued that the Court on judicial review should not be asked to do this as the Court on judicial review is concerned with challenge to the legal validity of a decision."

In dismissing RFA's challenge, the judge, at paragraph 119, emphatically states, in agreement with the respondent:

"It is not the function of the court in judicial review to substitute its own opinion of the evidence for that of the respondent. The court is not sitting as an appeal court to carry out a merits based review."

What this confirms is that there is no scope for a merits based review of poor environmental decision making, which runs the risk of significant harm or a permanent legacy of harm when a competent authority gets it wrong, as is the case with this present complaint. Whilst the Party makes reference at paragraph 64 to the "…availability of an appeals process for those requesting development consent…", it misses the point that third parties are not afforded the same rights to challenge environmental planning decision making. However, in claiming that the appeals process available to those requesting development consent should be seen by the ACCC as "…separate and additional to the wider rights of participation and challenge", the Party has inadvertently reinforced the anomalies and unjustness of the regime operating in the UK to the detriment of third parties.

It is correct that where environmental planning decisions are refused permission, and where these decisions are appealed by the planning applicant, third parties are afforded the right to participate in the environmental decision making process on the basis of a review of the substantive merits of the case. Yet where planning decisions are approved this right to review the substantive merits of the decision is denied to third parties, as confirmed by the Party in paragraph 68 of its submission. It is odd and unjust that the planning regime would afford third parties these rights to review the substantive merits of a case in certain circumstances (i.e. where an applicant for development consent exercises their right of appeal), yet deny those rights in cases where a third party is aggrieved at a permission that has been granted.

RFA would contend that affording third parties rights to participate in the assessment of the substantive merits of negatively determined (refused) planning decisions before an independent Planning Appeals Commission demonstrates a degree of compliant with Article 9 of the Convention. By the same token, denying those same rights to review the substantive merits of positively determined (approved) planning applications infringes Article 9(2) and (3) of the Convention.

At the heart of this argument is whether Article 9 requires that third parties should be afforded the right under the Convention to challenge the substantive merits of environmental decision making. Clearly the Party concerned thinks not and wishes to resist any such attempt to widen citizens' access to environmental justice. But as it points out at paragraph 64 of its submission, third party rights to a substantive merits review of a decision already exists in the circumstance where an applicant for development consent appeals a negative decision, thereby opening up the opportunity for any concerned third party to exercise its rights of participation enshrined in Convention. RFA contends that the purposive scope of Article 9 extends to a substantive merits review in all decisions, negative and positive, and that the latter is being unjustly and unfairly denied to third parties results in a violation of Article 9.

Do you allege that the costs of your case before the High Court were prohibitively expensive in the meaning of article 9, paragraph 4 of the Convention? If so, for what reason(s)? Please respond to the Party concerned's submissions in this respect and in particular the following submissions:

(a) The communicant had earlier decided not to pursue any application to the Court for costs protection (para. 12 (a) of the Party concerned's response);

At the time of RFA's challenge, no domestic regulations existed in regard to securing a Protected Cost Order (PCO). Significant uncertainty existed over whether the courts were likely to grant such an order. Furthermore, legal advice provided to RFA indicated that

should our voluntary organisation apply for and secure a PCO, in all likelihood the respondent would seek to secure a cross-capping order. If successful in our challenge, the discrepancy between recoverable legal costs limited by any cross-capping order and the estimated legal costs quoted at that time amounted to £50,000. In essence, the prospect of a cross-capping order meant that even if successful, essentially RFA could not afford to win our case as it would still mean that our organisation, which relies on subscription from or permit holders, would still take a major and, potentially, fatal financial hit. Given the prohibitive costs of securing legal representation, the effect of cross-capping is a further disincentive for third parties to challenge environmental decisions.

(b) The communicant could have chosen to resist any order for costs before the Court but instead chose to accept the Department's proposal (paragraph 12(c) of the response);

RFA is in no doubt that the admissible complaint with the ACCC influenced the level of costs proposed by the Department. In terms of the overall costs incurred as a result of this challenge, those paid to the Department (£6,000 including tax) amounted to less than 4% of the total legal costs incurred. What this demonstrates is that an applicant's own legal costs in Northern Ireland are significant and prohibitively expensive contrary to Article 9(4)

(c) The communicant does not raise any new issues regarding expenses that are not already being considered by the Committee in the context of its review of the Party concerned's costs regime under decision V/9n of the Meeting of the Parties (para. 83 of the response);

The fact that this same issue has arisen previously in regard to decision V/9n and, indeed, VI/9i before that demonstrates the Party's contempt for the Convention and an unwillingness or reluctance to comply with the ACCC's findings on those previous decisions. Rather than seeking to dismiss the complaint on the basis that it does not raise

any new issues that are not already being considered, perhaps that question that needs to be asked of the Party concerned is why these same issues are persistently arising in the form of complaints to the ACCC?

(d) *Costs of £6,000 for the High Court proceedings cannot be considered prohibitively expensive in this case (para. 91 of the response);*

Please refer to RFA's answer at point (b) above. Again, the Party's point (d) above suggests it is not prepared to accept the ACCC's previous findings on decisions V/9n and VI/9i before that, where it was made clear that failing to ensure that costs for **all** legal procedures were not prohibitively expensive rendered the UK Member State in breach of Article 9(4).

(e) The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 provide that in any appeal in an Aarhus Convention case, including an appeal from judicial review, the court may make an order limiting the recoverable costs. In deciding the costs limit to be imposed, the Regulations provide that the court must have regard to the means of both parties, all the circumstances of the case and the need to facilitate access to justice. Pursuant to the findings in Edwards the assessment of what is prohibitively expensive cannot differ depending on whether the court in adjudicating first instance or appeal proceedings (paras. 92 and 93 of the response).

The simple fact of the matter is even if liability for the Party's costs was set at zero for any appeal, our voluntary organisation was not in a position to afford its own costs of initiating such an appeal. This was the sole deterring and determining factor which prevented RFA mounting an appeal in order to attain environmental justice.

The Party's claim at paragraph 94 of its submission that "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" is total conjecture and without foundation. As one of four directors of RFA who met with our legal team minutes after the judgement was handed down, I am clear that the categorical advice from our senior QC was to appeal this ruling. The prohibitively expensive legal costs quoted at the meeting was the only deterrent to lodging an appeal.

Given this disparaging statement by the Party expressing confidence in its defense of the challenge and its claim that this case does not fall within the remit of Article 6, it would seem reasonable for the Party concerned to provide to the ACCC with its professional planning judgement on the accuracy of the statement it made in paragraph 57 of the sworn affidavit referred to previously on page 7, in support of its claim that the RFA case was a weak one. To reiterate, the statement in this affidavit is a wholly inaccurate statement which no professional planning officer within the Department has been prepared to publicly defend, despite repeated requests from RFA to the Department to confirm the accuracy of this misleading statement. RFA believes that the planning authority which approved this case and the Department for Infrastructure for Northern Ireland which provided input to the Party's submission are fully aware of the inaccuracy and misleading nature of this claim and how it misled a court of law. Hence the refusal of any professional planning officer to provide their professional opinion in defense of this statement

(f) The level of a claimant's own costs for legal representation are not relevant to whether proceedings are prohibitively expensive (para. 94 of the response).

A claimant's own costs are entirely relevant to whether proceedings are prohibitively expensive, being the sole reason why RFA was not in a position to pursue an appeal. Indeed, this is further demonstrated by the fact that in Northern Ireland there has been a surge in Litigant in Person legal challenges to environmental planning decisions in 2016. I am aware of five such challenges having been mounted where citizens are having to

represent themselves in the High Court because they cannot afford the prohibitive expense of legal representation.

These challenges are not without foundation as the first of these saw the impugned planning decision quashed in June of last year. Having attended court to observe two others I can confirm that in the successful application for leave to challenge the Department for Infrastructure's intention to proceed with a major roads proposal through an environmentally sensitive landscape, the judge advised the applicant that he needed to get legal representation. The response from the Litigant in Person was categorical; "I cannot afford to."

In a second case I attended, the Litigant in Person is challenging the Department for Infrastructure over its decision to approve a major gold mining operation, which it is alleged breaches the EIA and Habitats Directives. Again, whilst having secured a Protected Costs Order, the reason why the applicant is forced to represent himself in court, is because of the prohibitively expensive nature of legal representation in Northern Ireland and that there is no other recourse to seek environmental justice open to third parties. Therefore, it is simply incorrect for the Party to claim that a claimant's own costs for legal representation are not relevant to whether proceedings are prohibitively expensive.

Other matters

At paragraph 80 of the Party's submission, it makes the claim that "as a small jurisdiction the number of planning cases in Northern Ireland is relatively low and can be dealt with swiftly." I note the Party provides no evidence in support of this unfounded and, I would contend, incorrect claim.

As has been witnessed with RFA's challenge this was in no way dealt with swiftly, nor in a coherent manner. The challenge having been lodged in December 2012, leave was not contested and the hearing was scheduled to be heard over 2 days in May 2013. However, on the first day of that hearing the judge informed the parties that he would not be sitting the following day and that new dates would have to be arranged. Similarly, having set a further two days for hearing in June 2013, the hearing did not commence until after lunch

on the first day and did not recommence after lunch on the second allotted day. Given the disjointed nature of the proceedings, a further two days were scheduled for October 2013, meaning that the hearing was strung out over a period of five months.

Due to no fault of RFA this disjointed process added significantly to the uncertainty of affordability, literally doubling the initial estimate of £80,000 to actually costs of £160,000 (excluding any liability).

Then it took the courts four months to deliver a verbal judgement in February 2014 and the written judgement a month later. It was in September 2014 that costs were finally settled.

This disjointed process for environmental judicial reviews is not unusual. Below is the timeline of the ongoing Litigant in Person case in the impugned gold mine decision mentioned previously.

Timeline

27 July 2015	Approval of underground mine
12 October 2015	Pre-action correspondence and notification of intention to apply for judicial review
1 December 2015	First leave hearing took place. As a result of a large quantity of correspondence being sent to the applicant by the dept at the last minute Justice Deeny adjourned the leave hearing till 4.3.16
4 March 2016	Leave was granted and dates agreed for full hearing
27-29 September 2016	Full hearing - due to last minute change of Judge and her prior commitments in court the full 3 days were not available and a further 3 days were agreed in December 2016
6-8 December 2016	Full hearing scheduled to continue but due to unavailability of Judge once again postponed till following year.
6 February 2017	Litigant in Person seeks adjournment from the court until it confirms that his challenge is deemed an “Aarhus” case and

	that a Protected Cost Order (applied for at the outset) will be granted.
8 February 2017	PCO granted.
13-15 February 2017	Hearing resumes and concludes on 14 February 2017 due to the unavailability of the judge on the 15 February 2017. The Litigant in Person is allowed until Friday 17 February 2017 to submit a written summing-up.

This case has now been spread out over a period of one year and four months and has yet to conclude hearing, never mind, receive a judgement. Indeed, on recommencement on 13 February 2017 the judge's opening comments, as recorded from my contemporaneous notes, were: "as you know there has been quite a significant gap since we last dealt with this matter."

Contrary to the Party's claims of swift handling of judicial reviews, this is certainly not RFA's and other litigants' experience of the courts in environmental planning challenges. Other examples can be provided should this be required by the ACCC.

Summary

The judicial review process in Northern Ireland does not provide adequate or accessible recourse to environmental justice. Whilst RFA has endeavoured to address the points raised by the ACCC in its letter received 27 September 2016, our voluntary organisation's main concerns are:

(i) That citizens in Northern Ireland are denied access to reviews of the substantial merits of environmental planning decisions and are, instead, forced to consider judicial review as the only mechanism to challenge poor environmental decisions. In particular, it is the substantive merits of how decisions were reached that often lie at the heart of environmental decisions and the ACCC should confirm that the premise of substantive legality as set out in the Convention, includes recourse to a review of the merits of the case. It is considered a right of third party appeal (as currently exists in the Republic of Ireland) would provide the forum under which

this could be achieved and assist the UK Member State in fully complying with Article 9(2) and 9(3) of the Convention.

(ii) The recourse to the courts in environmental planning cases is prohibitively expensive and acts as a significant deterrent to those wanting to challenge poor environmental planning decision making. The uncertainty of timings due to the Courts other commitments, can lead to long delays and adds considerably to costs, beyond those initially estimated. In RFA's case this increased from £80,000 to £160,000. As such, the UK Member State is not fulfilling its obligations under Article 9(4) of the Convention.

(iii) That in the particular case of the River Faughan Anglers-v-the Department of the Environment for Northern Ireland, seriously inaccurate information was provided to a court of law by the respondent which misled a high court judge, giving rise to a serious injustice and permanent threat to a Natura 2000 site, not to mention the enormous financial expense. This being the case, the Department has persistently declined to provide RFA with a professional planning opinion on the factual accuracy of the statement contained at paragraph 57 of its sworn affidavit on which a court of law relied when dismissing RFA's legal challenge.

Should you require clarification or additional information on any of the above, please contact me at my e-mail address.

Yours sincerely

Dean Blackwood

Director

River Faughan Anglers