

Date: 25 February 2018

Ref: ACCC/C/2013/90

Ms Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
United Nations
Economic Commission for Europe
Palais des Nations
Room 429-4
CH-1211 Geneva 10

Dear Ms Marshall

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

Further to your letter dated 16 January 2018, please see the River Faughan Anglers (RFA) response to the Compliance Committee's questions. As requested, this letter has been copied to the Party for comment. The following questions were asked of the Communicant.

Please provide a chronological outline of the opportunities for public participation (if any) that were available to you in respect of planning application A/2008/0408/F and how you engaged with the formal planning process in this case.

1. The opportunities for public participation regarding A/2008/0408/F are as follows:
 - a) On receipt of a planning application the Department is required to advertise the development in the local press and carry out a neighbour notification exercise to alert interested / affected third parties and afford them the opportunity to make representation. RFA submitted objections to the retention of the lagoons and other associated development. These letters raised concerns regarding the absence of adequate environmental assessment. Indeed, for over three years after the submission of the planning application, it remained unclear whether the Department had conducted a negative Environmental Impact Assessment (EIA) Determination as none was available on file. When it did appear, it was unsigned, undated and unintelligible, particularly in regard to how consideration of Schedule 3 criteria informed the decision not to require EIA. That the Committee has had to raise this specific matter at question 5 of its letter dated 16 January 2018, highlights the profound difficulty the Party has had in explaining and addressing this fundamental concern raised by RFA. Essentially, our organisation raised reasonable questions and

environmental concerns which, largely, went unanswered (as referred to in paragraph 9 of RFA's opening statement to the Committee hearing on 12 December 2017).

- b) Similarly, when significant amendments to a planning application are proposed there is a requirement to re-advertise in the local press and inform objectors / third parties of those changes. Again, RFA submitted objections to the failures of environmental assessment surrounding the proposed construction of new lagoons and the decommissioning and removal of the existing "highly contaminated" lagoons, which are in close proximity to the River Faughan and Tributaries Special Area of Conservation. Our organisation continued to raise reasonable questions and concerns over inadequate environmental assessment which, largely, went unanswered (as referred to in paragraph 9 of RFA's opening statement to the Committee hearing on 12 December 2017).
 - c) Prior to a recommendation being presented to the local council (in this case the former Derry City Council) there is a requirement to make the council schedule of recommendations publicly available, **including the detailed case officer report and the development management report on the planning portal** (the latter being the corporate authorisation of the former). This provides a narrow window of opportunity to engage with council. Please noted that prior to 1 April 2015, elected representatives / councils played only a consultative, or advisory role in the planning decision-making process. Whilst recommendations would be presented to the council, the final decision rested with planning officials within the Department of the Environment. In the case of A/2008/0408/F, this would have been the Northern Planning Division (NPD); the authority which withheld this environmental information from RFA (and Derry City Council) until after NPD issued its decision. **Please refer to the Communicant's previous submissions uploaded on 16 February 2017 "Reply to questions from the Committee, pages 5-8 and the "Opening Statement for the hearing at the Committee's 59th Meeting" paragraphs 22-23, uploaded on 12 December 2017.**
 - d) Generally, the public is also at liberty to make representation at any time throughout the planning process. There is a requirement that all representations made regarding a planning application will be fully considered by the planning authority and, certainly, a public expectation that reasonable questions raised by objectors will be addressed by the decision-maker. How representations / objections were considered as part of the decision-making process must be recorded and assessed as part of the case officer and development management reports, and this must be made available to the public prior to the council meeting. In withholding the detailed report from RFA until after the decision issued, our voluntary organisation was unable to establish if, or how the decision-maker took account of our concerns / objections.
2. Full and meaningful public participation is predicated on openness, transparency and accountability on the part of the planning authority. Meaningful public participation is undermined if all relevant information / documentation that should be in the public arena is not made publicly available at the right time, or is withheld from citizens until after the decision is made. Failure to make available environmental information / documentation when it should be publicly accessible, and / or avoiding answering

reasonable questions, seriously curtails the ability of citizens to meaningfully participate in the planning decision-making process. This is what occurred in regard to A/2008/0408/F. RFA endeavoured to engage with the decision-maker as per points a) to d) above as is evident from the Party's Annex V detailing RFA's numerous letters of objection. What this Annex also demonstrates, contrary to the Party's claim of "extensive engagement" is that other than acknowledgements, RFA's objections were, by and large, not responded to by the planning authority (Refer to Annex V of the Party's response uploaded to ACCC/C/2013/90 on 27 November 2015).

3. Additionally, when development has already been allowed to take place without development consent or environmental assessment and is permitted to become immune from enforcement action, this undermines the value of the public participation process.
4. Notwithstanding what RFA considers to be the Party's clear failure to have understood, from the outset, that planning application A/2008/0408/F for the retention of unauthorised settlement lagoons, etc. constituted (unauthorised) EIA development, the ACCC will have previously noted that our organisation's concerns have also been with the Party's unwillingness to engage in open and transparent public participation. Whilst RFA has attempted to engage with all aspects of the public participation process (points a – d above) this was hampered by the decision not to answer the reasonable questions being raised in our letters of objection since 2008, but also the decision to withhold key environmental information from RFA until after the decision had issued, contrary to Departmental policy and established best practice (this was previously addressed in the communicant's opening statement of 12 December 2017, particularly paragraphs 9-10 and 22-23).
5. It was noted on the day of the ACCC hearing on 12 December 2017 that the Party conceded the point that the case officer / development management report requested by our river watcher on two separate occasions before the decision issued, should have been made publicly available before the council meeting on 4 September 2012, and should have been released to RFA when requested. The Party did not explain why this crucial environmental information was withheld. However, the fact remains that this report dated 24 August 2012, which planning officials claimed had not been finalised on 5 September and again, on 11 September 2012, was not made publicly available until after the decision had issued on 13 September 2012. This clearly breached RFA's right of public participation and limited our means of redress to the prohibitively expensive judicial review process. RFA can only conclude that, either; (i) the documents were deliberately withheld to avoid uncomfortable scrutiny and further public participation, or (ii) the documents were backdated.
6. Given the long history of unauthorised development and the past failures of the planning authority to adequately enforcement at this site, our voluntary organisation would already have been aware of the intentions of the Department to elicit a planning application before it was submitted to retrospectively address the unauthorised settlement lagoons, landfilling and other associated uses, which had been carried out

without planning permission or environmental assessment. As such, in relation to the points a), b) and d) above, RFA has not raised issue with the way the Department has made the public aware of planning application A/2008/0408/F. Rather, it was the inadequate nature of that participation, particularly the repeated failure to answer reasonable questions throughout the processing of the application (as contained in RFA's letters of objection) and not making relevant environmental information available (point c), which hindered, and made meaningless, our participation in the environmental decision-making process contrary to Articles 3.2 and 6 of the Aarhus Convention. Failure to adequately engage with RFA's concerns led to a bad and unlawful decision.

Please provide full details of the actual costs you incurred in bringing the judicial review proceedings to challenge the planning permission granted on 13 September 2012. This should include any court fees paid, lawyers' fees and experts fees relating to the judicial review proceedings. Please be as specific as possible when setting out the actual costs incurred.

7. The total costs incurred to River Faughan Anglers was £165,828.63. This is an exact and accurate figure as extracted from RFA's cheque accounts. Please note that because all financial transactions were managed through the acting solicitor, often cheques were made out to it to subsequently distributed between other actors. Cross-referencing with invoices indicates the following breakdown.

Senior Counsel	£83,200.00
Junior Counsel	£55,166.38
Acting Solicitor	£15,217.25*
Ecologist	£7,245.00
Department	£5,000.00 (costs awarded against RFA)
TOTAL	£165,828.63

*Within the solicitor's fee is included the court fees, which I am advised would have been in the region of £400.00.

Explain why you consider the costs you incurred in bringing the judicial review proceedings to be prohibitively expensive.

8. River Faughan Anglers Ltd. (RFA) is a voluntary-run, cross-community, not-for-profit organisation which relies solely on income derived from the issue of permit sales which afford anglers the privilege of fishing the River Faughan. Our organisation is a major recreation provider in the Derry City and Strabane District Council area. This part of the North-west of Ireland is impacted greatly by multiple deprivation. Indeed, the

council area hosts five of the top ten most multiply deprived “Super Output Areas”¹ in Northern Ireland.²

9. Our organisation recognises the contribution recreation makes to the health and well-being of citizens and the difficulties many have in availing of this due to low levels of income. Therefore, underpinning our core principle of serving the entire community, is the desire to provide recreation at a reasonable and affordable cost. In addition, as a not-for-profit organisation, our income is largely balanced out by our outlay. At the time of the judicial review, this annual income was in the region of £80,000. Practically all generated income would have, and still is, spent on annual rental of the fishing rights to the river, office running costs, maintaining good access (including repairs) and policing the Faughan.
10. Before initiating the judicial review, RFA sought an estimate of the costs likely to be incurred. This was initially estimated to be in the region of £50,000. However, as referred to previously in our complaint, for reasons over which RFA had no control, this scheduled two-day hearing became strung out, piecemeal, by the Courts over five days (or part days) of hearing, dispersed over three sittings, spanning a period of six months. Essentially, final costs significantly exceeded what our voluntary organisation had expected and budgeted for and was over twice our entire gross annual income. Had this been known at the outset, RFA would not have agreed to go forward with the judicial review, due to the severe and almost ruinous impact such a financial outlay could have had, and almost did have on our voluntary organisation. Indeed, had it not been for our legal counsel and solicitor agreeing to defer significant outstanding balances until the following year, our voluntary organisation would have had to file for bankruptcy in 2013. Additionally, these costs must also be considered in the context that RFA was simply not in a financial position to appeal what we and our legal counsel considered to be an evidently flawed and eminently challengeable High Court ruling.
11. Whilst the Party maintains it was weaknesses in RFA’s case that deterred appeal, nothing I have read or heard from the Party by way of evidence in its submissions against this complaint, or during its cross-examination by the Committee at hearing on 12 December 2017, supports the UK’s proposition that RFA’s case was a weak one. On the contrary, that the Committee deems it necessary to elicit detail from the Party by way of the questions in the letter dated 16 January 2018 – questions the Party addressed unconvincingly under cross-examination by members – demonstrates that the fundamental weaknesses in argument lie with the Party. That the Party would seek to defend such a weak and untenable position should be of concern to the Committee (as it is to RFA), if this is the level of entitlement to public participation and standard of environmental assessment the Party considers appropriate for environment decision-making, generally, never mind the safeguarding of the Natura 2000 network in Northern Ireland.

¹ A spatial area (of which there are 890 in Northern Ireland) over which multiple deprivation is measured.

² Source: Northern Ireland Statistics and Research Agency: Multiple Deprivation Measures 2017, p8.

Specific impacts

12. What constitutes prohibitively expensive, must also be considered in the wider context of the long-term impacts and consequences from which our voluntary organisation and permit holders are still impacted because of the significant financial outlay on legal costs between 2012 and 2014. Notwithstanding the issues of social deprivation and concerns over affordability mentioned at paragraphs 8 and 9 above, RFA was forced to raise the cost of an angling permit by twenty percent (20%) in 2013 in an attempt to offset some of our increasing legal costs.
13. The costs of the legal challenge has impacted on RFA's programme of providing good access to the river and maintenance of equipment.
14. [redacted] RFA fully appreciates the Compliance Committee's commitment to openness and transparency. However, the directors would request that this paragraph 14 is not publicly displayed, even if this means the matter cannot be taken into consideration by the ACCC for the purpose of determining prohibitive expense.
15. In summary, not only was the total cost considered to be unreasonable and a real deterrent when considering future legal action to protect our river, but such costs prevented RFA from being able to mount an appeal, thereby undermining our right to access to environmental justice as enshrined in the Aarhus Convention. Additionally, in 2018 the cost of the original challenge continues to have longer-term, knock-on impacts on the quality of service our voluntary organisation provides to our community and environment.

Yours sincerely

Dean Blackwood BSc (Hons) LL.M MRTPI
Director
River Faughan Anglers

[redacted]
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[redacted]

Copy to: Ahmed Azam, Department for Environment, Food and Rural Affairs, London