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Ms Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
UN Economic Commission for Europe
Environment Division
Palais des Nations
CH-1211 Geneva 10
Switzerland
(By email only)

1 March 2018

Dear Ms Marshall

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

I refer to your letter of 16 January 2018. I want to start by thanking the Committee for allowing a two week extension and apologise for the additional two days taken to submit this reply. I have addressed each of the Compliance Committee's questions in turn.

General background

- 1) **Please provide a chronological outline of the planning history of the W & J Chambers site (i.e. the activity/site at issue in this case), including any enforcement action taken against the developer/operator and the outcome of any such enforcement action. Please specifically indicate:**
 - (a) **All planning permissions granted for this site over the years since the development/activity first began operating on this particular site;**
 - (b) **The precise nature of the activities carried out on this site over the years;**
 - (c) **Any current (live) enforcement activity concerning this site.**

A chronology is set out to the best of the Department's knowledge at Annex A.

- 2) **Please provide details of any landfilling, authorised and/or unauthorised, which has taken place on the site either recently or in the past.**

RFA alleged that application A/2008/0408/F was to regularise unauthorised landfilling amongst other matters. The Party concerned wishes to emphasise that this allegation is

simply incorrect. The description of the application was for “*Retention of extension to site office, extension to vehicle maintenance shed and improved wash our facilities. Relocation of settlement lagoons, site drainage works. Associated landscape and environmental improvements*”. The application did not seek development consent retrospectively for alleged, historic landfilling operations.

The Department can advise that it previously dealt with planning permission application number A/1980/0813 for filling of land to provide extension to existing brickworks on the W & J Chambers site at Glenshane Road, Drumahoe. This “*filling of land*” was authorised by virtue of the planning permission granted on 19 June 1981.

A subsequent enforcement case was commenced by the Department in 2006 (planning reference A/2006/0043CA) against W & J Chambers for the site at 91 Glenshane Road, Drumahoe in respect of “unauthorised change of use, infilling and lagoons”.

This case eventually led to the serving of two enforcement notices (ENs) in May 2011 – one operational and one for a material change of use (MCOU) (EN/A/2006/0043/CA/1 and EN/A/2006/0043/CA/2). These ENs were subsequently appealed to the planning appeals commission (PAC) (references PAC 2011/E017 and PAC 2011/E018). At appeal the MCOU EN was found to be a nullity and the operational notice was legally immune from enforcement.

Otherwise, the Department has been unable to find any record within its planning files of the occurrence of the historic landfilling activities alleged by the Communicant to have taken place at the Chambers site.

In relation to recent activity associated with the Chambers site Derry City & Strabane District Council is the local planning authority for the district within which the site is situated. On foot of recent engagement the council has indicated that no permission has been granted for landfill since 1st April 2015 nor is it aware of any unauthorised landfilling having taken place since that date.

3) Please provide all documentation concerning the appropriate assessment for the purposes of the EU Habitats Directive undertaken by the competent authorities in connection with planning application A/2008/0408/F.

Matters related to Appropriate Assessment were addressed in the affidavits of Keith Finegan and Malachy McCarron, and to a lesser extent the affidavits of Adrian Brown, and the exhibits thereto as filed in the proceedings before the High Court. Copies are provided herewith at Annexes B - D.

These should be read in conjunction with the Judge’s comments as set out at paragraphs 15 – 27, 30 – 40, 42 – 45, 51 – 53, 72 – 75, 80 – 84, 86 - 92, 96, 98, and 109 – 120 of the judgment, attached for convenience again at Annex E.

4) Is there a legal requirement in Northern Ireland, either pursuant to legislation or established administrative practice, to carry out a public participation procedure in relation to appropriate assessments undertaken for the purposes of the EU Habitats Directive?

The Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995, as amended, transpose the provisions of the EU Habitats Directive. The EU Directive does not include any mandatory requirement to carry out a public participation procedure in relation to appropriate assessments undertaken for the purposes of the Directive. No mandatory legislative or administrative procedures to consult the public on the appropriate assessment have been introduced in Northern Ireland. There remains a discretion to consult the public in any given case. In the present case, the Communicant was able to make representations on the potential impact of the proposed development on nature conservation interests. The appropriate assessment is taken into account by the planning authority and only after having ascertained that it will not adversely affect the integrity of the site, can the planning authority agree to the development and impose appropriate mitigation measures in the form of planning conditions. A development proposal which could adversely affect the integrity of a protected site may only be permitted in exceptional circumstances as laid down in the relevant statutory provisions.

More generally, planning application A/2008/0408/F was subject to the legislative public participation requirements specified in the [Planning \(Northern Ireland\) Order 1991](#) (“the 1991 Order”). Article 21 of the 1991 Order sets out the public participation arrangements for all planning applications. These included:

- (a) Publication of a notice of the planning application in at least one newspaper circulating in the local area; and
- (b) Publication of a notice of the planning application on a website maintained by the Department for the purpose of advertising planning applications.

In addition to the above legislative requirements, there were administrative procedures in place which required the Department to serve notice of the application to any identified occupier on neighbouring land.

5) Please provide the detailed reasoning underpinning the two negative screening decisions in connection with planning application A/2008/0408/F (the first screening decision is undated and the second screening decision is dated 25 June 2012). In particular, please specify how the selection criteria were taken into account in arriving at the negative decisions.

This matter was addressed in the affidavits of Adrian Brown and the exhibits thereto as filed in the proceedings before the High Court. Copies are provided herewith at Annex D.

These should be read in conjunction with the Judge’s comments as set out at paragraphs 13, 14, 41, 46 – 50, 53, 61 – 71, 76 – 79, 97, 102 – 108, and 114 - 120 of

the judgment, attached for convenience again at Annex E.

Article 6

- 6) Please provide details of the specific arrangements for public participation that applied in respect of planning application A/2008/0408/F. Please also provide copies of all documentation published in relation to the public participation arrangements, including the notification(s) given to the public of this particular planning application (e.g. any notices published in the local newspapers) and the information provided to the public explaining how they were entitled to participate.**

As set out above planning application A/2008/0408/F was subject to the legislative public participation requirements specified in the [Planning \(Northern Ireland\) Order 1991](#) ("the 1991 Order"). Article 21 of the 1991 Order sets out the public participation arrangements for all planning applications. These included:

- (a) Publication of a notice of the planning application in at least one newspaper circulating in the local area; and
- (b) Publication of a notice of the planning application on a website maintained by the Department for the purpose of advertising planning applications.

In addition to the above legislative requirements, there were administrative procedures in place which required the Department to serve notice of the application to any identified occupier on neighbouring land. See further the reply to question 7 below.

Compliance with these requirements was not in issue in the proceedings. The Department has not retained copies of the relevant advertisements but attached at Annex G hereto a copy of a screenshot confirming initial advertisement of the application in two newspaper circulating in the local area on 17 and 18 June 2008 and advertisement of the revised proposal in the same two newspapers on 9 and 10 August 2011.

Although as stated above copies of the original newspaper advertisements for the application which is the subject of this complaint are not currently available a sample advertisement relating to the same district council area is attached for information at Annex H.

- 7) Please explain the difference between the public participation arrangements for planning applications that are subject to environmental impact assessment and for planning applications not subject to environmental impact assessment.**

This response is set within the context of planning application A/2008/0408/F which was received on 21 May 2008.

At the time the planning application was received, planning applications were processed in line with the legislative requirements specified in the [Planning \(Northern Ireland\) Order 1991](#) (“the 1991 Order”). Article 21 of the 1991 Order sets out the public participation arrangements for all planning applications. These included:

- (a) Publication of a notice of the planning application in at least one newspaper circulating in the local area; and
- (b) Publication of a notice of the planning application on a website maintained by the Department for the purpose of advertising planning applications.

In line with Article 21 of the 1991 Order, before determining a planning application the Department was required to wait 14 days from the date the notice was first published in the newspaper or on the website, whichever was the later.

In addition to the above legislative requirements, there were administrative procedures in place which required the Department to serve notice of the application to any identified occupier on neighbouring land. This formerly administrative procedure has now been made a legislative requirement within the new two-tier planning system as set out in Article 8 of the Planning (General Development Procedure) Order (Northern Ireland) 2015.

Planning applications which required an environmental impact assessment were also subject to the [Planning \(Environmental Impact Assessment\) Regulations \(Northern Ireland\) 1999](#), as amended¹ (“the 1999 EIA Regulations”). The legislative requirements for public participation arrangements for any such planning applications were set out in regulations 12 and 15 of the Regulations and required:

- (a) Publication of a notice of the planning application in at least one newspaper circulating in the local area; and
- (b) Publication of a notice of the planning application on a website maintained by the Department for the purpose of advertising planning applications.

The notice was to include:

- (a) A statement that the planning application was accompanied by an environmental statement; and
- (b) An address in the local area where a copy of the environmental statement could be obtained from the developer, so long as stocks last, and the charge, if any, of obtaining a copy.

The legislation also required the notice be sent to any person who may be affected by or have an interest in the planning application and who would be unlikely to become

¹ By the [Planning \(Environmental Impact Assessment\) Regulations \(Northern Ireland\) 2008. SR 2008 No. 17](#)

aware of the application through advertisement in the local newspapers or on the Department's website.

Regulation 12 of the 1999 EIA Regulations required a period of four weeks, from the date the notice was first published, to allow the public to make representations.

Under regulation 15 any further information provided by the developer on the environmental statement, or any evidence to verify the information in the environmental statement, was also required to be publicised.

The 1999 EIA Regulations prevailing at the time of submission of the application have been revoked and replaced. The current EIA regulations extant in Northern Ireland are the Planning (Environmental Impact Assessment) Regulations (NI) 2017 (S.R.2017 No.83) which transpose the requirements of the EIA amendment directive 2014/52/EU as they apply to the planning system.

Article 9

8) Please provide an account of the current state of the jurisprudence in your legal system concerning the application of the *Wednesbury* test in the specific context of a challenge to a negative screening determination. In your reply, please focus on:

- (a) The intensity of review undertaken by the courts when examining challenges to negative screening decisions;**
- (b) How the *Wednesbury* test was applied by the High Court in the communicant's judicial review proceedings.**

The screening procedure for environmental impact assessment is the creation of successive editions of the EU Directive on the assessment of effects of certain public and private projects on the environment ('the EIAD'). The version of the EIAD in force at the date of the negative screening determination made in July 2012 was Directive 2011/92/EU. The 1999 EIA Regulations transposed the EIAD into Northern Ireland law. There is no issue as to effective transposition.

Recital (21) of Directive 2011/92/EU recites the requirements of article 9(2) and (4) of the Aarhus Convention. Article 11 of Directive 2011/92/EU gave effect to those requirements (Article 9 of the Aarhus Convention had previously been given effect through article 10A of Directive 85/337/EEC which was inserted by the EC Public Participation Directive).

At the dates, therefore, of the hearing before Treacy J and the decision of the High Court, the EIAD gave effect to the requirement that the public concerned should have access to a review procedure before a court of law (etc) to challenge the substantive or procedural decisions subject to the public participation provisions of the Aarhus Convention.

At paragraphs [88]-[92] of its judgment in Case C-508/03 *Commission v United Kingdom* [2006] QB 764, the CJEU stated that the test required by EU law for the purpose of judicial review of a negative screening determination is “manifest error of assessment”. That test is substantially the same as the *Wednesbury* test.

In UK law as it applies both to Northern Ireland, the established principles are as follows:

- (1) The assessment of the significance of an impact or impacts of a project on the environment is essentially a fact-finding exercise which requires the exercise of judgment on the issues of ‘likelihood’ and ‘significance’: see *Bowen-West v Secretary of State* [2012] EWCA Civ 321 at [40].
- (2) Because the word ‘significant’ does not lay down a precise legal test but requires the exercise of judgment on planning issues and consistency in the exercise of that judgment in different cases, the function is one that the Courts are ill-equipped to judge for themselves: see *Jones v Mansfield DC* [EWCA] Civ 1408 at [17] and [61].
- (3) The decision in *R (Loader) v Secretary of State* [2012] EWCA Civ 869 recognises that the test for determining whether a development is EIA development is meant to be one which is intended to be used quickly by people with the requisite experience and qualifications. The EU Guidance also recognizes that as the basis for the screening process.
- (4) A proportionality test is inappropriate since the screening determination is essentially a fact-finding exercise rather than the exercise of a discretion which is susceptible to review on the basis of assessing whether the response to a particular aim is proportionate: *Bowen-West v Secretary of State* [2012] EWCA Civ 321 at [40].
- (5) The test required by EU law is “manifest error of assessment” which is a test substantially the same as the *Wednesbury* test: see Case C-508/03 *Commission v United Kingdom* (above).
- (6) *Wednesbury* should be seen as but one of the established heads of public law review: see *R(Evans) v Secretary of State* [2013] EWCA Civ 114 at [37].
- (7) The case law (including Case C-508/03 *Commission v United Kingdom* (above)) was reviewed by the Court of Appeal in *R(Evans) v Secretary of State* [2013] EWCA Civ 114 at [32]-[43]. The Court considered the Aarhus Convention as part of that review: see [42].

These principles were correctly stated and applied by Treacy J in the present case: see paragraph [78] of the Judgment.

In summary, both the CJEU and the UK courts have confirmed that the appropriate

basis upon which a negative screening decision falls to be considered by way of judicial review founds upon the *Wednesbury* principle. A proportionality test is inappropriate. The *Wednesbury* principle provides the flexibility to review the underlying legality and rationality of a screening decision on the facts of each individual case. Given the established position as outlined above, it is respectfully submitted that there is no proper basis upon which the Communicant may invoke the Committee's assistance in challenging the deployment of the *Wednesbury* principle.

9) Apart from lawyers' fees and experts' fees, what other costs may be incurred by an applicant in bringing judicial review proceedings in environmental cases? In particular, please specify the amount of the applicable court fees and any other similar charges that apply in this context.

The fee for judicial review in a matter concerning the Aarhus Convention is £200 on an ex parte application for leave and a further £200 upon the grant of leave.

10) Is it mandatory to have legal representation when litigating in the courts in Northern Ireland? In particular, it is possible for an applicant in judicial review proceedings to present the case to the court themselves (i.e. as a litigant in person)? If legal representation is mandatory, please specify what precisely is required in this regard in your legal system.

No, it is not mandatory to have legal representation when litigating in the courts in Northern Ireland. Yes, it is possible for an applicant in judicial review proceedings to present the case to the court themselves (i.e. as a litigant in person)? The third question is therefore not applicable.

11) Is it possible for litigants in environmental cases to be represented in court by an NGO (i.e. without legal representation as such)?

A litigant can be supported in a general sense by an NGO particularly with respect to preparation for the case including the preparation of written arguments which can then be relied upon at hearing. There is also provision made for self-represented litigants to be supported by a McKenzie Friend². An NGO could of course also bring a claim or application in its own right or could apply to intervene in a case as an Interested Party in which case it could support the Applicant through active intervention, argument and by way of submission of evidence in its own right.

Text of closing statement/remarks

12) Please provide the text of your closing statements/remarks (if available in writing) at the hearing on 12 December 2017 during the Committee's fifty-ninth meeting.

² Practice Direction on McKenzie Friends to be included within the bundle of annexes.

There is no pre-prepared text of closing remarks available. We attach at annex F a copy of the closing remarks based on notes taken as they were being delivered but it should be noted that, although accurate, the same do not represent a verbatim record of the remarks delivered.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Azam' with a flourish underneath.

Ahmed Azam
United Kingdom National Focal Point to the UNECE Aarhus Convention

Chronology

19 June 1981	Planning Application Number A/1980/0813 by W&J Chambers for filling of land to provide extension to existing brickworks at Glenshane Road, Drumahoe, approved.
15 December 1983	Planning Application Number A/1983/0516 by W&J Chambers for continued use of agricultural land for extension to brickworks at Glenshane Road, Drumahoe, approved.
11 September 1984	Planning Application Number A/1984/0451 by Mr William Chambers for change of use of part of agricultural field to yard for stocking agricultural products at Glenshane Road, Lismacarol, refused. Appeal dismissed.
1984 – 2006	The business operated at the site expanded without planning permission
2006	Enforcement proceedings regarding unauthorised change of use, infilling and lagoons at Glenshane Road, Drumahoe, commenced against W&J Chambers Ltd (reference number A/2006/0043CA)
5 March 2008	Planning Application Number A/2007/1061/LDE seeking a certificate of lawful development was made seeking to regularise changes to the site. The Department issued a Certificate of Lawful Development for the existing use “Premises of concrete products & sand & gravel merchants including offices, weighbridge, canteen, drying shed, vehicle maintenance shed, bagging plant, concrete plant, storage (pipes, bagged sand, gravel bins), parking area, hardstandings for circulation & laying out of blocks and washing facilities” at lands to the south of 91 Glenshane Road, Drumahoe. No enforcement action could be taken on the above operations as the time for enforcement action had elapsed. It was also however also highlighted at the time that were further changes and operations to the south west of the site which were not exempt. This ultimately led to application A/2008/0408/F being made.
19/12/08	Application A/2001/0165/O seeking site for residential development included associated road improvements at lands between Glenshane Road and Fincairn Road, Drumahoe, Londonderry (majority of housing site zoning H25 to north and west of the Beeches determined. Permission was granted on 19 Dec 2008.
26/3/2009	Application A/2001/0932/F seeking residential development of 33 No units comprising 29 No detached dwellings, 2 No apartments and 2 No townhouses for lands to the west of No 86 Glenshane Road, Drumahoe, and opposite 87 and 89

	Glenshane Road, Drumahoe, and east of 14, 16 and 18 The Beeches, Drumahoe, Londonderry determined. Permission was refused on 23 March 2009.
13/05/2011	Department served 2 enforcement notices to have unauthorised settlement lagoons removed.
02/04/2012	PAC Declared one enforcement notice a nullity
07/06/2012	The PAC quashed the other enforcement notice on the basis that it was not served in time, thereby rendering the lagoons immune from enforcement action
13/09/2012	Planning application A/2008/0408/F (as amended) granted to W&J Chambers Ltd for retention of extension to site office, extension to vehicle maintenance shed and improved wash out facilities, relocation of settlement lagoons, site drainage works, associated landscape and environmental improvements at 91 Glenshane Road, Drumahoe, Londonderry.
Current position	From recent correspondence with Derry City & Strabane District Council, the council responsible for the district within which the site is situated, we understand there is no current or recent enforcement activity concerning the site. Furthermore the council has indicated that no permission has been granted for landfill since that date nor is it aware of any unauthorised landfilling having taken place since that date.