Date: 30 August 2013

Ref: Communication to the ACCC

Aphrodite Smagadi

Secretary to the Aarhus Convention Compliance Committee

United Nations

Economic Commission for Europe

Palais des Nations, Room 348

CH01211 Geneva 10

Dear Ms Smagadi

Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by the United Kingdom with the provisions of the Convention in connection to access to public participation, access to information and access to justice.

Thank you for your letter seeking additional information in regard to the above mentioned complaint to the ACCC by River Faughan Anglers (RFA). Below is our response to the questions asked.

1. **Did you and do you have access to the negative screening decision of the authorities? Does the decision include the reasons for the decision? Please provide a copy of the decision, if available. Please indicate the web site of DOE Planning where the decisions – including annexes – is published.**

The negative EIA screening relates to planning application A/2008/0408/F and yes, RFA did eventually have access to this. There are two negative EIA screenings relating to this development consent which have already been provided to the ACCC at appendix 3 and appendix 5 of our original communication. This is the full extent of the EIA screenings carried by the Department in relation to this development consent.

The original screening carried out by DOE Planning was for the retention of the existing (unapproved) and highly contaminated settlement lagoons immediately adjacent the River Faughan. This is unsigned and undated but the Department is claiming that it was carried out in June 2008. The only reason given for not requiring EIA is recorded as *"All aspects of the application can be dealt with through the development control process."* The second negative determination was undertaken by the authority on 25 June 2012, after it received an amendment to the project in May 2011 which

involved the decommissioning of the existing lagoons and construction of new settlement lagoons some 40 metres away from the edge of the River Faughan Special Area of Conservation (SAC). The reason for not requiring EIA for the amended proposal was heavily predicated on the original EIA screening and is cited in full below:

"Based on the current location of the existing lagoons, the Department determined in June 2008 that there was no requirement for an environmental statement as all aspects of the application could be dealt with through the normal planning process. The consultation process established that NIEA had concluded, through its appropriate assessment consideration that there will not be significant adverse impact on the SAC and ASSI subject to amendment of the proposal. It was established the current lagoons are within the flood plain and as a result had the potential to impact on the nearby River Faughan if a flood event occurred. On foot of this a revised scheme was submitted, which proposes to decommission the current lagoons and relocate them outside the flood plain and further away from the area of acknowledged importance, the River Faughan ASSI and SAC.

The Department has determined that the relocation of the lagoons can also be dealt with through the normal planning process. It is satisfied that the relocation has reduced the probability of impact and has moved the proposal away from the River Faughan ASSI and SAC and outside the flood plain. Essentially therefore the overall size of the development subject of the application is the same as in June 2008 and the location of the new lagoons is an improvement on the current location. In conclusion an EIA is not required."

As mentioned above a copy of these negative EIA screenings has been provided at appendices 3 and 5 of RFA's original communication to the ACCC. It should also be noted that this reason is the subject of legal challenge as set out in detail under ACCC's question 4 below - see point c(iii) on page 6.

The planning decision A/2008/0408/F and June 2012 EIA screening can be viewed at http://www.planningni.gov.uk/ by going to "View Planning applications Online (PublicAccess)" and then click on "Application Search", then type in the planning reference number A/2008/0408/F and click "Search", then click on "click to view" , then click on "Associated Documents" , then click on "view Associated Documents", then click on "Additional Documentation" and then click on "EIA Determination Report".

The original (unsigned and undated) negative EIA screening is not available online as it was prepared prior to the electronic system going live. However, although the Department now claims that it was prepared in June 2008, this EIA screening is unsigned and undated and it was not held on file and was not made available to RFA despite requests for this documentation on 8 December 2008 and again on 31 October 2011. The Department has yet to explain why this was the case.

2. **When you were not provided with the DOE answer on your request for information, did you have the possibility to complain before other bodies, such as the Information Commissioner's Office. If yes, why did you not use it?**

We did not believe we had the possibility of complaining to the Information Commissioner's Office (ICO) in regard to our request for information contained in our letter dated 25 July 2012 (appendix 7 of our original communication) as the Department's response was indicating that the negative EIA

screenings carried out initially in June 2008 and subsequently on 25 June 2012 contained the full extent of its reasoning why EIA was not required. It has always been RFA's contention that these negative EIA screenings were inadequate for the public to be assured that the full extent of environmental effects had been identified and fully assessed for their significance before development consent was granted. Our letter of the 25 July 2012 was seeking clarification from the Department, highlighting where we believed it had failed to properly engage with the EIA Directive and affording it the opportunity to rectify those failings prior to issuing the development consent in the interests of protecting the River Faughan SAC. Instead, it refused to engage with our organisation and chose to invite us to judicially review its decision. At that stage it became clear to RFA that the information we were requesting did not exist, therefore, it would have been futile and a waste of time to go to the ICO, particularly as the Department was intent on issuing the development consent and our time for judicial review was limited.

3. **In your communication you mention that you plan to formulate a complaint to Europe. Please provide to the Committee with the information about the prospective / existing complaint, its content and the progress so far.**

The complaint to Europe will be based on facts, and supported by clear evidence, that the UK Member State (through the Department of the Environment for Northern Ireland) is infringing the EIA and Habitats Directives by operating a policy of after-the-event regularisation of unauthorised EIA developments by a process of granting Certificates of Lawfulness of Use or Development (CLUD) and by allowing EIA developments to take place, or in the case of mineral extractions, to continue extraction in the absence of the necessary development consents. In the case of CLUDs, the EIA Screening process and the need for EIA is bypassed completely as the Department considers that immunity from enforcement action (because of its failure to act on time) negates the need to apply the EIA Directive, as is evident from the Ministerial response contained in appendix 9 of our original communication to the ACCC. Also, we hold irrefutable evidence that the Department operates a policy of allowing unauthorised EIA Development to continue in the absence of development consent / planning approval, while it awaits additional environmental information because of inadequacies in environmental statements accompanying retrospective EIA Development planning applications. We also believe that the Department is more likely to make negative EIA screening decisions on retrospective planning applications to retain unauthorised development, so as to avoid being in breach of the EIA Directive. For example, in the case complained about, as shown in the aerial photograph contained at appendix 1 of our original communication to the ACCC, the Department is contending that this significant industrial, concrete production plant, with its highly contaminated settlement lagoons immediately adjacent to the River Faughan SAC does not represent EIA development. RFA is preparing a case study on the River Faughan SAC where the Department has permitted unauthorised mineral extraction and processing, waste processing facilities and industrial developments, such as the concrete production plant (which is the subject of our legal challenge and complaint to the ACCC), to take place on a truly massive scale without the benefit of adequate assessment of the environmental effects and in the absence of development consents.

Currently there are at least 10 retrospective planning applications for mineral extraction and processing directly affecting the River Faughan SAC. There are also an number of retrospective planning applications for the retention of a waste management site close to the SAC and, of course

this major concrete production plant (A/2008/0408/F) which is the subject of our current legal challenge and complaint to the ACCC.

Unauthorised mineral extraction

Despite having no development consents, most of the minerals extraction sites directly affecting the SAC have already been exhausted even though at least two where the subject of positive EIA determinations, with Environmental Statements being required. The Department has recognised that the environmental statements accompanying these retrospective minerals applications did not contain adequate environmental information in terms of effects on the River Faughan SAC and requested additional information in the form of addendums to those statements. Indeed, one of the environmental statements accompanying retrospective planning application A/2011/0210/F (which can be viewed on the DOE Planning "public access" site referred to previously on page 2) stated that there was no environmental designation of international importance within 5km of the project, yet the River Faughan SAC was less that 100m from the mineral extraction site. No development consent has issued on this site yet the mineral extraction is exhausted and the despoiled land has now been turned into an illegal waste disposal site of immense proportions. On an adjoining site (retrospective planning application A/2009/0400/F), The Department actually ignored calls from other competent authorities to halt unauthorised extraction because of actual environmental damage occurring and declined to take enforcement action despite it being aware of serious inadequacies in the accompanying EIA. The Department actually permitted the applicant a number of extensions of time in which to submit the necessary environmental information in the full knowledge that unauthorised extraction was continuing and causing environmental harm. The environmental information was never submitted and the applicant simply withdrew the planning application once extraction was exhausted, without ever obtaining development consent.

Cumulative effects

Another part of our complaint will be that the Department has failed to consider the cumulative effects of these mineral extractions and has made a number of flawed negative EIA determinations on relatively recent retrospective planning applications for extensions to existing mineral extraction sites that previously required EIA.

Our complaint to Europe has been somewhat delayed and further complicated by the recent shocking announcement in June 2013 by the Minister of the Environment, Alex Attwood MLA, that he was revoking the licence of the major waste facility (City Waste) following the discovery of an illegal land fill of an *"unprecedented scale",* adjacent to the River Faughan SAC. It is estimated that this illegal landfill contains hundreds of thousands of tonnes of illegal domestic, commercial and industrial waste. This illegal land fill is located in the vast holes created by the unauthorised mineral extractions adjacent to the River Faughan SAC which the Department failed to enforce against. The Department has only recently confirmed to the NI Assembly that a tributary of the River Faughan is now being polluted by leachate from the illegal activities of this waste facility, only a few hundred metres from where it enters the River Faughan SAC.

Furthermore, the construction the proposed strategic road proposal, the A6 dual carriageway between Dungiven and Londonderry , which is being co-funded by Europe, is directly affect by this illegal land filling and there is a concern that the liability for the costs of the clean-up operation may

fall to the public purse (and potentially Europe) if planned vesting of the lands where the illegal landfill has been discovered takes place in order to facilitate the construction of the road line. The Minister for the Department of Regional Development (DRD) who is responsible for this strategic project has recently advised the NI Assembly on 27 June 2013 that he does not consider it appropriate to inform Europe of any financial, or other implications from the discovery of this illegal land fill on the line of the A6 road proposal. A copy of the Assembly Question (Ref: AQW/24790/11-15) posed by Steven Agnew MLA (Green Party) and the Minister's answer are copied below

Question: *To ask the Minister for Regional Development whether he has made, or intends to make, the European Commission aware of the implications, financial or otherwise, of the discovery of the illegal landfill site at Mobouy Road, Derry, given that it is co-funding the A6 strategic road proposal.*

Answer: *Design work on this section of the A6 was not co-funded by the European Commission and therefore I am not aware of any implications, financial or otherwise, that would require me to inform it of the ongoing investigation into alleged illegal dumping at Mobouy Road, Londonderry.*

It seems the Minister is avoiding informing Europe on the basis that it is not co-funding the design of the road line, but fails to consider the implications for Europe in the costs of construction of a strategic road that is affected by what appears to be the largest illegal waste disposal site ever uncovered by the UK Member State.

In terms of progress on this complaint to Europe, our organisation is run on a part-time and entirely voluntary basis, and given the complicated nature of the complaint and the extent of the failings of the Department in regard to the EIA and Habitats Directive, it is likely to be late 2013 (at the earliest) before we can be in a position to submit our complaint. Although RFA's case study will concentrate on cases and retrospective planning applications affecting the River Faughan SAC, there is a serious concern that the failings and environmental concerns being identified at the River Faughan SAC, are reflective of wider systemic failure of the planning system operating across Northern Ireland, particularly as it is the same specialist Minerals Unit operating within the Department of the Environment which deals with all minerals extraction and processing applications across the entire country. In addition, last year the Minister confirmed to the NI Assembly that almost 50% of all current minerals applications were retrospective, in that the work was already taking place, or was completed prior to development consents being applied for, or granted. A number of these cases were considered by the Department to be (unauthorised) EIA Development.

4. **Please clarify whether in the judicial review, you challenged:**
a) **The DOE Response on your request for environmental information**
b) **The negative screening decision**
c) **Both under a) and b)**

d) Other issues

Yes, RFA is challenging both the failure of the Department to provide adequate reasons for its negative EIA screenings (as we believe is evident from the negative EIA screenings previously provided at appendices 3 and 5 of our original communication with the ACCC) and the negative screening itself. Our full grounds for legal challenge are set out below:

That the Department acted unlawfully and in breach of the EIA Regulations and EIA Directive by failing to require the preparation of an environmental statement in connection with the application which led to the impugned permission:

a) *Regulation 4(1) of the EIA Regulations prohibits the grant of planning permission for EIA Development without consideration of environmental information including an environmental statement.*
b) *Regulation 9 of the EIA Regulations require a determination as to whether the proposed development, which fell within Schedule 2, amounted to EIA Development by reason of its likely significant environmental impact, having regard to selection criteria in Schedule 3 (and Article 4.3 of the Directive)*
c) *The Department erred in making its determination under Regulation 9:*
    (i) *In so far as the proposed development was regarded as a change or extension to executed development, by failing to consider whether the whole development on the site, as changed or extended, would have likely significant environmental effects;*
    (ii) *By failing to address the potential effect of the proposed development in cumulation with other development;*
    (iii) *In concluding that an environmental statement was not required due to the overall benefits of the proposal, by failing to take into account the full extent of the development and the potential adverse effects thereof;*
    (iv) *By failing to take any or adequate account of the selection criteria as set out in Schedule 3 to the EIA Regulations (and Annex III to the EIA Directive), including the potential for pollution and the environmental sensitivity of the SAC and an area designated pursuant to Member States' legislation;*
    (v) *In concluding that an environmental statement was not required, by taking into account mitigation measures without properly examining their effectiveness or whether significant environmental effects would arise from their implementation;*
    (vi) *By failing to base its decision on sufficient information or inquiry about whether the proposals would be likely to have significant environmental effects, including, a) the environmental baseline potentially impacted by the proposal; b) likely earthworks requirements at the time the determination was issued; c) likely significant sedimentation and siltation impacts upon*

water courses (in the absence of objective information on mitigation techniques)

(vii) By failing to provide adequate reasons for its determination.

The Department acted unlawfully and in breach of the Habitats Regulations and Habitats Directive by failing to carry out a proper appropriate assessment of the implications for the project for the SAC:

a) *Regulation 43 of the Habitats Regulations (and Article 6.3 of the Habitats Directive) require the Department to make an appropriate assessment of the implications of the site in view of its conservation objectives and in light of the conclusions of the assessment, agree to the project only after having ascertained that it will not adversely affect the integrity of the site;*
b) *Regulation 49(3) provides that where Regulation 43 applies, permission shall not be granted unless the Department is satisfied that no development likely to adversely affect the integrity of a European site in Northern Ireland could be carried out under the permission;*
c) *NIEA prepared an appropriate assessment which acknowledged the potentially significant effect of the proposals arising from the egress of potentially contaminated spoil during decommissioning works and the leaching of alkaline material from storm run-off, with potentially significant effects on the Atlantic salmon in the SAC;*
d) *However the assessment was inadequate in law by lacking assessment on the potential impacts of the project and the efficacy of the proposed mitigation measures, which were properly capable of removing all reasonable scientific doubt as to the effects of the works proposed on the SAC;*
e) *The Department failed to base its decision on sufficient information or inquiry about whether the proposal would have significant environmental effects on the SAC or adversely affect its integrity.*

The Department erred in law when imposing conditions on the permission:

a) *By failing to impose a condition requiring the preparation of a lagoon management plan, as required by NIEA;*
b) *By imposing conditions 1 and 2, which are incompatible by (1) requiring proposed lagoon construction in the location of an existing lagoon and (2) not permitting the decommissioning of the existing lagoon until after the completion of the proposed lagoons;*
c) *By unreasonably imposing condition 4, which requires the removal of contaminated waste from the interior of the lagoons for disposal off-site, without also requiring the removal of materials used to construct the walls of the lagoons*.

5. **Please explain how the project at issue is an activity that falls under article 6, paragraph 1, and which aspects of you rights for public participation have been infringed?**

Firstly I would wish to apologise, in that I had not fully appreciated the limitations of Article 6 at the time of submitting our original communication. However, there remains the strong possibility that Article 6 does apply.

The retrospective project being complained about is a concrete production plant adjacent to the River Faughan, the expansion of which was refused planning permission in 1984. Between 1995 and 2006 significant illegal land filling was allowed to take place at the site in order to raise ground levels to accommodate the unauthorised and continuous expansion of the concrete production plant. This illegal land fill is made up of organic materials, builders rubble, metals, plastics and cement residues, that latter of which is recorded as being of particular risk to aquatic life, and particularly to the Atlantic salmon. RFA has not been able to ascertain the total capacity of the illegal land filling deposited at this site as the Department has confirmed that it does not hold such records and has been neglectful in including references to the retention of this extensive illegal land filling in either the CLUD granted in March 2008 for a significant portion of the unauthorised development, and the subsequent impugned planning application A/2008/0408/F granted on 13 September 2012. However, adjacent to the bank of the River Faughan SAC the land fill is estimated to be in the region of 10 metres deep and covers an area well in excess of 2 hectares. RFA believes that the scale of landfilling which has taken place at this site, without any development consents is likely to have a capacity exceeding 25,000 tons and may therefore fall under Annex 1, Category 5, "waste management". The photograph provided at appendix 1 of our original communication will hopefully give some indication of the scale of the illegal land filling which has been allowed to take place adjacent to the River Faughan, in order to support the concrete production plant which has been built on top of it. The disposal of waste from this plant, in the form of land filling, allowed the continued unauthorised expansion of the plant, by simply concreting over the waste after it was dumped, creating the large open storage yard in the centre of the photograph.

The fact that this illegal landfilling was allowed to take place without the benefit of any development consent, was not the subject of any enforcement proceedings, and is now considered by the Department to be immune from enforcement action, has infringed our rights, as the public were not informed early in the environmental decision-making procedure, or in an adequate and effective manner as is a requirement set out in Article 6 of the Convention. Instead, the Department choose to grant a Certificate of Lawfulness of Use or Development (CLUD), making a significant portion of this illegal landfill and associated industrial business lawful without any requirement to consult the public and with no requirement to engage the EIA Directive, despite the fact that the extent of the development subject to the CLUD clearly would have fallen within Schedule 2 (Annex II of

the EIA Directive) of the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 1999. This is previously covered in paragraph 10 of my original submission and supported by appendices 9 and 10 of that submission. In essence, by making development lawful through the CLUD process (because it was allowed to become immune from enforcement action) which would normally have required EIA screening and / or EIA, the Department is bypassing the need to engage with the requirements of the EIA Directive and denying the public the right to participate in environmental decision-making.

In early 2013 RFA has also referred the illegal land filling element of this industrial development to the Department's Environmental Crime Unit (ECU), but has not been updated on its investigation. A further reminder for an up-date and estimate of the amount of landfilling / dumping which has taken place has recently been submitted to the ECU. The ECU has since advised that it intends to carry out a series of intrusive excavations to determine the content of the waste. It also confirmed that it does not presently hold any information on the capacity of waste dumped at this location, thereby hindering validation of our complaint under Article 6 of the Convention. However, it has advised that it will be in a stronger position to make such an estimate within the coming weeks. A copy of ECU's latest correspondence is attached for your information.

6. **The Committee has already considered the prohibitively expensive costs arising from judicial review cases in the UK and made recommendations, which were then endorsed by the Meeting of the Parties in decision IV/9i. In following up with the Committee's and MOP's recommendations, the UK has introduced changes in CPR capping costs of judicial review for individuals and organisations. Given that the compliance review mechanism is not a redress mechanism, please explain whether the current CPR rules on costs would apply in your case.**

RFA does not believe that the current CPR rules on costs would apply in our case. Nor does it consider that the new legislation introduced in on 13 April 2013 [*The Cost Protection (Aarhus Convention) Regulations (Northern Ireland) 2013*] http://www.legislation.gov.uk/nisr/2013/81/regulation/2/made is an effective mechanism which would encourage or adequately protect individuals or groups from the prohibitively expensive financial burden of mounting a judicial review in the UK.

RFA's judicial review was launched on 12 December 2012, prior to the introduction of new legislation cited in the paragraph above. Nonetheless, we did initially apply to the Courts for a Protected Costs Order (PCO). However, we believe we were left with no option but to withdraw this application for a PCO on the basis that there was the strong possibility that the system of cross-capping of costs (now confirmed by the new Regulations) would have severely penalised our not-for-profit organisation, even if we are ultimately successful in winning our case.

At the time of mounting the judicial review, RFA found itself in the position that had we been awarded a PCO of £10,000, there was every likelihood that we would have been faced with a cross-capping order of around £30,000. This meant that even if we win our case, we would only be able to recover from the respondent around one fifth of our legal costs which are now estimated to be in the region of £160,000 (187,000 Euro). This would have left our organisation in severe financial difficulty after having fought and won our case, which we consider to be unfair and a new deterrent to mounting a legal challenge. Should we lose the case our organisation would still be responsible for our own legal costs of £160,000 plus the cap of £10,000, again leaving our organisation in a severe financial position. It was on this basis that the decision was taken to withdraw from the PCO and risk bankruptcy as, ironically, the legal system now formalised under *the Cost Protection (Aarhus Convention) Regulations (Northern Ireland) 2013* effectively means that for the first time those legally challenging environmental decisions, cannot afford to win (never mind loss) their case.

RFA does not consider that the legal system in Northern Ireland (and UK), at the time of mounting our judicial review in December 2012 provided a fair and equitable and affordable mechanism to enable the challenge of environmental decisions. The introduction of *the Cost Protection (Aarhus Convention) Regulations (Northern Ireland) 2013* does not improve the situation and is actually more likely to benefit the respondent and reward it for taking bad environmental decisions as it liabilities in terms of costs will be significantly reduced (at the expense applicants) where cross-capping applies. Rather than assisting individuals and organisations in mounting legal challenges on environmental grounds, this legislation is likely to act as a further deterrent in that successful challenges under this legislation will result in lower cost recovery, leaving successful challengers significantly out of pocket.

As an example, RFA has identified at least 13 current planning applications directly affecting the River Faughan SAC where serious, systemic errors in the application of the EIA and Habitats Regulations have been made by the Department and where there is every likelihood of success should a legal challenge be mounted. However, we are simply not in a financial position to take judicial reviews on all of these cases, meaning that poor environmental decisions, in significant numbers, are going unchallenged. The fact that under *"the Cost Protection (Aarhus Convention) Regulations (Northern Ireland) 2013"* would have the potential to significantly reduce cost recovery for successful challengers, only worsens the already prohibitively expensive access to environmental justice. The current legislation introduced in April 2013 is seen as a further disadvantage and deterrent to challenging environmental decisions. As an organisation which has gone through the judicial review process, it is unlikely that we would ever consider applying for a PCO for any future challenges as the risk of cross-capping would result in significant financial loss in a situation where our challenge was successful. This is neither fair, equitable and does not address the issue of access to justice at a cost that is not prohibitively expensive.

7. **In para. 23 of the communication you ask the Committee to consider "whether the failure to enact the proposed introduction of third party rights of appeal…is impeding the public's ability to effectively engage in environmental decision making". Please elaborate on the allegation you make with respect to third party rights of appeal and explain how the law in place has affected your situation.**

As outlined in para 23 of my previous communication I explained that only an applicant for a development consent has the right to challenge the authority's decision by way of appeal, to the independent Planning Appeals Commission (PAC). This appeal system includes the right for those applying for development consent to challenge environmental decisions such as the necessity for EIA, the right to challenge planning decisions which are refused on environmental grounds and the right to challenge any environmental mitigation measures attached to development consents by way of planning conditions. Third parties objecting to planning applications have no such rights and can only challenge through the prohibitively expensive judicial review mechanism; a mechanism that has for the first time, with the introduction of *the Cost Protection (Aarhus Convention) Regulations (Northern Ireland) 2013*, the potential to penalise applicants who are successful in their legal challenge, due to the likelihood for cross-capping of costs.

If third party rights of appeal were available in NI (as they are in the Republic of Ireland Member State), this would mean that a challenge of an authority's environmental decision making could be mounted via the independent appeals process, and on an equal footing with the rights currently afforded to applicants for development consents. Currently, planning appeals are heard in front of a Planning Appeals Commissioner and attract an affordable, set fee for mounting a challenge. Presently the fee for a planning appeal is £126 (146 Euro). The appeals process is normally less formal than court proceedings and less daunting or intimidating to individuals / groups who are normally not familiar with planning and environmental law and mounting challenges, unlike the Department, which has considerable experience and unlimited (public) resources in defending such challenges. There is no requirement for a third party to be legally represented at such appeals and there would be no likelihood of having costs awarded against those mounting a third party appeal should the Commissioner not rule in their favour. This would remove the significant pressure and stress placed upon those mounting legal challenges brought about by their real and legitimate fear of being held liable for costs (both their own and the respondent) which in reality could lead to financial ruin.

The adverse effects on those who would mount a legal challenge should not be underestimated and is often heightened by a reluctance for the courts to intervene in planning decisions unless it can be proven that a manifest error in law has occurred. This in itself places the applicant for judicial review at an unfair disadvantage. However, the planning appeal process, should it be introduced, is more likely to require the local authority to defend its decisions in the context of relevant planning and environmental policies and

law, as opposed to any challenge in the courts which set the higher (and unfair) test of having to demonstrate unreasonable and manifest error in law that has resulted from an authority's decision.

The law currently in place, has affected RFA's challenge of development consent A/2008/0408/F in that:

- There is no opportunity for third party appeal. Instead, the only option open to RFA was the prohibitively expensive and slow judicial review process.
- We are currently facing a cost estimated to be in the region of £160,000 (187,000 Euro) which to date we have only been able to raise £104,000 and are currently attempting to secure a loan to cover outstanding costs.
- We have had to make redundant two full time and one part-time river watcher who were employed to police the river and report any environmental crimes / pollution incidents that were uncovered.
- RFA is in real danger of not being able to meet our normal financial commitments in the running of our voluntary, not-for-profit organisation.
- That almost a year has passed since the impugned permission was granted, yet our case has once again been deferred by the courts until 17-18 October 2013 which will add significant costs and delay in getting a ruling from the court.
- Following a court ruling, sometime after October 2013, there will need to be a further court hearing in which costs will be attributed. All the while our voluntary, not-for-profit organisation will struggle to survive and meet our commitments of serving the entire community and protecting the environment of the River Faughan.
- Although it is likely that we will be in a position to meet our own costs of this legal challenge, should costs be awarded against our organisation, there is every likelihood that we will simply be put out of business.

A third party appeal hearing would have been significantly less expensive, afforded us an independent hearing in front of the PAC, who, we would argue is equally well placed to deal with the planning and environmental considerations raised in our challenge, would have been less adversarial and removed the worry of financial ruin due to the potential for significant costs to be awarded against us. We believe that this latter point is a serious deterrent to those whose only available option is legal challenge to address the Department's failings in environmental decision making. From our own experience of environmental decision making affecting the River Faughan SAC, we are firmly of the view that many seriously flawed environmental decisions directly impacting the environment and breaching the EIA and Habitats Directives are, and will continue to go unchallenged because of the prohibitively expensive mechanism for challenge available in NI and the UK Member State. This will form part of our complaint to the European Commission as summarised under question 5 above.

Support for the introduction of third party appeals

There is strong public and political support for the introduction of third party appeals in Northern Ireland and all but one of NI's political parties advocate its introduction. In late June 2013 and after our initial communication to ACCC, the issue of third party rights of appeal was debated in the NI Assembly as part of the consideration stage of a new "Planning Bill". RFA's complaint now needs to be considered in the context of this recent failed attempt to bring into law third party rights of appeal, which was tabled in the NI Assembly on 25 June 2013. Although receiving a significant majority vote in favour of making third party appeals law, this was cynically blocked by the largest political party, the Democratic Unionist Party (DUP) (the only political party opposing the introduction of third party appeals), by use and abuse of a special power unique to the NI Assembly known as a "Petition of Concern". A "Petition of Concern" exists to ensure that one community is not disadvantaged or discriminated against. This is explained in more detail under the section entitled "Third party rights of appeal" which follows at page 15.

Firstly, it is important to set the context surrounding this recent debate in the NI Assembly and to summarise below these developments in late June 2013 which seek to further reduce the rights of individuals / third parties to challenge government decisions, by further limiting scope of judicial review and at the same time denying an individual's right of third party appeal, by the misuse of the "Petition of Concern" special power.

The Planning Bill – Consideration Stage

On 24 and 25 June 2013, the proposed Planning Bill was debated by elected Members of the Local Assembly (MLA); the Assembly being the local devolved government in Northern Ireland. The attached links provide the official reports of the debate on the Planning Bill – Consideration Stage for the days in question. http://www.niassembly.gov.uk/Documents/Official-Reports/Plenary/2012-13/24.6.13%20_Complete_.pdf and http://www.niassembly.gov.uk/Documents/Official-Reports/Plenary/2012-13/25.6.13%20_Complete_.pdf The relevant pages of the official report for 24 June 2013 are pages 2-27 and 40-110. The relevant pages for the official report for 25 June 2013 are pages 48-84. As I go through this briefing I will endeavour to refer to specific pages of these reports which address the matter of third party rights of appeal and which I believe support RFA's complaint of violation of the Convention.

A number of controversial amendments had already been proposed by the Ministerial Executive but had been opposed by around 90% of those groups and members of the public who took part in the public consultation exercise conducted by the NI Assembly Environment Committee. The general thrust of these amendments seeks to give greater emphasis to economic considerations when taking planning decisions.

However, on Thursday 19 June 2013, the two main political parties; the Democratic Unionist Party (DUP) and Sinn Fein (SF) jointly tabled additional amendments at a very late stage and without any public consultation, or consultation with the Assembly's Environment Committee, or the Environment Minister, who is responsible for planning. These additional amendments included empowering the Department of the Office of First and Deputy First Minister (OFMDFM), which is controlled jointly by the leaders of the DUP (First Minister Peter Robinson) and SF (Deputy First Minister Martin McGuiness) with the authority to designate and administer Economically Significant Planning Zones where planning and environmental controls would be relaxed.

At this stage and by way of background it may be helpful to outline that decision making powers within the planning system operating in Northern Ireland presently rest with the central government Department of the Environment (DOE), under its sub-organisation "DOE Planning", which is advised on environmental matters by the DOE - Northern Ireland Environment Agency (NIEA). It is intended that come 2015/2016 a majority of planning decision making powers will revert to new local authorities following the completion of a Review of Public Administration. Local Authorities in the form of District Councils presently only play an advisory role in planning decision making after those powers were removed from them in 1973 due to widespread discrimination and abuse of those powers. As a result planning powers were then placed under the central control of DOE, where they have remained ever since.

Evidence specific to RFA's current complaint to the ACCC.

More specific to RFA's current complaint to the ACCC, are the proposed amendments to the Planning Bill to: 1) reduce the timeframe and limit the scope within which legal challenge of planning decisions can be mounted by third party objectors and 2) the continued denial of third party rights of appeal. A copy of these late amendments to the Planning Bill are recorded on pages 50 – 52 of the official report dated 25 June 2013 under the titles *"Third party right of appeal"* and *"Review of certain decisions"*. The voting of the NI Assembly on these amendments is contained on pages 80-81 of that same official report. It should be noted that the proposed introduction of third party rights of appeal was defeated on the use of a "Petition of Concern", whilst the proposed introduction of changes / new limitations to the right to review of certain decisions was passed with the co-operation of the two main political parties (DUP and SF), despite a warning from the Environment Minister of the illegality of making this law.

<u>Review of certain decisions</u>

Presently, although there is no specific timeframe within which legal challenges to planning decisions must be taken, the judicial system in Northern Ireland requires that any legal challenge is mounted expeditiously and normally no later than three months from the date of the decision. It should be noted that as a voluntary, part-time organisation, it took RFA 3 months to research, compile and instruct a legal team on our current legal challenge. This is not unusual in that individuals and groups are unlikely to

have previously mounted a legal challenge and will not have the knowledge of the legal system, or the resources, that would enable quicker challenge.

What has now been passed in this consideration stage of the Planning Bill in the Northern Ireland Assembly is a reduction in the timeframe from three months to six weeks, within which a judicial review can be initiated. Furthermore, the grounds for legally challenging a planning decision are to be limited to alleged breaches of European law and / or Human Rights. Errors made by the Department of the Environment in the administering of its planning function now appear to fall outside of the scope of legal challenge, even where it is believed that manifest errors have been made which could lead to environmental harm being caused to interests of national or local importance. This is alarming as part of RFA's current legal challenge is based on serious errors made by the Department in imposing planning conditions which, if attempted to be implemented, would result in serious environmental damage. Given what has been passed by the NI Assembly on 25 June 2013, there is now the real danger that in future such grounds for challenge will no longer be permissible in court.

The seven smaller political parties making up the Northern Ireland Assembly all strongly opposed the introduction of these latest changes proposed to the Planning Bill but were defeated by the joint forces of the DUP and SF. Alarmingly, the Minister for the Environment, Alex Attwood MLA, a member of the Social Democratic Labour Party (SDLP), in his strong opposition to these amendments, presented to the First Minister and Deputy First Minister, and read into the record for the Assembly, legal advice his Department of the Environment had taken and which he believed indicated that what was being proposed was in breach of European Law and Conventions. Minister Attwood's contribution to this debate in relation to the proposed amendments to limit the scope of judicial review can be found at pages 100-108 of the official report from 24 June 2013. Specifically, at page 100, the Minister for the Environment states that *"the third group of amendments, and in particular that one that tries to frustrate citizens who go to the courts to challenge public policy through judicial review"*, and at page 107 where he considers that proposed limitations to the judicial review process *"…is beyond legal competence"* give an indication of the likely adverse implications of this law for the ordinary citizen. Minister Attwood's elaboration at pages 70-77 of the official report from 25 June 2013 is also very relevant. Nonetheless, these potentially illegal changes were voted through by the DUP and SF by a majority of 54 to 33 as contained on page 81 of the official report from 25 June 2013.

It is considered that this attempt to limit the scope of judicial review will undermine the role of the courts and the rule of law in NI. The NI Assembly's determination to further limit, to matters of EU or Human Rights law, an individual's fundamental right and only method of challenging a decision of an authority, would seem to strengthen the argument for the introduction of third party rights of appeal. Without this, landowners / objectors affected by the granting of a development consent, will have no redress or mechanism to legally challenge (unreasonable) planning related grounds that do not impinge on EU or Human Rights law (however, it could be argued that what has been passed, in itself would seem a breach of human rights). The fact that the NI Assembly

has, at the same time, moved to deny third party rights of appeal, appears a deliberate attempt to impede an individual's right to environmental justice, no matter how much the decision of the authority affects the third party's land or interests of acknowledged importance. The manner in which this has sought to deny third party rights of appeal (as set out below) makes its actions all the more unfair, biased, potentially illegal and in breach of the Convention.

Third party rights of appeal

Because of serious concerns for the implications for environmental protection and the diminution of the right of third parties to legally challenge planning decisions now being undermined by these changes / limitations to the judicial review process, Steven Agnew MLA of the Green Party tabled a further amendment to the Bill, seeking the introduction of the right of "third party appeal" to planning decisions (page 50 of the official report from 25 June 2013). The purpose of this amendment introduced by the Green Party was to offset the infringement of an individual's rights to legal redress as a result of the limitations now being placed on those considering a challenge to planning decisions through the national courts, by giving objectors to planning decisions / development consents similar rights of appeal presently afforded to those applying for planning permission.

It is worth noting that even SF, the party jointly proposing the original amendment to the Planning Bill aimed at curtaining the scope within which legal challenges can be mounted against planning decisions, voted along with all the smaller political parties, in favour of the introduction of third party appeals. That being the case, the proposed introduction of third party appeals was actually supported by every political party in the Northern Ireland Assembly except for the DUP. In normal circumstances this would have been enough to secure the amendment and carry it into law, as can be seen from the vote on page 79 of the official report from 25 June 2013, where 57 MLAs voted for the introduction of third party rights of appeal as opposed to 30, who voted against. The effect of this would, once enacted, have allowed individuals and voluntary groups such as RFA the right to appeal planning decisions which we had objected to without having to embark on the prohibitively costly legal process of judicial review. However, the DUP invoked a "Petition of Concern" which was enough to veto this amendment which, in reality, received a significant, cross community majority in favour of its introduction.

A Petition of Concern is a special power, unique to the NI Assembly because of the troubled political situation which exists in NI, and can be legitimately invoked if it is considered that one community is being disadvantaged over another. It requires the support of thirty MLAs for it to be enacted. It was never envisaged that it could be abused by one political party, however, as the largest political party in the Assembly, the DUP is the only grouping with over 30 elected representatives, and it is therefore in a position to invoke a Petition of Concern when it believes it is in danger of losing a vote in the Assembly. Increasingly, this special power is being abused and not used for its original intention of ensuring one or other community is not discriminated against. In the

instance of the motion to introduce the right of "third party appeal", it is difficult to understand how the wider Unionist Community (of which the DUP is part) would be disadvantaged when the four other smaller Unionist parties, the Ulster Unionist Party (UUP), NI21, Traditional Unionist Voice (TUV) and the United Kingdom Independence Party (UKIP) all supported the Green Party amendment and voted along with those parties such as SF and the SDLP which would be perceived to represent the Nationalist Community, as well as the Alliance Party, which refuses to be affiliated with either the unionist or nationalist label. The official report of the Assembly debate for 25 June 2013 provides an indication of the cynicism in which the actions of the DUP are held by the other political parties when it (the DUP) vetoed this amendment and sought to deny an individual's right to third party appeal. The contributions from the wide spectrum of MLAs and political parties voting in favour of the introduction of third party rights of appeal is contained in this official report from 25 June 2013, including the serious concerns over the abuse of the "Petition of Concern" to deny the citizen access to justice, expressed by Mrs D Kelly (SDLP) MLA (page 59), Mr D Kinnegan (UUP) MLA (page 61), Mr B McCrea (NI21) MLA (pages 61-62), Mr Dickson (Alliance) MLA (pages 64-66), and Mr Allister (TUV) MLA (pages 67-69)

How is this related to RFA's initial complaint?

You will recall that in our initial complaint, paragraph 23(b) RFA asked the ACCC to consider whether the Northern Ireland Government's continued failure to enact the proposed introduction of third party rights of appeal, and reliance on the prohibitive expense of the Judicial Review process to discourage legal challenge on environmental grounds, is impeding the public's ability to effectively engage in environmental decision making in Northern Ireland. What we are now able to present is one political party's (the DUP) deliberate and effective blocking of the introduction of our (and the wider public's) right to third party appeal against the majority wishes of the NI Assembly. When considered in conjunction with the proposal in the Planning Bill and now passed by the NI Assembly to further limit what is the only legal, yet prohibitively expensive, redress through the judicial review process, RFA firmly believes that such actions by this part of the UK Member State is an unacceptable violation of the Aarhus Convention. The DUP, by its actions in invoking a "Petition of Concern" to prohibit the introduction of third party rights of appeal when all other political parties voted by a majority to make it law, is effectively assuming the decision making powers of government, and rendering the NI Assembly (and the UK Member State) responsible for contravening the Aarhus Convention's requirements on access to environmental justice.

RFA would ask that you draw these latest proposals of the NI Assembly to the attention of the ACCC, to be considered in the context of our recent complaint on the Violation of the Aarhus Convention, as we firmly believe that the enactment of this Planning Bill into law will further erode an individual's right to participate in environmental decision making and environmental justice.

8. Please provide the Committee with a chronology of the events relating to access to justice only. Could you please clarify whether you stopped the proceedings or not?

July 2012 RFA wrote to the Department of the Environment on 25 July 2012 in regard to planning application A/2008/0408/F asking it to address / explain our serious environmental concerns as to the way it had assessed the environmental effects of the project in regard to EIA and the Habitats Directives. This letter was provided to the ACCC as part of our initial communication at appendix 7.

Aug 2012 In its reply dated 2 August 2012 (appendix 8), the Department declined to justify its stance regarding EIA, or provide RFA with answers to our reasonable environmental questions. Instead, it invited RFA to take a judicial review of its decision. We believe that such a position was adopted by the Department on the basis that the likelihood of judicial review was low because of the prohibitively expensive nature of such challenges.

Sept 2012 On 13 September 2012 the Department issued the impugned development consent.

Sept/Oct 2012 The Directors of RFA decided that it would be prudent to seek expert environmental and legal advice in order to confirm if our concerns over how the Department had acted in relation to A/2008/0408/F were justified and if our concerns over the potential for environmental damage to occur to the River Faughan SAC as a result of granting this development consent were warranted.

Nov 2012 The commissioned ecologist's report confirmed our worst fears that the Department had failed to properly engage with the EIA and Habitats Directives before taking this decision. He was particularly concerned that these failures and serious errors made in the formulation of planning conditions aimed at providing mitigation from significant adverse effects, would if implemented, lead to serious environmental damage to the River Faughan SAC.

Nov/Dec 2012 On the basis of the alarming ecologist's report, RFA commissioned the opinion of a senior barrister specialising in planning and environmental law, who advised that there were clearly grounds for judicial review. The cost of this initial consultation was in the region of £2500 (2900 Euro). In all likelihood, this initial cost would have been much higher, but for the sympathy of the ecologist, who was so concerned with what he uncovered, undertook the work at no initial cost to our organisation, in order to assist us with seeking environmental justice through the only means available to us; judicial review.

Dec 2012 RFA formally instructed a solicitor to engage senior legal counsel on our behalf to initiate formal judicial review proceedings and these were lodged on 12 December 2012. As I understand it, only in NI is there a requirement to instruct legal counsel through a solicitor, which adds to the cost of taking a

judical review, although this would account for around 10% of the total legal costs. The significant legal costs are accrued by paying the senior counsel and the junior barrister, whose fee is normally calculated at 66% of Senior Counsel's fees.

This included an application for a Protected Costs Order (PCO), however, following further consultation and advice from our legal team, RFA decided that it could not take the risk of having cross-cap costs awarded against our organisation as this was likely to result in recovery of only a low percentage of our costs, should we win the case. Our organisation could simply not afford to forego the potential of full cost recovery in the our event of winning our case, as this would, in essence, leave us in a position, where we would have difficulty meeting our long-term running costs, as well as, ensuring that we would not be in a position to mount any future legal challenge against the Department through lack of finances. This is particularly important to our orgnaisation as we have identified some 13 projects directly impacting on the River Faughan SAC where the Department has made manifest errors in the application of the EIA and Habitats Directive and which are open to challenge, as it has yet to take decisions on these retrospective projects, yet has permitted development to continue resulting in actual environmental harm. RFA has also had to take the reluctant decision not to judicially review a recent development consent directly affecting the River Faughan SAC, where the negative EIA screening, has been recognised as one of the most inadequate assessments ever witnessed. This decision not to mount a legal challenge was taken purely on the basis that initiating a second judicial review was simply not affordable. If required, RFA can provide the details of this case.

To date our costs accrued are in the region of £130,000 (151000 Euro) of which RFA has paid £117,000 (137000 Euro). All but £4000 (4650 Euro) has been for legal expenses and we currently owe a further £26,000 (30000 Euro) to our legal team.

March 2013 After the Department decided not to contest the application for leave for judicial review, a date was set for a full hearing to take place over two days commencing on the 23 May 2013 and continuing the following day. By not contesting the hearing for leave, the Department avoided providing any indication of its likely defence until the full hearing, which placed RFA in the position where we could not review our position at leave stage, and effectively decide if our organisation would be in a position to continue with the judicial review.

May 2013 Prior to the commencement of the hearing scheduled for the 23 May 2013, the High Court informed our legal team that it would not be continuing with the hearing on 24 May 2013. No reason was given for the cancellation. Although the hearing did commence on 23 May 2013, it was subsequently postponed until 17 and 18 June 2013. This resulted in added expenditure.

June 2013 The start of the hearing was delayed until the afternoon of 17 June 2013 as the court remained closed in the morning because of security measures surrounding the visit to Belfast by the US President, Barack Obama. On the 18 June 2013 the judge ordered the respondent to submit additional sworn statements within two weeks clarifying why it had not sought additional environmental information specifically required by NIEA to prevent the "potential catastrophic collapse" of the highly contaminated settlement lagoons during the decommissioning process as it was unable, on the day to address contradictions in its evidence exposed by our legal team. The complexities of the case meant that it would not now finish on 18 June 2013 and is scheduled to recommence on 17 and 18 October 2013. This unforeseen postponement has been estimated to add an additional £30,000-40,000 (35000-45500 Euro) to RFA's legal costs.

July 2013 On 12 July 2013, after an agreed extension of one week, the Department submitted its additional sworn statements required by the judge. These affidavits now, for the first time, admit that it was mistaken in its assumption that it could not seek the additional environmental information required by NIEA as it had allowed the existing and highly contaminated settlement lagoons to become immune from enforcement action, and that Article 27(1)(a) of the Planning (Northern Ireland) Order 1991 empowered it to seek this environmental information. Prior to this, the respondent argued that it held all the environmental necessary to take a development consent which would ensure adequate protection of the River Faughan SAC.

Aug 2013 RFA has now applied to the court for permission to submit a further affidavit in response to the Department's admission of having erred in law and has recently obtained the judge's permission to do so. This further affidavit, is currently with our legal team for clearance / advice.

RFA's proceedings against the Department of the Environment have not been stopped, only rescheduled. It is hoped that they will be concluded on 18 October 2013 although it is likely to be the end of 2013 / early 2014 before the judge issues his ruling. Any further extensions or postponements by the courts will place additional financial burden on our voluntary, not-for-profit organisation. Our attempts at raising money to cover the costs, although relatively successful, have been exhausted and we are presently negotiating a significant loan from the owners of the fishing rights of the River Faughan; the Honourable, the Irish Society, in order to ensure our organisation's survival. Proceedings have not been helped by contradictions in the respondent's case which has required the judge to order it to submit further affidavits to clarify its position, and where it would now seems that its attempts to conceal a significant error in law have been exposed.

I have attempted to address the ACCC's request for additional information and apologise for the length of this response, which has been somewhat complicated by subsequent events in the NI Assembly in relation to proposed limitations on an individual's right to judicial review and the cynical blocking of third party rights of appeal, despite an overall majority of elected MLAs voting for it to become law.

If I can be of further assistance to the ACCC please do not hesitate to contact me. An acknowledgement of this communication would be appreciated.

Yours sincerely

Dean Blackwood

Director

River Faughan Anglers

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e-mail: [redacted]