Date: 23 July 2021

Your Ref: ACCC/C/2013/90

Fiona Marshall
Secretary
Aarhus Convention Compliance Committee
United Nations Economic Commission for Europe
Palais des Nations
1211 Geneva 10
Switzerland

Dear Ms Marshall

Draft findings and recommendations with regard to communication ACCC/C/2013/90 concerning compliance by the United Kingdom of Great Britain and Northern Ireland

River Faughan Anglers (RFA) very much welcomes the draft findings and recommendations of the Aarhus Convention Compliance Committee (ACCC) in respect of communication ACCC/C/2013/90. The voluntary directors of RFA would wish to place on record our sincere gratitude to you as Secretary, to the case Curator and to the Members of the Committee for the fair, thorough and transparent manner in which our communication has been handled.

In line with paragraph 201 of *the Guide to the Aarhus Convention Compliance Committee, RFA* would offer the following comments for consideration. These are provided in three parts; namely, (i) *Factual*; (ii) *Substantive* and (iii) *General*; and are made in the order they arise in the draft findings.

FACTUAL COMMENTS

Paragraph 76

The first request for a copy of the Case Officer Report was made by a RFA River Watcher who, on the instruction of directors, called in person at the local planning office on 4 September 2012 (not 5 September). This was just prior to the recommendation being presented to the former Derry City Council later that same day. RFA apologies for the confusion that has arisen over this date. This was due to an initial typographical error on my part. This was corrected in RFA's submission to the ACCC dated 15 February 2017, page 6.

The changed date is of no consequence to the ACCC's deliberation at paragraph 170 – 171, that the Party's withholding of this report is a *"serious matter*" which breached Articles 3(2) and 6(6) of the Aarhus Convention. However, in RFA's view, the withholding of the report is of consequence to the Committee's findings on costs, as explained under RFA's substantive comments made in respect of paragraph 156 below.

Paragraph 118

It is more accurate to state that the planning recommendation to approve was formulated that same day (i.e. 24 August 2012). The planning permission was granted on 13 September 2012 following consultation with the local council on 4 September 2012.

Prior to Local Government Reform in 2015, the Department of the Environment was the decision-maker on planning matters in Northern Ireland. Local councils, whilst consulted on planning recommendations at a monthly meeting, played only an advisory role in the planning decision-making process.

Paragraph 152

The appellate body that hears planning appeals in Northern Ireland is the "Planning Appeals Commission" (not "Committee").

Paragraph 155

The High Court's written judgment was 13 March 2014 (not September 2015).

Paragraph 168

As per paragraph 76 above.

SUBSTATIVE COMMENTS

Paragraph 147 - overlap

This states *"the Committee is not in a position to ascertain whether there were in fact any such overlaps."*

It is not clear why the Committee is unable to establish this objectively verifiable fact. The hard copies of approved drawings *02 Rev 5* and *07 Rev 3* and the existing site plan of A/2008/0408/F all clearly indicate that there is a three dimensional physical overlap between the site of the proposed lagoons and the location of the existing *"highly contaminated"* lagoon. The Party may wish to remain silent, but is surely not ignorant of this fact.

It may well be the view of the Committee that it is not within its remit to establish the existence of the overlap, or that it is not germane to its findings on this point. However, RFA

notes from the drawings uploaded to the ACCC webpage on 8 June 2021 that, when emailed, the resolution of these scanned drawings deteriorated significantly to a point where it is difficult to ascertain the very obvious physical overlap where the new lagoons cut directly through the existing "highly contaminated" lagoon. RFA would be concerned if the Committee has reached its position on the basis of the less that perfect quality of the scanned drawings that I provided to the ACCC on 8 June 2021, due to my limited technology and technological know-how that prevented the provision of better quality copies.

The Party, with its significant resource and equipment could have, but has not provided the Committee with clear copies of its relevant approved drawings that it knows, fundamentally, undermines its position that there is no such overlap. It should have provided clear copies as these key drawings have been inexplicably withheld from the planning portal.

That these approved drawings were received by the planning authority after the planning portal went live, is a clear indication that they should have been uploaded and publicly accessible online at the time they were received on 30 September 2011 and, most certainly, when the permission was issued on 13 September 2012.

That the Party was able to upload other approved drawings to the planning portal that it received on 1 May 2008 (e.g. Drawing 01), dispels any claim that other approved drawings received on 30 September 2011 (e.g. *02 Rev 5* and *07 Rev 3),* were not available electronically because they were received before the planning portal went live. There is no credible explanation or justification why these key drawings are withheld from the planning portal.

In any event, the blown-up extract of approved drawing *02 Rev 5*, as presented at the end of ACCC's upload from RFA on 8 June 2021 and entitled, *"drawings no. 04 and 05 annexed to development consent dated 13 September 2021"*, shows clearly how the proposed location of the new lagoons dissects the contours of the existing, *"highly contaminated"* lagoon. Thus the overlap is clear and proven.

Had the approved drawings *02 Rev 5* and *07 Rev 3* been made available online, the Committee would have had access to high-resolution electronic copies rather than having to rely on versions that are much less clear in quality due to the scanning process undertaken by RFA. That the Party avoids providing high quality copies of its drawings on the planning portal, should not be to the disadvantage of RFA.

Moreover, it is notable that the Party has never been able to provide the Committee with a rebuttal of RFA's position, or any explanation as to why it considers there is no physical overlap. This is because it is aware of the indisputable veracity of RFA's professional planning assessment on this matter.

Can it really be doubted that had the Party been able to explain how planning conditions 1 and 2 could be implemented in the phased manner it told the Court was possible and necessary to protect the River Faughan and Tributaries Special Area of Conservation (SAC), it would have presented this explanation to the Committee by now? Rather, unable to present a rebuttal of the objectively verifiable facts contained in the approved drawings, and which confirm the overlap, instead the Party has set about mobilising ambiguity through its silence. It does so to deflect from the unsettling fact that the evidence it presented in Court, under oath, is false and misleading.

Professional planning advice

The Party is being advised by the Department for Infrastructure (DFI), whose Permanent Secretary told the Northern Ireland Assembly's Public Accounts Committee on 8 July 2020 that *"…we have significant in-house expertise, more than any other Department that I have worked in."* [1] This includes the office of the Chief Planner for Northern Ireland which is responsible for maintaining the credibility and integrity of the planning system and is also charged with implementing its Planning Environmental Governance Work Programme (PEGWP) in response to the European Commission's *Pilot Case EUP(2015)7640: Environmental Enforcement in Northern Ireland* – see also General Comments below.

Yet, the Party suspiciously side-lines this significant in-house professional planning expertise in respect of this communication, even though the existence of the overlap engages fundamental issues of professional planning competence.

The Committee will recall from RFA's written and oral submissions at the hearing in Geneva on 12 December 2017, that we raised concern over the Department's unwillingness to apply its significant in-house professional planning expertise to this fundamental planning matter. It simply was unable and unwilling to provide the ACCC with an explanation that would elucidate the Party's position on the issue of the overlap.

There is a concern that the Party's deprofessionalisation of what are clearly planning matters are designed to avoid what should be a very simple matter of professional competence; namely, does the overlap exists or not? This is because it knows it cannot explain the overlap without exposing the falsity of the evidence it presented in Court. Moreover, the Party is aware that no DFI professional planner would compromise their proscriptive codes of professional conduct, or the high ethical standards expected from their professional body, by attempting to explain the absence of an overlap that obviously exists. That these tactics are deployed by the Department charged with upholding the credibility and integrity of Northern Ireland's planning system – in order to deprive the Committee of the professional planning

[1] Northern Ireland Assembly (2020) Official Report (Hansard): Inquiry into Major Capital Projects – Department for Infrastructure. Belfast, Public Accounts Committee (8 July 2020), p7. URL: http://data.niassembly.gov.uk/HansardXml/committee-22943.pdf [Accessed: 20 July 2021].

assessment on the issue of the overlap – is a dire reflection on the Party's lack of transparency and commitment to delivering access to environmental justice in Northern Ireland.

A significant part of why RFA has persevered with this case, is the fact that the Party – first, through the Department of the Environment and subsequently, through the Department for Infrastructure – refuses to provide our voluntary-run organisation with an explanation of how it envisaged the project could be constructed in *"the sensitive and stepwise manner"* it told a Court was possible and necessary to protect the SAC. It is concerning that it has continued this strategy in its engagements with the ACCC in order to mask this *uncomfortable knowledge* [2] around the issue of the overlap.

RFA would respectfully ask that the Committee clarifies why it is not in a position to determine whether there were any such overlaps in its final findings. If this is because of the poor quality of the scanned drawings provided by RFA at the request of the ACCC, the Party guilty of withholding these key drawings from the planning portal should be asked to provide clear copies and offer its explanation of the overlap that it has been evading since 2013.

Paragraph 156 - costs

RFA does not consider it was possible to offset the costs accrued to any great degree for the following reasons.

(i) The Court's erratic re-scheduling of our case which, through no fault of RFA, saw a scheduled and budgeted-for two-day hearing burgeon to six days (or part-days), spread out over eight months, as planned sittings were cancelled by the judge with little or no notice. This contributed to significant uncertainty and unforeseen and unplanned-for legal costs. This was previously set out in RFA's submissions to the Committee, including at pages 19 – 20 of the Communicant's additional information, posted on ACCC/C/2013/90 on 30 August 2013.

(ii) This jurisdiction (Northern Ireland) does not permit conditional fees arrangements. Therefore, this was never an option. The reason why this information was not before the Committee is because, at the time, RFA simply did not know that NI was somewhat unique in not permitting *"no win / no fee"* arrangements.

[2] ***Uncomfortable knowledge*** - is defined in organisational theory as *"…knowledge that is disagreeable or intolerable to an organisation"* (Flyvbjerg, 2013: 157), as it is in tension, contradicting, or disproving the legitimacy of government actions and decisions (Rayner, 2012) – References: Flyvbjerg, B. (2013). How planners deal with uncomfortable knowledge: the dubious ethics of the American Planning Association. *Cities.* 32, 157-163, and Rayner, S. (2012) Uncomfortable Knowledge: the social construction of ignorance in science and environmental policy discourses. *Economy and Society.* 41(1) 107-125.

(iii) The Department was represented by two counsel. Therefore, even if RFA could have reduced costs by engaging one counsel only, this would have raised a further issue of equality of arms, thus engaging and undermining the requirements of fairness and equitability under Art.9(4).

Moreover, the very unusual circumstance where the construction of the new lagoons had to be completed within six months of the grant of permission (where real uncertainties still remain about how this was to be undertaken), placed a significant stress on our voluntary-run organisation to act with urgency and surety that our river would be properly represented.

This was compounded by the *"serious matter"* of the Party withholding the case officer report from RFA until after the decision had issued. Obstructing RFA from understanding and participating in the decision-making process at a crucial time when something could still have been done about errors of professional assessment before the decision issued, has directly contributed to the significant costs incurred by having to initiate judicial review proceedings.

Whereas availability of the report in the weeks prior to the issue of the decision on 13 September 2012 would have allowed RFA to draw the fundamental error of professional assessment to the decision-maker's attention and afford it the opportunity to address its mistake on the overlap, the Party's withholding of this key document until after the decision issued, fundamentally curtailed our voluntary-run organisation's options. In other words, RFA could not have known or anticipated that the Party's decision would be based on a fundamental failure of professional planning assessment until we received the report <u>after</u> the permission was taken. This was due entirely to the Party's decision to withhold the case report from our voluntary organisation.

Not only was the withholding of this report a breach of Articles 3(2) and 6(6) of the Aarhus Convention, but the consequence of the Party's actions meant that RFA was left with the only option available to it; to embark on a costly judicial review to safeguard from bad environmental decision-making.

In the circumstances, RFA would respectfully ask the Committee to reconsider its finding in the matter of costs.

GENERAL COMMENTS

<u>Paragraph 175</u>

RFA fully endorses the recommendations of the ACCC. It is unfair, unjust and an affront to proper planning and environmental governance of the UK that, through its own institutionalised neglect, the Party can permit activities subject to Article 6 of the convention

to become immune from effective enforcement action. Implementation of recommendations (a) and (b) will act as an effective deterrent, particularly to those who would seek to take advantage of Northern Ireland's lax and systemically failing planning and environmental regulatory regimes.

In respect of recommendation (c), the introduction of equal rights of planning appeal for citizens to challenge decisions subject to Article 6 of the Convention will not only help address significantly the UK's non-compliance with Article 9 of the Convention, but will lead to better environmental decision-making in planning. This is because planning authorities will be alert to the potential for citizens to apply for a full merits review of badly made planning permissions.

Through the European Commission's (EC) *Pilot Case EUP(2015)7640: Environmental Enforcement in Northern Ireland*, RFA has helped force the Party into acknowledging the systemic nature of its failure to apply the EIA Directive and Regulations in Northern Ireland. Whilst it has been required to develop a Planning Environmental Governance Work Programme aimed at convincing the EC that it has addressed the institutionalised neglect that has come to characterise how it administers environmental governance in Northern Ireland, this will not address the inequity of the current system whereby citizens have no right to request a merits review of a decision before a specialist planning body.

Equal right of planning appeal will provide for a more fair and equitable means for challenging environmental decisions which fall under the scope of Article 6 of the Convention where, as noted in paragraphs 131 – 151 of the draft findings, the Court falls significantly short in that regard.

RFA Trusts the comments above will be give consideration in the formulation of the final findings of the Committee.

Yours sincerely

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