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

17 October 2023

Dear Ms Marshall,

Re: PRE/ACCC/C/2017/156: Case law update

Since submitting the above Communication in 2017, we have not undertaken a systematic review of UK cases in which the intensity of review in Judicial Review ("**JR**") to be applied by the Courts has been considered. Instead, we have drawn the Committee's attention to selected judgments (such as Heathrow and HS2) that we believe illustrate our ongoing concern about the UK's ability to comply with the relevant provisions of the Convention. In particular, we remain concerned about the established practice of the Courts explicitly to apply a lighter intensity of review where environmental and socio-economic considerations are in play and/or the issue of enforcement is involved - notwithstanding that such cases often concern policy issues and/or major infrastructure projects causing serious environmental harm. We write now to bring another such case to the Committee's attention.

***R (oao Wildfish Conservation v Secretary of State for the Environment, Food and Rural Affairs and the Environment Agency (Defendant) and the Water Services Regulation Authority (Interested Parties)* [2023] EWHC 2285 (Admin)**

Background
In 2022, there were over 300,000 incidents of overflow into coastal waters, freshwater rivers and estuaries from UK sewage works following heavy rainfall. The most common cause of the overflows studied was rainwater entering Sewage Treatments Works ("**STWs**") with insufficient capacity. This issue has been the subject of widespread public and media concern in recent years, with a universal call to action across civil society.

The increasing pressure on STWs is the result of cumulative pressure from a growing population, increased run-off from urbanisation and heavy rainfall. Both the Government and the water services regulator Ofwat recognise that water infrastructure has not kept pace with developmental growth over decades and that the lack of capacity in our STWs must be tackled.

The Water Industry Act 1991 ("**WIA 1991**") imposes various statutory obligations on water companies regarding the management of sewage. The Environment Act 2021 inserted a suite of new provisions into the WIA 1991 aimed at addressing *inter alia* capacity and overflow issues.

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Section 141A of the WIA 1991 requires the Secretary of State to prepare the "Plan" for the purposes of reducing discharges from storm overflows of sewage undertakers and reducing the adverse impacts of these discharges on the environment and public health.[1] The Secretary of State's 2022 Plan set three targets:

- **by 2050** - water and sewage companies will only be allowed to discharge from a storm overflow where there would be no local adverse ecological effect;

- **by 2035** - water and sewage companies must significantly reduce harmful pathogens from overflows either by carrying out disinfection or by reducing the frequency of discharges in order to protect public health in designated bathing waters; and

- **by 2050** - storm overflows will not be permitted to discharge above an average of 10 heavy rainfall events a year.

The 1994 Urban Waste-Water Treatment (England and Wales) Regulations 1994 ("**the 1994 Regulations**") impose an obligation on sewage undertakers to ensure that urban waste water is treated so as to ensure that disposal routes for treated waste water minimise adverse effects on the environment. The Regulations provide that the "*design, construction and maintenance of collecting systems shall be undertaken in accordance with the best technical knowledge not entailing excessive costs*" (so-called "**BTKNEEC**").

In 2022, Wildfish Challenged the lawfulness of the Secretary of State's 2022 Plan. The JR challenge was based on three grounds:

(1) When setting the first and third targets in the Plan, the Secretary of State failed to understand that Regulation 4 of the 1994 Regulations requires water and sewage companies to remedy insufficiency of physical capacity in accordance with the judgment of the Court of Justice of the European Union in *Commission v UK* (C-301/10) and was unlawful because it had the effect of directing water and sewage companies to breach Regulation 4;

(2) The Secretary of State failed to take into account obviously material considerations, including the enforcement of Regulation 4 of the 1994 Regulations.

(3) The Plan constituted 'a plan' within Regulation 63 of The Conservation of Habitats and Species Regulations 2017 and by failing to carry out an "appropriate assessment" of its effects on Special Areas of Conservation and Special Protection Areas, the approval of the Plan had been irrational.

The Court rejected each of these arguments. The judge (Holgate, J.) held there was no merit in the first ground because it was "*plain that the [Secretary of State] was considering adopting a strategy for dealing with overflows which went substantially beyond existing legislation, in particular the 1994 Regulations*". On the second ground, the judge held that the Defendant was under no legal obligation to have regard to whether the standards set by specific 'flow to full treatment' permit conditions were failing to comply with the 1994 Regulations.

On the third ground, the judge found the plan did not fall within the ambit of the appropriate assessment provisions in the 2017 Regulations. In response to the Claimant's reliance on *Wednesbury* unreasonableness Holgate, J. added: "*Because part of the claim brought by WildFish depends upon establishing irrationality, it is necessary to have in mind the relatively light intensity of review appropriate for dealing with a plan setting strategic or high level policy on environmental and socio-economic considerations, particularly where the*

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[1] See the Storm Overflows Discharge Reduction Plan published by the Secretary of State for Environment, Food and Rural Affairs on 26 August 2022 and laid before Parliament pursuant to s.141A of the WIA 1991 here

legislation allows the minister a very broad discretion as to the contents of the plan and he is required to lay the document before Parliament to whom he is answerable." [para 151 of the judgment]

The judge observed that the Plan contains measures to improve the performance of storm overflows, concluding that it does not prejudice the need for sewage companies to comply with existing statutory requirements, including environmental permit conditions and the 1994 Regulations. He remarked that this was the subject of an on-going, large scale investigation by the Environment Agency and Ofwat and that any issue about that process, such as whether those regulatory bodies are taking sufficient action, or whether the cost-benefit approach is sufficiently robust (e.g. with regard to the valuation of harm to ecology, or to human health and amenity, or to a business use) was not a matter for the Court in these proceedings [see paragraph 237 of the judgment].

As with Heathrow and HS2, this case raises serious and widespread environmental and public health / safety considerations. In our view, it is exactly the type of case in which the Court should exert a more intense standard of review (see page 17 of our Communication). It seems perverse that, in theory, a Local Planning Authority decision permitting the building of a garage with no environmental impact will be closely scrutinised by the Courts. But when the Government publishes a Plan to address one of the most widespread environmental and health crises affecting the UK in modern times - the Court stands back. The public body decisions with the greatest environmental impact get the lowest level of legal scrutiny and vice versa. This does not feel like equality before the law, or public access to environmental justice.

***Hatton and Others v. the United Kingdom* [GC] - 36022/97 Judgment 8.7.2003 [GC]**

We are also mindful that while our concerns about the scope of Judicial Review are ongoing, the limitations of the process go back many years. In *Hatton v UK*, the European Court of Human Rights ("**ECHR**") remarked upon the limitations of the English JR process – see the judgment (paragraphs 137-142) and online Case Report (July 2003). The Case Report states:

> *Article 13 – As the complaint under Article 8 had been declared admissible and indeed the Chamber had found a violation in its judgment, it had to be accepted that the claim under Article 8 was an arguable one. While judicial review proceedings were capable of establishing that the 1993 scheme was unlawful, it was clear that the scope of review by the domestic courts was limited to the classic English public law concepts, such as irrationality, unlawfulness and patent unreasonableness, and did not at the time allow consideration of whether the increase in night flights under the 1993 scheme represented a justifiable limitation on the right to respect for the private and family lives or the homes of those who lived in the vicinity of Heathrow airport. In these circumstances, the scope of review was not sufficient to comply with Article 13.*

Article 13 ECHR states: "*Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity*". Clearly, Article 13 ECHR is not framed in identical terms to Article 9 Aarhus Convention. However, the ECHR's conclusion that a "classic English public law" challenge in the UK did not enable the court to adjudicate on the core (substantive / health) issues with which the Claimant was concerned seems just as relevant to our Communication now as it did to the ECHR in 2003.

Progress of the Communication

We are acutely aware of the Committee's increasingly heavy workload and stringent efforts to ensure that all Communications are heard fairly and properly. We also recognise that Committee Members sit in a voluntary capacity and the substantial time commitment required of them to address not only the Communications

before them but compliance with adopted Findings. We therefore look forward to receiving the Committee's draft Findings in due course.

Please do not hesitate to contact us if there's any further information or clarification required by the Committee.

With best wishes.

Yours sincerely,

Carol Day and Rosie Sutherland, The RSPB
Katie de Kauwe and Will Rundle, Friends of the Earth
Mary Church, Friends of the Earth Scotland
Rowan Smith, Leigh Day

Encs.
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