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Your Ref: UNECE Decision VII/8s

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Dear Ms Marshall

**UNITED KINGDOM PROGRESS REPORT TO THE AARHUS CONVENTION COMPLIANCE COMMITTEE 2023**

River Faughan Anglers (RFA) makes the following comments on the UK progress report in respect of recommendations 4(a) and 4(b) of UNECE Decision VII/8s.

1. Two years after the publication of UNECE Decision VII/8s, it is disappointing that as much as the Party can muster by way of progress in complying with recommendations 4(a) and 4(b) is an uninformative statement that it “...continues to assess the implications of the recommendation and assess the options available.”
2. There can be no doubting that the implications of implementing UNECE recommendations 4(a) and 4(b) would make a considerable contribution to strengthening compliance and environmental protection across the UK. Particularly so in Northern Ireland, where breaching of the law in respect of unauthorised Environmental Impact Assessment (EIA) development has been systemic.
3. The Party’s lack of transparency on actual progress is concerning when considered in the context of unauthorised EIA development in Northern Ireland continuing to be regularised, or permitted to become immune from enforcement action under the

provisions of Section 132 of the Planning Act (Northern Ireland) 2011 (the Planning Act),<sup>1</sup> which repealed and replaced Article 67B(3) of the Planning Order (Northern Ireland) 1991. This runs contrary to the Party's international obligations under the Aarhus Convention (the Convention).

4. Since 2013, the Party has been officially aware of the problem around the regularisation of unauthorised EIA developments in Northern Ireland, not only via communication ACCC/C/2013/90, but also through the publication of the Mills Review. This was a review into a systemic failure of planning leading to a major environmental crime affecting the River Faughan and Tributaries Special Area of Conservation (SAC). A "key recommendation" of the 2013 review was for Government to:

*"make changes to the current planning enforcement policy to no longer allow the granting of retrospective planning permission for sand and gravel workings."* <sup>2</sup>

5. In January 2021, the Party's failure to implement this recommendation drew criticism from the European Commission (EC) which had, in 2015, opened Pilot Case EUP(2015)7640: ENVIRONMENTAL ENFORCEMENT IN NORTHERN IRELAND<sup>3</sup> against the UK because of Northern Ireland's systemic breaching of environmental laws.

6. Following the UK's exit from the European Union (EU), the EC closed Pilot Case EUP(2015)7640 in August 2021. Importantly, in its pre-closure letter dated 28 January 2021, the EC expressed its ongoing concern that the UK was still failing to comply with environmental law in respect of Northern Ireland's approach to unauthorised EIA development (copy of EC letter attached). Referring to recommendation 9 of the 2013 Mills Review, the EC letter states:

*"The reasons given by the UK authorities in their review Report for this not being followed up were surprising to the Commission as they appeared to claim that in order to do this, changes would be needed to primary law but that this could not be done as "under EU law, retrospective planning permission for unauthorised EIA development is permissible in certain circumstances". We explained to the UK authorities that the*

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<sup>1</sup> Legislation.gov.uk. The Planning Act (Northern Ireland) 2011, s.132. URL: <https://www.legislation.gov.uk/nia/2011/25/section/132>

<sup>2</sup> Mills, C. (2013) *A review of waste disposal at the Mobuoy site and the lessons learnt for the future regulation of the waste industry in Northern Ireland*. Belfast, Department of the Environment, p82.

<sup>3</sup> River Faughan Anglers was one of a number of concerned organisations that lodged formal infringement complaints to the European Commission in 2014 against the UK, exposing the Department's institutional neglect around EIA compliance issues in Northern Ireland.

Commission's reading of EU law is entirely at odds with this interpretation."<sup>4</sup>  
[emphasis added].

7. Here, the EC was expressing its concern that, in 2021, the Party was not only failing to comply with the law regarding unauthorised EIA development, but that it was attempting to dispute settled EU case law on the matter. RFA would be concerned if the apparent lack of real progress is because the Party remains under the misapprehension that it is EU environmental case law that is preventing it from complying with recommendation 4(a). Clearly, it would be wrong in that regard.

*Development Management Practice Note 9a: Unauthorised EIA Development*

8. The Party is also wrong to conflate its publication of the *Development Management Practice Note 9a: Unauthorised EIA Development* (DMPN9a) with progress towards compliance with Recommendation 4(a) of UNECE Decision VII/8s. Because of the systemic disregard for environmental law in Northern Ireland, the Party was required to formulate and implement its Planning Environmental Governance Work Programme (PEGWP) in a move to prevent the EC Pilot Case proceeding to formal infringement. A priority of the PEGWP was to publish guidance for local authorities on unauthorised EIA development.
9. In its attempt to link the publication of DMPN9a with compliance with recommendation 4(a) of UNECE Decision VII/8s, and in the absence of any actual progress on compliance with recommendation 4(a), there is a concern that the Party is indicating that its work undertaken as part of its PEGWP is considered an appropriate alternative to addressing UNECE Decision VII/8s.
10. This is unacceptable as it this would fall well short of compliance and does not provide the same level of environmental protection or act as a deterrent for systemic breaches of environmental law. Rather, it would be more appropriate for the Party to incorporate compliance with recommendations 4(a) and 4(b) as an objective of its PEGWP.
11. The lack of transparency around what progress has been achieved, is compounded by the fact that, in the meantime, unauthorised EIA development continues to be regularised retrospectively. Worse, it is allowed to become immune from enforcement action, by the very Department charged with advising the Party and with overseeing how Northern Ireland's local planning authorities are addressing the systemic nature of breaches of environmental law.

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<sup>4</sup> European Commission (2021) Pre-closure letter on EU Pilot (2015) 7640 concerning systemic failures of enforcement in Northern Ireland affecting the River Faughan SAC. Issued 28 January 2021.

12. For example, while placing heavy emphasis on the need to comply with the strict legal principles pertaining to unauthorised EIA development,<sup>5</sup> the Department has demonstrated that it is not prepared to exercise its oversight role to monitor compliance with how such decisions are being made. In what is believed to be the first real challenge to the legal principles set out in the DMPN9a since its publication, RFA alerted the Department to a case where these legal principles had been overturned by the Planning Appeals Commission (the appellate body).
13. Without going into the details of the specific case, on 17 May 2023, RFA wrote to the Department's Chief Planner (copy attached) pointing out how a refusal of unauthorised EIA development by a local planning authority had been successfully appealed. Given the Party's obligations and public expectations under its PEGWP, it would have been prudent for the Department to examine the case. Particularly as it had previously advised that its intervention was to seek to ensure that this unauthorised EIA development application *"...is managed appropriately and cognisant of environmental obligations."*<sup>6</sup>
14. Furthermore, the purpose of RFA's letter was to alert the Department to the importance of ensuring that the appeal decision did not countermand the strict legal principles on unauthorised EIA development set out in DMPN9a. This was because the High Court previously warned the Department that it should not rely on issued guidance to dispute an appeal decision it disagreed with. Rather, it must either accept appeal decisions or challenge them through the Court (see letter referred to at footnote 6).
15. Given the importance it places on DMPN9a, RFA was calling on the Department to exercise its oversight role and assure itself that its guidance on unauthorised EIA development had not been undermined by this first test of the strict legal principles at planning appeal. This seemed prudent given that in March 2022, the Northern Ireland Assembly's Public Accounts Committee's (PAC) inquiry into planning in Northern Ireland delivered its brutal findings which were seriously critical of the same Department for its lack of oversight of the planning regime. The PAC Public Inquiry report recommended that:

*"...the Department urgently considers how it exercises its oversight of the planning system. In the Committee's view, this must be accompanied with a culture change.*

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<sup>5</sup> Refer to pages 11-12 Of the UK Progress report 2023.

<sup>6</sup> RFA letter to the Department dated 17 May 2023 attached.

*Intervention should be to support delivery and to make improvements. The current minimal approach is no longer sustainable.”<sup>7</sup>*

16. Unfortunately, the Department’s response dated 6 June 2023<sup>8</sup> (copy attached) declined to exercise any such oversight as to whether the appeal decision undermined the strict legal principles contained in DMPN9a; effectively reinforcing that the minimal approach to oversight remains the order of the day.
17. The point being, while the Party seeks to erroneously conflate its publication of DMPN9a with progress on compliance with recommendation 4(a), it has clearly demonstrated that the monitoring of how unauthorised EIA developments are being decided does not form part of the Department’s oversight role. For that reason alone, the ACCC should not rely upon the publication of DMPN9a as a measure of progress on the implementation of recommendation 4(a).
18. More concerning than its lack of oversight is the fact that the Party has demonstrated, in the case of Lough Neagh Special Protection Area (SPA), how it is actually prepared to rely upon Section 132 of the Planning Act to permit regionally significant unauthorised EIA development to become immune from enforcement action.

#### *Lough Neagh Special Protection Area*

19. The Department is the public body charged with oversight of the planning system in Northern Ireland and has provided input into the Party’s progress report on section 4 of UNECE Decision VII/8s. It is also the public body charged with handling regionally significant planning projects and enforcement against regionally significant breaches of environmental law.
20. Government’s mismanagement of *the* most significant unauthorised EIA development in the history of the Northern Ireland planning system – unregulated sand extraction from the bed of Lough Neagh Special Protection Area (SPA) – indicates that it is prepared to take advantage of domestic planning legislation to permit, and justify permitting, unauthorised EIA development to become immune from enforcement action.
21. Having been forced into a position where it could no longer turn a blind eye to unregulated sand extraction taking place on a regionally significant scale from Lough Neagh SPA, the Department served enforcement notices on unregulated sand extractors and the owner of the bed of the Lough on 27 May 2015.

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<sup>7</sup> Northern Ireland Assembly (2022) Public Accounts Committee: Planning in Northern Ireland. Published 24 March 2022, p11, para.23.

<sup>8</sup> Department for Infrastructure (2023) Letter in response to footnote 4, dated 6 June 2023.

22. The enforcement notices were accompanied by positive EIA determinations, rendering the unregulated extraction unauthorised EIA development. The enforcement notices were not accompanied by Stop Notices. The enforcement notices were appealed with the effect that, due to the absence of Stop Notices, the unregulated extraction could continue until such times as the outcome of the appeal.

23. On 7 May 2019, the appellate body upheld the enforcement notices, with all extractions required to cease within 12 calendar months from the date of its decision.

24. On 30 November 2020, the Department informed the Northern Ireland Assembly that it had permitted unauthorised EIA development in the form of unauthorised sand extraction on a regionally significant scale from the bed of Lough Neagh SPA to become immune from enforcement action. The Minister stated:

*“Given the statutory restrictions on time limits associated with enforcement action, there is a period of several months in 2015 where enforcement action is not possible.”<sup>9</sup>*

25. The statutory restrictions the Department was referring to are contained in section 132 of the Planning Act,<sup>10</sup> which is the superseding planning legislation referred to in UNECE Decision VII/8s, recommendation 4(a)(i).

26. There can be no doubt that, between May 2020 and February 2021, the Department was aware that its failure to initiate formal enforcement proceedings was a breach of the law which would permit unauthorised EIA development to become immune from enforcement action. This is because, at the time it was not only dealing with Communication ACCC/C/2013/90, but was in quasi-judicial negotiations with the European Commission (EC), via the UK, in respect of Pilot case EUP(2015)7640, previously mentioned at paragraph 5 above.

27. Indeed, the Minutes of the Strategic Planning Group dated 20 September 2018, record the Department’s Chief Planner for Northern Ireland informing local authorities that:

*“The most significant challenge involves an ‘EU Pilot’ which has been ongoing since 2015 following a complaint to the EC alleging that there has been a systemic failure by*

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<sup>9</sup> Northern Ireland Assembly (2020) Assembly Written Question AQW 10715/17-22. URL: <https://aims.niassembly.gov.uk/questions/printquestionssummary.aspx?docid=316981>

<sup>10</sup> Refer to footnote 1.

*NI government to pursue enforcement action against unauthorised developments, which should have been subject to the requirements of the EIA process.*<sup>11</sup>

*The EU is looking for real evidence that things have improved on the ground in terms of how these unauthorised EIA cases are handled, and that the region is putting measures in place – strategically and operationally – to ensure that the statutory framework, capacity and expertise exists to enable us to fulfil our environmental obligations.*

*A key element of this work, then, is assurance on effective enforcement action in relation to unconsented EIA development.* [emphasis added].<sup>12</sup>

28. At the time this message was conveyed to Northern Ireland’s local authorities, the Department would have been in a position to initiate effective enforcement action to prevent the unauthorised EIA development taking place within Lough Neagh SPA from becoming immune from enforcement action. That it did not, shows a reckless disregard for the strict legal principles it was instructing local councils to adhere to.
29. While the Department did serve enforcement notices on 8 February 2021 against unauthorised sand extraction that took place within Lough Neagh SPA dating back to 8 February 2016,<sup>13</sup> its failure to do so in a timely manner resulted in over 8 months of regionally significant unauthorised EIA development, carried out between 27 May 2015 and 8 February 2016, becoming immune from enforcement action.
30. In effect, the Department responsible for input to the UK progress report is, itself, a breacher of environmental law in respect of its non-enforcement against regionally significant unauthorised EIA development (between 27 May 2015 and 8 February 2016). This is despite having had five years to initiate proceedings before immunity was achieved under the provisions of s.132 of the Planning Act. That the Department advising the Party was prepared to permit this unauthorised EIA development to reach immunity is, in itself, a clear indication of the need to have recommendations contained in section 4 on UNECE Decision VII/8s implemented in full and in compliance with the generous timeframe afforded by UNECE.

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<sup>11</sup> River Faughan Anglers was one of a number of complainants to lodge formal infringement complaints in 2014 against the UK for the Department’s institutional neglect around EIA compliance issues in Northern Ireland.

<sup>12</sup> Department for Infrastructure (2018) *Strategic Planning Group: Minutes of Meeting, 20 September 2018*. Agenda item 5: environmental compliance, p4.

<sup>13</sup> These enforcement notices have also been appealed. However, the appellate body advises that it is unable to convene an appeal hearing as it is awaiting additional information from the Department. Presently, it is unclear what that further information comprises.

31. While the Party points out that the implementation of these recommendations in Northern Ireland requires a sitting Executive and Assembly (which its citizens are currently deprived of due to a political dispute over the Windsor Framework / Northern Ireland Protocol), that is not a reason to stall progress in other jurisdictions of the UK. Nor should it prevent the Department from making all necessary progress, internally, that would enable swift implementation when the political stalemate is resolved.

### *Summary*

In summary, RFA is disappointed at the lack of transparency over what, if any, progress the Party has made towards implementing recommendations 4(a) and 4(b) of UNECE Decision VII/8s.

Our voluntary-run organisation is concerned and suspicious that the Party would seek to erroneously conflate the publication of guidance on unauthorised EIA development with progress towards amending planning legislation that would have a significant and positive effect on deterring breaches of environmental law.

The Party's historic reluctance to address the systemic nature of the circumvention of environmental laws in Northern Ireland is, perhaps, an indication that it has yet to grasp the extent to which it has breached, and continues to breach its lawful obligations regarding the strict legal principles around unauthorised EIA development.

This is compounded by a lack of scrutiny from the Department charged with the oversight of the Northern Ireland planning system.

That the Department is, itself, a recent breacher of the law pertaining to unauthorised EIA development undermines public confidence in Party.

The Party's exit from the EU and the resultant closure of EC Pilot Case EUP(2015)7640 heightens the UK's obligations to comply with the Convention. In that regard, it is time for the Party to indicate its acceptance and intention to comply with recommendations 4(a) and 4(b) and to do so by October 2024.

Yours sincerely

Dean Blackwood  
River Faughan Anglers



- Enclosures:
1. European Commission's letter to RFA dated 28 January 2021
  2. RFA letter to Department for Infrastructure dated 17 May 2023
  3. Department for Infrastructure's response to RFA dated 6 June 2023