Northern Ireland Audit Office (NIAO) report: Planning in Northern Ireland

1. I wish to make representation to the Public Accounts Committee (PAC) ahead of its evidence session scheduled for 10 February 2022 to examine the NIAO report[1] on the planning system in Northern Ireland, published on 1 February 2022.

2. First, it is important to place on record my concern that the very limited period of time between the publication of the report and the first evidence session is most disadvantageous to those who the planning system reputedly serves; the public.

My background

3. I am a Chartered town planner and have worked in planning in the public sector in Northern Ireland for my entire career until retirement in 2013.

4. I am a director and the Chair of River Faughan Anglers (RFA), a cross-community, not-for-profit organisation committed to providing affordable and free recreation to permit holders in the north-west (and beyond) and to protecting our river. Our voluntary-run organisation has been highlighting significant neglect within the planning system for many years, culminating in complaints to the European Commission (EC) and the United Nations (UN) over the systemic breaching of environmental planning regulations. This is elaborated upon from paragraph 13 below.

5. There is a concern that since Local Government Reform in 2015, the operation of the planning system has deteriorated in respect of both practices or conducts of some public officials, where behaviours akin to those exposed and heavily criticised by the Renewable Heat Incentive (RHI) Inquiry pervade the two tier planning system. For example, in the past year, the Northern Ireland Public Service Ombudsman (NIPSO) has required the Chief Executive of Derry City and Strabane District Council (DCSDC) to issue four separate apologies to RFA for neglectful practice and conduct of council

[1] Northern Ireland Audit Office (2022) *Planning in Northern Ireland*. Published by CDS 265237

officials. In the only investigation report that has published by NIPSO to date, the Ombudsman felt the need to remind DCSDC that:

"…a lack of openness can undermine trust, particularly in matters relating to planning and to the environment where openness is key to the integrity of the process." [2]

6. I am a founding member of the Environmental Gathering (the Gathering), a network of campaign groups and citizens directly affected by failed planning and environmental regulation. Formed in Derry in 2017 because of growing despair over the Northern Ireland Executive's aversion to initiate the public inquiry into illegal waste disposal in Northern Ireland and the role the planning system has played in facilitating environmental crime – voted for by the Assembly in March 2014[3] – the Gathering now boasts an affiliation of some sixty community organisations from across eight counties.

7. I am a member of the steering-group of the Environmental Justice Network Ireland (EJNI), launched in 2019 to assist communities respond to serious environmental governance failures and to highlight issues of environmental injustice across the island of Ireland.

8. I make this submission as a private citizen who has significant experience in and significant concerns about the planning system, how it is being administered and the seeming inability to effect meaningful improvements for the public good. I am deeply concerned with the increasing levels of unethical and improper practices and conducts – professional corruption[4] – directly encountered in my engagements with planning at central and local government levels.

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[2] Northern Ireland Public Service Ombudsman (2021) *Investigation Report 21017: Investigation of a complaint against Derry City and Strabane District Council.* Belfast, NIPSO, para.39.

[3] Northern Ireland Assembly (2014) Official Report (Hansard). *Waste Disposal: BBC "Spotlight" Programme*, 11 March 2014. 93(2), p70.
URL: http://www.niassembly.gov.uk/globalassets/documents/official-reports/plenary/2013-14/11-march-2014-revised.pdf [Accessed: 3 February 2022].

[4] Samuel, Y. (2010) ORGANISATIONAL PATHOLOGY: Life and Death of Organisations. New Jersey, Transaction Publishers, p97.

9. It gives me no pleasure in expressing my firm belief that the Northern Ireland planning system will continue to degenerate and squander public trust unless there is effective and independent oversight and robust external scrutiny of the underly organisational pathologies that are, in my documented experience, normalising deviant practices and conducts within the culture of public sector planning in Northern Ireland.

No late lessons from early warnings

10. Since the previous PAC report on planning in 2009 (which recognised its potential vulnerability to irregularity, impropriety and fraud), the system has been plagued by repeated crises of credibility. Those set out below are by no means exhaustive. Rather, they are indicative of the institutional neglect that doggedly pervades the planning system to the detriment of the public interest it is supposed to serve.

11. In 2012, in a withering report into a very public planning controversy involving mining in County Tyrone, the Ombudsman reported a *"…complete failure to protect the public interest…"*.[5] In response, the then Minister for the Environment, Alex Attwood MLA assured the Assembly that he was *"…determined to ensure that lessons are learnt.."* [6] so that there would be *"…no repeat of the failings…"* [7] that planning had presided over.

12. Two years on and succeeding Minister, Mark H Durkan MLA, was before the Assembly having to again acknowledge major system fail, this time regarding unauthorised mining and illegal waste disposal adjacent to the River Faughan at Mobuoy Road, Derry. In the Assembly debate of March 2014 he called for accountability for *"those working in planning…"* [8] who had presided over a most serious failure that will

[5] Northern Ireland Assembly (2012) AQW 11306/11-15 (Ross Hussey MLA). URL: http://aims.niassembly.gov.uk/questions/printquestionsummary.aspx?docid=134335 [Accessed: 3 February 2022].
[6] Northern Ireland Assembly (2012) AQW 14327/11-15 (Ross Hussey MLA). URL: http://aims.niassembly.gov.uk/questions/printquestionsummary.aspx?docid=143222 [Accessed: 3 February 2022].
[7] Ibid.
[8] Northern Ireland Assembly (2014) Official Report (Hansard). *Waste Disposal: BBC "Spotlight" Programme*, 11 March 2014. 93(2), p66. URL: http://www.niassembly.gov.uk/globalassets/documents/official-reports/plenary/2013-14/11-march-2014-revised.pdf [Accessed: 3 February 2022].

continue to have major socio-economic and environmental consequences for Northern Ireland[9] for generations to come. That day, Members of the Assembly expressed serious concerns over the role a failed planning system played in facilitating environmental crime.[10] Those concerns have never been addressed as the Members' unanimous vote for a public inquiry became buried in bureaucracy by the Executive.

13. By this stage, the perilous state of the Northern Ireland Planning system (and the Courts' inability to provide a just remedy to citizens challenging bad decision-making), was attracting international attention from the European Commission (EC) and the United Nations (UN). The recent positions and findings of these international institutions add to the worrying content of the 2022 NIAO report.

The European Commission

14. In 2015, the EC opened *Pilot Case EUP(2015)7640: Environmental Enforcement in Northern Ireland* against the United Kingdom due to the systemic misapplication of the provisions of the Environmental Impact Assessment (EIA) Directive by the Department of the Environment (DOE) Planning Service. While the NIAO report at para.5.33 records the Department for Infrastructure's (the Department) implementation of a programme to build EIA capacity – which is to be welcomed along with the remainder of its Planning Environmental Governance Work Programme (PEGWP)[11] – the Committee may wish to note the European Commission's continuing concerns with the Northern Ireland planning system, as set out in January 2022. A copy of this correspondence is attached as Annex I.[12] Of the EC's many concerns, of note is the Department's failure to implement recommendation 9 of the 2013 Mills Review aimed at strengthening the planning system. It is the EC's expressed view that this failure remains at odds with seminal EU environmental case law.

[9] 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, DOENI, p82.
[10] Refer to footnote 3.
[11] Department for Infrastructure (2021) *Planning Environmental Governance Work Programme* (Revised December 2021). Belfast, DFI.
[12] European Commission (2022) Pre-closure letter Ref: Ares(2022)657699 – Pilot Case (2015)7640 from Mark Speight, Head of Unit, Environmental Compliance – Enforcement, dated 28 January 2022.

15. Worryingly, due to the UK's exit from the European Union, the Commission is indicating its intention to close Pilot Case EUP(2015)7640 on the Northern Ireland planning system, despite its ongoing misgivings over continuing failures on the part of planning authorities to comply with environmental planning regulation and the continuing threat this poses to the environment.

16. It took direct intervention by the EC from 2015, and the threat of infringement proceedings against the UK, to force change in the lax approach planning was taking to harmful unauthorised developments in Northern Ireland. Effectively, any potential deterrent of formal sanction by the Court of Justice of the European Union will likely be removed due to Brexit. This raises the spectre, once more, of the exploitation of a dysfunctional planning system with the heightened risk of disregard for compliance with environmental planning regulation if an effective planning system is not in place.

The United Nations

17. As with the EC Pilot Case mentioned above, I am the communicant in respect of the UN case set out below. In July 2021, the UN issued significant findings of non-compliance with the Aarhus Convention against the UK in respect of communication ACCC/C/2013/90.[13] This complaint was, at the time, only the second case emanating from Northern Ireland to be deemed admissible for investigation by the Aarhus Convention Compliance Committee (ACCC). Like the concerns of the EC, the UN's intervention underscores the seriousness with which it views the failure of Northern Ireland's planning system.

18. The 2021 ACCC ruling, its findings of non-compliance and recommendations (contained in the link to the ruling at footnote 12) are a damning indictment of Northern Ireland's planning and judicial systems. These findings not only reinforce the European Commission's expressed misgivings about planning in Northern Ireland,

[13] United Nations: Economic Commission for Europe (2021) *Findings and recommendations with regard to communication ACCC/C/2013/90 concerning compliance by the United Kingdom of Great Britain and Northern Ireland.* Adopted by the Compliance Committee on 26 July 2021 and ratified at the seventy second meeting of the UN in Geneva, 18-21 October 2021. URL: https://unece.org/sites/default/files/2021-11/ECE_MP.PP_C.1_2021_14_E.pdf [Accessed: 3 February 2022].

but have a direct bearing on the matters which appear in the NIAO report before the Committee for consideration.

Equal Rights of Planning Appeal

19. For example, the absence of equal rights of appeal for Northern Ireland's citizens, referred to at para.3.19 in the NIAO Report, acknowledges how its introduction could act as a counter-balance to the *"considerable risks"* [14] which threaten the regularity and propriety of the planning system. Support for the introduction of a fairer appeals system can also be found in the recent finding of non-compliance with Articles 9(2) and 9(4) of the Aarhus Convention, as set out in para.167(e) of ACCC/C/2013/90. This states that:

"by maintaining a legal framework under which developers of proposed activities…are entitled to a full merits review of the decision on the proposed activity, but other members of the public seeking to challenge the same decision are not, the Party concerned fails to ensure the required procedures under Article 9(2) are fair as required by Article 9(4) of the Convention.[15]

20. While this finding refers specifically to projects likely to have significant effects on the environment (because that is what was complained about) there is no impediment to extending this right to other types of permission, such as those giving the NIAO cause for concern because of the considerable risks they currently pose for the planning system. This is because planning is a devolved matter. It is also worth noting that during an Assembly debate on the ill-fated Planning Bill of 2013, an amendment proposing Equal Rights of Planning Appeal was only defeated by a Petition of Concern after all political parties in the Assembly, with one exception, voted in favour of affording citizens the same rights as developers to appeal planning decisions.[16]

[14] Refer to footnote 1, para.3.19.
[15] Refer to footnote 13, p19.
[16] Northern Ireland Assembly (2013) *Official Report (Hansard)* Vol.86, No.5, p2-27 and p40-110 dated 24 June 2013 URL: http://www.niassembly.gov.uk/globalassets/documents/official-reports/plenary/2012-13/24.6.13-complete-revised.pdf and Official Report (Hansard) Vol.86, No.6, p48-84 dated 25 June 2013. URL: http://www.niassembly.gov.uk/globalassets/documents/official-reports/plenary/2012-13/25.6.13-complete-revision.pdf [Accessed 4 February 2022].

21. Introducing Equal Rights of Planning Appeal in Northern Ireland would not only reduce the *"considerable risks"* to the system by acting as a deterrent to the concerns raised by the NIAO report, but would improve decision making. It would provide a much fairer and participative planning system that would help meet the Assembly's international obligations of ensuring citizens' rights to justice under the Aarhus Convention.

Reducing pressure on the judicial system

22. Equal Rights of Planning Appeal would also reduce pressure on the judicial review system here; the only option open to citizens to challenge planning permissions that they have legitimate and well-founded concerns about. With the growth in Litigant in Person judicial reviews, particularly in the type of application referred to in the NIAO report as giving cause for concern, the question does need to be asked about whether the Court system is the right and proper forum to address such planning concerns. To that end, the PAC might consider canvasing the view of the Lady Chief Justice. Particularly so, as the ACCC finds the Northern Ireland judicial review process inadequate and in breach of the Aarhus Convention. At para.167(d) it states:

"By the court not undertaking its own assessment, based on all the evidence before it, of whether:

(i) The development was "likely to have significant effects on the environment by virtue of factors such as its nature, size or location";

(ii) The permit conditions could be implemented in practice without adverse environmental impacts,

but instead relying on the assessment of the public authority that took the contested decisions, the Party concerned failed to provide for a review of the substantive legality of those decisions in accordance with the requirements of article 9(2) of the Convention".[17]

23. In effect, what this ACCC case shows is that the Northern Ireland Courts, in having little or no remit to examine the substantive merits of planning decisions, nor expertise in environmental or technical planning matters, provide citizens with little recourse to

[17] Refer to footnote 13, para.167(d).

justice in planning-related matters. Rather, in its curtailed role, the judicial system is more likely to unwittingly perpetuate poor decision-making, compounding and normalising improper planning practices and conducts into the culture of Northern Ireland's failing planning system.

The dark side of planning

24. Worryingly, as in this ACCC case (and others), a lack of proper scrutiny of external whistleblowing concerns about the Northern Ireland planning system introduces the risk and opportunity for the judicial process to be readily corrupted by the use of false and misleading evidence by planning authorities, whether though professional incompetence or wilful disregard for the rule of law. These are serious matters I have previously drawn to the attention of the former Lord Chief Justice. A copy of this letter is provided as Annex II. Subsequently, I have raised these public interest concerns with the NIAO over the corruption of the judicial process in respect of the questionable practices and conducts in both central and local government.

25. For example, ACCC/C/2013/90 also highlights the UN's concern at paragraph 163 about the *"serious matter"* [18] of the planning authority withholding critical information from the public at a critical time which resulted in the significant findings of non-compliance with Articles 6(6)[19] and 3(2)[20] of the Aarhus Convention. There is nothing contained in the Northern Ireland Civil Service Code of Ethics, or planners' codes of professional conduct, that would remotely justify public servants engaging in such unethical (mal)practice. It is hard not to concluded that this action represented wilful irregular and improper conduct unbefitting of public sector planning officials.

26. <u>Importantly,</u> the significance of this ACCC case is not solely about the exposure of breaches on environmental regulations and malpractice in the planning system at the time. Rather, it is window into the *"dark side of planning"* [21] where this obvious

[18] Refer to footnote 13, para.163.
[19] Refer to footnote 13, para.167(b).
[20] Ibid., para.167(g).
[21] Certomà, C. (2015) Expanding the 'dark side of planning': Governmentality and biopolitics in urban garden planning. *Planning Theory*. Vol.14(1), 23-43; Flyvbjerg, B. (1996) The Dark Side of Planning: Rationality and

breaching of environmental planning regulations and malpractice in 2012 is compounded by the Department's ensuing and sustained attempts to cover up and rationalise a clear miscarriage of justice where false and misleading evidence corrupted the judicial process.

27. The fact that the Department which is the subject of this unfavourable NIAO report, is the same Department that up until mid-2021 sought to rationalise these blatant transgressions of environmental planning law and dismiss and playdown the effects of malpractice exposed by the ACCC findings, instils no public trust in the planning system going forward.

28. It raises doubt over the Department's suitability to provide the *"…significant leadership of the system"* [22] called for in the NIAO report. Certainly, a fundamental cultural shift in attitude and behaviour within this Department would be required. Presently, it is difficult to see how a government institution can earn the public legitimacy to direct fundamental cultural change of a failing planning system when it is incapable of acknowledging how its own ongoing irregular and improper practices and conducts are continuing to undermine public trust in that very system.

29. Simply put, the Department's claim that *"…it is committed to ensuring transparency and ethical standards…"* [23] must not be accepted at face value when this is being disputed with objectively verifiable evidence to the contrary. Over the past year, the NIAO has been presented with detailed evidence-based assessments, undertaken to exacting standards of inquiry, that highlight how government has persistently engaged in a corporate cover up of a clear miscarriage of justice. The damning report of the ACCC in 2021 is a further step to exposing the unethical practices and conducts that make this Department unsuitable for driving the much needed cultural change required by the NIAO report.

"Realrationalität", in Mandelbaum, S. J., Mazza, L., and Burchell, R. W. eds., *Explorations in Planning Theory*, New Brunswick, NJ: Center for Urban Policy Research Press.

[22] Refer to footnote 1, para.4.13.

[23] Refer to footnote 1, para.4.15.

30. At the time of the UN communication, and in the years preceding the ACCC ruling in 2021, evidence indicates how the values and standards expected in public service appear to have been abandoned by this Department in favour of limiting reputational harm and the corporate desire to mask irregular and improper practices that officials simply cannot claim ignorance of.

A missed opportunity

31. The implications of such actions are immensely damaging when it comes to engendering public confidence and, perhaps, go some way to explaining the worryingly low levels of public trust in planning highlighted by the Queen's University, Belfast study drawn on at paragraph 3.21 of the NIAO report.

32. When referring to public service, Sissela Bok wrote that *"truth and integrity are precious assets, easily squandered, hard to regain."* [24] This same author places significant emphasis on the role external scrutiny bodies must play in ensuring public service values and standards are respected and upheld by public institutions when indicators of irregularity and impropriety are at risk of eroding public trust; [25] in this case in the Northern Ireland planning system.

33. Unfortunately, the NIAO report misses a major opportunity to meaningfully address such public concerns because of its *"high level"* [26] approach to review of the planning system. Given that the report confirms that *"…NIAO regularly receives concerns about planning decisions, implying a lack of confidence in the way the system operates",* [27] it would have seemed appropriate to compliment the *high level* approach to review with a controlled, case study methodology designed to examine the veracity of some of the more serious concerns it has received from the public about planning. Particularly so, as renowned planning scholar, Bent Flyvbjerg, presents a persuasive argument for the

[24] Bok, S. (1999) *LYING: Moral Choice in Public and Private Life* (2nd edition). New York, Vintage Books, p249.
[25] Bok, S. (1989) *SECRETS: On the Ethics of Concealment and Revelation.* New York, Random House Inc.
[26] Refer to footnote 1, para.1.17.
[27] Refer to footnote 1, Executive Summary, p14.

use of specific case studies as a mechanism for strengthening the effectiveness of systematic outcomes,[28] aimed at effecting change for the public good.[29]

34. For example, under *Raising Concerns,*[30] a detailed, evidence-based analysis has previously been presented to the NIAO in respect of the solid indicators of irregularity and impropriety that underly the ACCC ruling against the UK. Although yet to be agreed, the draft minutes of a recent meeting with NIAO suggest the option of bringing this external whistleblowing concern to the current Head of the Civil Service (HoCS). This may follow in due course. However, that does not negate my informed view that a more effective way to address public concerns over irregular and improper practices and conducts in the planning system, or dispel them as unfounded, would have been to tackle them head on as part of this review of planning in Northern Ireland.

35. In light of the regular concerns about planning that the NIAO receives, including those submitted by myself, I would respectfully urge Members of the PAC to consider directing additional case study inquiry of the evidence-based claims already before the NIAO and the Local Government Auditor into whether unethical practices and conducts in central and local government are in danger of irreparably damaging the integrity and credibility of the Northern Ireland planning system. This is because it is the abandonment of ethical values and standards that represents the over-arching threat of dragging the planning system further into a post-Nolan (principles) era. It should not be left to concerned citizens to engage in asymmetrical power struggles with failing public institutions bent on abusing their power to divert the true extend of their institutional neglect from the publics' gaze.

[28] Flyvbjerg, B. (2006) Five Misunderstandings about Case-Study Research. Qualitative Inquiry. Vol.12(2), p219-245.
[29] Flyvbjerg, B. (2012) Why Mass Media Matters to Planning Research: The Case for Megaprojects. *Journal of Planning Education and Research.* 32(2), p169-181.
[30] Northern Ireland Audit Office (2020) *Raising Concerns: A good practice guide for the Northern Ireland public sector.* Published by CDS 238412.

36. Over the years, my evidence-base concerns regarding the systemically failure of the planning system have been acted upon by the EC and the UN to the extent that the Department has been required to (i) develop an extensive PEGWP to ward off the threat of infringement proceedings against the UK; and (ii) that the UK is now required to make fundamental changes to planning legislation in respect of unauthorised developments that given rise to significant environmental effects, respectively. In effect, my concerns about the institutional neglect within the Northern Ireland planning system have been verified by international bodies, expert in the field of environmental law.

37. Moreover, the finding of non-compliance by the ACCC covered at paragraph 25 above, is an indicator of the malpractice I know to have been engaged in on the exernal whisltleblowing concerns I have raised about the planning system. I have no hesitation in declaring that my complaints in respect of the irregular and improper practices and conducts – the professional corruption – I have encountered in planning at central and local government are as robust in their substance as those complaints subsequently verified and endorsed by the interventions and actions of the EC and UN.

38. Lastly, I would reiterate the point made at the outset of this submission at paragraph 2; that the tight timescales between the publication of the NIAO report and the evidence hearings is not conducive to enabling public participation in such an important and controversial matter. Particularly so, as the report is significant in terms of the level of institutional failure that has come to characterise the planning system in Northern Ireland.

Dean Blackwood BSc (Hons) LLM MRTPI

7 February 2022

EUROPEAN COMMISSION
DIRECTORATE-GENERAL
ENVIRONMENT
Compliance, Governance & Support to Member States
Environmental Compliance – Enforcement

Brussels
ENV.E.3/SG

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Subject: CHAP(2014) 01397 transferred to EU Pilot (2015) 7640 concerning enforcement failures in Northern Ireland (River Faughan SAC)

Dear Mr Blackwood

I would like to provide you with an update and assessment of your above-mentioned complaint file. Following receipt of your complaint and others raising concerns about a lack of enforcement of EU environmental law in Northern Ireland, we launched an EU Pilot investigation, reference EU Pilot (2015)7640 in June 2015. There followed numerous exchanges between the Commission services and the United Kingdom authorities. Our questions concerned the failures of the Northern Irish authorities to pursue planning enforcement action against unauthorised developments such as quarrying and landfills despite having been informed of the existence of such unlawful developments. In particular, we raised concerns about the fact that this had enable numerous environmentally damaging projects to bypass the requirements of the Environmental Impact Assessment (EIA) Directive, now Directive 2014/52/EU. We asked for clarification about the percentage of permissions that came through the system in Northern Ireland retrospectively, including through applications for Certificates of Lawful Use or Development (CLUDs) under Article 83A of the Planning (Northern Ireland) Order 1991. We drew attention to the critical comments on the planning system contained in the so-called Mills Report.

The UK authorities informed us of the follow up given to the Mills Report. In particular, they explained that they took the criticisms of this report seriously and had significantly reorganised their planning enforcement structures as a result. We were provided with information on these new structures and new Enforcement Practice Notes, which have been accompanied by training provided to the local councils that have been assigned these new functions. Furthermore, the UK authorities informed us of the results of their Internal Audit Follow-up Review of the Mills Report dated 8 March 2018. Whilst is appears that many of the Recommendations of the Mills Report have been implemented

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and that improvements have been made regarding environmental enforcement in Northern Ireland, we raised concerns about the lack of follow up to Recommendation 9 of the Report. Recommendation 9 states: *Make changes to the current planning enforcement policy to no longer allow the granting of retrospective planning permission for sand and gravel workings*.

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 Commission's reading of EU law is entirely at odds with this interpretation. There appears to be an incorrect reliance by the Northern Irish authorities on the judgment of the Court of Justice in case C-98/04, *Commission v. United Kingdom*. The Court in that case indeed found the Commission's claim to be inadmissible, but as a result did not provide guidance on its views on the substance of our claims. In the meantime, there have been further developments in case law and we referred the UK authorities to case C-215/06 *Commission v. Ireland* on this issue. This case concerned very similar circumstances where Ireland was taken to the European Court of Justice for regularly allowing mining and quarrying operations to commence without authorisation and then authorising these retrospectively. This practice was found to be contrary to EU law. We encouraged the UK authorities to read this judgment, to reconsider their position and to implement Recommendation 9. We underlined our concern that the authorities in Northern Ireland appeared to allow retrospective permission to be applied for on a regular basis: in 2013, this figure was 60% of mineral developments. Whilst we were informed that this had reduced to 38.7% in 2017 and 21% in 2018, this is still a high percentage implying that retrospective permissions are not limited to exceptional cases, as EU law requires under Case C-215/06. Nor have we been provided with information that these retrospective processes require the developers to have carried out remedial environmental impact assessments and to consider possible remediation or restoration for damage caused whilst the operations were carried out illegally.

With regard to the situation in and around the River Faughan and Tributaries Special Area of Conservation (SAC) designated under the Habitats Directive, we discussed the situation of the lack of enforcement surrounding the Mabuoy Road illegal landfill. As was explained in the Mills Report, this is one of the largest illegal landfill sites in Europe. The UK authorities explained to us at a package meeting in 2017, that there is a minimum of 913,105 m3 of waste illegally present in this site together with an additional 252,050 m3 of waste in the former licensed part of the site, some of which was also deposited illegally. We understand that the site has a long history of enforcement failures as were set out in the Mills Report and that no environmental impact assessment was undertaken even for those activities on the site that underwent development consent.

We were informed that a criminal prosecution was underway with regard to the illegal waste activities on the Mabouy Road site, but that this had undergone many years of appeals since the prosecution file was presented in 2014. The last information we were provided at the end of 2018, was that the criminal trial was scheduled to be heard on 7 January 2019. However, we understand from public news reports that this deadline may again have slipped. With regard to remediation of the site, we were told that assessments were ongoing with estimates that the clean up would cost £35-40 million. At the point in

time of our last information on this site at the end of 2018, it appeared that the failures to address the situation at the Mabouy illegal landfill site and to protect the Faughan SAC had still not been addressed.

As guardian of the Treaties, the Commission has a duty to ensure that Member States' legislation and practice comply with EU law. However, in exercising this role, the Commission enjoys discretionary power in deciding whether, and when, to start infringement proceedings or to refer a case to the Court of Justice.[1]

The United Kingdom left the European Union and ceased to be a Member State on 31 January 2020. In accordance with the provisions of the Agreement on the withdrawal of the United Kingdom from the European Union and the European Atomic Energy Community ("the Withdrawal Agreement")[2], EU law continued to apply to the United Kingdom for a transition period ending on 31 December 2020.

Given the United Kingdom's departure from the European Union, the Commission uses its discretionary power to pursue only complaints that point to a serious breach of EU law by the United Kingdom that could jeopardise specific EU interests, notably in connection with the interpretation and application of the Withdrawal Agreement. If you wish to contact the UK authorities with regard to any follow up on this case or other matters related to the continued application of environmental law nationally we have been informed that a centralised mailbox has been established which accepts queries and complainants regarding UK environmental enforcement and implementation: EUSR.Engagement@defra.gov.uk. Furthermore, I understand that in future it may be possible for complaints to be made to the Office of Environmental Protection: https://www.theoep.org.uk/submit-complaint.

In light of the above considerations, we will be proposing to close this complaint file. I make that proposal in the knowledge that your concerns in relation to the unregulated activities of illegal waste deposition on the edge of the River Faughan SAC have not been resolved. Furthermore, that the practice of allowing retrospective mineral extraction permission to be granted without sufficient regard to the requirements set out in case C-215/06 appears to continue without there being any clear provisions ensuring that such cases are exceptional and require the developer to undertake remedial environmental impact assessments and possible restoration. Whilst we do not see a way of taking these concerns further through infringement action, we hope to have an opportunity of providing the United Kingdom with an overview of the outstanding concerns we had on environmental enforcement at the point of the UK's final departure from the EU.

Should you have new information that might be relevant for the re-assessment of your case, pointing to a serious breach of EU law that jeopardises specific EU interests in the context of the United Kingdom's departure from the EU, please contact us within 4 weeks of the date of this letter. After this date, the case may be closed.

Yours sincerely,

[1] See in particular: judgement in Case C-329/88, Commission v Greece [1989] ECR 4159 and, more recently, judgement in case C-575/18 P, Czech Republic/ Commission, paragraph 66.

[2] OJ L29, 31.1.2020, p. 7.

(*Esigned*)

Paul Speight
Head of Unit

Date: 16 April 2020

Sir Declan Morgan
Lord Chief Justice
Lord Chief Justice's Office
Royal Courts of Justice
Chichester Street
Belfast
BT1 3JF

Dear Lord Chief Justice

FOR YOUR INFORMATION - [2014] NIQB 34: River Faughan Anglers-v-the Department of the Environment

What follows is less a criticism of the Courts and more a concern that public bodies are undermining the credibility of the judicial review process. This happens when respondents rely on false and misleading evidence, given under oath, which lead to miscarriages of justice. I draw this matter to your attention, not in the expectation of intervention, but as an alert to the reputational harm caused to the Courts, in the eyes of a concerned public. This occurs because respondents appear willing to distort what they know to be *"factual or forensic truth"*.[1] That is, an objectively verifiable fact, or a *"demonstrably correct answer"* on which there is the legitimate expectation that reasonable persons would converge.[2] Or, where public bodies make the Court's role more onerous by engaging in *"legalistic reinterpretations"* that set out to create doubt where none exists.[3] When the Courts fail to recognise this abuse of process, injustice follows.

You may recall that at an event on 5 December 2019 to launch the Guide for Litigants in Person, I raised concerns about how, in my experience, the judicial review (JR) process can be readily corrupted by a public body's lack of Duty of Candour to the Courts. Certainly, in both cases I have been engaged in on behalf of the River Faughan Anglers (RFA), I am satisfied that respondents' false and misleading evidence, given under oath, has been determinative in those judgments. I am aware that other JR applicants hold similar, legitimate concerns. Rightly, this severely damages public trust in public bodies when they wilfully squander their

[1] Cohen, S. (2001) *STATES OF DENIAL: Knowing about Atrocities and Suffering.* Cambridge, Polity, p227.

[2] Sunstein, C. R. and Hastie, R. (2015) *WISER: Getting Beyond Groupthink to Make Groups Smarter.* Boston, Harvard Business School Publishing, p30.

[3] Refer to Footnote 1, p103.

"precious assets" of *"truth and integrity"*.[4] Unfortunately, it also undermines public trust and faith in the Northern Ireland judicial review system.

To demonstrate this concern, attached for your information is a recent letter (and Ombudsman Report) sent to the Department for Infrastructure. This relates to the averment of false and misleading evidence, given under oath (and public officials' subsequent *conspiracy of silence* to evade accountability), which I consider misled a High Court judge in 2013 / 2014. It has taken six years, but with the intervention of the Northern Ireland Public Services Ombudsman's (NIPSO) office, Investigation Report 17453 now opens a *"tension point"* [5] that warrants further public scrutiny. In this case, sworn evidence relied on by the former Department of the Environment (DOE) is being exposed as false by another Government Department, as it scrambles to avert accountability for what my voluntary organisation considers to be this long-standing miscarriage of justice.

As elaborated on in my letter to the Department, the Ombudsman's findings at paragraphs 56 - 58 of Investigation Report 17453, begin to unravel how one public institution (DOE) misled another (the Courts) and then placed reliance on that corrupted Court judgment to both justify the Department's false evidence and to shut down public scrutiny of its wrongdoing. Only through persistence, is this unethical and potentially criminal practice being gradually exposed. Yet, this pattern of pathological conduct within the public service becomes repeated, perhaps learned, in a more recent judicial review case.[6] Precisely the same tactics were successfully deployed by the Respondent to mislead a High Court Judge in my Litigant in Person challenge in 2018. This, also, is now the subject of a current Ombudsman's complaint and soon-to-be external whistleblowing submission to the Northern Ireland Audit Office. The point being, when Courts are deceived by a respondent's unsubstantiated claims over an applicant's *forensic truth*, miscarriages of justice, like the one the Department for Infrastructure is frantically endeavouring to conceal, ensue.

As mentioned at the outset, this is not a complaint against the Courts, nor a plea for intervention. Rather, it is to alert you as Lord Chief Justice to how false and misleading evidence is being deployed to unduly influence Court decisions, where those corrupted rulings are then being used to rationalise the use of false and misleading evidence.

Stay safe through this worrying COVID-19 crisis.

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[4] Bok, S. (1999) *LYING: Moral Choice in Public and Private Life* (2nd edition). New York, Vintage Books, p249.

[5] Flyvbjerg, B. (2012) Why Mass Media Matters to Planning Research: The Case for Megaprojects. *Journal of Planning Education and Research.* 32(2), 169 – 81, p171. See also, Flyvbjerg, B. (2013) How planners deal with uncomfortable knowledge: the dubious ethics of the American Planning Association. *Cities.* 32, 157-163.

[6] [2018] NIQB 87: Blackwood-v-Derry City and Strabane District Council.

Yours sincerely

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