

20 December 2017

[REDACTED]
Omagh
Co. Tyrone
BT79 [REDACTED]

[REDACTED]
NIEA
Water Regulation Team
17 Antrim Road
Lisburn
Co. Antrim
BT28 3AL

Dear Sir,

Re: Letter before application

1. **Proposed claim for judicial review**

To: [REDACTED] Northern Ireland Environment Agency, Water Regulation Team, 17 Antrim Road, Lisburn, Co Antrim, BT28 3AL

2. **The applicant**

[REDACTED], Omagh, Co Tyrone, BT79 9AF

3. **Reference details**

Consent number 068/12/3, File Number TC40/12_3 issued on 29th September 2017

4. **The details of the matter being challenged**

Entirety of decision of NIEA dated 29th September 2017 to allow a discharge consent to Dalradian Gold to discharge waste into the Waterway at Irish Grid Reference H 5707 8690.

5. **The issue**

Dalradian Gold Ltd (DG) applied for a discharge consent on 20/04/17. The application was advertised as discharge consent for "site drainage" in the local press (Tyrone Constitution) on 18/05/17. Discharge consent was granted on 29/09/17 by Richard Coey, authorised officer of NIEA.(Consent No 068/12/3). This discharge consent allows substances including cadmium, zinc, iron, mercury and copper to be discharged into a waterway in amounts greater than those prescribed by legislation (Water Framework Directive (Classification Priority Substances and Shellfish Waters) Regulations (Northern Ireland) 2015. The Consent does not provide for any penalties or consequences for exceeding the limits granted despite these already being in breach of legislation. The conduct and monitoring of the discharge is not being monitored by the NIEA. It is left to DG to self monitor.

The waterway at Irish Grid reference H 5707 8690 is Curraghinalt Burn. This flows into the Owenkillew River, which joins the Glenelly, the Strule, the Mourne, the Derg and the Finn before becoming the River Foyle. The River Foyle and its tributaries are designated as ASSI (Area of Special Scientific Interest) and should be afforded special protection. The Owenkillew River is an EU designated Special Area of Conservation because of the presence of the particular species – freshwater pearl mussels (*margaritifera margaritifera*), atlantic salmon (*salmo salar*) and otters (*lutra lutra*). European and domestic legislation prohibits activities which may disturb or damage the habitats of these species.

At this time, I do not accept that [REDACTED] had the necessary authority to make the decision to grant the discharge consent as there was no Minister in post. There may be a procedural irregularity argument – I have yet to receive the files which are only being made available for viewing on 8th January 2018 despite having requested copies of the material on 10th October 2017. (In fact, NIEA replied on 1st November 2017, to my request for this information, stating that I had to pay a fee of £4,175.00. Subsequently, I requested access for viewing on 12th December 2017 and I received a reply on 14th December 2017 affording me access to the material on 8th January 2018).

5. **Grounds**

I believe that the decision of the NIEA is illegal, irrational, contrary to the spirit of the legislation, ultra vires, and Wednesbury unreasonable for the following reasons:

- (i) The decision is unreasonable and unlawful in that it affords discharge amounts in excess of the maximum limits set down in respect of a priority substance and specific pollutants in the Water Framework Directive (Classification, Priority Substances and Shellfish Waters) Regulations (Northern Ireland) 2015 (See Figure 1 below).
- (ii) The decision is unlawful in that it is contrary to Article 6 of the Habitats Directive 92/43/EEC which requires member states to avoid damaging activities that could significantly disturb these species [fresh water pearl mussels and atlantic salmon] or deteriorate the habitats of the protected species or habitat types.
- (iii) The decision is unlawful as the discharge consent was applied for on 20/04/17 and was not granted until 29/09/17. Under Schedule 1, Paragraph 2(2), to The Water (Northern Ireland) Order, the application is to be treated as refused if it is not given within the period of 4 months from the date the application is received;
- (iv) The decision is unlawful, unreasonable and irrational in that it provides for Dalradian to monitor the water itself. The NIEA is required to apply the environmental quality standards according to Articles 4 and 5 of the Water Framework Directive Regulations 2015. Cadmium is referenced at substance 6 in Table 47 of Part 2 of Schedule 1 to the Regulations. Articles 9, 11,13,14, 15 and 17 contain details of mandatory monitoring to be carried out by NIEA.
- (v) The decision is unreasonable and irrational in that it refers to adhering to limitations in respect of chromium, nickel, arsenic and lead under the 2015 Regulations whereas it has ignored the limitations contained within these regulations in respect of zinc, mercury, cadmium, iron and copper.

(vi) The decision is unreasonable and irrational in that it refers to the need to review the discharge consent if any area downstream from the discharge is designated under the European Communities (Natural Habitats etc) Regulations (Northern Ireland) 1995 or if the conditions do not meet the requirements of any other European Directive. This completely ignores the fact that the Owenkillev river is a SAC,(Special Area of Conservation) the Foyle river and tributaries are ASSI designated, and the whole area is an AONB (Area of Outstanding Natural Beauty). The decision has failed to take these European designations into account and afford them special protection under the Habitats Directive 1992.

(vii) The decision is unlawful in that it is contrary to Environment (Northern Ireland) Order 2002. Given that the discharge consent states it must be reviewed if it were to affect an area under European designation, the decision maker must not have taken into account the fact that there are affected designated areas and therefore has not complied with the according requirements of this Order.

(viii) The decision is unreasonable because water is extracted at Newtownstewart for the Castlederg reservoir which provides water for the people of the Castlederg area. In 2010, the United Nations recognised access to clean water as a fundamental human right.

(ix) The decision fails to provide for the immediate cessation of all activities in the event of discharges occurring in excess and in breach of the consent and relevant legislation.

(x)The decision is unreasonable in that an incomplete application was submitted and accepted by NIEA wherein the concentration of dangerous substances and of the additional significant chemical components was omitted.

(xi) The decision is unreasonable and procedurally improper as I believe that Richard Coey was not authorised to reach this decision.

(xii) The decision is unreasonable as I believe that [REDACTED] failed to remain independent in this decision making process due to himself and other NIEA officers having met with DG on numerous occasions throughout the 12 months period prior to the issue of this decision.

(xiii) The decision is unreasonable and procedurally improper as this Application for Consent ought not to have been accepted in the first instance by NIEA since DG was already in breach of the 3 year licence granted to DG for the works on this site in January 2014 (Project K/2013/0072/F).

6. **The details of the action that the respondent is expected to take**

Quash the original decision, revoke the consent and immediately stop the ongoing unregulated discharge into Curraghinalt Burn.

7. **The details of the legal advisers, if any, dealing with this claim**

N/A

8. **The details of any interested parties**

Dalradian Gold Limited, 3 Killybrack Road, Omagh, Co. Tyrone, BT79 7OG

9. **The details of information sought**

- Explanation as to how [REDACTED] is empowered to make the decision;

- Clarity on full reasons for the decision dated 29th September 2017,
- Confirmation as to how NIEA granted a discharge consent to a company whose exploratory mining licence had expired;
- Confirmation as to how many letters of objection were received in respect of the discharge consent application;
- Confirmation as to what weight was allocated to these letters of objection and how they influenced the NIEA decision;
- Given the number of objections received, explanation as to why NIEA did not direct planning appeals commission to hold a public local enquiry;
- Confirmation whether notice was given to the Foyle Fisheries Commission and the Fisheries Conservancy Board for Northern Ireland of the application;
- Explanation as to how the Water Framework Directive (Classification, Priority Substances and Shellfish Waters) Regulations (Northern Ireland) 2015 were applied to the decision when NIEA exceeded the limits imposed by this legislation;
- Explanation as to how NIEA determined the maximum quantity figure of each substance allowed to be discharged when the DG application was silent on these figures;
- Confirmation as to what considerations were used to reach the decision to grant this discharge consent in these terms.
- Details of what consideration NIEA gave to the cumulative impact of this discharge into the Foyle river network, especially when DAERA's Article 10 reports state that the river Foyle and its tributaries are already failing its conservation objectives and the Water Framework Directive water quality standards.
- Confirmation as to the basis upon which the NIEA accepted the application from DG when it was obviously incomplete and furthermore DG were already in breach of an earlier licence granted.

10. The details of any documents that are considered relevant and necessary

- Copies of all correspondence, notices for further information/replies, notes, memoranda, minutes, howsoever recorded between DAERA/NIEA and Dalradian and/or their representatives/investors in respect of this discharge consent application. This documentation is sought to clarify the role of Dalradian Gold Ltd in the decision making process.

- Supporting documentation to confirm that [REDACTED] was empowered to make the decision. This documentation is sought to establish the standing of Richard Coey as a representative of NIEA empowered to make the decision

- Correspondence between NIEA and DOE in relation to operations likely to damage the flora and fauna or other features of an ASSI. This information is sought in order to inform compliance with the Environment (Northern Ireland) Order 2002.

11. Costs

It is intended to apply for a protective costs order. It is submitted that the following considerations apply:

