2017 No. 132721

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (Judicial Review)

IN THE MATTER of an application for leave to apply for Judicial Review

AND IN THE MATTER of a decision of the Department for Agriculture, Environment and Rural Affairs dated 29th September 2017 ~~by~~

AMENDED AMENDED STATEMENT PURSUANT TO THE RULES OF THE SUPREME COURT (NI) 1980 ORDER 53 RULE 3(2)(A)
Amended this 26th day of June 2018
Re-amended this 2nd day of July 2018
DRAFT re-re-amended this 31st day of January 2019

1. The applicant is retired person, of Road, Omagh, Co Tyrone BT79 9AF.

2. The relief sought is:
   (a) an order of Certiorari to quash a decision of the Department for Agriculture, Environment and Rural Affairs ("the Respondent") dated 29th September 2017 which granted a Discharge Consent to Dalradian Gold Ltd (Consent no. 068/12/3) ("the impugned discharge consent") allowing dangerous substances and chemical compounds to be discharged into a waterway at Irish Grid Reference H5707 8690.

   (b) a declaration that the said decision was unlawful, ultra vires and void.

   (c) Costs, including a Protective Costs Order

   (d) Such further or other relief as this Honourable Court shall deem meet.

   (e) All necessary and consequential directions.

3. The grounds on which the said relief is sought are as follows:
   (a) The decision is unlawful in that it affords discharge amounts in excess of the maximum limits for pollutants set down in the Water Framework Directive (Classification, Priority Substance and Shellfish Waters) Regulations (Northern Ireland) 2015. ~~In particular, in calculating maximum amounts and testing these, the Respondent failed to take into account the fact that undissolved solids remained in the discharge effluent.~~

   (b) The Respondent has failed to comply with its duty to apply the environmental quality standards for copper; iron; zinc; cadmium; and mercury, set out in Tables

28; 34; 46 and 47 of Part 2 of Schedule 1 to the Water Framework Directive (Classification, Priority Substances and Shellfish Waters) Regulations (NI) 2015 ("the 2015 Regulations"), contrary to Regulation 4 and paragraph 14 of Part 2 of Schedule 1 to the 2015 Regulations. In particular:

(i) There are so many inconsistencies and errors in the raw data, in the summaries of data, in the choice of the software and in the calculations that the consent limits contained in the impugned discharge consent cannot be accurate and should not be relied upon. In making the impugned decision, the Respondent relied upon the results of this process and therefore took irrelevant matters into account (the unreliable results) and failed to take relevant matters into account (the correct results).

(ii) The above errors are such as to render the Respondent incapable (so long as it took the above process and results into account) of complying with its duties under Regulation 4 and paragraph 14 of Part 2 of Schedule 1 to the 2015 Regulations.

(iii) In taking the results of the calculations into account, the Respondent acted unreasonably and irrationally; and relied on material mistaken facts.

(c) The Respondent has breached the Applicant's legitimate expectation that in carrying out its duties under the 2015 Regulations, the Respondent would employ proper and reliable scientific means to calculate proper and reliable results of concentrations of copper, iron, zinc, cadmium and mercury in all relevant waterways.

(d) The Respondent has breached the Applicant's legitimate expectation that when the Respondent set discharge consent limits it would be able to monitor those limits and in particular would have equipment that was capable of ascertaining whether the concentration of cadmium and / or mercury in the Owenkillew River was within the relevant limits. The setting of limits that cannot be effectively monitored is irrational and contrary to the Respondent's obligations under Regulation 4 and paragraph 14 of Part 2 of Schedule 1 of the 2015 Regulations.

(e) The Respondent has failed to comply with its duty, with regard to mercury, to apply the biota Environmental Quality Standard in column 9 of Table 47 of Part 2 of Schedule 1 to the 2015 Regulations, instead applying the Maximum Allowable Concentration ("MAC- EQS").

(f) The Respondent has failed to comply with its duty, with regard to cadmium, to apply the Annual Average Environmental Quality Standard ("AA-EQS") set out in Table 47 of Part 2 of Schedule 1 to the 2015 Regulations.

(g) The Respondent has failed to comply with its duty under Regulation 4 and paragraph 14 of Part 2 of Schedule 1 to the 2015 Regulations to apply the environmental quality standards for copper; iron; zinc; cadmium; and mercury, set out in Tables 28; 34; 46 and 47 of Part 2 of Schedule 1 to the 2015 Regulations, in the Curraghinalt Burn. The Respondent failed to take into account the concentrations of these parameters in the Curraghinalt Burn at all and / or failed to give them adequate weight.

(h) In light of paragraphs a-g above, the Respondent has failed to comply with its duty to exercise its relevant functions in a manner which secures compliance with the requirements of the Water Framework Directive and the Environmental Quality Standards Directive contrary to regulations 3(1) of the Water Environment (Water Framework Directive) Regulations (NI) 2017 and contrary to Article 4 of the Water Framework Directive and to Article 3 of the Environmental Quality Standards Directive.

(i) In light of paragraphs a-g above, the Respondent, when deciding when to grant, vary, revoke, or impose conditions (and if so which conditions) in a discharge consent, has failed to comply with its duty to do so so as to prevent deterioration of the surface water status of the Curraghinalt Burn and / or the Owenkillew River and so as to otherwise support the achievement of the environmental objectives set for those bodies of water, contrary to Regulations 3(2) of the Water Environment (Water Framework Directive) Regulations (NI) 2017.

(j) **The decision is contrary to Article 6(3) of the Habitats Directive 92/43/EEC; Regulation 43 of the Conservation (Natural Habitats, etc) Regulations (NI) 1995 and Commission Guidance on the procedure to be followed under Article 6(3) of the Habitats Directive in that:**

  (i) **No adequate stage 1 test was carried out – the Respondent failed to consider whether the plan or project was likely to have a significant effect on the site, either individually or in combination with other plans or projects.** In the alternative, insofar as the screening matrix dated 17 August 2017 constitutes a stage 1 assessment, in carrying out this assessment the Respondent wrongly took into account mitigation measures contained in the application for the discharge consent at stage 1.

  (ii) **No, or no adequate stage 2 appropriate assessment was carried out prior to the impugned discharge consent being granted. Any prior assessments did not constitute an appropriate assessment for the purpose of the impugned discharge consent.**

1. Once the Respondent had decided on 17 August 2017 that a HRA was required, it was necessary to carry one out. The failure to carry out such an assessment in these circumstances was irrational and failed to take a relevant matter into account.

2. It was not sufficient to carry out "a review" of the appropriate assessment that had been undertaken in 2014.

3. In the alternative, if it was sufficient to carry out a review, the review was deficient in the following respects and therefore the Respondent's reliance on it was irrational: failed to ensure compliance with the requirements of the above Directive, Regulations and Guidance; and, insofar as reliance was placed on the HRA and the matters within it, irrelevant matters were taken into account.

    a. It was not in fact a review of the appropriate assessment that was carried out in 2014 because no appropriate assessment was in fact carried out in 2014. Whilst a HRA was carried out dated 26 September 2014, and whilst the cover sheet on this HRA recorded that an appropriate assessment had been carried out, the stage 1 assessment concluded that the proposal was not likely to have a significant effect on a N2K site and therefore an appropriate assessment was not carried out. There is no appropriate assessment within the HRA dated 26 September 2014.

    b. The 2 draft versions of the HRA [at Tabs 22 and 23 of Mr Coey's affidavit] conclude in relation to the stage 1 assessment that the proposal was likely to have a significant effect on the Owenkillew River, particularly in respect of fresh water pearl mussel; water courses; salmon; bog woodland and otters. The conclusion of the stage 1 assessment in the final version of the HRA [at Tab 25 of Mr Coey's affidavit, internal page 12] was the opposite – that the proposal was not likely to have a significant effect on a N2K site. There is no justifiable reason for this change.

c. In carrying out the stage 1 assessment of the final HRA, the Respondent took into account mitigation measures that had been included in the application for the discharge consent and also the conditions attached to the discharge consent. Both of these are measures intended to avoid or reduce the harmful effects of the proposed project on the Owenkillew SAC and therefore neither can be taken into account at stage 1.

d. The HRA was signed on 16 September 2014 and updated after this, on 26 September 2014. It appears that it was not signed after it was updated.

e. Several parts of the HRA appear to be "cut and pasted" from another HRA relating to the River Roe.

f. The assessment was not carried out for the purposes of granting, varying, revoking, or imposing conditions (and if so what conditions) in a discharge consent and did not therefore consider the issues relevant to these purposes.

(iii) **In carrying out the Habitats Regulations Assessment ("HRA"), the Respondent decided that appropriate conditions could be placed on the impugned consent to ensure that no significant effect on the Owenkillew SAC was likely to occur. This was the wrong procedure under the Directive, Regulations and Commission Guidance. If conditions were necessary then it was necessary to carry out an appropriate assessment in order to decide what those conditions should be. Conditions could not be placed on the impugned discharge consent in the absence of an appropriate assessment. It is not possible to negate the need for an appropriate assessment by attaching conditions to a consent.**

(iv) In making the impugned decision, the Respondent failed to pay any or sufficient regard to the North Western River Basin Management Plan and / or to the Practical Implementation of Freshwater Pearl Mussel Measures, Proposals for Owenkillew Sub-Basin Management Strategy, Final Draft (July 2014) ("the Owenkillew Sub-Basin Management Strategy"), contrary to Regulation 30 of the Water Environment (Water Framework Directive) Regulations (NI) 2017. In particular:

1. the Respondent failed to have any regard to the following matters set out in the Owenkillew Sub-Basin Management Strategy:

2. That the annual mean of suspended solids should be less than 10mg/L [page 2-18 of the strategy]. This is evidenced by the fact that the Respondent allowed the annual mean of suspended solids to exceed 10mg/L.

3. That suspended solids within the sub-basin should be rare rather than chronic and should be attributable to natural conditions. [page 2-24 of the strategy] This is evidenced by the fact that the Respondent allowed suspended solids to be discharged into the sub-basin that were not attributable to natural conditions and further allowed this on a continuous basis.

4. That it is important to understand the causes of elevated suspended solids where they are unnatural in order to rectify problems and to be aware that no level of exceedance beyond the natural is acceptable. This is evidenced by the fact that the Respondent allowed a level of exceedance beyond the natural.

(v) The Respondent failed to measure the amount of suspended solids in the Curraghinalt Burn upstream of the confluence with the discharge effluent and / or the amount of suspended solids in the Owenkillew River upstream of its confluence with the Curraghinalt Burn. The Respondent did not therefore know what the natural amount of suspended solids within either the Curraghinalt Burn or the Owenkillew River was. It was not therefore possible for the Respondent to consider whether the discharge consent created a level of exceedance beyond the natural; or to calculate the actual amount of suspended solids in the Curraghinalt Burn and / or the Owenkillew River after the effluent had been discharged into those waterways.

(b) The Respondent failed to take into account or to give sufficient weight to the fact that the Owenkillew River is a Special Area of Conservation; that the Foyle River and its tributaries are designated as Areas of Special Scientific Interest and that the whole area is an Area of Outstanding Natural Beauty. In particular:

(i) the Respondent failed to consult the Loughs Agency prior to granting the impugned discharge consent; and

(ii) the Respondent did not take into account, give adequate weight to, or comply with, the Owenkillew Sub Basin Management Strategy.

(c) The Respondent acted in contravention of Article 4 of the Water (NI) Order 1999 and failed to take into account or to give adequate weight to the facts that:

(i) the discharge included heavy metal (such as cadmium, mercury and zinc) which present a serious risk to health;

(i) the total amount of each heavy metal was not being tested by either the Respondent or Dalradian;

(i) the total amount of each heavy metal was not being tested in the local treatment plants;

(i) there was therefore no testing of the total amount of heavy metal being discharged into or present in the relevant waterways.

(d) The Respondent failed to take into account or give adequate weight to the fact that there was a history of Dalradian failing to comply with the requirements of the conditions in discharge consents granted to them.

(e) The decision is unlawful and procedurally improper as:

(i) ed beyond the purported delegated remit granted to him by the Minister on 16 June 2015 in that the purported delegated remit allowed him to sign domestic and non-strategic discharge consents, but it did not allow him to make decisions in relating to projects of strategic importance;

(ii) The Department did not have power to make the decision in the absence of a Minister. There was no Minister in place at the time the decision was made. In particular, the decision was contrary to Article 4(1) of the Departments (NI) Order 1999 which requires that the functions of a department shall at all times be exercised subject to the direction and control of the Minister.

(f) The decision is unreasonable and procedurally improper in that it failed to take into account or give adequate weight to the facts that, at the time the consent was granted:

(i) Dalradian was already in breach of the planning permission granted to Dalradian for the works on this site in January 2014. (Project K/2013/0072/F). Condition 43 of this planning permission required Dalradian to complete the implementation of the restoration of the site in

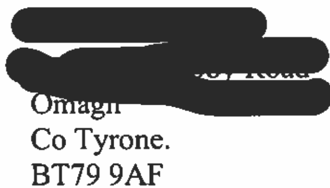
accordance with Drawing Number 14 and in accordance with conditions 41 and 42 of the said planning permission on or before 3 years from the date of commencement, unless otherwise agreed in writing with the Department. The date of commencement was August 2014. Three years from the date of commencement was August 2017. Therefore, at the date of the grant of the discharge consent (29 September 2017), Dalradian was in breach of the above conditions of the planning permission granted to it for the development in respect of which the discharge consent had been applied for. The breach is continuing.

(ii) Dalradian did not have any valid planning permission for the activity associated with the discharge. Dalradian's application for the discharge consent was for trade effluent in respect of mineral exploration involving the extension of an existing underground exploration tunnel. At the time the discharge consent was granted, Dalradian did not have valid planning permission for the activity associated with the discharge consent, namely for mineral exploration involving the extension of an existing underground exploration tunnel.

(g) The Respondent wrongly considered that Dalradian did have valid planning permission for the activity associated with the discharge consent, namely for mineral exploration involving the extension of an existing underground exploration tunnel.

The Applicant will also rely on the affidavits filed herein and the reasons to be offered.
Dated this 28th day of December 2017

Signed: ....



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Amended this 26th day of June 2018

Signed : ______________________

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Re-amended this 2nd day of July 2018