

.....
Northern Ireland Environment Agency

Our Ref: KLBVG48638-1
Your Ref:
Date: 18 March 2021

BY EMAIL ONLY - **th@daera-ni.gov.uk**

Dear

Our Client: Dalradian Gold Limited
Applications for Water Discharge Consents (Reference TC 80/20 and TC 081/21)

As you know, we act for our above-named client in respect of the proposed Curraghinalt Project and I write in particular with regard to the current applications for Water Discharge Consents made under Article 6 of the Water (Northern Ireland) Order 1999 which were lodged with you on 17 April 2020.

Our client's methodology is clearly set out in the supporting material which was submitted with each application. This methodology is consistent with the approach taken in the Environmental Statement submitted with the planning application for the project in November 2017, and which we had discussed and agreed in pre-application consultations with NIEA in 2016. A key aspect to the methodology is the adoption of the English Environment Agency guidance and the need to maintain environmental quality standards (EQS) in the Owenreagh and Owenkillew Rivers consistent with the Owenreagh and Owenkillew water quality objectives under the Water Framework Directive (WFD) catchment management plans. The standards set for the Pollanroe and Curraghinalt Burns are based on drinking water standards. The Environment Agency methods for calculating discharge criteria were adopted in the absence of equivalent Northern Ireland methods. The Environment Agency Monte Carlo modelling method was also used; which we understand is also used by NIEA.

Following our virtual meeting on Tuesday, 23 February 2021, we are concerned that the Agency is considering adopting a requirement to base water quality in the Pollanroe and Curraghinalt Burns on EQS. There is confusion as to the justification for that position because reference was made both to:-

50 Bedford Street, Belfast, BT2 7FW | DX421 NR Belfast | T +44 (0) 28 9024 3141 | F +44 (0) 28 9024 9096 | www.cleaverfultonrankin.co.uk |

Cleaver Fulton Rankin Limited is a company registered in Northern Ireland with Company Number NI031078 having its registered office at 50 Bedford Street, Belfast BT2 7FW. Cleaver Fulton Rankin is a trading style of Cleaver Fulton Rankin Limited. A list of directors is available at the above registered office.



- (i) the connectivity with the Owenkillev SAC; and also
- (ii) the perceived sensitivity of both the Pollanroe and the Curraghinalt Burns, because of potential for fish life.

We set out below why neither approach would be lawful:-

1. UK Technical Advisory Group (UKTAG) Guidance on the identification of small surface water bodies sets out that small headwater burns (catchments of <10 km²) are not normally considered "waterbodies" under the WFD (i.e., requiring the same level of protection as larger water courses). Both the Pollanroe and Curraghinalt Burns fall within that definition with catchments an order of magnitude below this threshold (~2 and 1 km² respectively).
2. NIEA has not identified either of the burns as a surface water body for the purposes of the WFD which is confirmed by reference to NIEA's Water Information Request Viewer.
3. Section 5.1 (ii) of the UKTAG Guidance sets out certain exceptions where small waterbodies can be considered "waterbodies". The only relevant exception is where achieving any standards and objectives for an SPA or SAC depend on the maintenance or improvement of the status of an element of surface water which is not the designated water body. This is an important exception which ensures that all Habitats Regulations requirements are met when a discharge may impact on a protected site. There is therefore no rational basis to re-draw the practical boundary of an SAC or SPA which has been suggested here.

The Section 5.1 (ii) exception has been addressed in section 7.3.2 of the Surface Water Impact Assessment which was submitted as part of our client's planning application and is set out below for completeness:-

'7.3.2 Sensitivity of receiving waters

The sensitivities of the local watercourses considered in this assessment to changes in water quality are outlined in Table 7-6.

Table 7-6: Sensitivity of watercourses for surface water quality assessment

Watercourse	Sensitivity	Reason for selection
<i>Pollanroe Burn</i>	<i>Low</i>	<i>Small watercourse with no significant ecological value</i>
<i>Unnamed Watercourse</i>	<i>Low</i>	<i>Small watercourse with no significant ecological value</i>
<i>Owenreagh River</i>	<i>High</i>	<i>Important sensitive and protected ecosystem</i>
<i>Curraghinalt Burn</i>	<i>Low</i>	<i>Small watercourse with no significant ecological value</i>
<i>Attagh Burn</i>	<i>Low</i>	<i>Small watercourse with no significant ecological value</i>
<i>Glenealy Burn</i>	<i>Low</i>	<i>Small watercourse with no significant ecological value</i>

Owenkillev River	High	Important sensitive and protected ecosystem
------------------	------	---

The approach used to define the sensitivity of watercourses are also consistent with the requirements of the WFD, which requires the protection and improvement of "water bodies".

For surface water, a watercourse is automatically identified as a water body if it has a catchment area greater than 10 km². Therefore, the Owenreagh River and Owenkillev River are considered as water bodies. The Owenkillev River is also a SAC under Directive 92/43/EEC, based on significant populations of rare or threatened species within a European context (namely otters, freshwater pearl mussels and Atlantic salmon). Therefore, management of water quality within the Owenreagh and the Owenkillev Rivers is required under the WFD and the quality of water in these rivers should be compared to the relevant Environmental Quality Standards (EQS) as per the WFD.

This is the approach taken in this SWIA, with a set of EQS standards that will be applied to the Owenreagh and Owenkillev Rivers. They are used to calculate discharge criteria for the mine site water treatment plants and they are compared to baseline and predicted future water quality in the two rivers.

The headwaters of a river with a catchment area of less than 10 km² (e.g., Pollanroe Burn or Curraghinalt Burn) are not normally considered water bodies under the WFD, particularly for catchments that are modified from their natural state. Small catchments of this type are not considered in the same way as larger streams under the WFD, but they could still be considered a water body under WFD, if one or more specific criteria are applicable, which are outlined by UKTAG2.

From the list in UKTAG, the following criteria are of relevance to the Pollanroe and Curraghinalt Burns:

- The achievement of any standards or objectives for a Special Area of Conservation (SAC) depend on the maintenance or improvement of the status of the watercourse; or
- Impacts on the small watercourse would result in a failure to achieve the objectives for a body (or bodies) or water in the river basin district AND the competent authority deems the identification of the small watercourse as a water body the most effective way of highlighting and managing the risks. It is noted that a risk of failure to achieve the objectives of a water body in the river basin district must be managed whether or not the small watercourse is identified as a water body.

Small tributary catchments are also important within the development of River Basin Management Plans (RBMPs), management tools under the WFD. The term 'natural headwaters' is used within RBMPs to define tributaries which are considered as having priority river habitat which can impact on larger watercourses (water bodies). In a consultation response DAERA (NED) has indicated that they do not consider the small

tributaries as headwaters under WFD, due to their modified state. This is consistent with the ecological and biological baseline surveys undertaken as part of the environmental assessment process for this project. This work identified the small watercourses as having limited ecological value, such that they are identified as Low Sensitivity streams in this assessment. Based on these surveys and consultations, EQS values are not applied to the Pollanroe Burn and Curraghinalt Burn (as well as other small tributaries to the Owenreagh and Owenkillew Rivers <10km² in area).

The approach taken in the development of water quality limits for discharges from the Curraghinalt Mine are based on calculations that aim to maintain the water quality within the Owenkillew and Owenreagh Rivers. The proposed discharges to the Pollanroe and Curraghinalt Burns would not result in a failure to achieve the objectives for the Owenreagh or Owenkillew Rivers, nor would the discharge to the Curraghinalt or Pollanroe Burns impact upon the achievement of the EQS within the Owenkillew River SAC, based on the methods used to calculate the discharge criteria outlined in Annex B and C and discussed in the SWIA. This approach has been accepted in consultations with statutory consultees.

Given their scale and the baseline assessment, the Pollanroe Burn and Curraghinalt Burn (as well as other small tributaries to the Owenreagh and Owenkillew Rivers <10km² in area) are not considered as water bodies under WFD. The water quality in these streams are not compared to EQS values and discharges to the streams from the site water treatment plants are limited to national and international Drinking Water Standards, which are considered appropriate standards to maintain water quality in the streams to a standard acceptable for its use. These standards are shown to be protective of the EQS in the Owenreagh and Owenkillew Rivers, which provides a link and consistency with the requirements of UKTAG outlined above.

It is noted that the results of this SWIA impact assessment are considered within the ecological impact assessment and Shadow Habitats Regulation Assessment, providing confidence that the approach taken is protective of the environment and consistent with the WFD approaches.'

4. The methodology that our client's consultants have adopted by definition means that any changes in the small waterbodies cannot adversely impact on the status of the SAC as the methodology is based on maintaining the water quality in the SAC, based on EQS. None of the exceptions therefore apply and small headwater burns are not water bodies for the purposes of the Water Framework Directive. Therefore EQS do not apply to the Pollanroe and Curraghinalt Burns.
5. The burns' catchments are too small to impact the overall waterbody and this position is confirmed in the appendices to the UKTAG recommendation on surface water classification schemes. There is detailed evidence over several years on this issue.

6. In summary the Pollanroe Burn data confirms that the alluvial fan formed has elevated the bed level of the Pollanroe Burn significantly above the Owenreagh River to the extent that there is a minimum water level difference at the confluence between the river and the burn of 1m. Moreover, the 'perched' nature of the Pollanroe Burn above the Owenreagh River coupled with the shallow nature of the Pollanroe Burn (water depth circa 0.05 to 0.1 m), indicates a constant barrier to fish migration into the Pollanroe Burn from the Owenreagh River.
7. The Curraghinalt Burn data confirms that the 'perched' nature of the Curraghinalt Burn above the Owenkillew River (2m) coupled with the shallow nature of the Curraghinalt Burn (water depth circa 0.1 m), indicates that there is a constant barrier to fish migration into the Curraghinalt Burn from the Owenkillew River.
8. These are not matters of professional judgement. They are matters of fact from which conclusions are drawn. The evidence base shows that the burns are of low ecological value and this has been acknowledged by NED: the evidence base shows no protected species presence, no fish spawning areas and the channels are generally of steep gradient with a substrate which consists of boulder and bedrock. A copy of a note setting out the evidence confirming this conclusion is attached. These conclusions are not controversial and the low ecological value has been acknowledged throughout the planning application process. We have seen the recent response from Loughs Agency in respect of our client's planning application and we attach a copy of Turley's letter dated 16 March 2021 to DfI Planning in response. You will see that they identify previous Loughs Agency conclusions that the Fisheries and River Habitat Assessment, Biological Water Quality Assessment, and Surface Water Impact Assessment provide a sound environmental baseline, are written to a high professional standard and provide the basis for environmental baseline data. Turley point out the incongruity of Loughs Agency's current position and confirm that this will be a matter of evidence at the Public Inquiry.
9. The principle that a party asserting that a risk has not been considered which ought to have been considered bears an onus to produce credible evidence that there was a real, rather than a hypothetical, risk which it asserts should have been considered. As the High Court in Northern Ireland (McCloskey LJ) stated in Sands (para 47):-

"In R (Lee Valley Regional Park Authority) v Epping Forest DC [2016] EWCA Civ 404, the English Court of Appeal observed at [65] that the Habitats Directive is –

"... intended to be an aid to effective environmental decision making, not a legal obstacle course ...

Judging whether an appropriate assessment is required in a particular case is the responsibility not of the court but of the local planning authority, subject to review by the court only on conventional Wednesbury grounds'."

Another principle which emerges from the corpus of decided cases is that a litigant who claims that there has been a failure to consider some particular risk has the onus of adducing credible evidence that there was a real, rather than a hypothetical, risk which should have been considered: R (Boggis) v Natural England [2010] PTSR 725, at [37]–[38]. To like effect, Sullivan J stated in R (Hart DC) v Secretary of State [2008] EWHC 1204 (Admin), at [81]:

“Merely expressing doubt without providing reasonable objective evidence for doing so is not sufficient ...”

*I refer also to Smyth v Secretary of State for Communities and Local Government [2015] EWCA Civ 174 at [56]–[62] and [78]–[85], which is to similar effect and, further, reiterates with some emphasis the principle that the authority concerned – **where it rationally chooses to do so** (my emphasis) – is entitled to attribute substantial weight to the views of a presumptively expert consultee.”*

10. There would be no sound basis to depart from this clear principle of the onus to produce evidence, and there is no basis to suggest that the principle does not equally apply to the WFD assessment. Indeed, as appears below there is every good reason why the principle should equally apply. That principle would be reinforced where an asserted risk is raised by a consultee without any evidence to support the same, and where the existing voluminous and detailed evidence points clearly against that assertion.
11. Furthermore, to treat the burns as waterbodies results in the following absurd consequences:-
 - (i) This would encourage discharges direct to designated water bodies before utilising undesignated water bodies. Indeed, the effect of dilution might well lead to a higher permitted discharge limit. Such an approach is plainly undesirable in principle.
 - (ii) If the test is connectivity to a protected site rather than potential impact upon a European site, this would have a very significant impact on water discharges throughout Northern Ireland. Such an approach could apply to almost every discharge application in Northern Ireland because of the significant number of European Habitats protected sites and their related connectivity. This makes a mockery of the designations and would require all water courses to be treated in the same way as the protected ones. That is wrong in Law and is manifestly absurd in practice;
 - (iii) The methodology is not workable in practice for small burns as most EQS are based on annual mean concentrations. The Monte Carlo method takes the variability of the background water quality into account, but where there is almost no dilution at the outfall then the calculation will default towards discharge criteria to be set to the mean baseline + 10%EQS. Natural concentrations in the rivers will vary around that mean. This may mean that discharge consent requirements will be less than the background in the watercourse (due to natural variability in watercourse), resulting in a non-compliance even where the discharge is below natural levels in the burn;

(iv) In requiring discharge consent values lower than drinking water standards and lower than natural groundwater, NIEA would be:

- 1) requiring compliance at levels that fail to show harmful effect; and
- 2) thereafter, it is unclear how NIEA could impose those limits, measure those limits, and check compliance (particularly if the levels in the discharge are lower than levels in the receiving watercourses at the time of the discharge); while
- 3) at the same time permitting other consented discharges (such as treated sewage and agricultural runoff) in the same catchment that are at significantly higher concentrations.

The issue has been discussed with Dr Theresa Kearney and we understand that a meeting is arranged for 1 April with your team and your colleagues in Natural Environment Division. Our client is looking forward to the opportunity of further explaining the protective nature of the work done, the standards proposed and the extensive evidence base for the conclusion that the burns are of low ecological value.

Yours faithfully

Cleaver Fulton Rankin

Cleaver Fulton Rankin

Email - r@cfrlaw.co.uk

Direct Dial -)

