

Applicant; [REDACTED]; 2nd; 25 June 2018

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER of an application by [REDACTED] for Judicial Review

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

AFFIDAVIT

I, [REDACTED], Omagh, County Tyrone, aged 18 years and upwards, make oath and say as follows:

1. I am the Applicant in the above entitled proceedings. I am making this affidavit in support of my application for judicial review and in particular to put in affidavit form matters which I had previously brought before the Court in the form of submissions, which, I am told by my legal representatives and verily believe, should be in the form of affidavit evidence. This is my second affidavit in these proceedings. I have prepared a bundle of exhibits for the purpose of this affidavit which I have marked "FOK2" at the time of swearing hereof.
2. I refer to my pre action letter to the Respondent dated 20 December 2017 and the Respondent's response dated 17 February 2018. [FOK2; Tab 14]

Planning permission

3. I understand that on or about 18 February 2013, Dalradian Gold Limited ("Dalradian") applied for planning permission for "extension to existing

underground exploration tunnel; including temporary buildings, vehicle parking, waste rock storage area, water treatment system and passing bays.” I believe, due to local knowledge of the area, that the exploration tunnel that existed at the time of this application had been made by previous mining companies. This application was granted on or about 22 January 2014, subject to a number of conditions. I am not aware as to whether there was a previous planning permission. In particular Condition 3 required that the development cease within 3 years of the date of commencement; or upon completion of 2710 metres tunnelling; or upon reaching the waste rock storage capacity of 5900 m³ in-situ volume; or upon having removed the permitted 14100 m³ of bulk sample material from the site, whichever limit was reached sooner. Furthermore, conditions 41 to 44 required that, within 3 years of the commencement of the works, the site be restored to the condition it was in prior to the commencement of works. [FOK2; Tab 15]

4. I became aware of work on the Dalradian site in or about January 2014. My husband, [REDACTED] has been in contact with [REDACTED], of the Planning Department of Fermanagh and Omagh District Council who confirmed by email of 3 January 2017 that Phase 1 works commenced in August 2014. [FOK2; Tab 16] I therefore believe that the development should therefore have been completed and the site restored to its original condition by or before August 2017. The work is still continuing. As far as I am aware this is without permission. I therefore believe that at the time the impugned discharge consent was granted there was no planning permission for the activity leading to the impugned discharge consent at all.

Water Discharge Consent applications and planning permission

5. Dalradian made 3 separate applications to the Respondent in respect of Water Discharge Consents. The first application was made for a new consent on or about 6 March 2012 and was granted on 2 July 2012 (File reference TC 40/12;

Consent No. 68/12). The second application was dated 30 May 2013 and was granted on 6 February 2014 (File No. TC 40/12_2; Consent No. 068/12/2). The application form for the second application requested a new consent. The third application was dated 20 April 2017 and requested a variation to an existing consent. The consent was granted on 29 September 2017 (File No. TC 40/12_3; Consent No. 068/12/3). This is the consent that is the subject of these proceedings (“the impugned discharge consent”). I refer to the 3 applications and consents. [FOK2; Tab 17]

6. I therefore believe that when the Respondent granted the consent on 29 September 2017, Dalradian was in breach of the above planning conditions and / or had no development permission at all for the activities associated with the effluent discharge. I believe that this was a relevant matter and should have been taken into account by the Respondent. I believe that the Respondent should have taken this into account because it meant that Dalradian was liable to show disregard for its obligations. I believe that the Respondent did not take this into account in making its decision in relation to the impugned discharge consent. If the Respondent did in fact take this matter into account in making its decision, I believe that it did not give it sufficient weight.

7. Whilst Dalradian applied for a “variation” of the discharge consent, the Respondent has throughout referred to this as a “review”. I understand that Schedule 1 of the Water (NI) Order 1999 provides for reviews and variations. It is my understanding that, despite the fact that the Respondent has referred to “review” throughout, the reality is that Dalradian made an application for a variation.

Discharge consents and amendment to Regulations

8. The Respondent has set out in its pre action correspondence that as a result of the Respondent monitoring the discharge effluent, it issued an Enforcement Notice

against Dalradian on the grounds that the permitted concentrations of zinc parameters had been exceeded on a number of occasions (namely in January, February and March 2017); and that Dalradian sought a review of the conditions within the consent on the ground that the Environmental Quality Standards (“EQSs”) for several of the substances regulated by the consent had changed since it was first granted.

9. This resulted in the impugned consent being granted. I understand from the Respondent’s pre action correspondence that it is alleging that the parameters for zinc had changed. The first discharge consent does not have any limit for zinc; the second discharge consent limits zinc to 33.8 ug/l and the third discharge consent limits zinc to 490 ug/l.

10. I understand that new Regulations were introduced in 2015 (The Water Framework Directive (Classification, Priority Substances and Shellfish Waters) Regulations (NI) 2015), which replaced the 2011 Regulations (The Water Framework Directive (Priority Substances and Classification) Regulations (NI) 2011), as amended.

11. Whilst I do not understand entirely the change that the 2015 Regulations made in respect of the maximum permitted amount of zinc that could be discharged, I find it difficult to believe that they would allow an increase from 33.8 ug/l to 490 ug/l. I would ask that the Respondent set out how it came to the figure of 490 ug/l.

Total amounts of substances

12. I am particularly concerned by the fact that the discharge contains heavy metals such as cadmium, mercury and zinc. I have carried out some research in this regard and spoken to different people who have some knowledge about these kinds of issues. I understand that Dalradian adds sulphuric acid and caustic soda to the effluent in order to change the pH of the effluent to dissolve the heavy

metals in it and then to return it to a neutral or near neutral pH. I understand that different metals are particularly soluble at different pH values. My understanding is that this process does not dissolve all of the heavy metals in the effluent. Some of these are left undissolved in the effluent and build up over time, with the potential to cause harm to the environment and to humans in drinking water. In view of the inability to totally dissolve these metals, there will be a cumulative impact on the water quality.

13. This particularly concerns me because the application form for the impugned consent asks for amounts of mercury; chromium; copper; iron; nickel and zinc in the format “total and dissolved”. In each instance, “total and” has been deleted. The Respondent does not therefore seem to be aware of the total amount of these heavy metals, only of the dissolved amounts. If it is not aware of these total amounts then it could not properly take them into account and could not ascertain whether the amounts were in compliance with the legislative limits.

14. It is further my understanding, again from my own research, that water for human consumption is not in fact tested for heavy metals in the local treatment plants so the fact that water taken from the relevant area is treated for human consumption does not protect against risks from heavy metals.

Appropriate assessment

15. I believe that a Habitats Regulations Assessment (“HRA”) and an appropriate assessment should have been carried out by the Respondent for the purposes of the impugned discharge consent. The Respondent asserts in its pre action correspondence that an appropriate assessment of the effects upon the designated features of the Owenkillew River was carried out prior to the grant of planning consent in 2014; that that assessment included consideration of the potential impacts arising from effluent discharge; that the assessment was also reviewed and updated prior to granting the 2017 discharge consent; and that the outcome on

each occasion was that, subject to the conditions imposed by the Department, the risk of adverse effects upon the protected features arising from the effluent discharge could be eliminated.

16. The Respondent alleges that the appropriate assessment for the impugned discharge consent is a 2 page document signed by ██████████ and ██████████ on 22 August 2017. [FOK2; Tab 18]

17. I believe that this does not constitute an appropriate assessment. I believe that the Respondent has failed to comply with Article 6(3) of the Habitats Directive and also with the corresponding national regulations. It has not even considered whether the plan or project is likely to have a significant effect on the site. It has not carried out an appropriate assessment of the implications for the site in view of the site's conservation objectives. The alleged HRA states that "appropriate conditions will be placed on the reviewed consent to ensure that no significant effect on the Owenkillew Special Area of Conservation ("SAC") is likely to occur, should the consent be complied with." This is the wrong approach. The Respondent cannot use conditions to circumvent the need to carry out an appropriate assessment. It should first of all consider whether it is necessary to carry out an appropriate assessment. If it is necessary to carry out an appropriate assessment, then that assessment must look in detail as to whether, and if so what, conditions should be imposed on the discharge consent. The Respondent cannot simply say it will put conditions on the discharge consent that will ensure that there is no significant effect on the Owenkillew SAC in circumstances where it has not carried out the appropriate assessment to see what those conditions need to be.

18. The alleged appropriate assessment also records "The Habitats Regulations Assessment (HRA) undertaken jointly by NIEA Conservations, Designations and Protection (CDP) and Water Management Unit (WMU), reference CB 20109, dated 26/9/14, remains appropriate and does not require further amendment".

This appears to be what the Respondent has referred to in its bundle of documents as “appropriate assessment for 2014 planning permission”. [FOK2; Tab 19]

19. I therefore understand that the Respondent may be relying on this document as the appropriate assessment for the impugned discharge consent. However, this document does not include an appropriate assessment. Whilst on the front page of the document the box is ticked to confirm that a stage 2 appropriate assessment has been carried out, the conclusion of the HRA is that the proposal is not likely to have a significant effect on a Natura 2000 (“N2K”) site and therefore the assessment is completed and there is no need to have a stage 2 assessment. (see internal page 12 of the document)

20. Furthermore, even if this was an appropriate assessment, the change in the discharge amounts in the impugned discharge consent would require a new appropriate assessment to be carried out before new conditions could properly be arrived at.

21. It is difficult to follow exactly what assessments have been carried out by the Respondent and when. The Respondent refers in its appropriate assessment above, dated 29 September 2014, to an earlier HRA. I have received a number of documents that seem to relate to HRAs in the documents I have received under the Freedom of Information Act. There appear to be several copies of the same document and some of these are signed on different dates, whilst others are unsigned and undated. I refer to the copies of the documents I have received in what I believe to be chronological order. [FOK2; Tabs 20] I believe that it would assist the Court if the Respondent set out and provided copies of all the HRAs it carried out and the results of these.

22. It is of note that in the various copies of these documents, up until and including the report updated on 27 May 2014, the conclusion of the stage 1 assessment is that the proposal is likely to have a significant effect on an N2K site. There is

then a change. The stage 1 assessment in the casework report updated on 26 September 2014 concludes that the proposal is not likely to have a significant effect on a N2K site. There does not seem to be any reason for this change in conclusion. It is further of note that the last report, updated on 26 September 2014, was signed by [REDACTED] on 16 April 2014 and by Keith Finegan and Gerard Breslin on 16 September 2014. All of these signatures were therefore prior to the date of the updated report. It therefore appears that the report was changed after it was signed. As a result of this, I believe that the final report may not have been verified by all of the signatories and it is unclear what the rationale was for determining that no stage 2 assessment was needed.

23. The Respondent seems to be alleging that the HRA and appropriate assessments carried out for the purposes of the planning application were sufficient to constitute an appropriate assessment for the purposes of the application for the discharge consent. I refer to an internal departmental email dated 17 July 2014 that confirms that no separate HRA was undertaken as part of the Water Order consenting process. [FOK2; Tab 21] I do not believe that this is sufficient. I believe that any HRAs or appropriate assessments for planning permission cannot satisfy the requirement for the Respondent to carry out a HRA and / or an appropriate assessment for the impugned discharge consent. In each instance, the relevant considerations are very different. In any event, the amounts of the substances permitted to be released under the impugned discharge consent were, in most instances, significantly greater than the amounts in the application form for the 2 July 2012 discharge consent. They could not therefore have been taken into account before the new amounts were made known to the Respondent. I should say that I do not know how the Respondent actually became aware of the amounts Dalradian wanted to discharge under the impugned discharge consent as there are no amounts for the various substances in the application form for the impugned discharge consent.

Wording of the Impugned Discharge Consent

24. Informative 2 on the impugned Discharge Consent states that “this discharge consent may be reviewed at any time, if the area of discharge or any area downstream, has been, or becomes designated under the European Communities Nature Conservation (Natural Habitats etc) Regulations (NI) 1995 or the consent conditions do not meet the requirements of any other European Community Directive.” I believe that this shows that the Respondent was not aware of the European Designations at the time of granting the impugned discharge consent and did not take the fact that there were European designations into account. I believe this because of the use of the phrase “has been” which suggests that at the time the consent was made there were no such designations.

Failure to Consult

25. I believe that whilst the Respondent was required to consult the Natural Environment Division (“NED”) of the NIEA, it did not do so. Upon inspecting the documents that I received on foot of my Freedom of Information request I have not seen any evidence that shows that such consultation did take place.

26. I initially thought that the Respondent had not consulted the Loughs Agency. I have now seen and considered documents from my Freedom of Information request that suggest that the Respondent did in fact consult with the Lough’s Agency. Therefore, I no longer make this allegation.

27. The waters affected by the discharge effluent are within the Owenkillew sub-basin. The Owenkillew sub-basin management strategy sets out requirements that were specifically arrived at by or on behalf of the Department as relevant to the waters within that particular sub-basin. It is therefore those requirements that are relevant to the discharge consent, over and above any other requirements. I believe that the Respondent did not take into account or give adequate weight to this strategy or the requirements set out therein. In this regard, I refer to emails

from [REDACTED] (of the Chief Planner's Office) to [REDACTED] (of Natural Heritage, NIEA) dated 10 February 2017 and from [REDACTED] (of Water Management Unit, NIEA) to [REDACTED] (Head of Regulation, NIEA) and [REDACTED] (of NIEA) dated 22 February 2017. [FOK2; Tab 22] I have obtained a copy of part of the Owenkillew Sub-basin Management Strategy under a Freedom of Information Act request, but what I received is only an extract and is not complete. [FOK2; Tab 23] I have asked my legal representatives to request a copy of the full document from the Respondent.

Failure to take into account bad track record

28. The Respondent has been taking samples of the effluent discharge and has been receiving sampling results from Dalradian. As a result of the reports of these samples, it is clear that there have been numerous breaches of the conditions imposed on the discharge consents, prior to the grant of the impugned discharge consent as well as pollution incidents. I have made a table entitled "Exceedences re Discharge Consent Conditions" and a second table entitled "Pollution Incidents". These relate only to exceedences and incidents prior to the grant of the impugned discharge consent. I have taken the information for these tables from the documents I received under the Freedom of Information Act. In relation to the exceedences, "database error" is on several occasions recorded beside a failure and sometimes on the front of an entire report. Where this has occurred, I have marked "BD" in the relevant table. I refer to the said tables. [FOK2; Tab 24]

29. I believe that these failures on the part of Dalradian were relevant to the decision with regard to the impugned discharge consent and should have been taken into account by the Respondent. I believe that they were not taken into account and I further believe that if they were taken into account then they were not given sufficient weight as I believe that the failures and pollution incidents were such as to prevent anyone reasonably holding the view that Dalradian would be likely to

comply with the conditions of a discharge consent so as to avoid the need for enforcement action.

Power to make decision

30. The Respondent alleges that [REDACTED] was provided with authority by the Minister pursuant to Article 7 Departments (NI) Order 1999 to determine this application for a discharge consent. The Respondent provided a copy of this alleged authority. [FOK2; Tab 25]

31. I have spoken to the Minister about this and he told me that whilst he had authorised [REDACTED] to sign documents on behalf of the Department, he did not authorise him to make decisions regarding strategic projects.

Save as otherwise appears, I depose to the foregoing of my own knowledge information and belief.

[REDACTED]

SWORN at *RD, Chiswick* in the County of *City of London* this 25th day of June 2018 by the said Fidelma O'Kane before me, a solicitor empowered to Administer Oaths in the High Court of Judicature in Northern Ireland.

[REDACTED]
[REDACTED]

This affidavit is filed on behalf of the Applicant by [REDACTED], Brolly Jameson, Solicitors, 14 Old Market Place, Omagh, County Tryone BT78 1BT

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

In the Matter of an Application by [REDACTED]
For Judicial Review

Plaintiff:

And in the Matter of a Decision of the Department for Agriculture,
Environment and Rural Affairs (Northern Ireland Environment Agency)
dated 29 September 2017

Defendant:

EXHIBIT

This is the Exhibit marked "FOK.2" referred to in the Affidavit of [REDACTED]

SWORN this 25th day of June, 2018

Before me [REDACTED]
a Commissioner / Solicitor empowered to Administer Oaths
for the Supreme Court of Judicature in Northern Ireland.

[REDACTED]

Brolly Jameson
Solicitors
14 Old Market Place
OMAGH
BT78 1BT

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER of an application by ██████████ for Judicial Review

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

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