DEPARTMENT OF AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS

CURRAGHINALT PROJECT, COUNTY TYRONE

WATER DISCHARGE CONSENTS

ADVICE

1. Dalradian Gold Limited ("DGL") is proposing a gold mine in County Tyrone - the Curraghinalt Project ("the Mine"). The Mine will, if consented, be on former agricultural land[1]. The Mine will discharge water from its workings into two burns. Site discharge and reserve capacity for mine water is proposed to be drained to the Curraghinalt Burn ("CB") via the CB Discharge about 90m upstream of its confluence with the Owenkillew river ("OKR"). The main mine water discharge and treated sewerage would drain into the Pollanroe Burn ("PB") via the PB Discharge and then into the Owenreagh river ("ORR") which itself flows into OKR downstream of both discharge points. The OKR is a special area of conservation ("SAC")[2] along the whole of its relevant length including upstream of the CB/OKR confluence and downstream past the OKR/ORR confluence. The discharges will contain some material which may have potential to pollute the water and impact protected species. On DGL's application for relevant consents for the CB and PB Discharges a dispute has arisen as to the appropriate discharge limits to be imposed. I am asked to advise DAERA as to the legal framework within which the limits in the permits for such discharges must be set.

Statutory Framework

A: Consents Under Art 7A of the Water (Northern Ireland) Order 1999

2. By virtue of article 7 of the Water (Northern Ireland) Order 1999 ("the Water Order") the discharge of any polluting matter into a waterway is an offence. Article 7A(3) provides an exception when the discharge is in accordance with the terms of a consent.

3. Sch 1 para 2(4) provides that the conditions subject to which a consent may be given under this paragraph shall be "such conditions as the Department may think fit....".

4. No guidance is given in the Water Order as to how those conditions should be framed or what they should require to be achieved and the words appear to confer a broad discretion on DAERA to impose conditions subject only to normal public law principles.

5. I can see nothing in the words used or the statutory scheme as a whole to mean that in deciding the appropriate conditions the DAERA is constrained to only impose conditions required to ensure compliance with *other* statutory schemes. Plainly where another more specific statutory scheme addresses matters relevant to the setting of discharge conditions the conditions required to secure compliance with that scheme will be material to the decision making (and, at the least, act as a baseline for what the conditions as a whole must achieve)

[1] An issue which does not appear to have been addressed to date is whether the current agricultural user currently contributes to the relevant exceedances considered below and whether there is any possible offset arising from this development by reason of any such reduction of agricultural pollution.

[2] Despite the breadth of the Habitats Regulation Assessment (HRA) and its consideration of other SACs I focus just on this SAC because if there is not an adverse effect on its integrity there is no postulated route to such adverse effect on other SACs further afield. Within that I focus on water quality because that is the central issue for the discharge consents

but there is no legal principle which makes such conditions *exhaustive* of what may be imposed under the wide discretion conferred by sch 1 para 2(4). Art 7A concerns consents to discharge and is the only legislation directly concerning such matters and is thus the legislation under which any consent must be granted.

6. There is, of course, a wide range of other legislation concerning water quality and habitats (see below) but none of it purports to amend or override sch 1 para 2(4) and none of it contradicts the wide discretion conferred by it. It seems to me that this is not thus a case where the specific overrides the general where there is a contradiction between the two or where the ambit of considerations for the exercise of sch 1 para 2(4) is *fixed* by the other relevant statutory schemes. In my view, that approach is consistent with the approach of the Supreme Court in *Cusak v. Harrow LBC* [2013] UKSC 40; [2013] 1 WLR 2022.

7. To satisfy general public law principles such conditions will have to be rationally related to the consent sought, the nature of the discharges, the environment into which the discharges will occur and the potential for impacts from the discharges on that environment. Plainly the Planning Appeal Commission ("the PAC") will test the justification for any conditions proposed to be imposed. The stronger the factual, scientific and legal basis for them the more likely it is that the PAC will agree with DAERA in respect of them.

8. I regard the analysis in this section to be fundamental to the correct approach to the setting of conditions. It has not yet been expressly addressed in any of the documents I have seen. It requires a refocussing of the analysis from whether the conditions are necessary under the statutory schemes I turn to below to whether they are justified under the broad discretion to which I have referred above. I therefore recommend that DGL be given an opportunity to comment on the above analysis and to bring to DAERA's attention any contrary legal analysis it wishes to raise.

B: Other Relevant Statutory Schemes

9. Whilst there is a broad discretion as to the conditions to be set under Art 7A as set out above, those conditions *must*, *at least*, secure compliance with the following statutory schemes (which impose duties rather than conferring discretion as per Art 7A):
    a. the Water Environment (Water Framework Directive) Regulations (Northern Ireland) 2017 ("the WFD Regs") and the and the Water Framework Directive (Classification etc...) Regulations (NI) 2015 ("the EQS Regs") – collectively the "Water Environment Legislation" originally made pursuant to the Water Framework Directive ("WFD") and the Environmental Quality Standards Directive ("the EQSD") respectively;
    b. the Wildlife and Natural Environment Act (Northern Ireland) 2011 ("the WNEA 2011"); and
    c. the Conservation (Natural Habitats and Species) Regulations (Northern Ireland) 1995 ("the Habs Regs").

B1: The Water Environment Legislation

10. Reg 3(1) of the WFD Regs provides that DAERA "must exercise [its] relevant functions in a manner which secures compliance with the requirements of [the Water Framework Directive and the Environmental Quality Standards Directive...". The relevant functions include granting a consent under Art 7A of the Water Order. Given what is said above, I do not think this

provision is exhaustive of the ambit of the Art 7A discretion and the assumption to the contrary appears to be where the erroneous approach to date (which I address below) has arisen from.

11. Reg 3(2) of the WFD Regs provides that DAERA must "determine an authorisation so as, in particular, (a) to prevent deterioration of surface water status of a body of water; and (b) otherwise to support the achievement of the environmental objectives set for a body of water under regs 12 and 13.

12. As to (a), the leading case is *Bund v. Germany* C-461/13 in which it was held that an authorisation must be refused (subject to any derogation) where it may cause a deterioration in the status of a waterbody or where it jeopardises the attainment of good surface water status. There is a deterioration in surface water status as soon as[3] the status of at least one of the quality elements fails by one class even if that fall does not result in a fall in classification of the surface water as a whole.

13. As to (b), reg 12(1) of the WFD Regs requires DAERA to prepare proposals for the environmental objectives for each river basin district in accordance with reg 13 and a programme of measures to be applied in order to achieve those objectives under reg 20. The environmental objectives for the OKR and ORR are to achieve "good status". The draft programme of measures under reg 20 is set out in the 3rd Cycle RBMP for the North West, Neagh Bann and North Easter River Basin Districts and includes (p119): (1) in respect of reducing nutrient pollution from sewage and industry to review consenting decision making processes and to review discharge consents; and (2) to carry out further research and improve the knowledge base to protect and improve fish populations and habitats. I do not think this document (in draft) takes the analysis below any further and so I do not address the reg 12/13 issue further.

14. Under reg 13(6) of the WFD Regs, for SACs, the reg 12 objective "is to achieve compliance with any standards and objectives required by [the Habs Regs] in accordance with which the individual [SAC] is protected". Whilst not very clearly worded this provides a link between Water Environment Legislation and the Habs Regs.

15. Reg 3 of the EQS Regs require the setting of environmental standards and biological boundary values for each river or part thereof according to its assigned type in accordance with Part 2 and Part 3 of Schedule 1. Certain requirements are fixed by reg 4 in respect of priority substances so far as potentially relevant here cadmium, lead, mercury and nickel.

B2: WNEA 2011

16. Under s.1(1) of the WNEA 2011, it is the duty of every public body, in exercising any functions, to further the conservation of biodiversity so far as is consistent with the proper exercise of those functions. Conserving biodiversity includes restoring populations (s.1(3)). S.3 requires DAERA to publish a list of species of flora and fauna which are judged to be of principal importance for the purpose of conserving biodiversity.

[3] Although this does not cover merely temporary impacts – see R(Misbourne) v EA *[2021] EWHC 3094 (Admin)*- refusal of permission for JR.

17. The biodiversity strategy (both existing and proposed) identifies freshwater pearl mussels ("FWPM") and salmon as priority species for s.3 purposes.

18. In setting discharge limits, this duty is engaged. This duty is not constrained by the more general water quality duties under the Water Environment Legislation referred to above.

B3: The Habs Regs

19. As is well known, a competent authority may not authorise a plan or project which may have likely significant effects on a special area of conservation ("SAC") unless it has carried out an appropriate assessment ("AA") and ascertained that it will not, in combination with other plans or projects have an adverse effect on the integrity of the SAC.

20. Case law is clear that integrity is to be judged by reference to the published conservation objectives ("COs") objectively interpreted.

Relevant Species

21. There are a range of protected habitats and species in the area particularly FWPM[6] and Atlantic Salmon in the SAC and a further protected species – Brown Trout - in the PB; and various statutory obligations in relation to water quality designed in part to protect particular species. I focus on those three species because if the discharges are acceptable in respect of those species they will also be for all other protected species and habitats.

The Freshwater Pearl Mussel

22. For reasons expanded upon below, I focus in this Advice on the FWPM. It is the most heavily protected species here and is the core basis of the SAC designation. If the DGL proposals are acceptable in respect of FWPM it appears likely that they will be acceptable in respect of other species. The FWPM are, however, dependent on successful salmonid populations and there is thus a read across both to salmon and, to a lesser extent, brown trout.

23. British Standard EN16859:2017 ("the BS") implements the EU Guidance on monitoring FWPM and their environment. It contains a useful summary of FWPM and their environmental needs. FWPM have a complicated life history. At larval stage, it is dependent on a salmonid host – with the larvae encysting in the gills and growing there over the autumn and winter before dropping off in the spring. Initially they remain buried in the riverbed substrate for several years where they interact with the interstitial water. The early life stages are "more demanding of a high-quality environment than adult mussels emphasising the importance of defining and maintaining appropriate ecological conditions for the young stages". FWPM may live for a very long time.

24. The protection of FWPM and their environment is the subject of extensive and evolving guidance. The BS notes that high water quality is "vitally important" in maintaining FWPM populations. A decline in water quality is often responsible for loss of FWPM recruitment and ultimately the extinction of populations (para 5.1). Their ecological requirements include fish hosts, water quality, water flow and habitat structure. As to water quality, the key issues are

[6] Ireland's only globally endangered species- it has a complex life cycle – combined with its long lifespan it is especially vulnerable to changes in its habitat and water environment.

phosphorous, nitrates, ammonia, biological oxygen demand ("BOD"), total suspended solids ("TSS") and metal contaminants.

25. Annex C to the BS lists the various contaminants and the academic studies relevant to each ("the FWPM Science Base").

The Current Condition of the Water Environment and SAC

Favourable Condition?

26. The JNCC Common Standards Monitoring Guidance ("CSM") is widely regarded as the core resource for the attributes relevant to assessing favourable condition. I note it is used in England (amongst other purposes) to set conservation objectives for SACs. It is a key resource and, for FWPM, is heavily based on the FWPM Science Base.

27. The CSM for Freshwater Fauna (updated in 2015) provides guidance on the identification of attributes, targets and methods of assessment for FWPM and Salmon (para 1) setting out the mandatory and discretionary attributes which should be assessed for each species (para 4). "A combination of direct (population) and indirect (habitat) attributes have been selected for each species to enable a sound assessment of condition to be made" based on current knowledge. The key components include population dynamics. Para 6 notes that the guidance "recognises that the long term sustainability of freshwater population depends on a range of biological, physical and chemical attributes. The habitat attributes are critical in providing the necessary supporting conditions for the species."

28. The FWPM favourable condition table sets out population, water quality and other attributes. Most are mandatory meaning that they must be met if the species is to be in FC at the site.

29. The population attributes cover spatial extent, density, age structure and the proportion of dead FWPMs – monitoring those attributes indicates how the population is doing and are thus the fundamental starting point. For obvious reasons, the age structure is important – given the high vulnerability of young to poor water conditions, if the water quality is poor the population will have difficulty sustaining itself.

30. The water quality attributes set out the essential features to allow the population to thrive and draw on the CSM for Rivers. Organic pollution, reactive phosphorous, acidification and other nutrients are identified as being particularly important. "These targets are intended to support a healthy, naturally functioning river ecosystem which protects the whole biological community and individual species to a degree characteristic of the river. All chemical targets ....are applicable" but "depending on the circumstance, UKTAG standards for HES under the WFD may be applicable." The relevant habitat targets from CSM for rivers (not covered by the next paragraph) are ammonia at 0.25mg/l and acidification[10].

[10] The standards used are based on the Moorkens research into FWPM in Ireland and is the most up to date research

31. In addition to habitat-based targets some "more stringent targets" are given for FWPM including phosphorous[11], nitrate[12] and BOD[13]. These are not ranges but levels not to be exceeded.

32. Targets for the salmonid juvenile hosts are also set.

33. As to salmon, the river water quality targets are as above except that nutrients are replaced with "other pollutants" which includes metals. In any decision DAERA will have to consider whether the proposed discharges comply with those requirements in respect of relevant metals[14].

34. No "more stringent targets" are set. As a result, it is appropriate to focus on FWPM (whilst not ignoring the link between their success and salmon success).

35. The three rivers designated for FWPM were all in Unfavourable Condition ("UFC")/Declining in 2007. By 2011 the population of FWPM had stabilised and grown slightly. Water quality and other factors resulted in UFC/No change. Nitrates mean level was 0.22 (a strong fail); and the BOD mean of 1.61mg/l was a fail. Suspended solids were generally less than 10mg/l but with some notable exceedances (pass). The population density was a fail, the number of live individuals had increased slightly (pass) but the age structure failed on both counts.

36. The scores for the proposed ORR area of special scientific interest ("the ASSI") were similar.

37. The exercise was largely repeated in 2017. The FWPM assessment for the OKR SAC remained as UFC – No Change[15]. All the FWPM population remained "imperilled". Water quality *improvements* were required on all FWPM rivers to address on going chemical water quality issues.

38. It, thus, appears that the population generally and the age structure in particular are of concern and that to improve the position the essential first step is improvement in water quality.

39. From the above it is clear that the CSM addresses the fundamental issue as to what is required for success of the FWPM and to ensure FC for it. That material is, to my mind, necessarily material when considering the conditions to be imposed on a discharge consent which may impact the success of FWPM:
    a. under the general discretion in art 7A (see para 5-7 above);
    b. because of the obligation under s.1(1) of WNEA 2011 in respect of FWPM and salmon; and
    c. potentially under the Habs Regs.

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[11] If already less than 5 ug/L, the target should be 5ug/l. If river exceeds that, the more stringent of high status values for SRP under the WFD or the SRP target for CSM river habitat

[12] Annual mean of less than 0.125mg/L

[13] Mean less than 1mg/l

[14] I do not address them further because they do not appear central to the fairly high level analysis in this Advice.

[15] The two other SACs deteriorated further.

WFD Status

40. The Water Framework Directive status does not tell us about the adequacy of the environment for FWPM. However, both rivers are in good ecological status ("GES") for WFD purposes but poor chemical status. Based on DGL modelling which has not yet been interrogated by DAERA, both would remain in GES with the discharges as proposed by DGL. There would not be any deterioration in chemical status. I return to the position under the WFD Regs for "parts of a stream" separately below.

The Modelling Impacts of DGL's Proposed Discharge Conditions

OKR

41. DGL has proposed discharge conditions the effect of which has been modelled:
    a. the CSM guideline for BOD is less than 1mg/l for FWPM. Successful FWPM populations consistently have BOD levels of less than 1mg/l and levels above 1.4 mg/l have been associated with poor juvenile survival – as we have seen above the crucial stage for population success and the stage at which FWPM are most vulnerable to inadequate water quality. The current modelled level upstream of the CB is 2mg/l and DGL modelling shows the discharges will increase the concentrations (estimated at 2.3mg/l) making the existing position worse[16];
    b. the CSM guideline for nitrates for FWPM is an annual mean of less than 0.125mg/l. The current *measured* position is around 0.26mg/l. The DGL modelling shows a deterioration from the current *modelled*[17] position (0.12mg/l) just meeting the guidelines to a modelled position with the discharges of 0.19mg/l - a significant exceedance of the 0.125mg/l.

42. The short and to my mind fundamental point is this. The OKR is already in UFC for FWPM and the population dynamics show an issue with juvenile population which is most vulnerable to water quality. Water quality already does not meet the guidance judged by JNCC to be necessary for FWPM to sustain themselves on a long-term basis and discharge consents with the conditions proposed by DGL *on its own modelling* will make the situation significantly worse in respect of some key parameters.

43. DGL has not addressed that short and central point in its multiple submissions.

44. Where the FWPM population is "imperilled", it seems to me that, putting it at its lowest and assuming paragraphs 5 – 6 above are correct, DAERA would be entitled to impose conditions which were set at a level which secured no deterioration in water quality in the OKR (in particular in respect of BOD and nitrates).

45. The BOD in the OKR also exceeds that appropriate for salmon (1.5mg/l) already and the discharges will make the position worse. This provides a potential route to harm to the FWPM if the BOD levels impacts the success of their hosts.

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[16] There is an unexplained disconnect between the actual measured data and the modelled data for BOD but that does not affect the overall picture. There will clearly be a further deterioration of water quality in the OKR with BOD levels well above the guidance levels.

[17] See above footnote which applies here too.

The ORR

46. The modelled position in the ORR shows the water quality is significantly worse in respect of BOD and nitrates below the confluence with PB *with* the proposed discharges:
    a. Nitrates increase from 0.24 mg/l upstream to 0.53 mg/l below PB and 0.47mg/l at the ORR when it reaches the OKR. The concentration will be much higher than in the OKR at that point and so the PB discharges will worsen water quality in the FWPM habitat downstream of the OKR confluence; and

    b. BOD will also increase with the PB discharges although there is no data for the BOD content at the confluence with the OKR (to see the impact of the PB discharge on the OKR downstream of the OKR/ORR confluence).

47. The same overall point therefore applies as for OKR. There will be a deterioration of water quality essential to the recovery of the population dynamics of the FWPM below the confluence of the OKR with the ORR by reason of the PB discharges based upon DGL's modelling.

CB

48. As to the CB, the FWPM requirements are not directly relevant because there is no FWPM population here. Further, whilst the first 40 metres of CB are accessible to salmon and brown trout there is no nursery habitat and "sub-optimal" spawning habitat and I therefore do not consider this aspect further.

PB

49. It seems that PB will not meet GES under the WFD with the discharges. I consider the relevance of this below.

The overall result

50. The existing condition of the OKR and ORR are summarised above. They are not in a state conducive to the success of the FWPM population. That short fact is necessarily material to the exercise of the Art 7A discretion for the reasons set out above.

51. The discharges as modelled by *DGL* will make matters worse in respect of some of the key water quality parameters which in turn are key to the success of FWPM especially in their early life stages. That is a necessarily central consideration in the determination of the applications.

52. Given the breadth of the Art 7A discretion, the duties on the DAERA and the fundamental core factual matrix set out above, it seems to me clear that DAERA can justify imposing conditions which are designed to ensure that discharges do not result in deterioration of water quality in the OKR or ORR.

53. Those headline conclusions apply whether or not the Habs Regs or Water Environment Legislation dictate such an outcome.

54. I note that the key issues appear to be nitrates from the explosives and BOD from the sewerage. I am not clear why these issues cannot be resolved by use of other methods for

mining other than nitrate based explosives and/or why the sewerage cannot be removed by tanker to a suitable discharge location.

The Habs Regs and the impacts on the SAC

Relevance of WFD Good Status

55. Case law shows that the conservation objectives ("COs") are fundamental to considering the Integrity Test: *R (RSPB) v. SSEFRA [2015] EWCA Civ 227* @ [7]. I do not understand why the shadow Habitats Regulation Assessment ("the sHRA") refers in detail to assessments which are not tied to the COs but instead to requirement of, for example, the Water Environment Legislation. The fact that requirements under other statutory schemes may be met does not tell one how the proposals impact the integrity in the light of the COs. The approach of DGL of applying generic standards derived for other purposes and not focussed on the needs of the SAC features is misplaced in principle.

56. For an SAC in unfavourable condition ("UFC") there is no scope consistent with the COs to permit a worsening of water quality in respect of those parameters which contribute to the UFC. If the existing poor situation would be made worse by reference to some key parameters that would not be lawful under the Habs Regs.

Approach to Interpreting COs

57. The COs are required to be and are here set out in the 2017 document. However, I am told that the water quality section has not been expressly updated "in recent times" to reflect changes in legislation and/or changes in relevant guidance and in particular the relevant CSM.

58. The COs mean what they say and not what they might be amended to say or what DGL or DAERA may wish they had said – see *RSPB* @ [21]:

> ***"[COs] are not enactments and should not be construed as such. However, it was common ground that they mean what they say and do not mean what the Secretary of State, or for that matter, Natural England or the RSPB, might wish they had said".***

The SAC and its Conservation Objectives

59. The SAC comprises a 43km long stretch of the OKR and the first 60m of the CB upstream from its confluence with OKR. The SAC continues past the confluence of the OKR with the ORR such that all discharges from the Mine will ultimately pass through the SAC and potentially impact its water quality.

60. The Habs Regs are therefore engaged. Regulation 43 gives effect to article 6(3) of the Habitats Directive and requires an appropriate assessment of the implications of the proposals for the the SAC in view of its conservation objectives ("COs"). Conditions on a discharge consent must ensure that the proposals will not adversely affect the integrity of the SAC ("the Integrity Test").

61. As explained in the CO Document the SAC boundary was set by reference to grade A and B features here including the FWPM.

62. The SAC site selection features include an excellent (10,000) population of the rare FWPM graded B and an Atlantic Salmon population of at least national interest graded C.

63. The COs are, so far as relevant, to "maintain or restore" the FWPM and the Atlantic Salmon to FC defined as the target condition in terms of abundance, distribution and/or quality of that feature within the site (see article 1(e) and 1(i) of the Habitats Directive for fuller definition).

64. The FC assessments using CSM (see above) show that the FWPM and its habitat does not currently meet that *fundamental headline CO*. The water quality, which we know is key to FWPM success will deteriorate with the discharge limits proposed and thus go against restoring the integrity of the SAC.

65. For the COs, a number of *component objectives* are then set out. For FWMP these include to maintain or increase the population through natural recruitment, to improve water quality and to ensure that the fish population is adequate for recruitment. For Salmon they include to maintain or increase the population, and maintain or enhance the extent and quality of suitable habitat for them in particular the chemical and biological quality of the water.

66. Water quality is described as "probably the most important single factor for the SAC". The required action is to "reduce enrichment of the water column by minimising point source pollution".

67. The key attributes for each of the relevant SAC features set out in annex 1 are to be monitored to assess favourable condition ("FC") as required by the CO. Water Quality is a "primary attribute" with the result that one failure among primary attributes[18] results in unfavourable condition ("UFC"). The water quality primary attributes include biological, ecosystem and suspended solids. The target for the latter is an annual mean of less than 10mg/l. The "Biological Class" and "Ecosystem Class" attributes refer across to Environment Protection's General Quality Assessment scheme (the EPGQAS"). The relevant parameters under that guidance do not equate to those in the CSM. There are not equivalent EPGQAS requirements for BOD and nitrates as in the CSM and the COs have not "caught up" with the CSM guidance. As far as I can tell there are no breaches of the *EPGQAS requirements* as a result of the proposed discharges and thus no breach of the *component objectives* used to assess FC. Given that the component objectives are the means to assess FC and given that the CO is FC, I think it follows that there is no breach of the COs at a granular level (notwithstanding the headline point at para 64 above). That arises though *only* because the COs are out of date. That creates a problem. It is now known from the FC Assessments and from the FWPM Science Base that the FWPM required standards are higher and more wide-ranging than was previously thought and as embodied in the component COs.

68. If one focusses on the fundamental headline CO, whilst unfavourable condition does not normally equate directly to unfavourable conservation status here the CO is favourable condition and that is defined. It is evident that the SAC is not in favourable condition in respect of the FWPM population under the headline CO. The CO which is the articulation of what the integrity of the site means is not currently met.

[18] I understand that for these purposes that each row of annex 1 is a separate "primary attribute"

69. The development will make this situation worse and therefore counts against achieving FC. It is moving in the wrong direction. I note in particular that the development results in a fail for nitrates when avoiding enrichment from point sources is one of the key objectives.

70. However, if one focusses on the component COs, the position is that they are met.

71. I regard the disconnect between the fundamental headline CO and the component objectives as unsatisfactory and the component COs should catch up with current science and the FWPM Science Base as soon as possible. However, adopting a purposive approach, the question is whether given the above facts the decision maker can be satisfied to the requisite high standard that there will not be an adverse effect on the integrity of the SAC. The answer appears to be no because the fundamental headline CO is not met and the proposed discharges would make the existing situation worse. Just looking at the SAC itself, the proposals *with DGL's proposed discharge limits* will result in a deterioration in the water quality in some key respects and contrary to a key part of the CO and will therefore, applying normal principles, result in an adverse effect on the integrity.

72. It is necessary to ensure that the discharge limits do not result in a deterioration of the relevant criteria. It is obviously essential to compare like with like[19](means should not be compared with peaks for example) but it appears that DGL's own modelling of its proposed discharges demonstrate the opposite of that contended for. The fact of this deterioration in condition is masked by the fact that the discharges will not impact the status of the waterbody for WFD/EQS purposes. That is a wrong comparator and is not directly relevant. The EQS/WFD requirements are generic and attach to waterbodies whether or not they are SACs and irrespective of the higher standards required for the SAC features.

73. I accept, of course, that the position is less clear cut here than under the general discretion as to conditions on the discharge consent but I cannot see how the FWPM Science Base is to be ignored in applying the integrity test against the fundamental headline CO.

The WFD - GES

74. In respect of the WFD, the Northern Ireland regulations on their face require the EQS standards to be applied to each part of the surface water including a "part of a stream" and therefore direct attention to the water quality at the discharge points and in CB and PB. This is in contrast to the approach required under the Water Framework Directive which focusses attention on the wider waterbodies. Neither PB nor CB will be in GES with the discharges at the levels proposed and therefore on a black letter reading of the Northern Ireland Regulations the proposed level of discharges will infringe the WFD Regs.

75. I do not know what the reason was for the WFD Regs going further than the Water Framework Directive requirements in this regard.

Overall Conclusion

76. The central question here is what conditions should appropriately be imposed under art 7A. I have concluded above that the current state of the water quality and the FWPM Evidence

[19] I am satisfied that this has been done here for detailed technical reasons that I need not go into and which are in any event for the experts and not the lawyers to be satisfied on.

demonstrate that tolerating a further deterioration in the key components of water quality relevant to FWPM would be contrary to the statutory scheme. The DGL modelling shows that its proposed discharges would have that effect. I therefore conclude that DAERA would be justified in imposing stricter conditions to require no deterioration in the key water quality attributes.

77. That is so despite there being no impact on the WFD status of either water body.

78. As to the Habs Regs, the fundamental CO will be further infringed by the proposed level of discharges and an adverse effect on integrity would necessarily follow. However, the position is less clear cut than that because of the component COs which have not kept up with the FWPM Science Base. I think it is well arguable that the fundamental headline CO prevails over the lower level component COs for the reasons given above. If one knows as against the up to date evidence base that the proposals will adversely impact the FWPM which is already under significant pressure and not in FC then it is difficult to see how that cannot, on a purposive approach be of central importance in the HRA. I do not think the WFD classification is relevant to the Habs Regs issue for the short reason that they are addressing different issues and have different statutory purposes.

79. Under the WFD Regs, as one is required to consider PB/CB in their own right and not only as part of the wider water body, the proposed discharges will result in a breach of those requirements.

80. The precise extent of the breaches is a matter for the experts to consider in the light of the legal framework set out in this Advice.

81. I consider that the material to date has not addressed the correct legal questions. I suggest this Opinion is provided to DGL to ensure that they have an opportunity to: (1) demonstrate why, if so be it, the above analysis is wrong; and/or (2) address the questions which seems to arise on a correct understanding of the statutory scheme.

κ KC

Landmark Chambers

31st July 2023