

Departmental Solicitor's Office
Oifig Aturrae na Ranna



Department of

Finance

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My Ref: Lit 60965/2017/KJB

Date  February 2018

Dear Madam,

I refer to your letter dated 20 December 2017.

In accordance with the Court's directions of 5 and 29 January 2018, the Department's pre-action response to the proceedings is set out below. The documents referred to in this letter have been prepared in a bundle which should be read alongside this response. Third Party details have been redacted in line with the Data Protection Act.

1. Proposed Respondent

The proposed Respondent is the Department of Agriculture, Environment and Rural Affairs. It acknowledges receipt of leave papers served on 28 December 2017. The Departmental Solicitor's Office at 2nd floor, Centre House, 79 Chichester Street, Belfast, has been instructed to act on the Department's behalf.

All future correspondence in relation to these proceedings should be sent to this office, for the attention of [REDACTED], using the above reference.

2. Decision Under Challenge

You seek leave to challenge the decision of the Department dated 29 September 2017 to grant a water discharge consent to Dalradian Gold Ltd ("Dalradian") pursuant to Article 7 of the Water (Northern Ireland) Order 1999, as amended by Article 280 of The Water and Sewerage Services (Northern Ireland) Order 2006]. The discharge point and conditions are set out in the consent. The consent was granted following an application from Dalradian

3. Response to the matter under Challenge

The discharge consent to Dalradian was granted by the Department on 29 September 2017. As an objector, you were notified of the decision on 3 October 2017 and you were sent a copy of the consent. Your Pre-Action letter is dated 20 December 2017 and you requested a response within 7 days, notwithstanding the Christmas holidays. You commenced proceedings on 28 December 2017, within one day of the three month outer limit for judicial review. This delay should also be considered against the backdrop of the existence of previous discharge consents. Planning permission for mining exploration works at this location was first granted in January 2014 (Planning Application ref: K/2013/0072/F) and the relevant discharge consent was granted on 6 February 2014. The 2017 consent therefore authorised the continuation of existing discharge activities which have been ongoing since 2014. The Department does not consider that the proceedings have been commenced promptly and it notes that you have provided no explanation for the delay in doing so.

It is not clear to the Department whether you have also provided notice of this application to Dalradian, which the Department considers to be an interested party.

The Department's response to each of the grounds of challenge in your Pre-Action letter and Order 53 Statement are set out below.

- (i) *The decision is unreasonable and unlawful in that it affords discharge amounts in excess of the maximum limits set down in respect of a priority substance and specific pollutants in the Water Framework Directive (Classification, Priority Substances and Shellfish Waters) Regulations (Northern Ireland) 2015.*

This ground of challenge focuses upon the conditions within the discharge consent which set maximum concentrations for certain substances within the discharge effluent. However, the relevant legal thresholds are set by reference to the maximum permitted concentrations of those substances within the surface waters (rivers and lakes etc) as a whole into which the effluent is discharged. This challenge therefore fails to take account of the effect of dilution when the effluent discharged by the operator enters the river and water system.

The Water Framework Directive (Classification, Priority Substances and Shellfish Water) Regulations (Northern Ireland) 2015 (the "WFD Regulations") (which transpose obligations within the Water Framework Directive) sets Environmental Quality Standards (EQS's) for the acceptable concentrations of specific substances or chemicals in surface waters (rivers and lakes).

The standards which have been set on discharge consent no. 068/12/3 have been formulated to ensure that achievement of these EQS's will not be compromised as a result of the regulated discharge. In accordance with the conditions within the discharge consent and also the Department's independent obligation under the Water Framework Directive to monitor the condition of surface waters, the discharge and the receiving waterway are being and will continue to be, monitored by the Department. This process has been ongoing since a discharge consent was first granted in 2014.

The result of this monitoring was that in March 2017, the NIEA issues an Enforcement Notice against Dalradian on the grounds that the permitted concentrations of zinc parameters had been exceeded on a number of occasions. Dalradian sought a review of

the conditions within the consent on the ground that the EQS's for several of the substances regulated by the consent had changed since it was first granted. The new EQS's are now set out in the 2015 Regulations and are based upon the most recent scientific research in the field regarding the extent to which the substances in question were known to cause damage to the aquatic environment. In light of the updated Regulations and the underlying scientific evidence, the NIEA agreed with the review request, which in turn has resulted in the most recent discharge consent. Monitoring has continued since the consent was reviewed and there have been no breaches of the conditions.

Discharge consent conditions are formulated using mass balance modelling software to ensure that the discharge can be sustained by the receiving waterway without damage to the aquatic environment and without breaching national or EU Directive standards.

When consent conditions are being drawn up, account is taken of:

- the composition and volume of the proposed discharge;
- the water quality target for the receiving water;
- the existing quality of the receiving water;
- available dilution; and
- the requirements of the relevant water quality legislation/regulations, in this case the WFD Regulations referred to above.

The limits specified within the Discharge Consent are greater than the Environmental Quality Standards set in the WFD Regulations, the former relate to concentration levels within the discharge effluent whereas the latter relate to concentration levels within the surface waters, in this case the Owenkillew River. The mass balance modelling undertaken by NIEA as part of the consent assessment process has demonstrated that the limits set, if complied with, will not compromise achievement of requirements of the WFD Regulations, thus ensuring full compliance with these Regulations, and allowing the legislative requirements to be met within the Owenkillew catchment.

- (ii) *The decision is unlawful in that it is contrary to Article 6 of the Habitats Directive 92/43/EEC which requires member states to avoid damaging activities that could significantly disturb these species [fresh water pearl mussels and atlantic salmon] or deteriorate the habitats of the protected species or habitat types.*

In 2001, the Owenkillew River was designated as a Special Area of Conservation for the purposes of the Habitats Directive on account of the physical features of the river and the associated flora and fauna. It is a very important river for rare species and includes the largest known population of Freshwater Pearl Mussel in Northern Ireland. The selection features for the Owenkillew River designation include the following:

Selection Feature
Freshwater Pearl Mussel <i>Margaritifera margaritifera</i>
Water Courses of plain to montane levels with <i>Ranunculus fluitans</i> and <i>Callitriche-Bratrachion</i> vegetation
Old Sessile Oak woods with <i>Ilex</i> and <i>Blechnum</i> in the British Isles
Bog Woodland
Otter <i>Lutra Lutra</i>
Brook Lamprey <i>Lampetra planeri</i>
Salmon <i>Salmo salar</i>

This ground of challenge alleges that the discharge authorised by the recent consent has given or will give rise to a breach of the obligation under Article 6(2) Habitats Directive not to cause significant disturbance to the protected species or habitats for which the OwenKillew River has been designated,

The evidence you have filed in these proceedings does not identify any damage or threat of damage to any of these interests. Nor does your evidence explain the basis of any belief you may hold of such damage or threat. The challenge under this heading is therefore opposed on this basis.

In addition, Article 6(2) gives rise to a “*general obligation of protection*” in relation to the designated habitats and species (See eg. decisions of CJEU in C-127/02 *Waddenzee* at [32] & [38] and C-258/11 *Sweetman v An Bord Plenala* at 33)). As set out above, discharge consents have been in place in relation to effluent from this location since 2012. There has been continuing monitoring and testing of both the discharge effluent and also the OwenKillew River since that time, in accordance with the conditions of the consents. Save as set out above in relation to zinc concentrations and subsequent amendment of the conditions, none of the testing has revealed any evidence of disturbance to protected species or deterioration of protected habitats.

In addition, the CJEU made clear in the *Waddenzee* case that Article 6(2) has no application where the issue in question is the potential effects upon protected species and habitats arising from a project for which consent has been granted in accordance with Article 6(3) and where the consent was preceded by an appropriate assessment. In this case, 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 assessment included consideration of the potential impacts arising from effluent discharge. The assessment was also reviewed and updated prior to granting the 2017 discharge consent. 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.

In the circumstances, the Department does not accept that there are any arguable grounds of a breach of Article 6(2) Habitats Directive.

The Department is currently preparing a Management Strategy which is specific to the OwenKillew SAC. It will make provision for both ongoing monitoring of water quality and ensuring the preservation of the protected features. The Department considers that the Plan will make adequate provision to ensure that any future and continuing obligation of protection under Article 6(2) can be satisfied.

- (iii) ***The decision is unlawful as the discharge consent was applied for on 20/04/17 and was not granted until 29/09/17. Under Schedule 1, Paragraph 2(2), to The Water (Northern Ireland) Order, the application is to be treated as refused if it is not given within the period of 4 months from the date the application is received;***

Schedule 1 Section 2 (2) states that:

“Subject to the following provisions of this schedule, on an application made in accordance with paragraph 1, the applicant may treat the consent applied for as having been refused if it is not given within the period of 4 months beginning with the day on

which the application is received or within such longer period as may be agreed in writing between the Department and the applicant."

In this case, the application was received on 20 April 2017. On 14 August 2017 the Department and the applicant agreed in writing to extend the time period for determining the application until 19 December 2017. The consent was granted on 29 September 2017, within the agreed period of extension. A copy of the agreement is contained in the materials bundle.

- (iv) *The decision is unlawful, unreasonable and irrational in that it provides for Dalradian to monitor the water itself. The NIEA is required to apply the environmental quality standards according to Articles 4 and 5 of the Water Framework Directive Regulations 2015. Cadmium is referenced at substance 6 in Table 47 of Part 2 of Schedule 1 to the Regulations. Articles 9, 11, 13, 14, 15 and 17 contain details of mandatory monitoring to be carried out by NIEA.*

Condition 1(l) of the consent requires the operator to discharge sampling on a monthly basis at fixed sampling points. This requires test sampling of the discharge itself and also of the surface waters (both upstream and downstream), with all samples analysed, recorded and to be made available to the Department. In addition, Condition 4 enables officers of the Department to take its own sample, which it does on a monthly basis, by way of unannounced visit.

The legal provisions referred to in this ground of challenge impose obligations upon the Department to monitor the water quality of surface waters across Northern Ireland. The Department discharges these obligations through monitoring and testing programmes. In the case of the Owenkillev, the programme involves monitoring at 9 river monitoring stations on the Owenkillev and its tributaries, and includes monitoring for cadmium in the water column. Sample records from this monitoring programme are contained in the bundle of papers.

The Department undertakes these statutory obligations in relation to the Owenkillev in addition to its own specific monitoring of the discharge authorised by this consent.

It is therefore factually incorrect to assert that the imposition of monitoring and testing requirements upon the operator by way of conditions, amounts to a failure by the Department to perform statutory water testing and monitoring obligations in relation to the river as a whole. Again it is noted that you have provided no evidence of any nature to support your assertion of non-compliance by the Department. In any event, it is not accepted by the Department that this could provide a legal basis for challenging this discharge consent.

- (v) *The decision is unreasonable and irrational in that it refers to adhering to limitations in respect of chromium, nickel, arsenic and lead under the 2015 Regulations whereas it has ignored the limitations contained within these regulations in respect of zinc, mercury, cadmium, iron and copper.*

Condition 1 of the discharge consent sets concentration limits for all of the metallic elements referred to above. All of the maximum concentrations within the conditions have been calculated using the Department's modelling software to ensure that the discharge, when diluted with the surface water, will not give rise to a breach of the permitted concentrations prescribed by the Water Framework Directive (Classification,

Priority Substances and Shellfish Water) Regulations (Northern Ireland) 2015. This ground of challenge appears to be based upon a misinterpretation of the 2015 Regulations and also does not take account of the effect of dilution, once the effluent discharges into the river.

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

This proposed ground of challenge arises from Informative 2, which in turn reflects the Department's power under Schedule 1, Para. 5(1) Water (NI) Order 1999 to review a discharge consent and its conditions at any time.

The Department does not accept that this Informative gives rise to any illegality in the discharge consent. It simply advises the operator of circumstances in which the Department may exercise its power of review – ie the designation of any new sites downstream from the discharge point or the consent conditions may be operating in a manner which may give rise to a breach of EU law obligations.

The Department considers that it is entirely rational and lawful to include an informative of this nature with the consent. As set out above, the obligations under the Habitats Directive have been complied with in full prior to granting this consent.

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

As set out above, the Department is fully aware of the fact that the Owenkillew River is designated as a SAC and is aware of each of the features for which it has been designated. All obligations under the Habitats Directive to assess the impacts of the effluent discharge prior to granting consent have been observed.

The power of the Department to review a discharge consent or its conditions is not evidence of a failure to take account of any environmental designation, but is a legal mechanism by which the Department can ensure that the conditions or the consent itself continue to be appropriate in light of any changes to the environment. The power of review therefore enables the Department to take account of relevant environmental information which might emerge. It does not reflect a failure to take account of relevant information prior to granting consent.

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

Northern Ireland Water abstracts water from both the River Derg and the River Strule. The combined abstraction supplies raw water to the Derg Water Treatment Works for treatment before distribution to the Derg area as drinking water. The water abstracted from both rivers is treated to Drinking Water Standards and is regulated by the Drinking Water Inspectorate.

As set out above, all monitoring and testing of water quality within the Owenkillew carried out by both the Department and the operator has demonstrated that water quality standards meet legal standards and there is no basis for any contention that effluent discharge pursuant to this consent poses any threat to drinking water or human health.

Again it is of note that you have not provided any evidence of threat to human health of drinking water.

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

The consent holder is subject to the same compliance assessment and enforcement procedures as all consent holders. The Water (NI) Order 1999 contains extensive powers of enforcement, in the event that any breach of discharge consent occurs. This includes the power to require cessation of all discharge and revocation of the consent (eg. Schedule 1, Para 5 1999 Order). The action taken in the event of non-compliance depends on the circumstances of each individual case and takes account of a number of factors, including severity, extent, duration, and repetition of the non-compliance.

NIEA seeks to work co-operatively with consent holders to secure improved practice, but acknowledges that enforcement action will need to be taken in some cases to ensure compliance. Any enforcement action taken is in accordance with the NIEA Enforcement and Prosecution policy a copy of which is within the bundle.

Under this policy, NIEA endeavours to be:

- consistent and impartial;
- proportionate in its actions; and
- transparent in its activities.

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

The Department does not accept that the application form was incomplete. The Department considered that it was provided with all detail which it required in order to allow a full assessment of the impacts of the discharge to be made, and to allow detailed modelling of the predicted downstream effects of all relevant parameters contained within the discharge to be undertaken. The consented concentrations of the parameters in question were calculated and verified during the mass balance modelling procedure outlined in the response to points (i) and (v) above.

It is of note that you have not provided any particulars of the information which you suggest was missing from the application form. You were an objector to this application and participated in the statutory consultation process. It is also of note that you did not

raise this concern at that time and made no attempt to ensure that the Department had any additional information which you considered to be important.

- (xi) *The decision is unreasonable and procedurally improper as I believe that [REDACTED] was not authorised to reach this decision.*

Under Article 7 (1) of the Departments (Northern Ireland) Order 1999, as amended by the Departments Act (Northern Ireland) 2016, the Minister of a Department may authorise an officer of that Department to sign documents on behalf of the Department. [REDACTED] was authorised by the then Minister of the Environment, [REDACTED] MLA, to sign discharge consents. This authority has never been revoked and continues to have effect until formally revoked by a future Minister. A copy of the authorisation is contained in the bundle of materials.

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

It is normal practice for Departmental staff to meet with discharge consent applicants during the application process, particularly in the case of a complex application such as that for the discharge in question, to allow detailed discussion on the content of the application. The Department does not accept that meetings and discussions between officials and applicants for discharge consent is in any way improper and does not of itself invalidate any subsequent consent on the grounds of a lack of independence.

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

Since 1 April 2015, responsibility for taking any enforcement action in relation to a breach of planning control lies with the local council in whose district the breach takes place. Planning enforcement is a matter which is an entirely separate statutory process to the grant of water discharge consents. Even if a breach of planning control has occurred or is occurring, this does not deprive the Department of its power to grant a discharge consent. I would recommend that you report your concerns to Fermanagh and Omagh District Council which is the relevant local council in this case and will be in a position to address these matters.

In the Order 53 Statement, you have also raised a number of additional proposed ground of challenge. The responses are set out below:

- (i) *The decision is unlawful because Article 4(1) of the Departments (Northern Ireland) Order 1999 requires that the functions of a department shall at all times be exercised subject to the direction and control of the Minister. There was no Minister in place at the time of this decision: therefore Richard Coey did not have the requisite authority.*

The power to grant a discharge consent under the 1999 Order is vested in the Department (a statutory corporation) not the Minister. The Department does not accept that it is deprived of legal authority to exercise its own statutory powers in the absence of a Minister.

This is clear from Article 4(3) Departments (NI) Order 1999, which provides that the powers of a department may be exercised by either the Minister or a senior officer of the Department. It is also clear from S. 23 of the Northern Ireland Act 1998 which provides that executive and prerogative powers in Northern Ireland in respect of transferred matters may be exercised by either Ministers or Departments.

This issue is also the subject of challenge in other cases which will be determined by the Courts in the very near future. In particular, the case of *Re Buick* is due to be heard on 14th February 2018. The case concerns a challenge to the decision of the Department for Infrastructure to grant planning permission in the absence of a Minister. The Department will invite the Court to defer consideration of this ground of challenge until the conclusion of those cases.

In any event, this issue does not arise. As set out above, Richard Coey was provided with authority by the Minister pursuant to Article 7 Departments (NI) Order 1999 to determine this application for discharge consent.

- (ii) ***The decision fails to comply with European Communities (Natural Habitats etc) Regulations (Northern Ireland) 1995 in so far as areas with special environmental designation: Special Area of Conservation (SAC); Area of Special Scientific Interest (ASSI) and Area of Outstanding Natural Beauty (AONB) on the Owenkillew/Foyle River Basin have not been given adequate consideration. The decision breaches the Habitats Directive 1992 in failing to take the European designations into account and afford them special protection***

As set out above, prior to granting consent, the Department conducted an appropriate assessment in accordance with Article 6(3) Habitats Directive, as a result of which the possibility of adverse effects upon the designated habitats and species arising from the effluent discharge (subject to conditions) was eliminated.

- (iii) ***The decision is unlawful and irrational in that it is contrary to the obligations on NIEA under Article 4 of the Water (Northern Ireland) Order 1999.***

The Discharge Consent conditions have been designed to implement the requirements of Article 4 of the Water (Northern Ireland) Order 1999 as amended.

- (iv) ***This Discharge Consent is a matter of public interest.***

The Department has acted in an open and transparent manner in the decision making process. The discharge consent review was publicly advertised and objections have been received. The objections received have been considered in the determination process.

The monitoring collected to date demonstrates that there has been no impact detected in the water quality in the Owenkillew River, or protected species as a result of the permitted discharge. The incident in 2017 of zinc exceedance has been regularised to the satisfaction of the NIEA, following a review of the discharge conditions, the 2015 Regulations and the most up to date scientific evidence in the field.

- (v) ***The apparent ability of NIEA to act outside the limits of the Water Framework Directive (Classification, Priority Substances and Shellfish Waters) Regulations (Northern Ireland) 2015 and outside of the scope of the Habitats Directive 1992, the European Communities Natural Habitats Regulations (Northern Ireland) 1995, the***

Water(Northern Ireland) Order 1999 and outside the Environment (Northern Ireland)Order 2002 as well as outside the United Nations 2010 Resolution on the right to safe, clean drinking water require clarification.

NIEA have not acted outside of the Water Framework Directive (Classification, Priority Substances and Shellfish Waters) Regulations (Northern Ireland) 2015. As explained above, the conditions of the discharge consent are designed to ensure ongoing compliance with these Regulations and have done so to date.

NIEA have not worked outside the scope of the Habitats Directive 1992 or transposing Northern Ireland Regulations, for the reasons set out above.

The Department accepts that these proceedings, if permitted to continue, constitute an Aarhus Convention case, within the meaning of the Costs Protections (Aarhus Convention) (NI) Regulations 2013, as amended. It does not object to the Court making a protective costs order in accordance with the terms of those Regulations.

Yours faithfully

[Redacted signature]

[Redacted]
for The Departmental Solicitor
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