

Ref: TRE9214

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

Delivered:

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY RIVER FAUGHAN ANGLERS  
LIMITED FOR JUDICIAL REVIEW

AND

IN THE MATTER OF A DECISION BY THE DEPARTMENT OF THE  
ENVIRONMENT FOR NORTHERN IRELAND (PLANNING SERVICE) ON  
13 SEPTEMBER 2012 TO GRANT PLANNING PERMISSION

## TREACY J

### Introduction

[1] The applicant, River Faughan Anglers Limited ("RFA"), challenges a decision of the Department of Environment (Planning Service) ("the Department") dated 13 September 2012 whereby it granted planning permission for development of land at 91 Glenshane Road, Drumahoe, Co Londonderry, consisting of retention of extension to site office, extension to vehicle maintenance shed and improved wash out facilities, relocation of settlement lagoons, site drainage works, associated landscape and environmental improvements.

[2] The permission relates to part of a wider operation at this site by W&J Chambers Ltd for the manufacture of concrete products and the distribution of sand and gravel. The impugned permission is in part retrospective, but prospective mainly in respect of the relocation of the settlement lagoons. The use of the site has historically been carried out without planning permission, however activity beyond that covered by the impugned permission is now considered immune from planning control by the respondent, due to the respondent's failure to take enforcement action in time.

## Order 53 Statement

[3] The applicant sought the following relief:

“(a) an order of certiorari to ... quash the decision of the Department dated 13 September 2012 (ref. A/2008/0408/F);

(b) a declaration that the Department acted in breach of the EIA Regulations (and EU Directive 85/337/EEC, as amended (and consolidated by EC Directive 2011/92/EU) by failing to require the preparation of an environmental statement in connection with the application;

(c) a declaration that the Department acted in breach of the Habitats Regulations (and the Habitats Directive) by failing to properly carry out an appropriate assessment;

(d) a declaration that the said decision is unlawful, ultra vires and of no force or effect;

(e) an order for mandamus to compel the Department to adjudicate upon and re-determine the application for planning permission (ref. A/2008/0408/F) in a proper and lawful manner;

...”

[4] The very detailed grounds on which relief was sought are:

“9. The Department acted unlawfully and in breach of the EIA Regulations and EIA Directive by failing to require the preparation of an environmental statement in connection with the application which led to the impugned permission:

(a) Regulation 4(1) of the EIA Regulations prohibits the grant of planning permission for EIA development without consideration of environmental information including an environmental statement;

(b) Regulation 9 of the EIA Regulations required a determination as to whether the proposed development, which fell within Schedule 2, amounted

to EIA development by reason of its likely significant environmental impact, having regard to selection criteria in Schedule 3 (and Article 4.3 of the Directive);

(c) The Department erred in making its determination under Regulation 9:

i. in so far as the proposed development was regarded as a change or extension to executed development, by failing to consider whether the whole development on the site, as changed or extended, would have likely significant environmental effects;

ii. by failing to address the potential effect of the proposed development in cumulation with other development;

iii. in concluding that an environmental statement was not required due to the overall benefits of the proposals, by failing to take into account the full extent of the development and the potential adverse effects thereof;

iv. by failing to take any or adequate account of the selection criteria as set out in Schedule 3 to the EIA Regulations (and Annex III to the EIA Directive), including the potential for pollution and the environmental sensitivity of the SAC as an area designated pursuant to Member States' legislation;

v. in concluding that an environmental statement was not required, by taking into account mitigation measures without properly examining their effectiveness or whether significant environment effects would arise from their implementation;

vi. by failing to base its decision on sufficient information or inquiry about whether the proposals would be likely to have significant environmental effects, including:

(a) the environmental baseline potentially impacted by the proposals;

(b) likely earthwork requirements at the time the determination was issued;

(c) likely significant sedimentation and siltation impacts upon watercourses (in the absence of objective information on mitigating techniques);

vii. by failing to provide adequate reasons for its determination.

10. The Department acted unlawfully and in breach of the Habitats Regulations and Habitats Directive by failing to carry out a proper appropriate assessment of the implications for project for the SAC:

(a) Regulation 43 of the Habitat Regulations (and Article 6.3 of the Habitats Directive) required the Department to make an appropriate assessment of the implications for the site in view of its conservation objectives and, in the light of the conclusions of the assessment, agree to the project only after having ascertained that it will not adversely affect the integrity of the site;

(b) Regulation 49(3) provides that where Regulation 43 applies, permission shall not be granted unless the Department is satisfied that no development likely to adversely affect the integrity of a European site in Northern Ireland could be carried out under the permission.

(c) NIEA prepared an appropriate assessment which acknowledged the potentially significant effects of the proposals arising from the egress of potentially contaminated spoil during decommissioning works and the leaching of alkaline material from storm run-off, with potentially significant effects on the Atlantic salmon in the SAC;

(d) However the assessment was inadequate in law by lacking assessment, on the potential impacts of the project and the efficacy of the proposed mitigation measures, which were properly capable of removing all

reasonable scientific doubt as to the effects of the works proposed on the SAC;

(e) The Department failed to base its decision on sufficient information or inquiry about whether the proposals would have significant environmental effects on the SAC or adversely affects its integrity.

11. The Department erred in law when imposing conditions on the permission:

(a) by failing to impose a condition requiring the preparation of a lagoon management plan, as required by NIEA;

(b) by imposing conditions 1 and 2, which are incompatible by (1) requiring proposed lagoon construction in the location of an existing lagoon and (2) not permitting the decommissioning of the existing lagoons until after the completion of the proposed lagoons;

(c) by unreasonably imposing condition 4, which requires the removal of contaminated waste from the interior of the lagoons for disposal off-site, without also requiring the removal of the materials used to construct the walls of the lagoons."

## **Background**

[5] The applicant is a not-for-profit, cross-community organisation dedicated to the protection and development of the angling resource of the River Faughan and its tributaries. It manages the fishing of salmon and trout on the tidal and inland waters of the Faughan and benefits from a lease of the freshwater section of the river from the Honourable the Irish Society.

[6] On 9 May 2008 the River Faughan and tributaries were declared to be an area of special scientific interest to be known as the "River Faughan and Tributaries Area of Special Scientific Interest" ("ASSI"). The ASSI was declared due to the relevant area's "flora, fauna and physiographical features".

[7] The River Faughan and tributaries were, also, submitted to the European Commission for consideration as a Special Area of Conservation because the relevant area contained "habitat types and/or species which are rare or threatened within a European context" where such habitat types and/or species included otters and Atlantic salmon. On 29 January 2013, the area marked on the relevant map, to

be known as “River Faughan and Tributaries Special Area of Conservation” (“SAC”), was listed in the register of designated Special Areas of Conservation. The SAC is within the network of Natura 2000 sites, the aim of which is to “assure the long-term survival of Europe’s most valuable and threatened species and habitats”.

[8] The owner of the application site, W & J Chambers Ltd, operates a brick making and concrete production business. The land occupied by W&J Chambers lies adjacent to one of the most important holding pools for Atlantic Salmon on the River Faughan, known as “Bessie’s Dam” which forms part of the ASSI and the SAC.

[9] In 1981 and 1983 W & J Chambers Ltd was granted permission for extensions to its brickworks but, in 1985, the respondent defended, on appeal, a decision to refuse permission to expand the business on grounds it was contrary to planning policy and would harm the landscape.

[10] Thereafter, the business of W & J Chambers Ltd expanded without the respondent taking effective enforcement action in respect of the unauthorised development. Then, on 5 March 2008, the respondent granted a Certificate of Lawfulness of Existing Use or Development under Article 83A of the Planning Order for such unauthorised development of the application site.

[11] The applicant’s referred in court, in some detail, to the lengthy planning history of the application site and alleged the respondent has, for a significant period, failed to address the risk of environmental harm to the ASSI/SAC arising from unauthorised activities at the application site.

[12] A retrospective planning application for the development was submitted by W & J Chambers Ltd on 1 May 2008 and, on 21 May 2008, the planning application was validated.

[13] The respondent identified the application as Schedule 2 development under Category 5(B) Mineral Industry of the EIA Regulations (ie installations for the manufacture of cement) and, taking the whole site into account, found the area of the floor space exceeded 1000 square metres, a determination as to the need for an environmental statement was required. On 12 June 2008, the respondent determined the application was not an EIA application and that no Environmental Statement was required. The respondent recorded this decision in an EIA Determination Sheet.

[14] The EIA Determination Sheet recorded likely environmental effects of the project were “[s]ite drainage and settlement lagoons for the process”. Further, it provided that no consultations were necessary to complete the determination. The recommendation stated that “[a]ll aspects of the application can be dealt with through the normal development control process”. The word “yes” was recorded next to selection criteria identified as the size of the development, the production of waste, pollution and nuisances, the existing land use and the absorption capacity of

the natural environment (wetlands). There were no entries against the criteria identified to consider the characteristics of potential impact.

[15] In correspondence dated 13 January 2010, the Rivers Agency confirmed a portion of the site, including the existing lagoons, lay within the flood plain.

[16] The Northern Ireland Environment Agency (“NIEA”) is an agency of the respondent charged with the protection, conservation and promotion of the natural environment. In a report dated 9 March 2010, under the heading of “Recommendations”, NIEA: Natural Heritage provided:

“CDP [Conservation Designations and Protection] would point out that if the application were submitted as a normal planning application it would fail an Article 6 assessment [under the Habitats Directive] due to the location of the drainage lagoons being adjacent to a section of the River Faughan and Tributaries ASSI/SAC and their positioning within the floodplain of the River Faughan (as pointed out by Rivers Agency in their correspondence dated 13 January 2010) raising the potential for serious water pollution to occur from the site.

CDP has concerns regarding the existing lagoon embankments and possible risk from erosion from the adjacent River Faughan during a flood event. Such an event could potentially compromise the structural integrity of the embankment, leaving it unstable and liable to collapse, with the release of polluted water directly into the River Faughan, part of the River Faughan and Tributaries ASSI/SAC. CDP also has concerns relating to the capacity of the current lagoons and the construction of the retaining embankment surrounding the lagoons. The current water level appears close to the capacity of the lagoons and has the potential to overflow during a storm event or spill onsite. Such an event has the potential to cause overflow from the lagoons onto the adjacent river banks and pollution of the River Faughan and Tributaries ASSI/SAC.

To this end CDP suggests various options to Planning Service for progression of the application:

1. The settlement lagoons should be moved out of the flood plain away from the River Faughan...

3. A settlement lagoon management plan should be drawn up by the applicant to contain measures to cleanse the settlement lagoons and prevent overflow should a spillage or storm event occur... Flood and storm water management (to include defences/measures to protect the lagoon embankment from erosion) should also be included in the plan. Site drainage to include any discharges to the River Faughan (a discharge pipe out-falling on the river bank was found onsite) must also be addressed in any such management plan."

[17] The report refers to the Article 6 assessment carried out on the planning application by NIEA as required by the Habitats Directive. Under the heading of 'Assessment criteria', potential impacts to the SAC resulting from the proposals were recorded as including:

"1. Overflow of settlement lagoons during storm events due to limited capacity for the acceptance of storm water run-off leading to pollution of the adjacent river.

2. Erosion of the retention embankment of the settlement lagoons leading to compromised integrity and collapse during a 100 year flooding event lagoons are wholly within the flood plain."

[18] Also, under the heading of 'Assessment criteria', regarding any likely direct, indirect or secondary impacts of the project on the Natura 2000 site, the report provides, *inter alia*:

"Emissions potentially significant - the settlement lagoons appeared close to capacity during the site visit leaving little capacity for storm water runoff during a sustained storm event. Emissions as a result of this could contain pollutants such as concrete wash water..."

[19] In relation to four of the assessment criteria, the report provides:

"CDP has concerns that the capacity of the existing lagoons is insufficient to contain storm water or water resulting from a spill onsite. The levels were close to capacity during a site visit and did not appear likely to be able to contain water from a large spill or storm



event. In addition the banks surrounding the lagoons could potentially be susceptible to erosion, compromising the structural integrity, leading to collapse and pollution of the designated site.”

[20] In correspondence dated 23 March 2010, being a response to a consultation letter from the Planning Service, the NIEA set out its concerns in similar terms.

[21] On 28 April 2010 the Department wrote to the agent acting for the applicant to inform him the Rivers Agency indicated the site is within the flood plain and the NIEA: Natural Heritage required removal of the settlement lagoons from the flood risk area.

[22] On 28 May 2010, the Loughs Agency, the statutory body charged with the conservation, protection and development of inland fisheries within the Foyle system, responded to the retrospective planning application. It stated, *inter alia*, as follows:

“The potential for deleterious matter to enter a watercourse is of primary concern. Impacts on the aquatic environment such as an increase in silt load can cause a significant impact upon various life history stages of salmonids. It is therefore requested that the aquatic and riparian flora and fauna be given due consideration during any proposed works”.

[23] On 8 September 2010 the planning applicant submitted a Flood Risk Assessment (“FRA”). Within its commentary appeared the following advice:

“6.1 River Faughan... In order to move the lagoon outside of this floodplain [this] would require ground works resulting in a smaller lagoon and movement of the lagoon embankment. We understand that the lagoons appear to be effective in capturing site runoff and there would be a concern that changing the lagoons might affect their performance. Ground works close to the river also have the potential to result in the release of sediment to the river.

...

6.4 Site Drainage... An assessment of the existing and any proposed site drainage systems were not part of the current study.

...

7. Summary, Conclusions and Recommendations  
... It should be noted that risk of flooding can be reduced but not totally eliminated given the potential for events exceeding design conditions and given the inherent uncertainty associated with estimating hydrological parameters for any given site”.

[24] A further preliminary “Stage 1” report by NIEA dated 28 September 2010 recorded that the FRA failed to address concerns previously raised by the CDP. When identifying the potentially significant effects on Atlantic salmon, the report stated (at pages 7 and 8 of the report):

“During a site visit...it was noted that levels of the lagoon appeared close to maximum capacity. In the event of a period of severe wet weather there is the potential for overloading of onsite drainage leading to surface water entering the lagoon system and causing overflow. Should this occur then highly alkaline water would be released into the adjacent River Faughan. The water in the settlement lagoons is recycled for washing out of concrete lorries, however a storm event has the potential to overwhelm this and cause overflow.

The Flood Risk Assessment document provided by the applicant appears to focus on the possibility of flooding of the lagoons by the adjacent River Faughan rather than any impact on the lagoon system from such an event...

...

Potential for significant effects if pollution occurs leading to large scale mortality of salmon”.

[25] In correspondence dated 15 February 2011, NIEA: Natural Heritage objected to the proposed development, stating:

“...none of the information submitted addresses our concerns ... that flooding appears most likely to the River Faughan from the lagoons...”.

[26] NIEA: Natural Heritage set out two options it considered to be open to the Planning Service in order to progress the application:

“1. Removal of the settlement lagoons from the floodplain of the River Faughan to other areas in the applicant’s land ownership. This should be managed in a sensitive and stepwise manner...

2. Increase the capacity of the existing lagoons to provide appropriate freeboard in line with construction industry guidelines and implement structural improvements to the embankments...

The existing levels within the lagoons appear dangerously close to the top of the embankment and represent a serious risk of water pollution of the River Faughan and Tributaries ASSI/SAC should a large spillage or storm event occur”.

[27] The correspondence also provides as follows:

“We have carried out a Stage 1 Test of Likely Significance that shows the proposal has the potential to cause significant effect on the River Faughan and Tributaries SAC. A Stage 2 Appropriate Assessment will therefore be required which must show with scientific certainty that the proposals will not have a significant impact on the site selection features of the Natura 2000 site. At present we do not possess the necessary information to complete this.

...

We therefore recommend refusal of the planning application in its current form”.

[28] A Development Control Officer’s professional planning report, dated 18 February 2011, recommended refusal of the application due to the proposal being contrary to PPS 2, 4, 15 and the DAP 2011.

[29] The main body of the report refers, *inter alia*, to Policy ENV 1 of DAP 2011, as follows:

“Policy ENV 1 of DAP 2011 states that proposals which would adversely affect or change either the quality or character of the landscape within the Areas of High Scenic Value (AoHSV) will not normally be permitted. It has not been demonstrated that this expansion will not have an adverse impact on the local character and

no exceptional reasons have been presented to the Department to live departure from this policy.”

[30] Further, the report refers to Planning Policy Statement 15 which deals with planning and flood risk and to FLD 1. It is noted, the applicant did not demonstrate this was an exceptional case in which development would be allowed in the floodplain and, instead, presented a case the site did not lie in the floodplain. In this regard, the report states:

“Flood Risk Assessments were submitted on 2 occasions and [on] both occasions [the] Rivers Agency confirmed that the lagoons were in the floodplain. As such the proposal fails to meet policy FLD 1 of PPS 15.”

[31] The report proceeds to record the concern of NIEA: Natural Heritage, as follows:

“...there would be the potential for the lagoons to overflow during a storm event or spill onsite. Such an event has the potential to cause overflow from the lagoons onto the adjacent riverbanks and pollution of the River Faughan and Tributaries. They stated that unless the lagoons are moved out of the floodplain and away from the River Faughan, they would recommend refusal.”

[32] The Development Control Officer’s recommendation was accepted by the Development Control Group on 18 February 2011. The recommendation was presented to Derry City Council on 1 March 2011 but the application was deferred for further discussion at an office meeting on 16 March 2011 and at which the applicant was advised of the reasons for refusal in more detail.

[33] On foot of discussions at the office meeting and a subsequent site meeting, revisions were made to the planning application to include a proposal to relocate the lagoons to outside the flood plain of the River Faughan.

[34] The Department sought the views of the NIEA: Natural Heritage and the Rivers Agency. In a letter dated 16 May 2011, the Rivers Agency stated, on checking the revised drawings, it was content the lagoons were now outside the floodplain. The Rivers Agency also stated it was commenting purely on the drainage aspect of the application and not on the risks associated with environmental matters.

[35] NIEA: Natural Heritage carried out a Stage 2 Appropriate Assessment on 31 May 2011. In respect of likely effects on Atlantic salmon, the Scientific Officer’s report provides:

“Potential effects as a result of the following:

Egress of potentially contaminated spoil during decommissioning works and leaching of alkaline material from storm run-off.

Release of high levels of sediment as a result of re-grading works onsite”.

[36] As to why these likely effects were significant, the report states:

“Studies have shown that exposure to alkaline conditions can have effects on Atlantic salmon including irreversible damage to the heart ventricles and atria and also to blood cells when subjected to a pH greater than 9.5... Other effects can include death of fish species, damage to outer surfaces like gills, eyes and skin; and an inability to dispose of metabolic waste.

...

While the applicant will allow for the evaporation of water from the existing lagoons prior to re-grading works, potential exists for storm water run-off to become alkaline if the base sediment of the existing lagoons were to contain concrete from long-term usage. While an individual event in itself is unlikely to be significant, it is likely that this sediment would lead to longer term leaching of alkaline water from the site leading to contamination.

This effect is therefore considered potentially significant.

Potential exists for sediment egress from the site during re-grading works due to close proximity to the River Faughan. Sediment can cause infilling of interstitial spaces in spawning grounds, leading to reduced oxygen flow through gravel and increased mortality in developing Atlantic salmon.

This effect is therefore considered potential[ly] significant given the extent of re-grading works in close proximity to the River Faughan”. [pp6 & 7 of the report]

[37] The CDP concluded, as follows:

“...significant adverse effects on the integrity of the River Faughan and Tributaries SAC are unlikely provided appropriate mitigation is included as part of any planning approval”. [p2 of the report]

[38] The mitigation measures were described, as follows:

“1. Sediment extracted from the interior of the existing settlement lagoons must not be used in proposed re-grading works and must be removed offsite and disposed of to a suitably licensed waste disposal site.

...

2. The proposed re-grading works... must not encroach within 10m of the banks of the River Faughan and all works must be carried out from outside the boundary of the River Faughan and Tributaries SAC”. [p2 of the report]

[39] Further, the report explains the reasoning behind requiring these mitigation measures:

“the applicant has ... omitted from their current plans the recommendation that any spoil removed from the existing lagoons be disposed of to a suitable waste disposal site, instead stating intent to use it to re-grade the area. Due to the potential presence of contaminants in the lagoons from long-term use accepting concrete wash water etc, CDP recommends a condition on the removal of sediment from the interior of the lagoons so as to remove the potential leaching of contaminants from storm water run-off.

Re-grading works are also considered to pose a threat to sediment contamination of the adjacent River Faughan due to close proximity to the banks of the watercourse. A further condition is therefore recommended to exclude works within 10m of the river banks”. [p4 of the report]

[40] Based on this assessment, NIEA: Natural Heritage returned a consultation response dated 8 July 2011 to the Planning Service.

[41] In a letter dated 24 June 2011, the applicant objected to the revised proposals and raised the question of why the application did not/does not require assessment under the EIA Regulations. In a reply dated 20 July 2011, the respondent stated:

“The Department is of the opinion that the proposal, including the amendment, does not fall within the description of development that requires the submission of an environmental statement. The Department considers it appropriate to determine the application through the normal development process which includes consultation with other statutory agencies.”

[42] On 11 July 2011 the revised proposals in relation to the lagoons were the subject of an addendum to the FRA dated 7 September 2010. Under the heading of “Impact of new site layout on overland flow pathways”, the addendum states:

“In terms of increased runoff to the river, the size of the proposed lagoons is similar (0.15 ha) to the size of the existing lagoons (0.25 ha), with the existing lagoons 1000 sqm larger...

The lagoons are constructed for water treatment and are not part of the site drainage system. It has been confirmed by the landowner ... that remedial measures on site (bunds and infiltration trenches) prevent surface runoff from the site entering the ponds. As a result, the lagoons have not been designed to attenuate.”

[43] Formal plans showing the relocation of the lagoons were submitted on 19 July 2011 and an amended P1 (Application for permission to develop land) was submitted on 22 July 2011 which included the following new description:

“Retention of extension to site office, extension to vehicle maintenance shed and improved washout facilities. Relocation of existing settlement lagoons, site drainage works. Associated landscape and environmental improvements.”

[44] Further amendments were subsequently made to the application.

[45] The consultation process was reopened with Rivers Agency and NIEA: Natural Heritage. By letter dated 8 July 2011 (and 30 September 2011 and 16 March 2012), NIEA stated that it had no objection to the proposals to relocate the lagoons subject to the imposition of conditions which reflected those suggested in the Stage 2

Appropriate Assessment report. In the letter dated 16 March 2012, NIEA concluded that the risk of overflowing would be minimal. On 4 August 2011 Rivers Agency confirmed it had no objection to the proposed relocation but required clarification on issues and requested further information. Rivers Agency returned its final response on 20 October 2011 confirming its satisfaction with the amended plans as submitted on 30 September 2011. NIEA: Natural Heritage were consulted on 31 May 2012 seeking feedback as proposed conditions to be used in relation to the proposal.

[46] A second EA Determination was carried out on 25 June 2012 based on the amended application dated 22 July 2011. The respondent made a determination as to whether the amended proposal is for EIA development:

“...The Department received an amended proposal on 22<sup>nd</sup> August 2011 and have decided it is appropriate under the prevailing legislation to make a further determination as to whether the amended proposal would fall under the description of EIA development.

As the development is within Category 13(A) of Schedule 2 of the Planning (Environmental Impact Assessment) Regulations (NI) 2012 the Department is obliged under Regulation 10 of these Regulations to make a determination as to whether the application is for EIA development.

As the amended development is a subsequent application relating to the overall site at 91 Glenshane Road, the Department has decided under Regulation 12 of these Regulations to make a determination as to whether the application is EIA development.

The Department has determined as such that the planning application does not need to be accompanied by an Environmental Statement”.

[47] In relation to the likely environmental effects of the project, the EIA Determination Sheet provides:

“No environmental issues with the proposed siting of the lagoons, which are an improvement on the current situation.”

[48] Regarding whether consultations were required to complete the environmental assessment determination, the EIA Determination Sheet states:



“No - as information from NIEA and Rivers Agency is already available through the ongoing process for determination on the current application”.

[49] The EIA Determination Sheet then sets out the following recommended determination:

“Based on the current location of the lagoons, the Department had determined in June 2008 that there was no requirement for an environmental statement as all aspects of the application could be dealt with through the normal planning process. The consultation process established that NIEA had concluded, through its appropriate assessment consideration, that there will not be significant adverse impact on the SAC and ASSI subject to amendment of the proposal. It was established that the current lagoons are within the flood plain and as a result had the potential to impact on the nearby River Faughan if a flood event occurred. On foot of this a revised scheme was submitted, which proposes to decommission the current lagoons and relocate them outside the flood plain and further away from the area of acknowledged importance, the River Faughan ASSI and SAC.

The Department has determined that the relocation of the lagoons can also be dealt with through the normal planning process. It is satisfied that the relocation has reduced the probability of impact and has moved the proposal away from the River Faughan ASSI and SAC and outside the flood plain. Essentially therefore the overall size of the development subject of the application is the same as June 2008 and the location of the new lagoons is an improvement on the current location. In conclusion an EIA is not required”.

[50] By a letter dated 25 July 2012, the applicant alleged that the respondent had erred fundamentally in its determination, and that the serious mismanagement of this case had compromised its ability to protect the SAC. The alleged errors were repeated in correspondence from the applicant dated 21 August 2012. The respondent replied respectively in letters dated 2 August 2012 and 7 November 2012 which referred to the recent determination as “*consistent with normal practice*”.

[51] On 1 August 2012, NIEA prepared a further Stage 2 Appropriate Assessment report which recorded the same potentially significant effects as previously and proposed further mitigation measures, in particular:

“New lagoons must be constructed and operational as soon as possible upon granting of planning permission and within a period of no more than 6 months after the date of issue.

The existing lagoons must be completely decommissioned and removed from the site during the first summer period (between 1 June and 31 October) after the granting of planning permission.

Maintenance works relating to the existing lagoons during the period after granting of planning permission and commissioning of new lagoons must be submitted in writing and approved by the department prior to implementation.

Phasing of the works must be in line with the method detailed in drawing REG - D 03.

...

Under no circumstances shall any banks of the newly constructed lagoons associated with retention be planted with tree or shrub species - grass species sourced from suitable local stock should be used.

...”.

[52] By a letter dated 8 August 2012, NIEA advised that the conditions referred to in the report should be imposed, albeit that the recommended condition relating to maintenance works had been revised to read as follows (where the reason for the condition is included):

“A lagoon maintenance and management plan relating to the existing lagoons and implementation of new lagoons shall be submitted in writing and approved by the department prior to implementation.

Reason: To prevent pollution of the adjacent River Faughan and Tributaries SAC/ASSI”.

[53] On 24 August 2012, the Development Control Group concluded, as follows:

“...Whilst the Department was content there were valid planning reasons for recommending refusal of the

existing lagoons, the same recommendation could not be arrived at for the relocated lagoons. As documented above the relocated lagoons will not be impacted upon by flooding and their new location has moved them further away from the River Faughan ASSI/SAC. The 3<sup>rd</sup> party letters do not provide any evidence which would persuade me that the relocated lagoons, if approved, would have a negative impact on the River Faughan. I am satisfied that NIEA and Rivers Agency have given this sufficient consideration and have provided adequate mitigation measures to ensure the existing lagoons are decommissioned and the new lagoons are constructed correctly.”

### *Enforcement action*

[54] On 13 May 2011, the respondent served two enforcement notices to have the unauthorised settlement lagoons removed. Also, on 13 May 2011, in carrying out an EIA Determination as part of the enforcement process, the Department found:

“This unauthorised development does not fall within Schedules 1 or 2 of the above Regulations [i.e. the EIA Regulations] [and] therefore an EIA is not required as part of the Deemed Application.”

[55] Subsequently, the enforcement notices were appealed at the same time as the submission of an amendment to the planning application which proposed to decommission and move the lagoons out of the flood plain and build new lagoons on another part of the site.

[56] NIEA: Natural Heritage’s Statement of Evidence in the enforcement appeals provided:

“...NIEA became aware of a pollution incident on 6 December 2011 in relation to the current site. Investigation by NIEA Water Management Unit concluded that this was as a result of a previous landslip onsite some time previously and that an amount of suspended solids would likely have been released as a result. NIEA Water Management Unit consider that a further landslip is a distinct possibility...”

[57] On 2 April 2012 the Planning Appeals Commission declared one of the enforcement notices to be a nullity. On 7 June 2012, the Planning Appeals Commission quashed the other enforcement notice because the respondent had

failed to serve it in time and, therefore, the unauthorised settlement lagoons were immune from enforcement action.

### *Landslip outside the application site*

[58] The applicant referred to their continuing objections in 2011 to the use of the site and nearby land which include references to what it considered to be the serious environmental consequences of unlawful landfill operations associated with the use of the site between the river bank and the land covered by the Certificate (and the application site). The applicant, also, expressed the view that the current application should not be considered in isolation from the landfill operations.

[59] The applicant refers to the written answer of the Environment Minister to a question posed in the Assembly regarding the legal status of the embankment from which the previous landslip occurred. The Environment Minister stated:

“... Although the developer did not include this land in the application for the Certificate of Lawful Development, the Department is satisfied, having regard to the planning history of the site and aerial photographs available, that any illegal landfill had been deposited prior to May 1992 and is therefore immune from enforcement action.”

### **The Impugned Permission**

[60] The impugned planning permission was granted on 13 September 2012 subject to conditions which included the following:

“1. The new lagoons shall be constructed and brought into operation within 6 months of the date [of] planning approval.

Reason: to minimise the potential for pollution incidents on the adjacent River Faughan and Tributaries SAC/ASSI

2. The existing lagoons shall be decommissioned and removed from the site by 31 October 2013 and all works associated with this operation shall be confined to the period between 1 June and 31 October. The decommissioning and removal of the existing spoil shall be effected from the Glenshane Road side of the development towards the River Faughan and no heavy plant works or spoil storage shall take place within 10m of the banks of the River Faughan.

Reason: to prevent potential sediment loading of the adjacent River Faughan and Tributaries SAC/ASSI, which may impact on the fish cycle particularly at the most sensitive times of the year.

3. The approved development shall be carried out in accordance with the stamped approved drawings... The phasing of the works hereby approved shall be carried out as detailed in drawing 07 rev 3.

Reason: to prevent pollution of the adjacent River Faughan and Tributaries SAC/ASSI.

4. Sediment extracted from the interior of the existing settlement lagoons shall not be used in the proposed re-grading works and shall be removed off-site and disposed of to a suitably licensed waste disposal site no later than 31st October 2013.

Reason: to prevent long term contamination of the adjacent River Faughan and Tributaries SAC/ASSI”.

### **Applicable Statutory & EU Provisions**

[61] In Northern Ireland the requirements of EU Directive 85/337/EEC (as amended) on the assessment of the effects of certain public and private projects on the environment have been implemented and transposed into domestic law by the EIA Regulations. The Directive has recently been replaced by Directive 2011/92/EU, which consolidated changes made to Directive 85/337/EEC by Directive 97/11/EC; Directive 2003/35/EC and Directive 2009/31/EC (“the EIA Directive”).

[62] The recitals to the EIA Directive set out the basic principle that:

“development consent for public and private projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out.”

[63] Article 2(1) of the EIA Directive requires member states to:

“adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their

nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects.”

[64] Article 4(2) imposes on member states the obligation to determine whether a project of a type listed in Annex II is to be made subject to EIA. Such a determination must be “made available to the public”: Article 4(4).

[65] Regulation 4(1) of the EIA Regulations prohibits the grant of planning permission for “EIA development” without consideration of “*environmental information*”. “*Environmental information*” includes an Environmental Statement (ES) (regulation 2(2)).

[66] Regulation 9(1) provides for a “screening” process to determine whether a development proposal is for “EIA development”. It provides that:

“Where it appears to the Department that an application for planning permission or a subsequent application –

(a) is a Schedule 1 application or a Schedule 2 application;

(b) has not been the subject of a determination as to whether the application is or is not an EIA application; or in the case of a subsequent application, has been the subject of a determination before planning permission was granted to the effect that it is not EIA development; and

(c) is not accompanied by a statement referred to by the applicant as an environmental statement for the purposes of these regulations,

it shall make a determination as to whether the application is for EIA development, taking into account the selection criteria...”

[67] Schedule 2 sets out a table specifying in the first column a number of categories of development project. The second column then sets out various threshold criteria which, if exceeded by the development proposal in question, bring that proposal within the definition of a “*Schedule 2 development*” (regulation 2(2)).

[68] Schedule 2 includes (at para 5(b) of Column 1) “*installations for the manufacture of cement*.” The corresponding threshold in Column 2 is that the area of new floor space exceeds 1000 sqm. Schedule 2 also includes (at para 13 of Column 1):

“any change to or extension of development of a description listed in...paragraphs 1 to 12 of Column 1..., where that development is already authorised, executed or in the process of being executed, and the change or extension may have significant adverse effects on the environment”.

The corresponding threshold in Column 2 is

“(i)... the thresholds and criteria in the corresponding part of Column 2 of this table applied to the change or extension (and not to the development as changed or extended)”.

[69] If a development proposal falls within Schedule 2, the Respondent must then determine whether it is “EIA development”. EIA development is defined as “*Schedule 2 development which is likely to have significant effects on the environment by virtue of factors such as its nature, size or location*” (regulation 2(2)). In deciding whether the development is likely to have significant environmental effects, the selection criteria which regulation 9(1) requires to be taken into account are defined at Schedule 3 (by reference to (regulation 2(2)). They comprise:

“Characteristics of development

1. The characteristics of development must be considered having regard, in particular, to –
  - (a) the size of the development;
  - (b) the cumulation with other development;
  - (c) the use of natural resources;
  - (d) the production of waste;
  - (e) pollution and nuisances;
  - (f) the risk of accidents...;

Location of development

2. The environmental sensitivity of geographical areas likely to be affected by development must be considered, having regard, in particular, to –
  - (a) the existing land use;
  - (b) the relative abundance, quality and regenerative capacity of natural resources in the area;
  - (c) the absorption capacity of the natural environment, paying particular attention to the following areas...:
  - (iv) nature reserves and parks;

- (v) areas classified or protected under Member States' legislation; areas designated by Member States pursuant to... Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora;

#### Characteristics of the potential impact

3. The potential significant effects of development must be considered in relation to criteria set out under paragraphs 1 and 2 above, and having regard in particular to –

- (a) the extent of the impact (geographical area and size of the affected population);
- (b) the transfrontier nature of the impact;
- (c) the magnitude and complexity of the impact;
- (d) the probability of the impact;
- (e) the duration, frequency and reversibility of the impact”.

[70] The EIA Regulations require the selection of Schedule 2 development for screening to have regard to the “*cumulation with other development*” when assessing whether the proposals should be made the subject of an ES. Further, it is clear that when a change to or extension of development within Schedule 2 is proposed, the development as a whole, as changed or extended, must be considered when screening, in particular when considering the potential effects on the ecological interests protected by the SAC and ASSI.

[71] Cumulative effects can and often will include the effects of other development on the site or on adjacent land, or both. Guidance on the approach to be taken to the assessment of such impacts is to be found in the European Commission’s “Guidelines for the Assessment of Indirect and Cumulative Impacts as well as Impact Interactions”. That guidance recognises, in the context of scoping, that consideration should be given to “*historical or potential future impacts which may affect the assessment*”, noting that activities carried out “*in the past, present and future can all have a bearing on the project being assessed and will influence the time frame set for the EIA*”. It adds that determining how far back in time the decision-maker must go in gathering the information it requires “*will depend on the project and the historical use of the area*” (p1185).

[72] Regulation 43 of the Habitat Regulations (which reflects the requirements of Article 6.3 of the Habitats Directive) provides as follows:

- “(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which –



(a) is likely to have a significant effect on a European site in Northern Ireland (either alone or in combination with other plans or projects), and

(b) is not directly connected with or necessary to the management of the site, shall make an appropriate assessment of the implications for the site in view of that site's conservation objectives;...

(5) in the light of the conclusions of the assessment, and subject to regulation 44, the authority shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site".

[73] A European site is defined to include a "special area of conservation" (SAC) and a candidate SAC: see regulation 9(1).

[74] Regulation 44(1) (which reflects Article 6.4 of the Directive) provides:

"(1) If it is satisfied that, there being no alternative solutions, the plan or project must be carried out for imperative reasons of overriding public interest which, subject to paragraph (2), may be of a social or economic nature, the competent authority may agree to the plan or project notwithstanding a negative assessment of the implications for the site".

[75] Regulation 49(1) applies these regulations to a decision to grant planning permission.

### **Applicable Legal Principles**

[76] In World Wildlife Fund v Autonome Provinz Bozen (Case C-435/97) [2000] 1 CMLR 149 the European Court of Justice said at para70 that it was for the authorities of member states to:

"take all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment" (see too Commission v Ireland (Case C-215/06) at paragraph 49).

[77] The English High Court in R (on the application of Baker) v Bath and North East Somerset Council [2009] EWHC 595 (Admin) concluded that in determining

whether an ES is required, the likely significant impact of a change to an existing EIA development must be considered in relation to the development as a whole including the proposed change, and not solely in relation to the proposed change. Whilst this related to the English equivalent to the EIA Regulations, the wording of the relevant provisions in the EIA Regulations was the same and both seek to implement the Directive into domestic law. The Respondent has reflected its acceptance of Baker in the recent Planning (Environmental Impact Assessment) (Northern Ireland) Regulations 2012 (“2012 Regulations”), which came into force on 13 March 2012 but do not apply to planning applications made before this date (regulation 40(2)(a)).

[78] The principles applicable to the screening exercise can be summarised as follows:

(a) the judgment as to whether a development failing within the categories in Schedule 2 has significant effects upon the environment is a matter of planning judgment for the decision maker, only reviewable on *Wednesbury* grounds: R (Loader) v Secretary of State for Communities and Local Government [2012] EWCA Civ 869 at [31], [36] and [43]; R (Evans) v Secretary of State for Communities and Local Government [2013] EWCA Civ 115 at [21]-[23] and [40]-[42];

(b) however, the decision maker must have regard to the precautionary principle and to the degree of uncertainty, as to environmental impact, at the date of the decision. Depending on the information available, the decision maker may or may not be able to make a judgment as to the likelihood of significant effects on the environment. There may be cases where the uncertainties are such that a negative decision cannot be taken: R (Loader) v Secretary of State for Communities and Local Government [2012] EWCA Civ 869 at [43]; see too Sandale Developments Limited's Application [2010] NIQB 43 at [39]-[40];

(c) all likely significant environmental effects are relevant and it is legally erroneous to proceed on the basis that only negative effects are relevant to the screening exercise. It is not open to the decision-maker to conclude that the overall impact would be beneficial so as to avoid the scrutiny as to the nature of effects and the appropriate mitigating measures which the EIA process is designed to facilitate: British

Telecommunications plc v Gloucester City Council  
[2001] EWHC 1001 (Admin) at [68]-[69] and [71]:

“69. In my judgment an important feature of this democratic process, as the part of the government publication which I have emphasised notes, is that individuals “should form their own judgments on the significance of the environmental issues raised by the project.” This involves a recognition that it is not always clear whether an impact is beneficial or not ... It would frustrate the process of debate about the merits of such a development if the planning authority could determine that the impact was beneficial and as a consequence rule that no environmental statement was needed. In this context benefit, like beauty, is in the eye of the beholder”;

(d) whilst a screening opinion does not involve a detailed assessment of factors relevant to the grant of planning permission and does not require all considerations to be mentioned, the decision must be carefully and conscientiously considered and must be based on information which is both sufficient and accurate. It must demonstrate that the issues have been understood and considered: R (Bateman) v South Cambridgeshire District Council [2011] EWCA 157 at [11]; see too Sandale Developments Limited's Application [2010] NIQB 43 at [39]-[40];

(e) A planning authority cannot rely on conditions and undertakings as a surrogate for the EIA process and conclude that a development is unlikely to have significant effects on the environment simply because all such effects are likely to be eliminated by measures that will be carried out by the developer pursuant to conditions and/or undertakings: see Jones v Mansfield District Council [2003] EWCA Civ 1408 at [38];

(f) it is permissible to take into account prospective measures “whose nature, availability and effectiveness are already plainly established and plainly uncontroversial; though I should have thought that there is little likelihood of such a stage of affairs in relation to a development of any complexity. If

remedial measures are not plainly established and plainly uncontroversial, the case calls for EIA”: Gillespie v First Secretary of State [2003] EWCA Civ 400 at [46]. Thus, remedial measures contemplated by conditions and/or undertakings can be taken into account, but only to a certain extent: see Jones v. Mansfield District Council [2003] EWCA Civ 1408 at [38]. The decision maker must examine the actual characteristics of the particular project and consider whether the uncertainties present are such that their favourable implementation can or cannot be assumed when the screening opinion is formed: see Loader at [41]-[42]. Remedial measures must also be of themselves unlikely to have significant effects on the environment (at [49]); see too R (on the application of Hereford Waste Watchers) v Hereford County Council [2005] Env LR 29[at [34]];

(g) the question of whether development proposals would be likely to have significant effects on the environment should not be considered on the basis of the application in isolation if in reality they could properly be regarded as part of an inevitably more substantial development: R v Swale Borough Council ex p RSPB [1991] 1 PLR 6 (at 16);

(h) a decision that a development does not require an ES must contain or be accompanied by sufficient information to make it possible to check that it was based on adequate screening. It is necessary for parties to be able to satisfy themselves that the competent authority has actually determined, in accordance with the rules laid down by national law, that an ES was not necessary and for them to have sufficient information to enable them to challenge the decision, if that is thought appropriate: R (Bateman) v South Cambridgeshire District Council [2011] EWCA Civ 157 (at [9]), following R (Mellor) v Secretary of State for Communities and Local Government [2010] Env LR 18;

(i) the requirement to provide reasons in this way and generally to uphold the procedural requirements of the EIA Directive is an expression of the wider principle of effectiveness, that is securing the effective protection of a right conferred by Community law: see Mellor [at [59] and [AG26] and [AG30]] and Article 4(3) of the

Treaty on European Union (2012 consolidation) (formerly Article 10 of the EC Treaty), which requires member states to “*take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union*”.

[79] The need to consider cumulative effects was emphasised in R (on the application of Mortell) v Oldham Metropolitan Council [2007] EWHC 1526 (Admin). There the court rejected an argument that although there was no express reference to cumulative impact in the screening opinions, it was clear that the authority had in mind other development that was part of a wider master plan and that there would be no difference to the conclusions of the screening decision if it were written to address cumulative effects (at [31]-[32]).

[80] The threshold test of whether an appropriate assessment is required at all is to be determined by reference to the precautionary principle, such that an assessment must be undertaken where a risk of a significant effect cannot be excluded: see Waddenzee [2005] All ER (EC) 353; Weatherup J in Sandale at paras 19-20 and Stephens J in Alternative A5 Alliance [2013] NIQB 30 at paras 85-86. This screening stage is known as a “Stage 1” assessment. Whilst the assessment does not have to be detailed, there must be sufficient information to enable those interested to see that proper consideration has been given to the possible effects of the development in question: Alternative A5 Alliance at [91], referring to R (Bateman) v South Cambridgeshire District Council [2011] EWCA 157.

[81] It is permissible in principle to take into account mitigation proposals at this initial screening stage: R (on the application of Hart District Council) v Secretary of State for Transport, Local Government and the Regions [2008] EWHC 1204 (Admin) (at [55]). However, if the competent authority does not agree with the proponents’ view as to the likely efficacy of the proposed mitigation measures, or is left in some doubt as to the efficacy, then it will require an appropriate assessment because it will not have been able to exclude the risk of a significant effect on the basis of objective information. See also Alternative A5 Alliance at para [88].

[82] In Waddenzee the ECJ also addressed in further detail the test to be applied when any decision is taken in reliance upon an appropriate assessment (known as the “Stage 2” assessment”):

“56. It is therefore apparent that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned.

57. So, where doubt remains as to the absence of adverse effects on the integrity of the site linked to the

plan or project being considered, the competent authority will have to refuse authorisation...

59. Therefore, pursuant to Article 6(3) of the Habitats Directive, the competent national authorities, taking account of the conclusions of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned, in the light of the site's conservation objectives, are to authorise such activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects...

61. The competent national authorities, taking account of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in the light of the site's conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects" [emphasis added].

[83] The European Court very recently gave further guidance in Sweetman and others v An Bord Pleanála [Case C-258/11] on the proper approach to appropriate assessment and effects on the "integrity" of a European site:

"40 Authorisation for a plan or project, as referred to in Article 6(3) of the Habitats Directive, may therefore be given only on condition that the competent authorities - once all aspects of the plan or project have been identified which can, by themselves or in combination with other plans or projects, affect the conservation objectives of the site concerned, and in the light of the best scientific knowledge in the field - are certain that the plan or project will not have lasting adverse effects on the integrity of that site. That is so where no reasonable scientific doubt remains as to the absence of such effects (see, to this effect, Case C-404/09 Commission v Spain, paragraph 99, and Solvay and Others, paragraph 67).

41 It is to be noted that, since the authority must refuse to authorise the plan or project being considered where uncertainty remains as to the absence of adverse effects on the integrity of the site, the authorisation

criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle and makes it possible to prevent in an effective manner adverse effects on the integrity of protected sites as a result of the plans or projects being considered. A less stringent authorisation criterion than that in question could not ensure as effectively the fulfilment of the objective of site protection intended under that provision (Waddenvereniging and Vogelbeschermingsvereniging, paragraphs 57 and 58)...

43 The competent national authorities cannot therefore authorise interventions where there is a risk of lasting harm to the ecological characteristics of sites which host priority natural habitat types. That would particularly be so where there is a risk that an intervention of a particular kind will bring about the disappearance or the partial and irreparable destruction of a priority natural habitat type present on the site concerned (see, as regards the disappearance of priority species, Case C-308/08 Commission v Spain, paragraph 21, and Case C-404/09 Commission v Spain, paragraph 163).

44 So far as concerns the assessment carried out under Article 6(3) of the Habitats Directive, it should be pointed out that it cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned (see, to this effect, Case C-404/09 Commission v Spain, paragraph 100 and the case-law cited). It is for the national court to establish whether the assessment of the implications for the site meets these requirements...

48 It follows from the foregoing considerations that the answer to the questions referred is that Article 6(3) of the Habitats Directive must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of a site will adversely affect the integrity of that site if it is liable to prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat whose conservation was the objective justifying the

designation of the site in the list of SCIs, in accordance with the directive. The precautionary principle should be applied for the purposes of that appraisal” [emphasis added].

[84] As for the “integrity” of the site, reference can also be made to the Commission’s guidance on Article 6 of the Directive “*Managing Natura (2000)*” at para 4.6.3 which states:

“as regards the conational meaning of ‘integrity’, this can be considered as a quality or condition of being whole or complete. In a dynamic ecological context, it can also be considered as having the sense of resilience and ability to evolve in ways that are favourable to conservation” [p. 687].

[85] Conditions on planning permissions should be interpreted benevolently and not narrowly or strictly (Carter Commercial Development Limited v Secretary of State for the Environment [2002] EWHC 1200 (Admin) at [49]). A condition will invalid only “if it can be given no meaning or no sensible or ascertainable meaning” (per Lord Denning in Fawcett Properties v Buckingham County Council [1961] AC 636 at 678)(both cases are referred to in Hulme v Secretary of State for Communities and Local Government [2011] EWCA Civ 638 at [13]. However, conditions must nonetheless be reasonable in the *Wednesbury* sense to be valid in law: Newbury District Council v Secretary of State [1981] AC 578 at 599H.

### **Relevant Evidence**

[86] The applicant submitted, despite Mr Brown’s unequivocal evidence that NIEA had been consulted in a manner which informed the EIA screening decision that no such consultation occurred with NIEA. At para 13 of his affidavit he averred:

“13. On 14 January 2010 Rivers Agency confirmed in writing... that a portion of the site, including the existing lagoons lay within the floodplain. Based on the contents of the Rivers Agency response the Department re-consulted NIEA: Natural Heritage. On 09 March 2010 NIEA carried out an Article 6 assessment under the Habitats Regulations... and based on this, forwarded a consultation response which was received by the Area Planning Office on 25 March 2010...”

[87] At paras 24-27 of his affidavit Mr Brown sets out the responses from NIEA and from Rivers Agency and further engagement with NIEA before the impugned regulation 9(1) determination of 25 June 2012 was carried out:



“24. NIEA Natural Heritage responded on 30 September 2011... stating that they had no objections to the proposed relocation of the lagoons subject to the imposition of conditions. The proposed conditions were as those outlined in their 08 July response...

25. Rivers Agency returned their final response on 20 October 2011... confirming that they were satisfied with the amended plans as submitted on 30 September 2011...

26. Following receipt of all relevant consultee responses and considerations of any objections, the APO proceeded to formulate a possible recommendation on the 2011 proposal. NIEA Natural Heritage were consulted on 31 May 2012 seeking feedback on the proposed conditions to be used. In particular the Department sought clarification on the timing of any operational work that would be carried out for the construction of the new lagoons and decommissioning of the existing lagoons so as to avoid any impact on key migration and spawning periods for salmon as outlined in the e-mail sent on 31 May 2012...

27. The APO carried out a second EA determination on 25 June 2012. This second determination was based on the application as amended on the P1 dated 22 July 2011... seeking the relocation of the lagoons out of the floodplain and away from the River Faughan. The determination took into account the current (i.e. amended) plans at the time...

28. That second determination of 25<sup>th</sup> June 2012 determined that whilst the proposal falls under Schedule 2 of the Regulations, the nature and form of the proposal was such that it was not EIA development and therefore did not require the submission of an Environmental Statement. The determination was carried out having regard to the selection criteria in Schedule 3 as well as having regard to specific comments already made by the competent authorities in relation to the proposal. In particular the Department had established through the consultation process that NIEA, through its Article 6 appropriate assessment consideration had concluded that the amended proposal would not have a significant

adverse impact on River Faughan and Tributaries SAC and ASSI.”

[88] In para 32 onwards of his affidavit, Adrian Brown set out in more detail the reasoning behind the decision insofar as same relates to the areas set out in Schedule 3 to the EIA Regulations.

[89] Contrary to the applicants submission the evidence also clearly establishes that the existing and proposed development on the application site was in the contemplation from the outset of the process. This was further confirmed in para 32 of Mr Brown’s affidavit where he addresses the Schedule 3 criteria sequentially:

“32. The Department also took account of the selection criteria and all other information available to it when arriving at its final determination. The characteristics of the development were considered having regard to the areas as set out in Schedule 3 of the Environmental Regulations as follows:

...

(b) Schedule 3, 1(b): the accumulation with other development (the totality of the Chambers operations) was taken into account when arriving at the final determination. Whilst overall the site exceeded the threshold of 1000m, the opinion was that given the evidence provided by NIEA, even in conjunction with the existing development the proposal to relocate the lagoons was unlikely to have a significant environmental impact.

...

(d) Schedule 3, 1(d): The production of waste is limited to the silt contained by the lagoon system and this will be dealt with through the proper management of the relocated lagoons. NIEA advised that this can be done without significant adverse environmental impact subject to implementation of the proposed mitigation measures.

...

(f) Schedule 3, 1(f): NIEA considered the proposed risks associated with the development, including possible egress of potentially contaminated spoil, which

may occur as a result of an accident. The stepwise manner in which it is proposed to remove the existing lagoons and construct the new lagoons will ensure that any such risk is reduced to insignificance and that no significant environmental impact is likely.

33. The environmental sensitivity of the geographical areas likely to be affected by development was considered when arriving at the determination that no Environmental Statement was required, particularly as follows:

(a) Schedule 3, 2(a): the nature of the existing land use and its juxtaposition with the River Faughan were of relevance in the determination process. The existing business had been operating since the 1950s with no report of significant pollution to any relevant body and the purpose of the proposed development is to collect any run off from the site.

...

34. The Department also took into account the characteristics of the potential impact of the proposal:

...

(d) Schedule 3, 3(d) & (e): The probability of impact has been reduced by the proposed relocation of the lagoons outside the floodplain. It is envisaged that once the existing lagoons are removed from the floodplain that the risk of impact will be reduced to insignificance. The construction of the lagoons and mitigation measures proposed will be designed to ensure that no contaminants enter the river. Monitoring of river quality by NIEA reinforced by pollution control and other legislative powers will ensure that, in the very unlikely event that any seepage takes place, the quantities released to the river will be so insignificant that normal dilution will negate any impact.

[90] Contrary to the case being made by the applicant the evidence is also clear that the respondent did not rely on the overall benefits of the proposal in making its determination. In response to points raised by Dr O'Neill in his affidavit Mr Brown avers:

“50. Paragraphs 25 & 26 - the Department considers that the amended location of the lagoons outside the floodplain is a preferable option but this is not the reason for justifying a ‘negative determination ‘as stated by Mr Quinn. The Department concluded, having regard to all the relevant information which took into account the potential environmental impacts of the proposal including any likely impact on the SAC and having regard to the mitigation measures recommended by other competent authorities available, that an ES was not required. The Department took account of the selection criteria as set down in Schedule 3 of the regulations and concluded that subject to implementation of the conditional approval, the amended proposal would not have a significant adverse impact on the sensitivity of the SAC. Stringent conditions have been imposed on the planning permission regarding decommissioning of the existing lagoons. The Department made an informed determination based on the expert consideration by the competent bodies, who concluded by June 2012 that subject to conditions imposed, the mitigation measures proposed would be effective and ensure that the development would not have any significant environmental effects on the adjacent SAC...”

[91] That the respondent considered all potential effects of the development can also be seen from para 51 of Mr Brown’s affidavit wherein he avers that the Department considered the current proposal under part 13 (a) of Schedule 2 of the EIA Regulations. Part 13 (a) gives direction to consider the cumulative impact of proposals and whilst the Department accepted that the proposal met the threshold to be considered for determination it arrived at a determination that no Environmental Statement was required.

[92] I also reject the contention that the respondent did not provide adequate reasons for its determination. As Mr Brown explains at para55 of his affidavit the Department carried out an EIA determination in June 2012, within which it justified the determination it arrived at. The report was available to view on the public access system and was also available to view on the file, which could be viewed by appointment. Furthermore, copies were copied and sent out to RFA on 17 July 2012 at their request.

[93] In relation to the imposition of a condition regarding lagoon management Mr Brown avers:

“56. - Condition 3 of the planning permission states that the ‘approved development shall be carried out in accordance with the stamped approved drawings 01, 03, 04 received on the 1<sup>st</sup> May 2008, 05 received on the 21<sup>st</sup> May 2008 and 02 Rev 5 and 07 Rev 3 received on the 30<sup>th</sup> September 2011. The phasing of the works hereby approved shall be carried out as detailed in drawing 07 Rev 3. Reason: To prevent pollution of the adjacent River Faughan and Tributaries SAC/ASSI.’ Approved drawing 07 Rev 3 received on 30<sup>th</sup> September 2011 includes detailed actions to be carried out under lagoon management.”

[94] Regarding the ground that conditions 1 and 2 the evidence establishes that whilst the proposed lagoons are in close proximity to the existing lagoons the site sections as indicated on approved drawing 07 Rev 3 demonstrates that the new lagoons can be constructed without interference with the existing lagoons. Furthermore, as Mr Brown points out at para 57 “it would be illogical to permit the decommissioning of the existing lagoons before the proposed lagoons are completed. In such a scenario there would be no facility to capture run-off or contaminants which would otherwise flow directly into the river.”

[95] The applicant contended that the respondent erred by unreasonably imposing condition 4, which requires the removal of contaminated waste from the interior of the lagoons for disposal off-site without also requiring the removal of the materials used to construct the walls of the lagoons. I reject this argument. As Mr Brown explains at para58 the condition will ensure that sediment accumulated in the existing lagoons is removed off site. Condition 2 requires the existing lagoons to be decommissioned and removed from the site and the area regraded. Condition 3 imposes a requirement for the methodology of lagoon removal from the historic floodplain and the associated sections require the existing lagoons to be restored to grassland at original floodplain level. Together these will result in the removal of materials used to construct lagoon walls and deposited thereon as part of the maintenance regime. Informatives also advise the applicant that under other legislation, noxious or polluting material should not be deposited on the site or allowed to enter the watercourse.

*Affidavit of Keith Finegan dated 26 March 2013*

[96] Paras 3-21 of Keith Finegan’s affidavit sets out the relevant factual background including details of the appropriate assessment process:

“17. The assessment again took account of all operations of the Chambers site, unforeseen events and in-combination effects. The result of this revision of the screening assessment... was again that significant

effects on the designated site could not be discounted. NIEA therefore recommended refusal of the project in its current form. At this point, in order to ensure the protection of the natural heritage interests of the designated site, NIEA proposed two options. Firstly, to construct new lagoons outwith the floodplain and remove the existing lagoons in an ecologically sensitive manner or secondly, for W & J Chambers to undertake works (to be signed off by a suitably qualified structural engineer) on the existing lagoons to ensure they were made fit for purpose and managed in an appropriate manner. After further representations and information received from W & J Chambers via PS on 21 January 2011... NIEA issued its recommendation to refuse the application in its current form and our suggestions to improve the design of the project to PS in a letter dated 15 February 2011...

18. On the 19<sup>th</sup> May 2011 NIEA received a further consultation from PS... detailing further revisions to the W & J Chambers proposal. Significantly these revisions included the complete removal of the settlement lagoons from within the floodplain. The HRA was again revisited in response to these revisions. The result of stage 1 ToLS determined that significant likely effects could not be discounted. NIEA then proceeded to undertake a stage 2 appropriate assessment of the project. In undertaking this assessment NIEA again had cognisance of: the site and scale of the project, its location, timing of operations, risk of unplanned events, in-combination impacts and all stages of the project including construction, operation and decommissioning. In accordance with the legal requirements to which I have referred, this assessment was undertaken with the objective of safeguarding the integrity of the SAC in light of its conservation objectives. *As appears from the record of the NIEA assessment..., NIEA considered that there would be no impacts on the integrity of the SAC provided that the identified mitigation measures were included in any planning approval as legally enforceable conditions. The efficacy of the proposed mitigation measures were also assessed and detailed within the appropriate assessment as is recommended by the European Commission's guidelines. NIEA's response to the consultation was issued to PS on the 8<sup>th</sup> July 2011 ...*

19. NIEA was again consulted by PS on the 18 August 2011. The reason for consultation was detailed as 'amended sections'. The description of the project was also amended to 'relocation of settlement lagoons'. Notably the re-consultation documents included drawings... These drawings clearly showed that it was proposed to return the area of the existing lagoons to the 'original floodplain level'. The drawings also detailed a number of proposed mitigation measures including methodology for removing existing lagoons, *the lagoon management plan* and emergency procedures, site drainage and woodland management plans. The consultation letter and drawing... can be found in the exhibits... NIEA was content that the amendment constituted further improvements to the development and issued a response on 30 September 2011 detailed in the exhibits...

20. On 8 August 2012 NIEA reviewed the HRA of the proposed development for the final time. The review was prompted by a number of factors including; a request from PS for NIEA to detail its recommendations in a manner compliant with planning legislation, the decision of the PAC relating to enforcement action on the development site, objection letters received by the Department from River Faughan Anglers and additional site investigations undertaken by NIEA staff. As before, the project in its entirety was assessed, alone and in-combination with other projects and plans. The assessment was undertaken in a logical, systematic and scientifically robust manner and in line with accepted guidance on the Habitats Directive. ... The HRA progressed to stage 2 appropriate assessment. NIEA again proposed the imposition of measures to prevent any impacts on the SAC. As before the effectiveness of the mitigation measures was investigated and detailed within the HRA. A final response was issued by NIEA to PS on 8 August 2012...

21. As before, all aspects of the development and all operations at the Chambers site were considered including those aspects detailed in the planning application."

## **Applicant's Submissions**

[97] The applicant argued that the Department acted unlawfully and in breach of the EIA Regulations and EIA Directive by failing to require the preparation of an environmental statement in connection with the application which led to the impugned permission [see Ground 9.(a)-(c)(i)-(vii)].

[98] Further the applicant argued that the Department acted unlawfully and in breach of the Habitats Regulations and Habitats Directive by failing to carry out a proper appropriate assessment of the implications for project for the SAC [see Ground10.(a)-(e)].

[99] Finally the applicant argued that the Department erred in law when imposing conditions on the permission by failing to impose a condition requiring the preparation of a lagoon management plan, as required by NIEA; by imposing conditions 1 and 2, which are incompatible by (1) requiring proposed lagoon construction in the location of an existing lagoon and (2) not permitting the decommissioning of the existing lagoons until after the completion of the proposed lagoons; and by unreasonably imposing condition 4, which requires the removal of contaminated waste from the interior of the lagoons for disposal off-site, without also requiring the removal of the materials used to construct the walls of the lagoons."

## **Respondent's Submissions**

[100] The respondent submits that the criticisms levelled by the applicant are criticisms of the respondent's findings of fact, the weight given to evidence (particularly from specialist consultees) and the balancing of relevant considerations by the respondent. It is asserted that the applicant is asking that the Court form its own opinion of the evidence and substitute that for the respondents. It is argued that the Court on judicial review should not be asked to do this as the Court on judicial review is concerned with challenge to the legal validity of a decision.

[101] It is contended, notwithstanding the applicant's views, the respondent's decisions under challenge were not unreasonable in the *Wednesbury* sense and there has been no manifest error of assessment sufficient to justify the Court's intervention.

## ***The EIA Regulations***

[102] The respondent submits the development and the application for planning permission did not involve any particular uncertainties which present difficulties of analysis.

[103] It is asserted the respondent was well aware of the applicant's concern of risk of the development polluting and so causing harm to the River Faughan and its ecology, particularly its salmon fishery and, in judging whether, on that account, the development was likely to have significant effects on the environment, the respondent had the benefit of the specialist advice and assessment of the NIEA in



particular, who undertook a careful appraisal of the likely efficacy of the proposed design and mitigation measures proposed to obviate that risk.

[104] It is submitted judgment was exercised after extensive consideration of the planning and ecological issues and with the benefit of extensive information.

[105] The respondent relies on R (Berky) v Newport City Council [2012] EWCA Civ 378 and submits, contrary to the applicant's contentions in paragraph 91 of its skeleton argument, there is nothing improper or unreliable in the respondent giving evidence through Mr Brown and Mr Finegan to explain the basis upon which the "screening process" was carried out and the determination made on 25 June 2012. The point is made that such evidence is of assistance to the Court.

#### *EIA development - the screening process*

[106] It is submitted that the respondent's determination under regulation 9(1) of the EIA Regulations, that the development was not EIA development, was:

(i) properly and legitimately informed and influenced by advice received in relation to the amended application from specialist consultees including NIEA and Rivers Agency; and

(ii) similarly informed and influenced by the judgment that relocation of the lagoons to outside the one hundred year floodplain, together with the proposed imposition of conditions, was sufficient to justify the overall view that this aspect of the development was not likely to have significant environmental effects.

[107] The respondent relies on paras 24-28 and 50 of Adrian Brown's affidavit dated 26 March 2013 in relation to responses from NIEA and Rivers Agency and further engagement with NIEA before the impugned regulation 9(1) determination of 25 June 2012. Reference is also made to the reasoning behind the decision insofar as same relates to the areas set out in Schedule 3 to the EIA Regulations as set out in paras 32 onwards of the same affidavit.

[108] The respondent says the determination whether the development is EIA development is an exercise of judgment for the decision maker and not one with which the courts should interfere lightly. It is argued that the respondent's decision was considered, informed and reasonable and it was entitled to the overall judgment that it reached on 25 June 2012 that the development, albeit Schedule 2 development, was not EIA development. It is asserted there was no manifest error of assessment which ought to prompt the Court's intervention and the Court is not an appeal court

carrying out a merits review of the Respondent's 'screening' determination under regulation 9(1) of the EIA Regulations.

***The Habitats Regulations – the appropriate assessment***

[109] Reference is made to the authorities relied on by the applicant in paras 146-152 of its skeleton argument which concern the proper approach to screening for appropriate assessment, i.e. the competent authority's determination whether or not appropriate assessment is required under regulation 43(1) of the Habitats Regulations. The respondent submits such authorities are not in point as, in the present case, NIEA as the competent authority did both require and lawfully undertake appropriate assessment of the development in order both to ascertain and to satisfy itself, as competent authority, that the development will not adversely affect the integrity of the River Faughan SAC. Reliance is placed on the evidence of Mr Finegan and it is contended NIEA had regard to the proposed mitigation measures to control, manage and avoid the risk of any adverse effect on the integrity of the SAC.

[110] It is asserted no aspect of the respondent's conduct in this regard may sensibly be said to have been *Wednesbury* unreasonable and there was no manifest error of assessment.

[111] The respondent relies on paras 18-21 of Mr Keith Finegan's affidavit dated 26 March 2013 and submits it is notable that NIEA recommended refusal of the planning application submitted in 2008 in its original form and it was only following further assessment after the development was amended to its current form in such a way as to seek to satisfy NIEA's objections that NIEA was prepared to agree to the development being granted planning permission. It is asserted NIEA's response throughout the process was appropriately detailed and considered.

[112] The respondent contends that NIEA was prepared when appropriate to recommend refusal of the planning application but then, in consideration of further amendments and details relating to the development, NIEA was properly prepared to revise that recommendation in accordance with regulation 43 of the Habitats Regulations.

[113] It is argued NIEA's appropriate assessment of the development as competent authority involved an exercise of judgment for the decision maker and which is not one with which the courts should interfere lightly. It is argued that the respondent's decision was considered, informed and reasonable and there was no manifest error of assessment which ought to prompt the Court's intervention. It is asserted the respondent was entitled to the overall judgment that it reached on 8 August 2012 that the development would not adversely affect the integrity of the River Faughan SAC. Further, the respondent says the Court is not an appeal court carrying out a merits review of the respondent's appropriate assessment under regulation 43 of the Habitats Regulations.

## Discussion

[114] In reviewing some of the evidence in an earlier section of this judgement I have dealt with many of the applicants submissions which on the evidence I am compelled to reject. I remind myself that the judgement as to whether a development falling within Schedule 2 has significant effects upon the environment is a matter of planning judgement for the decision maker only reviewable on *Wednesbury* grounds. Findings of fact, the weight to be given to evidence and the balancing of relevant considerations are for the primary decision maker. The applicable legal principles were not in dispute and are set out above.

[115] It has not been demonstrated that the decisions under challenge were unreasonable or infected with any manifest error of assessment, lack of sufficient inquiry or any other public law error justifying intervention by this court.

[116] I have earlier set out the detailed background to the impugned decision and reviewed some of the evidence bearing on the rival submissions. The evolution of the planning proposals and the respondent's ongoing engagement demonstrated a keen awareness on the respondent's part of the risk to the River Faughan and its ecology. As part of that process the respondent had the benefit of specialist advice, assessment and input from the NIEA in particular. As we have seen, based on that advice, the respondent was recommending refusal of the earlier proposals in which the lagoons were located in the floodplain of the River Faughan. However, the submission of revised plans relocating the lagoons outside the flood plain in association with other mitigating measures enabled the NIEA, which had objected to the original proposals, to inform the respondent that it had no objection to the proposals to relocate subject to the imposition of conditions reflected in the Stage 2 Appropriate Assessment report. Rivers Agency likewise confirmed satisfaction with the amended plans. NIEA were consulted on 31 May seeking feedback on 25 June 2012 about proposed conditions to be used in relation to the development proposal. A second EA determination was carried out on 25 June 2012 based on the amended application concluding that the planning application did not need to be accompanied by an Environmental Statement. Thereafter matters developed in the manner set out at para 47 *et seq* above with the DCG concluding:

“...Whilst the Department was content there were valid planning reasons for recommending refusal of the existing lagoons, the same recommendation could not be arrived at for the relocated lagoons. As documented above the relocated lagoons will not be impacted upon by flooding and their new location has moved them further away from the River Faughan ASSI/SAC. The 3<sup>rd</sup> party letters do not provide any evidence which would persuade me that the relocated lagoons, if approved, would have a negative impact on the River

Faughan. I am satisfied that NIEA and Rivers Agency have given this sufficient consideration and have provided adequate mitigation measures to ensure the existing lagoons are decommissioned and the new lagoons are constructed correctly.”

[117] The respondents determination under regulation 9(1) of the EIA Regulations, that the development was not EIA development, was properly informed and underpinned by the advice received in relation to the amended application from the specialist consultees including the NIEA and the Rivers Agency. Relocation of the lagoons outside the floodplain in combination with appropriate conditions was sufficient to justify the assessment that this aspect of the development was not likely to have significant environmental effects. No public law basis has been established for impugning that judgment.

[118] In relation to Reg 43(1) of the Habitats Regulations NIEA as the competent authority did undertake an appropriate assessment of the development to satisfy itself that the integrity of the River Faughan would not be adversely affected. I am satisfied from the evidence of Mr Finnegan in particular that NIEA had appropriate regard to the ability of the proposed mitigation measures to avoid the risk of any adverse effect on the integrity of the SAC and that the judgment of the respondent to that effect is unimpeachable.

[119] There is considerable force in the respondent’s submission that the criticisms levelled by the applicant are criticisms of the respondent’s findings of fact, the weight to be given to evidence particularly from specialist consultees and the balancing of relevant considerations by the respondent. It is not the function of the court in judicial review to substitute its own opinion of the evidence for that of the respondent. The court is not sitting as an appeal court to carry out a merits based review.

[120] I have concluded that the decisions under challenge have not been shown to be unreasonable in the *Wednesbury* sense and there has been no manifest error of assessment to require the court’s intervention. The applicant made a very elaborate challenge arguing that the respondent contravened the EIA regulations, the habitat regulations and the provisions of The Planning (NI) Order 1991. Having regard in particular to the affidavit evidence of Mr Brown and Mr Finnegan summarised above, I accept the respondents submission that none of the grounds of challenge are made out.

[118] Accordingly, for the above reasons the application is dismissed.