Bill Donnelly Cavanacaw Appeal

Submission to the Court of Appeal 15 Feb 2018

INTRODUCTION

In 1995 Omagh Minerals were granted planning permission for a 60 hectare site for an open cast pit for the extraction of gold and silver and associated minerals, with associated plant and storage at Cavanacaw, near Omagh. The application was supported by an environmental statement. Prior to approval the application had been the subject of a lengthy public inquiry.

1 In 2012 the Notice Party Omagh Minerals, submitted the impugned application to extend mining operations underground beneath the existing opencast mine site. [Core tab15 pages 189-199] The application was declared an Article 31 application of regional significance. It was approved in July 2015.

2 I was granted leave for judicial review of the decision, but the application was dismissed on 29 September 2017, by Madam Justice McBride, stating that: "none of the grounds of challenge has been established and the application must be dismissed".

3 I had challenged the approval on 5 grounds, I'd have liked to appeal the dismissal of all 5, but due to time constraints of the appeal process, I have to limit my appeal to 2 of those original 5 grounds. I believe these 2 are of most significance for the environment going forward. They are grounds "d" and "e" from my Order 53 statement. I will now address each of these grounds for appeal in turn.

GROUND "D" – REFERRED TO AS GROUND 4 IN MADAM JUSTICE MCBRIDE'S JUDGEMENT stated:

"The Department approved inaccurate drawings numbered 02 and 19 which show the application boundary encompassing an area of approximately 81 hectares, not 60 as applied for and assessed. This represents a failure to comply with EIA Directive 2011/92/EU Article 5(3), as well the precautionary requirements of the (EIA Directive 2011/92/EU) and the (Habitats Directive 92/43/EEC)."

4 The judge deals with this ground for challenge in Paragraphs 118-124 of her judgement, agreeing with virtually my entire ground for challenge.

5 Firstly she agrees with me that only 60 hectares had been assessed, as at paragraph 123 of her judgement she states:

> *"I am not satisfied that the environmental statement covered the entire 81 hectares"*-she goes on, *"The environmental statement and the addendum environmental statement both refer to the site as comprising 60 hectares"*

6 She then says:

> "*I am not satisfied that the environmental statement covered all of the matters required under Schedule 4 in respect of the additional 21 hectare area"* ------- *"Further the testing for acid rock took place only within the 60 hectare site, I am therefore not satisfied that the additional 21 hectare area, was assessed as required by the Regulations".*

7 At paragraph 124 she also agrees with me that only 60 hectares had been applied for, stating:

> *"I am however satisfied that the planning permission granted, only relates to what was applied for, namely the 60 hectare area".*

8 Mr Mould at Par 21 in his skeleton says: "Indeed the judge's interpretation of the planning permission, provides the answer that the Appellant seeks. It establishes that planning permission does not exist to mine west of the 60 hectare site. It resolves any ambiguity in the approved plans and drawings in his favour. The Notice party is bound by this finding and the fact that the planning permission relates only to the 60 hectare area."

9 So I now find myself asking the question, if as Mr Mould claims, any ambiguity in the approved plans and drawings has been resolved in my favour, then why did the judge in the lower court, not even mention the issue of the ambiguity in the drawings, and uphold my ground for challenge, and why did she award costs against me.

10 Her Ladyships judgement confirms what I have been saying all along, that this seriously flawed planning permission, granted by the Department of the Environment, now the Department for Infrastructure, should never have extended to 81 hectares which is why I challenged it, worryingly it was in operation for two years, and the Notice Party was carrying out operations in the unassessed area during that period, in breach of the EIA and Habitats Directives, before the ruling of the lower court, had clarified the extent of the planning permission.

11 Had I not brought this judicial review, the Respondent and Notice Party would still be under the impression that the planning permission extended to 81 hectares, and blissfully unaware, the Notice Party would still be operating in breach of the requirements of the EIA and Habitats Directives, possibly for the full 15 years of the planning approval. It was therefore plainly wrong for the lower court to award costs against me , as my ground for challenge has been vindicated, and my actions were in the interest of the public, and the environment, and have now resulted in the law being upheld.

12 Her Ladyship provided no reasons, adequate or otherwise, for not upholding this ground for challenge, and erred by not quashing this flawed permission.

13 She also completely failed to address the issue of the inaccurate drawings, and did not resolve the ambiguity they have given rise to. So I would like to briefly draw your lordships attention to the main points, and to do so I need to go back to when these drawings were first submitted by the applicant.

14 The P1 application form submitted with the application in July 2012, and an amended version in October 2012, both confirmed at question 3 the size of the site as 60 hectares, [Core tab15 page 193]

15 However, from the outset, the Notice party submitted drawings depicting an 81 hectare site, within the application boundary, which clearly contradicted the P1 forms. [Drawing 02 Bundle] The Department was wrong to validate the application, as the P1 forms and drawings did not correlate. This was a clear breach of procedure and a breach of Article 7.1.b of the Planning General Development Order Northern Ireland 1993, which was in force at the time of the application and states:

> Subject to the following provisions of this Article, an application for planning permission shall-
>
> a) be made on a form issued by the Department;
> b) include the particulars specified in the form, and be accompanied by a plan which identifies the land to which it relates .

16 The drawings submitted by the notice party, and accepted and validated by the department, failed to identify the 60 hectare site referred to on the P1 form. *(See Rejoinder Affidavit paragraph 22) [Core Page 180]*

17 The P1 form itself is also quite specific as to the requirements to be met with regard to plans and drawings. [Core tab15 page 191] It states:

> *"Planning applications are open to the public for inspection and comment. It is essential that drawings are clear and precise, this will avoid misinterpretation."*

18 And just below that it states,

> *"all planning applications require: an accurate, up to date Ordnance survey site location plan to scale..... clearly showing the boundary of the application site outlined in red. Any other land owned by the applicant should be shown with a blue line around its boundaries".*

19 The Department in accepting and processing these inaccurate 81 hectare drawings, along with the 60 hectare P1 application forms, breached procedure by failing to comply with this requirement.

20 The P1 forms also make reference to notes on completion of the form included in the application pack, and also available on the planning website, planningni.gov.uk. The advice given for the location plan states quite clearly, "The application site must be edged clearly with a red line on the location plan. It should include all land necessary to carry out the proposed development..... A blue line must be drawn on the plan around any other land owned by the applicant, close to or adjoining the application site."

21 The inclusion of an 81 hectare area "edged with a red line" is a clear indication that the Notice party considered all of the 81 hectares to be necessary to carry out the proposed development.

22 From the outset therefore, the answer given at question 3 on the P1 Application Form, "60 hectares," did not correlate with the 81 hectare drawings submitted with the application.

23 Even after I had made the Department aware of the discrepancy by way of a planning objection on 18 November 2014, [File 1 tab12 (iv) page 600] the Department continued to accept 81 hectare drawings from the developer in relation to this 60 hectare project, as can clearly be seen on Drawings No. 3. 13. 14. 15. & 19 which are all stamped received by the Department on 26 January 2015, and indeed this is confirmed in the planning permission at informative 01. *[Core tab24 page 348]* The judgement of the lower court has failed to recognise that this was a clear breach of procedure by the Department.

24 It is this breach of procedure which has given rise to all the ambiguity in the processing and approval of this application, and is the main reason why I am here today.

25 At Paragraph 40 of her judgement, Madam Justice McBride makes reference to Case [2015] NIQB 65 Treacy J, paragraph [44] and the following principle: "Planning authorities are obliged to collect the information they need to be able to exercise their discretion in a rational way. A court must be satisfied that the planner has asked himself the right question when addressing his task, and that he took reasonable steps to find the information required to answer the question correctly".

26 The lower court could not have been satisfied that in this case the planner had asked himself the right questions.

27 In this case the planner in question was Niall Marshall who had processed numerous other Cavanacaw applications as far back as 2008, and was therefore very familiar with the size, shape and characteristics of the 60 hectare site, yet he failed to ask himself the questions:,

28 "Why are we processing a 60 hectare application accompanied by 81 hectare drawings?" , "Why are we not requiring the applicant to submit accurate 60 hectare drawings for consideration" and "Why, two years into this process are we still accepting 81 hectare drawings from the developer, even after the discrepancy has been brought to our attention in Bill Donnelly's planning objection of 18 November 2014"? [File 1 tab12 (iv) page 600]

29 All of this clearly flies in the face of Justice Treacy's principle and the lower court could not have been satisfied that in this instance, the planner has asked himself the right questions. This is yet another reason why her Ladyship erred by not quashing this permission.

30 There is no evidence that the Department attempted to rectify the situation "and took reasonable steps to find the information required" ie by requiring the submission of accurate 60 hectare drawings. Not only did the Department process the inaccurate drawings over a three year period, they subsequently approved them. [Core Bundle of drawings or Tab 26 (A4 format)] The Department therefore breached procedure and for this reason alone the judge was wrong not to uphold my ground for challenge "D" and quash the planning permission.

31 At paragraph 123 of her judgement her Ladyship states:
"I am not satisfied that the environmental statement covered the entire 81 hectares. The environmental statement and the addendum environmental statement, both refer to the site as comprising 60 hectares" she goes on to say: I am not satisfied that the environmental statement covered all of the matters required under Schedule 4 in respect of the additional 21 hectare area... Further the testing for acid rock took place only within the 60 hectare site".

32 At paragraph 124 her Ladyship states:
"I am however satisfied that the planning permission granted, only relates to what was applied for, namely the 60 hectare area".

33 Her Ladyship's decision to construe the planning permission for underground mining as only covering 60 hectares, as applied for and assessed, does not exonerate the developer, from fully assessing for environmental impacts, the remaining 21 hectares which make up 35 % of the area within the 81 hectare application boundary. As already stated, this area was not covered by the environmental statement, but was included in the approved drawings which still remain valid.

34 Notwithstanding that, the judge also overlooked the fact, that the Notice Party by their own admission, had already begun operations in that area, as evidenced by a company announcement from 25 January 2016, which I exhibited and drew to her attention. **[TB file 1 tab12 (vii) page 606]**

35 The company announcement on a London Stock Exchange bulletin board read: "A new drilling programme commenced on the Joshua vein at the Omagh mine site in September 2015, ... in addition, recent drilling (Core 154) has encountered new high grade mineralisation in an underexplored area. A new vein (Kestrel) has been discovered located approximately 70 m west of the Joshua vein. The drill results assayed 38.58 g/t gold, 85.8 g/t silver" and so on, it continues: "the discovery is of particular note because mine land extends westwards some 450 metres from Joshua vein, and underground mining is permitted on this part of the mine land ownership (freehold)", ie beneath the extra 21 hectares.

36 Therefore by ruling that the planning approval only extends to the 60 hectare area, the judge has effectively also ruled that the Notice Party has been operating unlawfully in the 21 hectare area, in breach of the planning approval and also the requirements of the EIA and Habitats Directives.

37 If enforcement action now needs to be taken because of a breach of planning permission, the Department will find itself in a very difficult position, because the only approved drawings for the site actually include the 21 hectares where the unlawful development has taken place, i.e. within the 81 hectare red line approved application boundary.

38 The lower court erred by not ruling that the failure to assess the entire 81 hectare area within the application boundary, means this approval does not comply with the requirements of the EIA and Habitats Directives, exacerbated by the fact that development has already begun here, and therefore the permission should be quashed.

39 At Paragraph 124 the judge goes on to say:
"In his final development management report of 10 June 2011 (actually 2015) Neil Marshall (Niall) confirmed that the "proposed mine will be within the existing mine site area" that is 60 hectares. I therefore find the planning permission only extends to the 60 hectare site, notwithstanding the fact that some of the drawings which were approved encompass the larger 81 hectare area."

40 The judge was wrong as crucially her Ladyship failed to realise that in actual fact not "some" but all of the approved drawings depicting the site layout and application boundary, namely drawings 2, 3, 16,19 and 20 "encompass the larger 81 hectare area".

41 The planning permission on its first page **[Core tab24 page 337]** specifically includes drawings referenced 1-20 and at Informative 01 **[Core tab24 Page 348]** it also clearly states that "this planning permission relates to drawings numbered, 01, 02 ,03, 04, 05, 06, 07,08,09,10, 11, 12, 3, 14, 15, 16, 17, 18, 19, 20. " including of course drawings 02 and 19 which I referred to in my ground for challenge.

42 However none of the approved drawings depicting the application boundary, encompassed a 60 hectare area. Not one single approved drawing depicts a 60 hectare site within the red application boundary line.

[Comparison drawing Tab27 page 395-396]

[Core Bundle of drawings/Tab 26 (A4) pages 375-394].

43 Additionally, the planning permission document itself the Decision Notice, as it stands, unambiguously grants planning permission for the entire 81 hectares, as it regulates the entire 81 hectare area, as evidenced by condition 57, which restricts surface development of the extra 21 hectares, but not underground mining.

44 Both the Respondent and the Notice Party shared this view. Principal Planning officer Stephen Hamilton who signed the decision notice, was himself of the opinion that the application related to an 81 hectare site, and that he was granting approval for underground mining of the entire 81 hectares, as evidenced by his affidavit. [Core tab8 Page124].

45 At Paragraph 288 and 289 he states:

"While the Department wholly accepts that there was a discrepancy between the reference to site hectarage in the P1 form, and the boundary of the site, as delineated in red as shown in approved drawing number 2, this does not mean that the area within the red line was not considered during the processing of the application. The error was rather in the statement of the site area as being 60 hectares in the application, rather than an error in respect of assessment of the 81 hectare area."

46 "Other than the ecology assessment, the environmental statement does account for the red line site area. It is and would have been apparent to any person viewing application drawings, that the application includes the red line area. I confirm that the application has always been considered to relate to the entire red line area of the application." i.e. 81 hectares.

47 And at Paragraph 327 he concludes [Core tab8 Page134].

"It should be noted in this respect that the application allows for exploitation of reserves within the entire red line area, and to a depth of 350 metres subject to the 15 year duration of the permission." (i.e. within the entire 81 hectare area).

48 Mr Hamilton at this point had just contradicted himself, as he as an authorising officer had signed off Niall Marshall's Final Development Management Plan which repeatedly confirms the size of the site as 60 hectares [Core tab23 Pages 285-335] *[Signature on page 323]* but he had also signed the decision notice [Core tab24 Page 354] in which the only indication as to the size of the approved site, was the 81 hectare approved drawings. It seems to me Mr Hamilton may have been just a little bit confused.

49 For two years the Respondent has argued that the planning permission extended to the 81 hectare site, from July 2015 right up till September 2017, through 5 long court days, until the judgement of the lower court was made known, when they then did a U turn and decided to agree with the judge, and me, that the permission should only extend to 60 hectares as applied for and assessed. It is my understanding that the Department has a lawful duty of candour to the court, and it is not the role of the Department to defend a decision at any cost, but to assist the court to make the right decision.

50 The Notice Party took the same view as the Respondent and had also already made their position clear on this matter, at chapter 2.2 of their environmental statement, written in 2011, it states :

> "For clarity, the planning application does not limit the underground depth of extraction, below Omagh Minerals Ltd freeholds, or limit the underground location of mining beneath that freehold land". [Core tab28 page 399 paragraph 2.2]

51 And as already mentioned, in a company announcement from 25 January 2016, six months after approval, the Notice Party announced that a new mineral rich vein (Kestrel), has been discovered beneath the extra 21 hectares, and this announcement is evidence that the Notice party had already begun operations in this part of the site, on foot of the impugned approval. [TB file 1 tab12 (vii) page 606] In an area where condition 57 expressly prohibits surface development.

52 As a result of the judge's ruling that the planning permission only extends to the 60 hectare site, we now have a corrected interpretation of the planning permission, but the original decision notice and drawings remain unaltered and in force, and herein lies the problem.

53 Anyone looking at this planning permission can have no idea, that the permission only relates to a 60 hectare area. The drawings which still form an integral part of the permission, depict an 81 hectare area within the redline application boundary. Despite the ruling of the lower court that the planning permission should only extend to 60 of those 81 hectares, there is nothing on the drawings or anywhere in the planning permission to indicate this, or indeed to indicate which 60 hectares within the application boundary, benefit from planning permission.

54 Furthermore, the planning permission which the judge has now ruled only covers 60 hectares, still contains planning condition 57, which regulates land outside the 60 hectare area, and at Informative 01 still states that this planning permission, relates to drawings 1-20, none of which depict a 60 hectare area.

55 Therefore the ruling of the lower court has rendered this planning permission seriously flawed on two counts, and clearly not fit for purpose. This documentation i.e. the decision notice and approved drawings, was appropriate for an 81 hectare approval, but totally inappropriate for a 60 hectare approval. The lower court was therefore wrong not to quash this unsound permission**.**

56 At the end of paragraph 124, Her Ladyship concludes her comments on this ground for challenge by stating: "For the reasons set out above I am satisfied that the 60 hectare site was properly assessed" but makes no further mention of the failure to fully assess the remainder of the site, within the application boundary where operations have already commenced.

57 Her Ladyship agreed with me that only 60 hectares had been applied for and fully assessed for environmental impacts, and has now determined that the planning permission only extends to the 60 hectare area, however given that all the approved drawings which depict the site layout and application boundary in its entirety, stamped "Granted", depict an 81 hectare site, her Ladyship was wrong, not to rule that the Department had indeed approved inaccurate drawings, and was wrong not to uphold this ground for challenge.

58 The inaccurate drawings include 21 hectares of land, somewhere within the 81 hectare application boundary, 21 hectares which does not benefit from planning permission. To make the 60 hectare permitted area identifiable within the 81 hectare area, would require a second application boundary superimposed within the current boundary, which is completely unacceptable in an Article 31 permission of regional importance, or indeed any approval.

59 My decision to challenge this approval has been vindicated, as already stated Her Ladyship at Paragraph 123, said she was not satisfied the ES covered the entire 81 hectares, nor had all matters required under Schedule 4 been adequately assessed in respect of the extra 21 hectares. All parties now concur with this.

60 However, Principal Planning Officer Stephen Hamilton had signed the decision notice, in the belief he was granting planning permission for an 81 hectare site. He could not have made this any clearer in his affidavit which I have already referred to.

61 The Notice Party has been engaged in mining activity on foot of this approval for over 2 years, in the mistaken belief they had permission to mine the entire 81 hectare area.

62 It is only as a result of my intervention that the legal extent of the planning permission has been clarified, and now limited to the 60 hectares actually applied for and assessed.

63 But unfortunately the problem of the drawings remains. It took a High Court judge to tell the "competent authority" what they had actually granted planning permission for, so if the planners didn't know what they had approved, how could a member of the public, looking at this permission possibly be expected to know.

64 It is evident from his affidavit that Mr Hamilton (an authorising officer) was clear he was approving 81hectares. But the fact that he had also signed the final development management report, which refers to the site as 60 hectares throughout, is cause for concern. The case officer Niall Marshall wrote the final development management report, so he is clearly in the 60 hectare camp.

65 So were they in agreement, or was there confusion between the case officer and Mr Hamilton, over exactly what was assessed and approved?

66 The public should be able to rely on a document which is plain on its face, without having to consider whether there is any discrepancy between the permission and the application. If I could refer your Lordships back to Paragraph 44 of Justice Treacy's judgement, already referred to, (at 44 iv) he rules that:

"Planning decisions issued to parties must be fit for purpose which requires that they must state the outcome in an intelligible way, and give adequate reasons to explain why the case was decided as it was." As I see it, this

planning permission is clearly not fit for purpose, as this did not happen. Clearly the planners themselves were not in agreement over what they were approving, so how could they possible communicate the outcome in an intelligible way to anyone else. And sadly this lack of clarity is reflected in the planning permission itself, as it is now totally confusing.

67 The 60 hectare area which now benefits from planning permission is not identifiable within the 81 hectare application boundary, depicted on the inaccurate approved drawings. Yet these are the only approved drawings and are the drawings against which any future enforcement action will need to be taken, as there are no approved 60 ha drawings in existence. Indeed these are the drawings which the decision notice at Informative 01 specifically refers to. There is in fact nothing at all in the planning permission either, confirming which area benefits from planning permission, and which area does not.

68 The fact remains that this approval is seriously flawed, Drawings 2,3,16,19 and 20 which show the site layout and application boundary in its entirety, all depict an 81 hectare application boundary, and are therefore inaccurate.

69 It was not open to the Department to approve drawings for an 81 hectare site, 21 hectares larger than applied for, the decision by the Department to approve these drawings was surely unlawful, definitely irrational, and lapses into Wednesbury unreasonableness. Another reason why her Ladyship erred by not quashing the permission.

70 The judge was right to rule that the planning permission should only extend to 60 hectares, but was wrong not to quash this approval, as the planning permission documents as they currently stand, as far as any normal person reading them is concerned, clearly still grant permission for an 81 hectare site and are not fit for purpose.

71 I have no legal expertise, but it seems to me that if a decision of the lower court, were to validate this previously unlawful seriously flawed planning permission, allowing it to remain in force, then it will effectively have regularised an unlawful permission, and this is surely not the role of the court.

72 The planning permission still has condition 57 imposed within it, which regulates land outside the 60 hectare area but within the 81 hectare application boundary, and as already stated the decision notice at informative 01 still confirms that the planning permission, relates to drawings all of which are for 81 hectares, and none of which are for 60 hectares.

73 The planning permission is devoid of any planning condition restricting underground mining to the 60 hectare area, thereby rendering the planning permission decision notice inaccurate, as well as the approved drawings.

74 So although Mr Mould states that the Notice party is bound by the finding of the court, that the planning permission only relates to 60 hectares, there is nothing in the planning permission to reflect this.

75 These documents cannot be allowed to remain in place for 15 years, this approval is at best an unsound planning permission, open to abuse and non compliance, and should be quashed, and if the notice party so wishes reactivated, and properly processed.

76 For all of the reasons mentioned, I believe that ground for challenge "D" should have been upheld and the planning permission quashed.

GROUND "E", REFERRED TO AS GROUND 5 IN MADAM JUSTICE MCBRIDE'S JUDGEMENT

Ground "E" stated

The Department accepted a requirement for acidic rock testing every 25 vertical meters, as part of a monitoring plan post approval. This entirely new proposal for acidic generation testing at various depths, first appeared on the public planning portal on 7 December 2015, four months after approval. This is a subversion of the appropriate assessment process. It represents a failure to comply with the precautionary requirements of the (EIA Directive 2011/92/EU) and the (Habitats Directive 92/43/EEC), it also breaches the (Management of Waste from Extractive Industries Directive 2006/21/EC).

Some Background Information

77 The 1993 Cavanacaw Goldmine Public Inquiry report contained numerous concerns regarding heavy metals and acid rock drainage at the site. With regard to acid rock issues, condition 39G imposed in the open cast mine permission, required "an assessment of the potential for post-closure acid rock drainage and the control of such drainage if it exists". [File1, tab8 (vi) Page 393] There was also an Article 40 agreement entered into between Omagh Minerals Ltd and the Department, in 1995, which required that if net acid generation potential is identified, monitoring should continue for a period of thirty years after closure of the development. [File1, tab8 (viii) Page 416, paragraph 4]

78 Anyone with any knowledge of the mining industry is aware that acid rock drainage as a result of leaching from acidic rock, from this and other types of mining, has caused worldwide environmental devastation, the financial cost of which now runs into billions.

79 Her Ladyship deals with this ground for challenge at Paragraphs 125-128 of her judgement.

80 Her Ladyship was wrong to reject this ground for challenge. It appears at Paragraph 125 of her judgement, she misinterpreted the ground, as she stated: "The applicant alleges that the Department breached the EIA, Habitats and Waste Regulations, by accepting a monitoring plan for acidic rock testing post-approval". This was not the case, I would be the last person in the world to object to a monitoring plan! As a result of misinterpreting the ground for challenge, she failed to provide a robust judgement.

81 The ground for challenge was quite clear and I had explained it in some detail in my second affidavit, and my rejoinder affidavit. [File 1 Page 586, Paragraph 7 and Page 898 Paragraph 35]

82 The ground for challenge was not the accepting of a monitoring plan post approval as her Ladyship states, but the amending post approval, of the 2013 version of that monitoring plan, which formed part of the Environmental Statement Addendum, and which had been used for appropriate assessment, and the inclusion in it for the first time, of a requirement for acidic testing of the underground rock.

83 In November 2013 soil and water specialists ESI, had produced as part of the Environmental Statement Addendum, a draft Monitoring Plan for Environmental Waters for the site, to ensure the protection of the aquatic environment, this draft was the version of the plan which was used for the appropriate assessment, required by Article 6.3 of the habitats directive. This plan neither contained, nor envisaged any future requirement for potential acid generation testing of the underground rock.

84 On 7 December 2015, four months after approval, an amended version of the 2013 plan, was resubmitted to the Department containing at paragraph 4.2 Monitoring of Deep Groundwater**,** an entirely new requirement for analysis to be carried out, of the potential for acid generation of rock samples, not water, which are to be taken every 25 vertical meters as the mine progresses in depth, having been added**.**

[Please compare] [Core tab17 Page212] and [Core tab25 page 366]

85 For the first time, a requirement for acidic testing of the underground rock during operations had been added. This requirement should have been included in the original version of the monitoring plan, which had been used for appropriate assessment. This represents a subversion of the appropriate assessment process, exactly as I stated in my ground for challenge. There is and has always been just the one monitoring plan, the one which forms part of the Environmental Statement Addendum.

86 To be clear, this post consent amendment to the monitoring plan, means that every 25 vertical meters as the mine progresses in depth, for the first time the developer will now be required to take a sample or samples of rock, and ship them off to a laboratory, in England I believe, to be analysed by experts for potential acid generation, pre consent there was no such requirement. The amended monitoring plan contained no other significant changes from the 2013 draft version, which was used for appropriate assessment

87 Had acidic rock been identified pre consent, then planning permission may have been refused. If acidic rock is identified post consent, then we have a serious environmental problem, as the amended plan is devoid of any details of mitigation, or what containment measures will be required, if and when potentially acid generating rock is found. **[Core tab25 page370, 371]**

88 Unlike condition 39 G imposed in the 1995 approval, referred to earlier and the Article 40 agreement. The requirement for acidic testing of the underground rock and associated mitigation, are issues which should all have been dealt with pre approval during processing of the application and appropriately assessed.

89 Only when the full analysis of the potential acidity of the rock, had been made available by the laboratory for consideration, could the competent authority have properly conducted appropriate assessment, in compliance with the strictly precautionary requirements of Article 6(3) of the Habitats Directive.

90 This belated confirmed need for acid rock testing during operations, indicates serious uncertainty regarding the robustness of the appropriate assessment, which fails to satisfy EIA and Habitats precautionary principles.

91 The judge erred by failing to conclude that this introduction of a post consent requirement for acid generation testing, represents a circumvention of the appropriate assessment process, and a breach of procedure.

92 Regulation 4, The Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2012 prohibits the granting of planning permission without the consideration of environmental information.

93 Case C-258/11, (The Sweetman Ruling) at paragraph 44 makes clear that: "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.

94 Her Ladyship erred by concluding at Paragraph 128, that: "it was not a new proposal but was rather an aspect of monitoring which was part of the mitigation required by the 2015 permission". In actual fact as I've already stated, this is a new proposal for acidic testing of the underground rock. Furthermore it was completely unconnected with the requirements of a monitoring plan for environmental waters. The 2013 version of the monitoring plan, contained no mention let alone a requirement for testing of the rock, it concerned itself solely with water related data.

95 A completely new post consent proposal requiring analysis of the potential acidity, of samples from perhaps millions of tonnes of as yet untested underground rock, can in no way be compared with Case PPG11 Limited v Dorset County Council, *[2003] EWHC 1311)* which her Ladyship at paragraph 127 used in support of her judgement.

96 This completely new requirement to analyse the underground rock, was not some kind of further survey, which is no more than a prudent approach to establish whether any changes had taken place on the ground, between the last survey and the starting of work, as was the case in Dorset, the underground rock from these depths has never been tested.

97 In their Habitats Regulations Assessment, NIEA had raised concerns specifically regarding acid rock deposition, where aggregate is exported from the site and used for road construction adjacent to rivers. [Core tab21 page 258 final paragraph] Nevertheless, planning permission had been granted without a single piece of underground rock having been tested, this new requirement for testing being introduced post consent represents a subversion of the appropriate assessment process exactly as I stated in my ground for challenge, as well as being a blatant breach of procedure, and fails to comply with the precautionary requirements of the EIA Directive (2011/92/EU) and the Habitats Directive (92/43/EEC).

98 Article 59 of Waddenzee makes clear that, Pursuant to Article 6(3) of the Habitats Directive, the competent national authorities must be certain beyond reasonable scientific doubt, as to the absence of effects on the NK2 site. How can a competent authority undertaking appropriate assessment possibly be certain, or convinced, that no reasonable scientific doubt remains, when the requirement on the developer to test the potential acidity of the rock, isn't imposed until 4 months after approval?

99 The need to impose a post consent requirement to carry out acidic testing of the rock, calls into question the robustness of this approval, in the context of compliance with Article 6.3 of the habitats regulations. It indicates that a large degree of risk and uncertainty remains. Paragraphs 53-59 of the Waddenzee ruling, do not permit any remaining risk or uncertainty.

100 The judge was wrong not to rule that this significant addition of a requirement for potential acid generation testing of the rock every 25 vertical metres, constituted a fundamental and highly significant change to the Environmental Statement, which should have been advertised as a further addendum, and assessed prior to any permission being granted. By not doing so the Department again breached procedure and failed to comply with the precautionary requirements of the EIA Directive (2011/92/EU) and the Habitats Directive (92/43/EEC). For all of the above reasons I believe that ground for challenge "E" should also have been upheld and the planning permission quashed.