Submission 27 Sept 2016

1. By way of introduction, I would like to give a brief outline of the background to the current approval, and my grounds for challenge.

2. In 1992, Omagh Minerals Limited which is now owned by Galantas, a Canadian company incorporated in 1996, applied for planning permission ('the original permission'), for a 60 hectare site at Cavanacaw Omagh, under planning application K/1992/0713/F, for an "opencast pit for the extraction of gold and silver and associated minerals, with associated plant and storage". Planning permission was granted on 23 May 1995, after an extensive public inquiry. Many expert witnesses gave evidence at the inquiry about the likely environmental impact of such a project, and 40 planning conditions for the protection of the people and the environment were agreed, to the satisfaction of all concerned. The proposed development was EIA development and a detailed Environmental Statement was required and submitted.

3. Although permission was granted in 1995, open cast mining did not commence until twelve years later in 2007, and continued until Autumn 2013.

4. The evidence now shows that in or around 2005, some kind of arrangement between the Department and the company seems to have given the company the green light to redesign the agreed site layout and tailings dam, but planning permission for the changes was never granted, and the public were kept in the dark about what was going on.

5. In 2008 Omagh Minerals began to remove rock from the site, and despite having confirmed there was no planning permission in place to remove the rock, the Department allowed the company to continue doing so for a further seven months.

6. A long history of non compliance with planning conditions at the mine, and the lack of planning enforcement over the years, was confirmed by the Northern Ireland Ombudsman in 2012, who reported that with regard to planning enforcement at the mine, a major system failure had taken place.

7. In July 2012, Planning application K/2012/0373/F for an underground mine extension to the project, was applied for and subsequently approved in July 2015, effectively regularising much of the unlawful development, which had taken place over many years.

8. I have serious concerns about the impugned approval regarding the protection of the environment and amenity, especially as no financial guarantee has been put in place to cover remediation, should environmental damage occur.

9. Clearly I also have concern for my livelihood as a Bed and Breakfast proprietor close to the mine. I hope this review also helps highlight what I believe, is a very unhealthy relationship between developers and planners, often on first name terms, with some officials it seems to me, regarding the presumption of development consent as a green light to turn a blind eye when it suits.

10. The 1992 Environmental Statement contained details of the production, quantities, and the onsite storage of hazardous sulphide waste residue, it also outlined a scheme to accentuate the original level of the site to accommodate all of the waste rock on site, This would also facilitate monitoring, and containment of acid rock drainage from the waste rock should it occur, as was required by planning condition 39G of the original permission. WD 1 Tab 6

11. By way of explanation M/Lord, Columbia Analytical in the United States, explains for us exactly what it is, and I quote: “acid mine drainage refers to water contamination, when pyrite is exposed and reacts with air and water to form sulphuric acid” .
http://www.caslab.com/Acid-Mine-Drainage-Testing/

ACID MINE DRAINAGE TESTING - CAS Lab

www.caslab.com

Acid Mine Drainage Testing. Acid mine drainage refers to water contamination when pyrite (an iron sulfide) is exposed and reacts with air and water to form sulfuric ...

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12. With regard to analysis of the acid generating potential of the excavated waste rock, NIEA have little or no experience.

    13. The enormous ‘Dalradian’ seam of sulphide ore being mined and processed at Omagh, which extends from Scandinavia through Scotland and Northern Ireland to Newfoundland Canada, is currently being mined at two locations near Omagh, Cavanacaw and Gortin. The Cavanacaw 1993 public inquiry’s concerns about the potential for acid rock drainage, from the excavation of the Dalradian seam, were vindicated when the mining company at Gortin actually admitted, they had uncovered potentially acid generating waste rock samples at the Gortin mine.

    14. In my order 53 statement I outlined 5 major grounds for challenging this approval, and further issues became apparent on receipt of the Notice Party’s affidavits. I would now like to go into each of these in more detail.

UNLAWFUL DEVELOPMENT

15. **Firstly** I wish to address issues of unlawful development, i.e. development not sanctioned by the grant of planning permission, and the fact that substantial unlawful development has effectively now been regularised by the impugned approval.

16. This is in contravention of the precautionary requirements of the EIA Directive (Directive 2011/92/EU) and the Habitats Directive (Directive 92/43/EEC). It was not lawful for the Department to approve this application since the assessments, as required by these Directives, were not and could not have been carried out lawfully given the extent of unauthorised activity on the site.

17. The Department is specifically in breach of Articles 2, 4, 5 and 10 of the EIA Directive (transposed by the Planning Environmental Impact Assessment Regulations (Northern Ireland) 2015) and Article 6(3) of the Habitats Directive (as transposed by Regulation 43 of the Conservation (Natural Habitats, etc) Regulations (Northern Ireland) 1995.

18. The latter imposes a strict precautionary doctrine to sites, in this case the river Foyle SAC. Although the Cavanacaw mine does not lie within the River Foyle SAC, it is drained by the Creevan burn which is connected to the it, and itself contains a population of Atlantic salmon. Furthermore the Department failed to consider the relevant constraints of both EU and national case law.

19. **The first** instance of unlawful development which took place at the mine, that I am aware of, was the removal of perhaps hundreds of tonnes of mineralised ore from the site, this would have required the excavation of thousands of tonnes of rock and overburden to access it. Back in the late 1990's with the commencement of open cast mining still years away, a new company "Galantas Irish Gold", which would produce and market Galantas Gold products was set up. The precious metals needed to produce the jewellery were sourced from Cavanacaw, the ore extracted from the ground by a mechanical digger and processed at another facility offsite. No planning

permission for such activity was included in the original 1995 approval, clearly the environmental impacts of this activity are unknown as they were never assessed.

20. Mr Stephen Hamilton at Paragraph 306 of his affidavit states, "To my knowledge the Department was not aware of the alleged removal of 100 tons of mineralised ore in 1998. But Galantas have confirmed this. [File 1, pages 423-425].

21. **The second example** of unlawful development was the fact that the excavated waste rock and overburden stock piles, were not built in their northerly locations, as approved in the original 1995 planning permission, the waste rock and overburden was either unlawfully removed from the site or stockpiled elsewhere on site. The rock stockpile approved location was to the north of the processing plant, it is now located to the south west of it. The rockpile occupies a smaller footprint than the original as a result of up to half a million tonnes of it having been removed from the site.

22. **Thirdly**, two substantial settlement lagoons which do not appear on the original 1995 approved drawings, and were not assessed in the 1992 Environmental Statement, were constructed around 2006 and 2007, but were never assessed or approved prior to their construction. These have been retained and will also form an integral part of the underground mine project going forward, before eventually being removed in the years to come as part of the project. These were granted planning permission in 2015 by the impugned approval, and although Omagh Minerals have continued working the site since 2015, an arial photo taken just week ago shows the lagoons, still there, and still full. This in my opinion amounts to regularisation of unauthorised EIA development.

23. **Fourthly** the 1995 tailings dam approved solely to serve the open cast mining operations, and granted under the original permission, was never built.

Instead, it was replaced by a multi-cell tailings system, which was designed to serve not only the open cast mining operations, but also the future underground mining operations, now approved under the impugned 2015 permission. Clearly these cells were never approved or assessed as part of the 1995 permission. I will return to this in more detail later.

24. **Fifthly**, between 2008 and 2009 up to half a million tonnes of potentially contaminated waste rock was removed from the site, without planning permission for use as road building aggregate. A letter from the Planning Service Special Studies Section to the Managing Director of Omagh Minerals Limited, dated 9 July 2008, stated: "whilst it may have always been the intention of the company to integrate the surplus rock into the local aggregate environment, it is evident that this intention was insufficiently highlighted, or included in the Environmental Statement, PAC Report, or indeed the planning approval under K/1992/0713/F". The letter also advised, that OML should "contact the Department to discuss the submission of a retrospective planning application should the company wish to regularise this breach of planning control". This contradicts the view expressed by Matthew McCriskin at paragraph 12 of his affidavit, that this breach had been remedied through cessation.

25. The Department had made its position regarding the so called surplus rock removal unambiguously clear, they clearly did not consider that this activity benefited from planning permission, and believed it needed to be assessed as part of the Environmental Statement, however in defiance of their instruction, Omagh Minerals continued removing up to 145 truckloads per day, the Department allowed them to continue doing so unabated for a further seven months.

26. A stop notice EN/2009/0270 was eventually issued by the Department on 30 June 2009. Point 3 of the notice reads “The matters which appear to constitute a breach of planning control: unauthorised removal of stone/rock being development carried out without the grant of planning permission required”, it then continues: “unauthorised removal of rock required under K/1992/0713 for restoration of the site, from lands at Cavanacaw, Omagh” .

27. A company announcement from 29 April 2009, shows that the unauthorised removal of waste rock from the mine, was undertaken not because of any "exceptional circumstances" afforded under case C-215/06 Commission v Ireland, but more taking advantage of lax planning control and for commercial gain. It reads: "The pit continued to be the main focus of management attention. During this period an arrangement was entered into with a local contractor for the removal of surplus rock, at no cost, with a view to assisting with pit development and reducing mining costs. The removal of this rock resulted in the mining focus, being on the removal of till to allow the expansion of the open pit and expose more ore" (TB file 1 page 907).

28. This kind of activity is also constrained by National case law, *(Padden) v. Maidstone Borough Council,* which permits regularisation only in exceptional circumstances, and where no unfair advantage has been gained by the operator from failing to comply with the relevant Directives and national regulation.

29. Padden at Paragraph 60 states: "The Claimant thus submits that retrospective permission for EIA development should only be granted firstly in exceptional circumstances, and secondly if the developer does not obtain any improper advantage from the pre-emptive development.

30. The respondent implies at paragraph 56 of their skeleton, that the entire development has been subject to EIA either under the 1992 application, or the currently impugned application. It is not the case at Cavanacaw that a few unauthorised modifications to the original approval have taken place; having studied this application extensively, I have struggled to identify any substantial development carried out in accordance with the original planning permission, and assessed by the 1992 environmental statement. Assessing it after the event does not satisfy the requirements of the EIA Directive. These multiple modifications which took place should also have been considered cumulatively with the proposed development, see *Abraham v Others paragraphs 27/ 42 / 43 and 44,* as well as Baker v Bath, in particular *paragraphs 42/ 45 and 46.* The many unknown environmental impacts of these unregulated activities, some of them dating back almost 20 years, as already stated, clearly cannot be assessed cumulatively with what has now been approved, particularly as many of them are unknown.

31. Mr Hamilton did state that, “to my knowledge the Department was not aware of the alleged removal of 100 tons of mineralised ore in 1998.

32. In 2008, Planning officers who attempted to take a number of readings in relation to the dimensions of the open pit, along with the height of the stockpile, were unsuccessful as the equipment available to the officers was not suitable, as a consequence of the scale of the site.

33. This was confirmed by the Ombudsman at chapter 29 of his 2012 report. And Stephen Hamilton in his affidavit at paragraph 262 also stated that: the Department had until now been working on the premise, that the 2005 detailed design drawings were the appropriate authority, and had surveyed against same, in other words since 2005, the Department has been surveying and enforcing against the wrong drawings, as the only approved drawings for the site until last year were from 1995.

34. Clearly the same Department agrees with me: Former Environment Minister Mark Durkan, MLA, advised by Mr Hamilton’s department regarding the Cleggan quarry at Belcoo, issued a Ministerial statement citing: *“I believe there is insufficient information to establish, what environmental impacts may have already arisen as a result of these unauthorised activities. Therefore, it is not possible to assess the environmental impact of the drilling, cumulatively with other unknown environmental impacts of unregulated activity”.* (TB File 1 page 908) Here the Minister and Mr Hamilton’s Department are adopting the position that for the purpose of EIA, there is a lawful requirement to consider, cumulatively, past environmental effects from associated unauthorised development, along with those likely effects from any proposed development. However, in relation to the impugned planning permission, they have chosen to ignore their own policy.

35. In respect of how excess waste rock should have been dealt with, and with regard to acid rock issues at the site, condition 39G imposed in the original permission required, “an assessment of the potential for post-closure acid rock drainage from the site and control of such drainage if it exists”. (TB File 1 page 393)

36. Further additional information was provided to Planning Service in the course of the original planning application. In particular, a letter of 26 March 1993, from the Department which at page 6, asked Omagh Minerals where the excess material would go, in view of the fact that the excavated material would increase in bulk. The response at page 9, reiterates what was said in the Environmental Statement, namely, that "accommodating surplus rock would increase surface levels in the affected areas by 1-2 metres," and that, "The basis of the proposal, in terms of dealing with excess material, is that two areas aggregating some 250,000 square metres, over and in the vicinity of the Kearney excavation, will be built up to an average depth of between one and two metres above existing levels, with recompacted material" (TB File 1 page 409).

37. As we now know, much of the rock never made it to these locations, the company either sold it as road building aggregate, or located it elsewhere on site. The two areas referred to, cover an area about the size of 12 football fields in total, these areas remain largely empty and undeveloped to this day.

38. There was also an article 40 agreement entered into between Omagh Minerals Ltd and the Department, around the time of the grant of planning permission, which required that if net acid generation potential is identified, monitoring should continue for a period of thirty years after closure of the development. (TB File 1 page 413-422).

39. Sadly, if the unpredictable onset of acid rock drainage has commenced in the removed rock, then it is possibly now leaching into ground water somewhere in the vicinity of Ballygawley and Auchnacloy, where myself and others witnessed it being deposited.

40. What we are now left with at the site is a waste rock stockpile located to the south west of the processing plant, instead of to the north of it, a stockpile which will form an integral part of the underground mine going forward. Condition 22 of impugned approval actually requires this stockpile to be retained in that location.

41. The impugned approval therefore grants retrospective planning permission for the retained stockpile. This in my opinion amounts to more regularisation of unauthorised development.

42. The potential environmental impacts of this unlawful activity remain unknown and have never been assessed, neither at the mine site, nor at the disposal destinations, the latter perhaps being particularly significant if they are located close to water courses connected to Natura 2000 sites. Nor have the environmental effects of the unauthorised removal of this vast quantity of material, been considered or plainly understood, cumulatively, with what has now been approved under the impugned 2015 permission. The Department has simply negated this requirement which it previously deemed necessary on 9 July 2008 for the purpose of EIA.

ISSUES RELATING TO TAILINGS DAM AND SITE LAYOUT

43. I have already made reference to changes made to the tailings management facility, which I believe represented unauthorised EIA Development, claims by Mr Hamilton in his letter to me of 12 March 2014, (TB file 1 page 902) that changes to the approved tailings dam were permitted pursuant to Condition 10 of the original approval are, I believe, incorrect. (TB file 1 page 388)

44. Condition 10 states that: "*The tailings dam shall be constructed generally in accordance with details shown in cross sections depicted in Figure B8 of the environmental statement"* and also that *"The completed design for the dam structure and impoundment area shall be submitted to the department for approval prior to construction".*

45. I have been informed that in 2005, the Notice Party submitted drawings to the Respondent depicting a whole new concept of tailings management system, to replace the approved tailings dam. In my opinion these were not "generally in accordance" with what was previously approved, nor were they "the completed design," nor were they "submitted prior to construction," all three of which were required by Condition 10.

46. These 2005 drawings proposed an entirely new tailings system of 8 individual Paste Cells, an arrangement about twice the size of the previously approved tailings dam. Just three of these cells, as we now know, would have had sufficient capacity to service the open cast project. The remaining five were designed to service the future underground mine extension, which had not been the subject of any planning application, permission, or environmental assessments at that point in time. These 2005 drawings also included plans for a comprehensive redesign of the site, including as described earlier, settlement ponds and relocated stockpiles, all of which, the Notice Party is claiming were approved by the Department in October 2005, pursuant to condition 10, but I disagree.

47. In my opinion, not by any stretch of the imagination, could these proposals/drawings be described as “generally in accordance” with the previously approved single *unit* tailings dam, there were after all eight of them.

48. Furthermore, the SRK Consulting Report from June 2007, exhibited by Stephen Hamilton, (SH33 Page 1745) confirms that the completed design details for the tailings facility were not submitted to the Department for approval “prior to construction”, they were in fact compiled later during paste cell construction in 2006, it reads: “ In 2006 SRK provided a review of the proposed tailings design, it goes on, SRK were commissioned to do the work in October 2006, when construction work had started on site, It continues, Omagh Minerals requested SRK to prepare the relevant drawings together with specifications for the materials and the construction. SRK understood that this comprised modifications to the construction drawings, and that no design work was required in terms of dimensions and infrastructure.

49. However, during initial review of the previous work, SRK established that the previous designs were of a preliminary nature, and that final designs were not prepared. SRK were therefore requested to prepare final designs. The design work and inspection work had to go hand in hand with the construction, and existing work was accommodated in the design where possible”.

50. At section 3.2, on page 1747 it reads: “A documented design is required to accord with the terms of the planning consent”, and the paragraph concludes, “ordinarily the fully documented design would be produced prior to any construction activities”. So on both counts the completed design details did not comply with Condition 10.

51. It should also be noted that in actual fact, both the Respondent and the Notice party have confirmed they have no record of the completed design details being submitted to the Department at all until this year. So much for compliance with condition 10.

52. Neither the Notice Party nor the Respondent has been able to provide any stamped approved drawings, i.e. planning permission for the changes, as no new planning application was ever submitted to make these changes. This was in defiance of (Informative 02) of the original approval which states that: “The applicant should note that the planning permission hereby granted, cannot be altered except by way of a further planning application”. I am aware that Informatives are not binding on a planning permission, but it nonetheless sets out the Department’s thinking at the time, which it is now choosing to ignore by claiming that these significant changes were made pursuant to Condition 10. In contrast the Department has since been requiring compliance with Informative 02, by requiring new planning applications, ensuring public consultation of course, for relatively minor modifications at the site, such as the retainment of a shed, revision of an internal haul road, boreholes, to name but a few, all of which have now been approved. (See Rejoinder Affidavit Paragraph 12)

53. A new application for the very substantial site redesign and tailings system enlargement should have been submitted, and a new environmental assessment of the project undertaken. Not doing so circumvented the need for a new EIA and for the first time, compliance with the Habitats Regulations. Furthermore, this denied me, as a member of the public, my right to participate in the environmental and planning decision making process, a right enshrined in both the 6th paragraph and Article 6(2) of Directive 85/337/EEC, (this is the original EIA Directive which would have been in effect at 2005).

54. The substantial changes made and supposedly approved in 2005, were completely non compliant with Condition 02 of the original approval, which requires that, “The development shall be carried out in accordance with the drawings and details bearing the Department’s drawing no K/92/0713 01-09” which it clearly wasn’t.

55. At Paragraph 261 of his affidavit Mr Hamilton informs us that: “Discussions with Gavin Harris (General Manager OML) on Wednesday 18th May 2016, alluded to OML being unaware or unsure if the drawings submitted in October 2005, constituting the final design, were approved, as they had not received a

stamped approved version". This statement is further evidence that the Department presided over these changes to the tailings dam without the granting of planning permission, or assessment of likely environmental effects, or public consultation with people who may be concerned by the project. (This is also a quote from the 6th paragraph of EIA Directive 85/337/EEC).It is clear that the Notice Party proceeded with the project without ever having received approved drawings and planning permission.

56. At paragraph 25 of the Ombudsman's 2012 report into enforcement failings at the mine, he confirmed that: "It is clear from the evidence in this case, and the detail given in the CE's response, that the layout of the site differs considerably from that of the approved drawings. The operator of the mine changed the layout of the site without the prior approval of PS"

57. At that time the Department was given an opportunity to challenge the Ombudsman's findings but did not do so.

58. **In my opinion condition 10 did not permit:**

(a)The comprehensive redesigning of the site which took place involving the relocation of waste rock and overburden stockpiles each about the size of six football fields.

(b)The construction of an eight cell tailings system at least twice the size of the approved single unit tailings dam. Paste Cells 1, 2 and 3 were constructed around 2006/7 and now contain tailings from the opencast mine project. A further paste cell 7 was constructed between 2011 and 2012 in anticipation of the first tailings from underground mining. An aerial photo taken just weeks ago, shows cell 7 empty, and as already stated, awaiting tailings from the underground mine.

59. All four of these paste cells as well as the retained stockpiles and lagoons were eventually granted planning permission by the impugned approval in July 2015, which in my opinion amounts to regularisation of unlawful EIA development.

60. The introduction of section 261A into the Planning and Development Act 2000, in the Republic of Ireland on 26 July 2010, in response to ruling *C-215/06 Commission v. Ireland*), effectively removed the ability of those who choose to breach the EIA Directive, to ever gain retrospective permission for unauthorised EIA development, other than in exceptional circumstances. This European ruling is now reinforced by national case law *(Padden) v. Maidstone Borough Council*, which also permits regularisation only in exceptional circumstances, and where no unfair advantage has been gained by the operator from failing to comply with the relevant Directives and national regulation.

ISSUES IN RELATION TO THE WASTE MANAGEMENT PLAN

61. My second ground for challenge in my order 53 statement relates to the Waste Management Plan.

62. The Department illegally failed to retain its discretion in relation to its duties as a competent authority under Article 6 of Council Directive 92/43 EEC (1) of 21 May 1992 and EIA Directive 2011/92/EU during the processing of this application in that it allowed private contractors, commissioned by Omagh Minerals, to analyse and determine the classification of the waste rock with regard to its potential to harm the environment, and that the Department, in acceptance of this information at face value, failed in its duty under inter alia Article 43 of The Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995. A competent authority is a legally delegated or invested authority with capacity, or power to perform designated functions, these are functions it failed to carry out.

63. The Department also illegally failed to retain its discretion in relation to its duties as a competent authority, under the Management of Waste from Extractive Industries Regulations (Northern Ireland) 2010, which transposes EC Directive 2006/21/EC (Management of Waste from Extractive Industries**),** better known as the Mining Waste Directive, by approving an Annex J Waste Management Plan for inert waste for the site.

64. The Department also failed to comply with the actual regulations in that it accepted a Mine Waste Management Plan compiled by Omagh Minerals. The Mining Waste Directive 2006/21/EC at Paragraph 25 states quite specifically that the plan should be, and I Quote, "prepared pursuant to Article 5 and required by the Article 7 permit, by a suitably qualified and independent third party" at Cavanacaw the waste categorisation was carried out by people in the employ of Omagh Minerals. The Department clearly breached the Directive.

65. With regard to the impugned permission, the Department has failed in its statutory duty as the Competent Authority, to correctly categorise the onsite waste rock with regard to its potential acidity, or acid generation potential as is required by the Mining Waste Directive 2006/21/EC, which states:(Preamble 13). (BA tab 12) “Waste from extractive industries should be characterised with respect to its composition in order to ensure that, as far as possible, such waste reacts only in predictable ways”.

66. The correct classification of the rock has a major impact on the requirements of the Waste Management Plan, for example the rock’s classification as inert led to the approval of an Annex J Waste Management Plan for inert waste at the site, the alternative being a Category A Plan. The approval of the Annex J plan effectively removed the 20 year old requirement of the public enquiry that the waste rock be retained on site to permit the monitoring and containment of acid rock drainage should it occur. It also meant the requirement for a financial guarantee, from the developer to cover future remediation work, as required by Article 14 of the Mining Waste Directive 2006/21/EC, being waived.

67. There was no independent assessment of the analyses of the acid generating potential of the rock which were provided by the Notice Party, the first of which was carried out by Knight Pieshold in the 1990’s, but the most recent of which was carried out by SGS in 2012. However SGS were careful to issue a disclaimer which read: “the information in the SGS Reports, reflects the company’s findings at the time of its intervention only, and within the limits of the client’s instructions”, My interpretation of this in layman’s terms, is that SGS are prepared to stand over the samples they tested, but are washing their hands of any accountability for the millions of tons of rock still to be mined, thereby rendering their findings valueless in my view. This possibly explains why both the consultants and NIEA, have failed to confirm the suitability of the Cavanacaw waste rock for reuse as road building aggregate, avoiding accountability by refusing to do so pre-approval. (TB file 1page 531-554)

68. Concerns were considered in the Habitats Regulations Assessment regarding acid rock deposition, where aggregate is exported from the site and used for road construction adjacent to rivers.

69. In a study sent to Roads Minister Danny Kennedy, Omagh Minerals made clear their intention to supply their potentially contaminated waste rock from the Cavanacaw mine, as aggregate for the construction of the soon to be built A5 road scheme, which runs right through the River Foyle S.A.C. Potential acidic leaching from the rock would have the potential to impact upon the SAC. (TB file 1 page 580)

Silke Hartman

70. Senior Scientific Officer Silke Hartman, in her affidavit at paragraphs 33-35, also discusses in some detail the acid generating potential of the rock. She relies on scientific literature which is exhibited at Tab 18 page 292-294, and which she summarises at Paragraph 34 of her affidavit: She talks about the neutralising potential of the rock, the NP, and also the acid generation potential, the AP.

71. She informs us that, "if the NP:AP ratio is less than 1, the geological material commonly produce acidic drainage, ratios between 1 and 2 may produce either acidic or neutral drainage, and ratios greater than 2 should produce alkaline water ie no acidic drainage". You have to ask yourself, what kind of scientific evidence is this, "commonly produce, may produce, and "should produce, its hardly going to satisfy the precautionary principal of Article 6.3 I reckon.

72. This statement is actually a direct quotation from the scientific literature she has exhibited. She has however conveniently stopped her quotation at this point. The real scientific evidence confirming the unpredictability of acid generation analysis is to be found in the very next sentence, it states:

"However, this index does not always accurately predict the resultant acid generation from a mine. Of 56 mines evaluated 11% did not conform to the expected results based on NP: AP ratios, including 4 sites with ratios greater than 2: these sites eventually produced acidic drainage". Far from corroborating what Ms Hartman claims in her affidavit, this document, if read in its entirety, highlights the fact that predicting acid generation is an area of uncertainty and unpredictability.

73. The document goes on to tell us:

- "Mineralogical variation between each geologic domain, causes dissimilar reactivity to weathering conditions, and leads to laboratory variability in assessment.

- Recurrence of inaccurate interpretations between laboratory and field data, has caused investigators to reexamine the adequacy of the analytical methods

- Because of the challenges inherent in interpreting laboratory data and predictive models, forecasting future water quality impacts from AMD should not be considered routine and robust, rather they should be considered an area of uncertainty and ongoing research. "

74. M/Lord this is the document Silke Hartman chose to quote from and for the life of me I don't know why, because it absolutely concurs with what the world wide scientific community has been telling us for years, i.e. the onset of acid rock drainage from waste rock in locations where sulphide ore is being mined is simply unpredictable, which is why in my opinion it should never be used as road building aggregate.

75. Her contribution to this review in my opinion does absolutely nothing to underpin the inert status bestowed upon the waste rock by the Department, when they approved an Annex J Waste Management Plan for inert waste at the site. On the contrary, I believe she has just confirmed for us, the uncertainty and unpredictability of acid rock generation analysis. The Competent Authority, NIEA, actually confirmed, that due to lack of expertise, they have no way to query the Notice Party's acid generation findings, and are prepared to take their findings at face value, while ignoring the precautionary requirements of article 6 (3) of the Habitats Regulations.

76. I remain of the opinion that the Department has failed in its duty as a Competent Authority during the processing of this application, in that it allowed these private contractors in the employ of Omagh Minerals, to analyse and determine the classification of the waste rock with regard to its potential to harm the environment, and that the Department in acceptance of this information at face value, failed in its duty under inter alia: the Conservation (Natural Habitats,) Regulations (Northern Ireland) 1995. Additionally the Department failed to comply with EIA Directive 2014/52/EU Article 5, 3,b which states that "*the competent authority shall ensure that it has, or has access as necessary to, sufficient expertise to examine the environmental impact assessment report".*

    This they failed to do.

77. This is further reinforced by Case C-50/09 Commission v Ireland which requires that and I quote: "*the competent environmental authority must thus undertake both an investigation, and an analysis to reach as complete an assessment as possible, of the direct and indirect effects of the project concerned".*

MY THIRD GROUND FOR CHALLENGE RELATES TO THE APPROVAL OF THE INACCURATE DRAWINGS.

78. 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 as the precautionary requirements of the (EIA Directive 2011/92/EU) and the (Habitats Directive 92/43/EEC).

    79. The underground mine application P1 form, (TB SH file 1 Tab 3 page 293) submitted in July 2012, confirmed the area of the site to be 60 hectares, the size of the mine site had remained unchanged since 1992. The Notice Party had also provided an Environmental Statement which had assessed the 60 hectare site. However the accompanying drawings 02 and 19, (and indeed all of the site drawings) outlined an area of 81 hectares within the red line. The case officer Niall Marshall was now in possession of a planning application P1 form for 60 hectares, accompanied by drawings for 81 hectares. I do not believe for a second that he somehow didn't notice this, and that it was some kind of oversight, even within the Environmental Statement there is an assortment of drawings, some showing a 60 hectare site and some showing an 81 hectare site. (TB file 1 page 594-599).

    80. According to Stephen Hamilton's affidavit at paragraph 31, on the 30 October 2012, (TB SH file 1 TAB 10 page 1559) Niall Marshal telephoned Strategic Planning to query eight separate matters relating to an amended P1 form and ES, but still never thought to mention the 81/ 60 hectare discrepancy.

    81. Are we really expected to believe he and his colleagues at NIEA spent the next three years processing an application and environmental statement for a 60 hectare site, along with drawings for an 81 hectare site, and nobody thought to question this? Even when I emailed Mr Marshall in 2014 complaining about it no action was taken. In total 3 P1 forms and two versions of the Environmental Statement were submitted in the first year without the

discrepancy having been rectified. In 2013 an Environmental Statement Addendum was submitted still claiming a 60Hectare site.

82. As we now know the extra 21 hectares was an area where the Notice Party were hopeful further resources would be discovered, as indeed they were with the discovery of the Kestrel vein.

83. In a company statement from 25 January 2016, just six months after the impugned approval, the Notice Party announced that: “a new vein (Kestrel) has been discovered, located approximately 70 meters west of the Joshua vein”, 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 freehold land ownership”, in other words under the extra 21 hectares. (TB file 1page 606)

84. Omagh Minerals had already made their position clear on the matter, on page 5 Paragraph 4 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”.

85. At Paragraph 290 of his affidavit Mr Hamilton confirms that the disputed 21ha had not been assessed by the applicant for the purposes of the ecology assessment, the flora and fauna survey clearly shows that only the 60ha site was assessed. This is perhaps best explained by the Galantas announcement in early 2012, of the purchase of the 21 hectares of contiguous land, (Tb file1page914) in other words they didn’t even own this land when the ecology survey got underway in mid 2011.

- Section 4.1 of the Environmental Statement dealing with air quality and dust also confirms at 4.1.1 the site as 60 hectares.
- Section 4.2 which deals with cultural heritage at appendix fig 4.2.1showing the site as 60 Hectares. (Sh Page 632)
- Section 4.3 flora and fauna contains multiple references to a 60 hectare site.

86. Mr Hamilton will also be aware that no scientific analysis of the potential acidity of the rock in this area has been undertaken either as all of the samples tested by SGS in 2012, and also Knight Pieshold in the 1990’s, came

from the 60ha area of the original open cast mine site, nor has any consideration been given to the effects of unassessed underground mining on among other things the protected Blanket Bog covering it (protected under Annex 1 of the Habitats directive).

87. The Kestrel vein actually lies beneath the extra unassessed 21 hectares stamped "Granted" on the inaccurate approved drawings. Among other things in the absence of any intervention, we are now faced with the prospect of potentially contaminated waste rock from this recently discovered and unassessed Kestrel vein, ending up being used as aggregate in the building of the A5 Western Transport Corridor adjacent to the River Foyle SAC.

88. In the environmental statement, chapter 2.1 it states, "The development site is located in the countryside 5km south-west of Omagh town. The site is approximately 60 hectares in size". (TB SH file 2 page 311) A 60 hectare location map is located provided in figure 2.1. (TB SH file 2 Page 570)

89. The Director of Strategic Planning Division, Simon Kirk's memo to Mary Bunting and the Minister on 27 March 2015 (SH1 Tab 28 page 1640) confirms a 60 hectare site. Case Officer Niall Marshall's final development management report, compiled on 10th June 2015 shortly before the granting of planning permission, was still confirming at 1.1: "the proposed mine will be within the existing mine site area" (i.e. the 1995 approved 60 hectare open cast mine site) at 2.0 he then goes on to once again confirm that : "the site covers an area of approximately 60 hectares" (SH1 Tab 30 Page 1647).

90. The Department approved drawings which show the application boundary encompassing an area of approximately 81 hectares, for an application which on the P1 form and everywhere else clearly states the size of the site to be 60 hectares.

91. This represents a failure to comply with EIA Directive 2011/92/EU Article 5(3), which states: *The information to be provided by the developer in accordance with paragraph 1 shall include at least:*
A description of the project comprising information on the site, design and size of the project.

92. It is also a breach of the precautionary requirements of the Habitats Directive 92/43/EEC which requires the entire site to be assessed.

93. These drawings were subsequently approved in July 2015 effectively granting planning permission to an extra 21 hectares of protected Blanket Bog for which planning permission had never been applied, nor was it assessed under the EIA and Habitats Regulations.

Court adjourned at this point and the remainder was rewritten

THE POST CONSENT PLANNING CONDITION

94. A further ground for challenge as per my order 53 statement is**:** 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).

95. After much debate and the instigation of these legal proceedings, the Department, it seems, is no longer convinced by the applicant's inert rock claims and findings. On 7 December 2015, four months after the impugned consent had been granted, and after I had already initiated these legal proceedings, a final version of the Cavanacaw Monitoring Plan for Environmental Waters, as was required by condition 5 of the impugned approval, had been submitted to the Department and posted on the public planning portal (TB file 1 607-625) However an additional paragraph had been inserted under section 4.2 "Monitoring of deep ground water", and for the first time, there was a requirement imposed within it, for acid generation testing of the rock every 25 vertical meters as the mine progressed. (Page 617) This key paragraph was not part of the original version, included in the environmental statement addendum of November 2013, which was used for appropriate assessment. (TB file 1 page 626-641).

96. This previously undisclosed requirement for further acidic testing, throughout the life of the mine, as a post consent planning condition, had been quietly slipped into the approval when most of the scrutiny of the application had waned, further proof if it was needed that the competent authority is not at all convinced of the inert status of the rock, now confirmed in the Waste

Management Plan, which they approved. *Waddenzee of course requires that the competent authority must be convinced*.

97. This entirely new proposal for acid generation testing of the rock, did not form part of the initial design, NIEA should have asked the applicant to include and assess it, as part of an amendment to the original application and environmental statement, but failed to do so.

98. This amounts to a circumvention of the Department's statutory duty as competent authority, as post consent there is no legal requirement for them to assess any acid generation analysis, assuming that is they had the expertise to do so. It is also a subversion of the appropriate assessment process, i.e. taking account of the appropriate assessment, of the implications of the site concerned, in the light of the site's conservation objectives,(C-127/02, the Waddenzee case).

99. It also represents a failure to comply with the precautionary requirements of the (EIA Directive 2011/92/EU) and the (Habitats Directive 92/43/EEC). The public and myself, as someone raising concerns with the proposal should have been consulted.

100. Sadly, if the mining company ever did identify acid rock drainage at depth, and were prepared to admit it, it may well be too late as thousands of tonnes of their acid producing rock, could already have been shipped down to the A5 road scheme on the banks of the River Foyle SAC.

ATKINS

101. Further evidence of the threat to the river Foyle SAC from acid rock drainage, came from environmental experts Atkins who were commissioned by NIEA. Atkins raised serious concerns regarding the threat from metal sulphides left in situ, i.e. at the bottom of the mine.

102. The affidavits of Silke Hartman and Neil McAllister of NIEA, both make reference to the existence of an amended technical note by independent environmental experts Atkins (Atkins 2), [SiH1, Tab 3a] and to the fact that this

report was forwarded to Niall Marshall on 6 June 2013. Mr Stephen Hamilton's affidavit however makes no mention of Atkins 2 and this document has never been uploaded to the planning portal. This is in sharp contrast to the handling of Atkins 1, when at a meeting between Anthony McKay, Niall Marshall and Wendy McKinley, Mr Hamilton's affidavit at paragraph 73 states "it was agreed that there was a need for the shortcomings highlighted by the report to be published online (Planning Portal)".

103. Atkins 1, which highlighted shortcomings in the environmental statement, with respect to chapter 4.5 geology hydrology and hydrogeology, (See Tab 17 pages 1586 - 1594 of Stephen Hamilton's affidavit) required the submission of further environmental information from Omagh Minerals. This information took the form of a response from water and soil specialists ESI, Tab1 SiH,01 Pages 1 –140 which quoted the relevant shortcomings highlighted by Atkins 1, and dealt with each one in turn. The ESI response was forwarded to Atkins for comment, according to Silke Hartmans Affidavit at paragraph 12, Atkins then issued the second report, Atkins 2.

104. I have been unable to find any evidence that shortcomings highlighted in Atkins 2 were addressed by Omagh Minerals, NIEA, or indeed anyone.

Atkins 2 states "The applicant has stated in their response that metal sulphides will be left in situ, that have the potential to generate acid rock drainage". (Page 147 Silke Hartman Tab 3a page 147).

105. In reference to hydrological flowpaths within the mine, Atkins 2 states: "The result of such flowpaths is the potential for long term acid rock drainage at surface, as seen in many abandoned mines the world over" [SiH1 TAB 3 page 148].

106. Scientific officer Keith Finegan in his affidavit at Paragraph 14, confirmed the hydrological connection to the SAC and stated: “Therefore impacts to surface water quality have the potential to affect the SAC”. Given this evidence how is it possible that NIEA could conclude in their HRA, that there would be no impact on the SAC, beyond all reasonable scientific doubt that is?

107. Had Atkins 2 and Keith Finegan’s evidence been made public, I believe it extremely unlikely that the Department could have approved the application and it may well have avoided the need for this Judicial Review, but instead of publicising it they suppressed it.

108. The “Atkins 2” document had been in the possession of Case Officer Niall Marshall since 2013, but was never uploaded to the planning portal or advertised publicly, nor was it provided to me in advance of the leave hearings, when “Atkins 1” was. Indeed if I recall correctly, at the first leave hearing on 1st February 2016, Your Lordship specifically queried whether Atkins had been reconsulted after the submission of further environmental information. The Respondent made no mention of the existence of a second Atkins report on that occasion either. This key document was withheld from the planning portal and was not provided to me, or the general public, and I believe it was withheld from the court also. This behaviour must surely fail to comply with the intent of Directive 2011/92/EU and the principles of effective and guaranteed public participation, as set out in the preamble, including 16, 18 and 19, and also including Articles 2, 3 and 6.

109. Atkins were the only independent environmental experts commissioned by NIEA to carry out independent environmental assessments. Definitive expert evidence was contained within the Atkins 2 document, that acid mine drainage would indeed be present in the mine at surface, and therefore did have the potential to threaten protected Atlantic Salmon in the Creevan burn which drains the Cavanacaw site, as well as in the River Foyle SAC further downstream.

110. This expert evidence provided by Atkins 2, was not provided to the public or as already stated, the court at the leave stage, it was I believe being withheld by officials and sadly it has required this legal process to extract it from them in their affidavits.

111. NIEA also contributed to keeping Atkins 2 under wraps, as in the eleven consultation responses they made after having received the report, not once did they mention it.

112. The Court of Justice of the European Union has made it abundantly clear that when granting development consent, "*there can be no lacunae*", (2013 Sweetman-v-An Bord Pleanala ruling), *"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."*

113. The European Court of Justice Case C-127/02, (the Waddenzee case), also ruled that: "*A plan or project may be authorised only if a competent authority has made certain that the plan or project will not adversely affect the integrity of the site".* The judgment also said that competent national authorities must be *"convinced"* that there will not be an adverse effect and where doubt remains as to the absence of adverse effects, the plan or project must not be authorised. How could the authorities possibly have been convinced in this case?

ISSUES IN RELATION TO HAZARDOUS SULPHIDE WASTE

114. When making the underground mine application, Omagh Minerals stated on both the P1 application form and the Waste Management Plan that no hazardous substances or waste would be stored on site. An Annex J Waste Management Plan for inert waste at the site, was duly approved by the Department, and planning permission was subsequently granted. Due to the confirmed inert nature of the waste being stored on site, no financial guarantee was required under the Mining Waste Directive 2006/21/EC.

However, at Paragraph 20 in his affidavit, Mr Gavin Harris for the Notice Party states, " the sulphides present in the ore are required to be removed from the site pursuant to the notice party's discharge consent issued by NIEA. This refers to a discharge consent 20501/90, reviewed in 2011, relating to the removal of sulphides from the site. At condition 5, it reads: "The area used for the temporary storage of leach residue in sealed drums on the site shall be in a bunded area." (hazardous waste)

115. On the 26 July 2016 I emailed the Departmental Solicitor, asking for details of the storage of sulphide waste / leach residue at this bunded area or indeed any other on site location. On 28th August emailed them again asking for all information/correspondence held by the Department/NIEA in respect of discharge consent 20501/90, specifically Condition 5, Leach Residue. To date very little information has been provided.

116. On Thursday last week I did however, receive an affidavit from Keith Finegan, which confirmed what I had feared. He confirmed that "The discharge consent includes an informative which requires Omagh Minerals Ltd, to notify NIEA six months in advance, if it is intended to process ore using a Cyanide Destruct Reactor. It is this process which would produce sulphide waste residue".

117. Mr Finegan had just confirmed that the option of using cyanide and producing hazardous sulphide waste, included in the original 1995 open cast permission, was still open to Omagh Minerals. The impugned approval had extended the duration of the original 1995 open cast permission until 2030. Omagh Minerals are now operating with 2 live planning approvals at the site. The impugned approval had avoided the need for a financial guarantee, by virtue of there being no hazardous waste stored on site, and the original approval from 1995, permits just that.

118. Furthermore, I believe the Department was wrong to extend the original 1995 approval, as this approval did not comply with Directive 2006/21/EC.

119. For all of the reasons I have mentioned I believe this approval should be quashed

William Donnelly