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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **15/10/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY DERRY CITY AND STRABANE DISTRICT COUNCIL FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE GRANT BY THE DEPARTMENT FOR THE ECONOMY ON 8 MAY 2019 OF MINERAL PROSPECTING LICENCES TO FLINTRIDGE RESOURCES LIMITED AND DALRADIAN GOLD LIMITED UNDER SECTION 11 OF THE MINERAL DEVELOPMENT ACT (NORTHERN IRELAND) 1969

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Mr Jones KC with Mr Honey KC (instructed by TLT NI LLP Solicitors) for the Applicant
Mr McGleenan KC with Mr McAteer (instructed by the Departmental Solicitor's Office) for the Respondent

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McBRIDE J

Application

[1] The applicant, Derry City and Strabane District Council ("the Council") challenges the grant of three mineral prospecting licences ("MPLs") under section 11 of the Mineral Development Act (Northern Ireland) 1969 ("the 1969 Act") by the Department for the Economy ("the Department") on 8 May 2019. One MPL was granted to Flintridge Resources Limited hereinafter referred to as "OM4" and two MPLs were granted to Dalradian Gold Limited, hereinafter referred to as "DG3" and "DG4".

The Parties

[2] The Council owns land in the area covered by each MPL. As part of its statutory remit it acts as a guardian of the environment within its area and has specific and general duties under a broad range of statutes including the Planning (Northern Ireland) Act 2011 and the Wildlife and Environment Act (Northern Ireland) 2011.

[3] Dalradian Gold Limited is a mineral exploration company. It has been exploring in Northern Ireland since 2010. It currently holds several MPLs namely DG1, DG2, DG5 and DG6. It is presently seeking planning permission to build a mine at Curraghinalt, Greencastle, County Tyrone.

[4] Flintridge Resources Limited is a mineral exploration company.

Nature of lands contained within MPLs

[5] The total area covered by the MPLs is approximately 742km sq and contains several Special Areas of Conservation ("SACs"), Special Protection Areas ("SPAs"), or "Natura sites" protected under the Habitats Directive 92/43/EEC and Areas of Special Scientific Interest ("ASSIs") protected under the Environment (Northern Ireland) Order 2002.

[6] DG3 and DG4 are both located in County Tyrone. DG3 is an area to the east of Strabane and Newtownstewart. DG4 is located within the Sperrin Mountains. OM4 covers an area to the south and west of Castlederg.

[7] Two Natura 2000 sites and eight ASSIs are wholly or partly coincident with the licence area covered by DG3.

[8] Three SACs and five ASSIs are wholly or partly coincident with the licence area covered by DG4.

[9] OM4 licence area includes three SACs and 11 ASSIs.

[10] The SACs include Banagher Glen, River Roe and tributaries, Moneygall Bog, Ferry Water Bog, River Foyle and tributaries and Killowenkillow River. The ASSIs include Banagher Glen, River Faughan and tributaries, Lough Corr, Killeter Forest and bogs and lakes, Drummahan, Croagh Bog, Mullaghcarn, Grange Wood, McKean's Moss, Lisnasharragh etc.

[11] The SACs and ASSIs have been designated to protect a wide variety of habitats and landscapes including breeding bird assemblage, Atlantic salmon, otter, blanket bogs, fens, purple moor grass, rush pastures, wet heath and oakwood.

Grounds of Challenge to MPLs

[12] The applicant Council challenges the grant of the MPLs on the following grounds:

(a) Inadequate consultation.
(b) Breach of Habitats Directive and Regulations.

(c) Error of law.

(d) Breach of statutory duties related to the environment.

(e) Taking into account immaterial considerations and failure to take into account material considerations.

(f) Failure to give adequate reasons.

(g) Acting ultra vires.

Relief Sought

[13] By notice of motion dated 15 April 2020 the Council seeks the following relief:

> "(a) An Order of Certiorari to bring up into this honourable court and quash the three prospecting licences granted on 8 May 2019 under section 11 of the Mineral Development Act (Northern Ireland) 1969, one to Flintridge Resources Limited (OM4) and two to Dalradian Gold Limited (DG3 and DG4) (the licences) and each of them; in the alternative, an order requiring the Department for the Economy to make available to the applicant and the public the work programmes in the licences in unredacted form.
>
> (b) A declaration that the licences and each of them are unlawful, ultra vires and of no force or effect.
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> (c) Such further or other relief as this honourable court shall make.
>
> (d) All necessary and consequential directions.
>
> (e) Costs."

Leave to apply for judicial review

[14] Leave to apply for judicial review was granted on 1 April 2022.

Representation

[15] The Council was represented by Mr Jones KC and Mr Honey KC of counsel. The Department was represented by Mr McGleenan KC and Mr McAteer of counsel. Written submissions were lodged by Mr Beattie KC and Ms Kylie KC on behalf of Dalradian Gold Limited. Flintridge Resources Limited took no part in the proceedings. Friends of the Earth, represented by Ms Gallagher of counsel lodged a written submission as an interested party dated 9 May 2023.

Factual background

[16] The court had the benefit of the following affidavits from the parties:

(a) affidavit of Karen Phillips on behalf of the Council lodged on 7 August 2019,
(b) affidavit of Jonathan Davies lodged 29 September 2020,
(c) affidavit of John Crowley lodged on 29 September 2020,
(d) affidavit of Sarah Mulholland lodged on 29 September 2020,
(e) second affidavit of Sarah Mulholland lodged on 31 August 2020,
(f) second affidavit of Jonathon Davies lodged on 7 March 2023,
(g) second affidavit of John Crowley on 7 March 2023,
(h) third affidavit of Jonathan Davies on 16 November 2023,
(i) first affidavit of Mark Patton lodged on 10 August 2020,
(j) first affidavit of Mark Wilson lodged on 8 September 2020,
(k) second affidavit of Mark Patton lodged on 8 December 2022,
(l) second affidavit of Mark Wilson lodged on 10 February 2022,
(m) third affidavit of Mark Wilson lodged on 28 September 2023.

In addition, the following affidavits were lodged by interested parties:-

(a) first affidavit of Brian Kelly dated 1 October 2020,
(b) first affidavit of Michael Gordon dated 23 September 2020,
(c) first affidavit of Karl Goodbun dated 3 August 2020,
(d) second affidavit of Karl Goodbun undated but made in 2023,
(e) second affidavit of Michael Gordon dated 30 January 2023,
(f) second affidavit of Brian Kelly dated 3 May 2023,
(g) affidavit of James Orr dated 10 May 2023,
(h) affidavit of Simon Wood dated 10 May 2023,
(i) affidavit of Laura Neal dated 10 May 2023.

[17] I do not intend to rehearse in full the content of these affidavits but will refer only to the facts which are relevant to my consideration of the legal issues raised.

Statutory context

[18] The Minerals (Miscellaneous Provisions) Act (Northern Ireland) 1957 provides that any person proposing to undertake mineral prospecting is required to serve notice on the Department; keep a record of work undertaken and retain specimens for a specified period of time. Section 4 provides that the person undertaking such works

may serve notice in writing on the Department requesting it treat the records or any specimens taken as confidential and in those circumstances the Department shall not disclose the information or allow copies or specimens to be disclosed outside the Department without the consent of the person so requesting. Section 6 provides that any person who fails to comply with the obligations imposed by the statute shall be guilty of an offence.

The Minerals Development Act (Northern Ireland) 1969 – ("the 1969 Act")

[19] The 1969 Act provides for the grant of MPLs.

(a) The preamble states that this is an Act "to facilitate the discovery and working of minerals …"

(b) Section 1 vests all minerals in the Department.

(c) The key section is section 11 which is entitled "Prospecting – Power of Ministry to prospect or grant prospecting licences." It provides as follows:

> "(1) Where it appears to the Ministry (now the Department) that any mines and minerals vested in the Ministry may be situated in any land, the Ministry, for the purposes of searching for those mines and minerals, may, subject to any rights conferred upon any other person by any lease or licence granted by the Ministry and subject to subsections (3) and (4), -
>
> (a) subject to sections 47 and 58(3), enter upon the land and there do all such things as are necessary for, or reasonably incidental to, those purposes, and, without prejudice to the generality of the foregoing provisions, in particular make borings, sink pits, remove water from old workings and take and remove reasonable quantities of any such minerals for analysis, test, trial or experiment; or
>
> (b) grant to any person, in accordance with the succeeding provisions of this section and section 12, a licence (in this Act referred to as `a prospecting licence') authorising that person to do anything that the Ministry is

authorised to do by paragraph (a), subject to and in accordance with the provisions of this Act."

(d) In accordance with section 11(1)(a) the Department can, in its own right, engage in prospecting activities. Under section 11(1)(b) the Department can delegate this right to any person in accordance with the provisions of the section and section 12.

(e) Section 11(3) sets out the requirements for the Department to notify certain parties/bodies of its intention to grant an MPL. It provides:

> "(3) Before exercising with respect to any land the right conferred by paragraph (a) or the power conferred by paragraph (b) of subsection (1), the Ministry shall notify its intention to do so by publishing in two successive weeks in the Belfast Gazette and in one or more than one newspaper circulating in the locality where the land is situated a notice -
>
> (a) stating that the Ministry proposes to exercise the right or power in question;
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> (b) mentioning the land in relation to which the right or power is proposed to be exercised; and
>
> (c) naming a place or places (including at least one place in the locality) where maps identifying the land are available for inspection at all reasonable hours."

(f) Section 11(4) particularises the persons/bodies to be notified. It provides:

> "(4) Without prejudice to subsection (3), the Ministry, not less than one month before exercising the right or, as the case may be, the power mentioned in that subsection, shall serve notice of its intention to do so on—
>
> (a) every other government department;
>
> (b) every local authority within whose area the land, or any part of the land, in relation to which the right or power is proposed to be exercised is situated; and
>
> (c) every public body which, in the opinion of the Ministry, will be materially affected by any activity

likely to be carried on in the exercise of the right or in consequence of the exercise of the power."

(g) Section 11(5) sets out the requirement for consultation by the Department. It states:

> "(5) Where the Ministry publishes under subsection (3), or serves under subsection (4), a notice with respect to the proposed exercise of any right or power, before exercising that right or, as the case may be, that power it shall take into account any representations which are made to it -
>
> (a) by any person other than a person on whom such a notice was served, before the expiration of a period of one month from the date of the last such publication;
>
> (b) by the person on whom such a notice was served, before the expiration of a period of one month from the date of the service of the notice on him or such longer period as the Ministry may in any case permit in writing."

(h) Section 12 sets out conditions the Department may or shall require before granting a MPL. It states:

> "(1) Before granting a prospecting licence the Ministry may require the applicant to furnish evidence as to his character, financial standing or technical qualifications and to give such security as the Ministry may think fit for the fulfilment of his obligations under the licence.
>
> (2) A prospecting licence may be granted for such consideration, if any, as may be agreed upon between the Ministry and the applicant and shall be for such period and upon such other terms and conditions as may be specified in the licence.
>
> (3) Without prejudice to subsection (2), it shall be a condition of the granting of a prospecting licence that the applicant shall pay a reasonable sum towards the Ministry's costs in connection with the grant."

(i) Section 56 defines "minerals" and "mines" as follows:

"'Minerals' includes all mineral bearing and other substances (not being the soil at the surface of the ground and its vegetation or peat or water) naturally occurring in land, whether obtainable by underground or by surface working; but does not include petroleum…"

"'Mine' means an excavation or system of excavations, whether underground or on the surface, made for the purpose of, or in connection with, the getting of minerals (whether in their natural state or in solution or suspension) or products of minerals, and without prejudice to the generality of the foregoing provisions of this subsection includes any cubic space underground formerly occupied by minerals."

(j) Section 49 enables the Department to make regulations prescribing the application process for MPLs. It states:

"(1) The Ministry may make regulations prescribing -

(a) the manner in which applications may be made to the Ministry for prospecting licences or for grants of mineral rights (whether by way of sale, mining lease, mining licence or mining permission) or for mining facilities permits;

(b) the information required in support of any such application;

(c) the fees, if any, to be paid on any such application;

(d) the conditions to be complied with by applicants;

(e) the terms and conditions to be incorporated in any such licence, lease or permission or on which any such sale may be made;

(f) model clauses which may be incorporated (directly or by reference) in any such licence, lease or permission;

(g) such incidental or supplementary matters as are necessary or expedient."

(k) The Mineral Development (Applications, Fees and Model Clauses) Regulations (Northern Ireland) 1970 ("1970 Regulations") were made pursuant to section 49.

(l) Regulation 3 prescribes who can apply for an MPL. It states:

> "(1) Any person may apply in accordance with these Regulations for a prospecting licence or for a grant of mineral rights, by way of sale, mining lease, mining licence or mining permission."

(m) Regulation 4 prescribes that applications must be made in writing in the manner set out in Schedule 1 and the application must be accompanied by:

> (a) appropriate evidence in support of the facts stated in the application;
>
> (b) the appropriate fee;
>
> (c) two copies of the 6 inch ordnance survey map …
>
> (d) copies of audited accounts.

(n) Regulation 4(2) provides that the Department may request that the applicant furnish such further information or evidence as it requires.

(o) Regulation 4(4) provides for confidentiality in respect of information provided to the Department by applicants and states:

> "All information comprised in or furnished to the Ministry in connection with an application made under these Regulations shall be treated by the Ministry as confidential."

(p) Regulation 7 sets out the form and content of MPLs. It states:

> "(1) Every prospecting licence shall be in such form and may incorporate (directly or by reference) such of the model clauses in Schedule 2 with such modifications as the Ministry thinks fit."

(q) Schedule 1 sets out the application form. Part 1 of the application form requires the applicant to provide details of their name, the nature of the grant applied for whether it is a prospecting licence or other licence, nature of minerals for which application is being made, the period for which the grant is required, details of the

applicant's date and place of corporation, nature of business carried on etc, situation and approximate size of the area in respect of which the application is made, brief particulars of previous experience in mining and prospecting, name and qualifications of technical experts or advisors, amount of capital required for the operations, nature of security offered for fulfilment of the obligations.

(r) Schedule 2 sets out "model clauses" which may be incorporated into the MPL. These cover several matters including prospecting obligations, conduct of operations, limitations on workings etc.

The application process for DG3, DG4 and OM4.

[20] On 1 December 2016 Dalradian Gold Limited submitted two applications for MPLs. The applications related to 2 different areas namely the areas covered by DG3 and DG4.

[21] Each application was commenced using the proforma application form set out in Schedule 1 of the 1970 Regulations. Each application was accompanied by the necessary maps; three years company accounts and the requisite fee.

[22] In respect of DG3 the company completed each section of the proforma application form. Under the section headed "Previous experience in mineral prospecting" the applicant stated:-

> "The company is the current holder of MLPs DG1/14, DG2/14, DG3/11, DG4/11. DG5/16 and DG6/16. The company is conducting on-going geological, geophysical and geochemical surveys across all of these licence areas as well as a feasibility study and underground exploration of the Curraghinalt gold deposit. An interim licence report demonstrating the company's prospecting work in licence area DG3/11 is provided as a supporting document to this application".

Under the heading "Work programme" it stated:

"**Proposed exploration programme for the area**

The planned exploration programme over the initial two year period (as detailed below) intends to follow on from work completed during the 2011 to 2017 licence period. Work programmes for the following four years of the licence will be submitted to the Department for the

> Economy in due course based on the results of the first two year programme."

[23] The application then identified various locations where activities would be targeted and identified the activities to be undertaken during the first 2 years which included prospecting of streams and outcrops, baseline stream sediment survey, ground geophysics and follow-up anomalous soil or deep overburden anomalies with trenching and drilling.

[24] The licence application for DG4 was in similar format and the works programme again identified sites where various activities would be targeted.

[25] The OM4 licence application by Flintridge Resources Limited was lodged on 12 August 2016 (updated on 24 March 2017) and was in proforma format. Like the DG3 and DG4 applications it set out its "work programme" which included the following:-

> " We propose that the work programme for the first two year phase of a new licence will incorporate the following initiatives;
> Investigation of mineralisation potential proximal to the Laghy Fault ….a field recci will be carried out….
> Trenching targets may be determined within the Magherangeeragh area….
> A high resolution soil grid will be completed for the Garvetagh Hill Target area…"

OM4 therefore, like DG3 and DG4 applications identified the proposed activities and the sites where such activities would be targeted during the first two years of the licence.

[26] Following receipt of the applications the Department processed them in line with its understanding of the applicable legislation and in accordance with the provisions of the Department's Draft Internal Mineral and Petroleum Procedures Manual ("the manual").

[27] The Department undertook legal and financial due diligence checks to ensure that each applicant company had the required standing and financial resources to deliver the proposed programme of exploration.

[28] The applications and supporting maps were then passed to Geological Survey Northern Ireland ("GSNI") for a technical assessment of the proposed exploration programme and for an environmental overview.

[29] GSNI reviewed the papers and completed a "Mineral licence application review" in respect of each application on 1 February 2017. The mineral licence

application review considered the details of the application and details of any history the company had in respect of exploration and details of licences it had been granted previously, the location history including previous exploration, the proposed works programme, the geology of the area, the exploration model and expenditure. In respect of DG3 and DG4 licence applications GSNI concluded as follows:- "Adequate proposal to continue the prospecting of the licence area. Nothing in the report is contraindicative to awarding the licence. The company are well funded…." In respect of OM4 it concluded "The licence application is comprehensive ….the proposed work programme is appropriate…"

[30] After conducting the mineral licence review for each application GSNI then conducted an "environmental overview" which is contained within a document entitled "Habitats Screen and ASSI".

[31] Using GSNI computer software GSNI identified the SACs and ASSIs which fell within each licence area. This process identified that there were eight ASSIs and two SACs falling within the licence area for DG3. Five ASSIs and three SACs were identified in respect of licence application DG4. 11 ASSIs and three SACs were identified as falling within the licence area for OM4. The "Habitat screen and ASSI" then set out the reasons for designation of each ASSI and SAC; provided details of the exploration plan for the licence area and concluded with the GSNI's "assessment". The assessment in respect of DG3 was:

> "Field based activities mentioned in the proposed work programme are unlikely to have any significant effect on the SAC designation features. The company is well aware of environmental requirements for field activities. … Any drilling locations identified through exploration activity will be supplied to DfE for assessment and individual works will be assessed as appropriate … Drilling shall be employed in regional drill holes at an appropriate level to mitigate any risk of drain fluid contamination. Best practice borehole management will be employed to protect groundwater resources. The targets identified at Bessy Bell, Deer's Leap, Balix are outside designated areas. The Owenreagh Burn has no designation and does not drain to a designated watercourse."

In respect of DG4 its assessment was that:

> "Field based activities mentioned in the proposed work programme are unlikely to have any significant effect on the SAC designation features… Geochemistry will focus on existing target areas, none of which fall within the SAC designated areas … Extensive Redds are found in the southern regions of the licence area. Any activity in the

> reed streams will be time dependent on spawning activity."

In respect of OM4 the assessment was:

> "… the methods to be used are predominantly low impact … individual works may require assessment and screening. The Foyle and tributaries is the most important salmon river in Northern Ireland – any activity which may have a detrimental effect on the reason for its designation will require an appropriate assessment eg sediment sampling in tributaries. Any other works proposed will be screened and appropriately assessed as individual activities if required, whenever the company provides details."

As appears from the assessments GSNI identified some potential environmental impacts and mitigation and noted that certain works may require screening and assessment in the future.

[32] Mark Patton, Senior Scientific Officer with the Department averred that the purpose of the environmental overview was to inform the Department of any designated sites that may require further consideration under the Habitats Directive after the licence was awarded. Although the proposed activities were mapped against any designated sites no formal screening process was carried out at this initial stage. The environmental overview was retained on file for future reference and no further action was taken by the Department until the specific location and nature of exploration activity was identified and notified to the Department by the prospector. Accordingly, no habitats screening was carried out prior to the grant of each licence.

[33] After the environmental review was completed, GSNI officials met with Dalradian Gold Limited on 7 April 2017 and with Flintridge Resources Limited on 8 April 2019. The Department requested that Dalradian Gold Limited update their proposed work programme and provide a copy of their 2016 accounts and parent company guarantee.

[34] On 27 April Dalradian Gold Limited provided a supplementary note to the Department which detailed their exploration of base metals and identified the areas and activities to be undertaken at these sites.

[35] On 22 May 2017 the Department sought authority from the Minister to proceed to notify its intention to award the licences to the applicants.

Consultation process

[36] The consultation process in respect of DG3 and DG4 commenced on 16 June 2017 and extended to 15 September 2017. On 16 June 2017 and 19 June 2017

consultation letters in respect of DG3 and DG4 were sent to local councils including the applicant together with enclosures. The letter stated that the Department had received an application for a mineral prospecting licence and consideration was being given to granting a licence for 6 years. It requested that the council make any representations by 11 August and indicated that in accordance with section 11(4)(b) and (5)(b) of the 1969 Act the Department was required to take into account any representations made by the council before coming to a decision. The letter further requested that the council display the map showing the area over which the application had been made at its office until 11 August 2017. The three enclosures with the letter were a company brief on Dalradian Gold Limited; a copy of the press notice and a copy of the map.

[37] On 19 June 2017 the following documentation relating to DG3 and DG4 was placed on the Department's website:-

i. Company brief.

ii. Press notice.

[38] On 19 June 2017 press notices were placed in the Belfast Gazette and at least one other local paper for the required two-week period. The Press notice stated :-

> "In exercise of its powers under section 11 of the Mineral Development Act (NI) 1969 the Department for the economy proposes to grant a prospecting licence. " It then set out a list of wards in the licensed area and indicated a map was available to view on Department's website and at a number of locations identified by address. The notice further stated, "Any person may make representations to the Department about the proposed licence (from 19 June to 11 August)."

[39] On 23 June 2017 an email relating to each application was sent to the Department for Agriculture, Environment and Rural Affairs; Department for Infrastructure; Department of Health; Department of Justice; Department for Communities; The Executive Office; Tourism NI, The National Trust; NIE; British Telecom; Invest NI and NI Water, advising of the notification/consultation and providing a link to the relevant documents on the Department's website. Copies of the maps, list of townlands, company brief on Dalradian Gold Limited and a copy of the Common Exploration Methods Document were enclosed.

[40] The Common Exploration Methods Document is a publicly available document. It comprises 12 pages and provides a brief description of the methodology involved in the most common exploration methods. It provides annotated pictures describing how a desk study, field mapping, soil sampling, stream sediment

sampling, geophysical methods, drilling, trenching, airborne surveys and marine acquisition are carried out.

[41] Consultation in respect of OM4 commenced on 2 October 2017. A consultation letter in similar format to that sent in respect of DG3 and DG4 was sent to the local authorities and the relevant public bodies. This time, in addition to the company brief, map and press notice, the consultees were provided with the following additional documentation:-

i. Notification of Intention document which contained a high level summary of the works programme and details of prospecting activities to be undertaken. It did not however include details of the targeted areas.

ii. a list of the townlands (sent to public bodies but not sent to applicant).

iii. Minerals information paper.

iv. Common Exploration Methods paper (not sent to applicant but was available on Department website).

v. Mineral prospecting licence – Frequently asked questions document.

[42] A press notice in similar format to DG3 and DG4 was issued in the requisite local newspapers and Belfast Gazette requesting all representations to be made between 2 October and 10 November 2017.

Engagement by the applicant prior to providing consultation responses

[43] The applicant's Environment and Regeneration Committee ("the committee") met on 5 July 2017 and its Head of Environment presented a report to advise members that a consultation had been received from the Department in relation to their intention to grant MPLs to Dalradian Gold Limited to carry out prospecting in lands owned by the council or over which the council had a statutory remit in relation to safeguarding the environment. The report also enclosed a draft consultation response. The committee requested that representatives from Dalradian Gold Limited be invited to address a future meeting of the committee.

[44] On 13 September 2017 Dalradian Gold Limited gave a slide presentation to the committee. The company explained who they were and set out details of the methods they used for exploration. The slides explained the methodology used in stream sediment sampling, soil sampling, deep overburden sampling, geophysical surveys, trenching and drilling. Dalradian Gold Limited also provided some detail of the proposed works programmes for both licences during years one and two of the licence. The information provided replicated that provided to the Department in the licence applications for DG3 and DG4 save that Dalradian Gold Limited did not give

the committee members details of the locations of sites where certain activities were to be undertaken.

[45] The minutes of this meeting record a DUP member stating that the DUP had:

> "…no issue with the company's exploration work at this time, however there was a responsibility as councillors to protect constituents. He added that the mining could bring 24,000 jobs with £1bm of investment to the area and would welcome work carried out in a safe manner which created inward investment. In response Mr Kelly (representative of Dalradian) stated that to relay a proper explanation of the exploration and extraction process this was not feasible in a 10-minute presentation and invited members to visit the site and view the planning application process at their offices in Omagh."

[46] Licence OM4 was discussed by the same committee in November 2017. The committee had the benefit of the Head of Environment's report which highlighted concerns in relation to the effect that mineral extraction could have on the environment. The committee endorsed the officer's draft consultation response which was in similar terms to the response provided in respect of licences DG3 and DG4.

Consultation responses

The applicant

[47] The applicant responded to the consultation regarding DG3 and DG4 on 14 September 2017. This was similar to the draft response provided by the Head of environment in the report presented to the committee in July. The response highlighted that the area identified contained ASSIs as well as a number of scheduled sites and monuments and stated:

> "Due to the vast number of watercourses which exist in this area, consideration should be given to potential impacts on this environment. Members have concerns in relation to the potential environmental impacts of both prospecting and of any future mining in the area."

The letter further stated:

> "The Council would again reiterate its strong view that mineral exploration should not be allowed in this highly sensitive landscape and that the application to DfE for a prospecting licence over this area for a period of 6 years should be denied. The Council believe that mineral

> prospecting should not be permitted within the Derry City and Strabane Council area ahead of the public inquiry which will be held into the gold mining project at Greencastle, County Tyrone as part of a planning application for such activity in that area.
>
> If DfE grant approval for the prospecting licence, Derry City and Strabane District Council would request that DfE ensure that any concerns from local communities in respect of such applications and the potential impact on the rural landscape are given adequate consideration."

[48] On 27 November 2017 the Council provided its consultation response to OM4 in similar terms.

Council for Nature, Conservation and the Countryside ("CNCC")

[49] The CNCC is a statutory advisory consultee on matters affecting nature, conservation and the countryside. Its response dated 8 August 2017 highlighted that multiple small scale changes to landscapes, as may arise in mineral exploration, can lead to unintended levels of overall alteration. It recommended that:

> "mechanisms are put in place to ensure independent monitoring of prospecting and mineral exploration activities so as to ensure that the cumulative impact of activities does not reach unacceptable levels."

It concluded by stating:

> "Finally we would like to express concern over the limited information available via the public consultation. While the area of search is delineated the methods of search and extent of interference with the land surface and sub-surface do not seem to be detailed. To provide meaningful comment on the granting of licences, CNCC would need to see more information on these issues."

Historic Environment Division

[50] The Historic Environment Division; Historic Monuments responded on 9 August 2017 advising the Department to undertake "at first instance" an archaeological impact assessment, the results of which could be used to ensure that heritage assets were avoided by the proposed exploratory works. They replied in similar terms in respect of the OM4 consultation process.

Department of Agriculture, Environment and Rural Affairs ("DEARA")

[51] On 10 August 2017 DAERA responded in respect of DG3 and DG4 advising the Department that before deciding to undertake or to give any consent, permission or other authorisation for a mineral prospecting licence or subsequent activities the Department must:

(a) Determine whether they need to carry out a Habitat Regulations (Article 6) test of likely significance; and

(b) If required carry out a Habitat Regulations appropriate assessment.

In respect of ASSIs it advised that field-based activities associated with a mineral prospecting licence, may include activities which have the potential to damage features of the ASSIs. They acknowledged that detailed screening and assessment of field-based activities could not take place until the licensee has made and submitted firm plans for these activities which included details about the location, timing, duration of activities and proposed methods. They further recommended that a condition be attached to the licence ensuring that the licensee should not carry out any work within or likely to damage an area of a ASSI without the prior written consent of the Department.

DAERA provided a similar consultation response in respect of OM4 licence.

Department's consideration of consultation responses

[52] Following closure of the notification/consultation period the Department produced a document entitled "Issues Raised" in respect of each licence. This document sets out a summary of the main issues raised during the notification/consultation period together with the Department's response to each issue and the impact of each issue in respect of their consideration whether or not to grant the licence.

Issue of licences

[53] On 5 March 2019 draft licences were provided to Dalradian Gold Limited in respect of DG3 and DG4. On the same date a draft licence was provided to Flintridge Resources in respect of OM4.

[54] On 7 and 8 March 2019 Dalradian Gold Limited and Flintridge Resources Limited respectively confirm agreement to the draft licences.

[55] On 1 and 8 April 2019 respectively the Department met Dalradian Gold Limited and Flintridge Resources Limited to discuss the new licences.

[56] The licences, DG3 DG4 and OM4 were issued on 8 May 2019.

Terms and conditions of the licences

[57] The licences were entered into between the Department and the respective licensees on 8 May 2019. All the licences contain identical terms and conditions.

[58] By Clause 1 the Department grants to the licensee a licence for a period of 6 years in respect of the licensed area,

> "for the purpose of searching for such mines and minerals except lignite in the said lands as are vested in the Department and there to do all such things as are necessary for or incidental to those purposes and without prejudice to the generality of the foregoing in particular to make borings, sink pits, remove water from old workings and take and remove reasonable quantities of any such minerals for analysis, tests, trial or experiment."

[59] Clause 2 incorporates all the Model Clauses set out in Schedule 2 of the 1970 Regulations, save Clause 22 into the licence agreement.

[60] Clause 3 sets out certain terms and conditions attaching to the licence. It requires the licensee to agree a works programme for years 3, 4, 5 and 6 with the Department and "upon agreement with the Department of the Work Programme it shall be deemed to be incorporated into and become part of the Second Schedule for the purposes of clause 2 of the said Model Clauses…"

[61] Clause 5 provides:

> "The licensee shall not carry out any work within or in close proximity to an Area of Specific Scientific Interest (ASSI) or a Natura 2000 site without the prior written consent of the Department."

[62] The Second Schedule permits the licensee to carry out the works programme detailed for years one and two. The works programme set out replicates the works programme for years one and two submitted by each licensee in their licence application forms. Schedule 2 further provides:-

> "The company will provide DfE with a minimum of 28 days notice before undertaking any exploration activity on or in close proximity to ASSI/SAC/SPA designated areas within the licenced boundary."

Events post grant of licences

[63] Notice of the grant of licences was sent to consultees on 9 May 2019 which also provided a link to its "issues raised" document.

[64] The grant of the MPLs was considered by the Council's Environmental Committee on 12 June 2019 and by the full Council on 27 June 2019.

[64] On 31 January 2023 Dalradian Gold Limited submitted a proposed works programme for years 5 and 6 of the licences DG3 and DG4 to the Department.

[65] On 22 February 2023 the Department agreed the proposed works programmes for these years 5 and 6 in respect of DG3 and DG4.

CONSIDERATION

Consultation

[66] The applicant contends the consultation process was unfair and in breach of the Department's statutory duty to consult as the Department failed to provide sufficient information to enable it to give intelligent responses.

[67] Secondly the applicant submits that their responses were not conscientiously taken into consideration.

Relevant Legal principles

[68] Arden LJ observed in *R (on the application of Royal Brompton & Harefield NHS foundation Trust) v Joint Committee of Primary Care trusts and others* [2012] EWCA 472 at para [11],

> "The object of requiring fairness is to ensure high standards in decision-making by public bodies, and to enable responses to be made which will facilitate a sound decision as a result."

[69] The duty to consult can arise at common law or under statute but as Lord Wilson noted at para [23] *R (In the application of Mosley) v Haringey LBC* [2014] 1 WLR 3947:-

> "…irrespective of how the duty to consult has been generated, that same common law duty of procedural fairness will inform the manner in which the consultation should be conducted."

[70] The leading authority on the obligation of "fairness" which the law imposes on any public consultation exercise was set out in *R v Brent LBC ex parte Gunning* [1985] 84 LGR 168 and was later endorsed by the Supreme Court in *Mosley* at para [25] as "a prescription for fairness".

[71] The so-called *Gunning* principles compose four key elements which were conveniently summarised by Scoffield J in *The Matter of an application by NI Badger Group and Wild Justice for Judicial Review* [2023] NIKB 117 at para [41] as follows:-

> "(1) the consultation process must be undertaken when the proposals are at a formative stage; (2) there must be sufficient reasons given for the particular proposals to allow those consulted to give intelligent response; (3) adequate time must be afforded for this; (4) the product of the consultation must be conscientiously taken into account when the decision is taken."

[72] In determining whether a consultation process has been unfair, the court will consider the following principles which emerge from the jurisprudence:-

(a) "The obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make intelligent response" as per Lord Woolf in *ex parte Coghlan* [2001] QB 213 at para [112]. A consultation may therefore be unfair and unlawful if the proposer fails to give sufficient reasons for a proposal.

(b) The content of the common law duty of procedural fairness varies almost infinitely depending upon the circumstances – as per Lord Reed in *Mosley* at para [35].

(c) The content of the statutory duty to consult also varies greatly from one statutory context to another and the duties imposed depend on the statutory provisions in question; the context, and the purpose/objective for which the consultation is to be carried out. A mechanistic approach to the requirements of consultation should therefore be avoided – as per Lord Reed in *Mosley* at para [36].

(d) The object of consultation is related to the circumstances which call for it and if a consultation fails to achieve the purpose for which the duty to consult was imposed it may be unlawful.

(e) The nature and content of consultation is related to the overall context.
(f) Accordingly, the requirements of a fair consultation process are highly context specific.

(g) The outworking of the principles at (d) - (f) can be seen in *Mosley*. Lord Reed considered that the object of statutory provisions requiring a local authority to consult with all local residents was to "ensure public participation in the local authority's decision-making process." To achieve that objective, in a context where the public were unfamiliar with the scheme and options available to the local authority, the local authority was required to provide information not only on the draft scheme proposed but also on the realistic alternatives open to the local authority.

(h) The courts will not lightly find that a consultation process is unfair. Unless there is a specification as to the matters that are to be consulted upon, it is for the public body charged with performing the consultation to determine how it is to be carried out, including the manner and extent of the consultation, subject only to review by the court on conventional judicial review grounds. Therefore for a consultation process to be found to be unlawful, "clear unfairness must be shown."…..or a conclusion by the court that …"a consultation process has been so unfair as to be unlawful is likely to be based on a factual finding that something has gone clearly and radically wrong." – as per Hickinbottom LJ in *R v (Help Refugees Ltd) v Secretary of State for the Home Department* [2018] EWCA 2098 at para [90]. Perfection is not required.

Submissions of the parties regarding consultation

The applicant's submissions

[73] The applicant submits there was a breach of the second and fourth *Gunning* principles.

[74] The applicant submits that the Department, in only providing a company brief, map and press notice failed to provide sufficient information to enable it to make an intelligent response. Even though more information was provided in respect of OM4 the applicant contends that even with this additional information it was still unable to make an intelligent response.

[75] The applicant contends that the objective of the statutory consultation process was to allow interested parties which included local residents and the council to identify considerations which the Department should take into account when deciding whether to grant the licences and to suggest conditions which ought to be included in the licences to address the impacts of the licensed activities. To enable consultees to do this the applicant contends the Department ought to have provided the following consultation documentation as a minimum;-

i. The licence application forms or at least the "work programme" section contained within it which set out the proposed activities and targeted locations for proposed activities

ii. The draft licences

iii. GSNI review

iv. GSNI environmental overview

Without these documents the applicant submits that it did not understand the Department's rationale for granting the licences and could not ascertain the degree to which they or their interests might be affected and accordingly the consultees could

not make meaningful responses. Accordingly, the consultation process was unfair and unlawful.

The respondent's submissions on consultation

[76] On behalf of the respondent, Mr McGleenan submitted that as this was a statutory consultation process fairness must be mapped against the statutory provisions having regard to the statutory purpose.

[77] He submitted that section 11 of the 1969 Act did not require consultees to be given the documents now sought by the applicant. Further, he submitted section 49 provided for regulations to be made to prescribe the manner in which applications could be made; the information required to support an application for a licence, and the terms and conditions to be incorporated into licences. He submitted that the fact the legislature, included these matters in regulations rather than in the primary Act, showed a deliberate intention on the legislature's part to confine and define the obligation to consult. Accordingly, section 11 should be interpreted as providing a limited consultation process. He submitted such an interpretation was in line with the overall purpose of the Act, which the preamble stated was, "to facilitate the discovery and working of minerals." The Act was therefore designed to facilitate the discovery of mines and minerals rather than presenting a legal obstacle course.

[78] Secondly, the Department submitted that the confidentiality provisions contained in Regulation 4(4) illustrated that the purpose of the statute was to facilitate the discovery of minerals, by encouraging the involvement of commercial speculators through the protection of commercially sensitive information. Accordingly, the legislature's clear intention was that such information should not be the subject of consultation.

[79] The Department, thirdly, submitted that the council had sufficient information to make informed representations as it had the information provided pursuant to the provisions of section 11 and the information which was publicly available. Further, it was a knowledgeable consultee as it had the benefit of expert presentations to its E&R Committee (including a detailed slide presentation made by Dalradian Gold Limited) and had previous experience of MPLs previously granted in the areas over which it had responsibility.

[80] Finally, the Department submitted the council made no complaint at the time that it lacked sufficient information to provide consultation responses, and it never requested any further information.

[81] Accordingly, the Department submitted the consultation process was in line with the statutory provisions; met the purpose of the statute and was in accordance with its confidentiality provisions and the information provided was sufficient to enable the council to engage and, in fact, enabled the council to engage in a meaningful way.

Was the consultation process unlawful?

[82] In the context of a statutory duty to consult, the content of the duty to consult depends on the statutory provisions; the purpose for which consultation is to be carried out, and the overall context. To determine whether the Department acted fairly it is therefore necessary to consider the provisions of the 1969 Act and determine what the purpose of the statutory provisions was having regard to the context and thereafter to consider the nature and manner of consultation required in light of the overall context.

The statutory provisions

[83] Section 11(3) requires the Department to notify its intention to grant an MPL in the "Belfast Gazette and in one or more than one newspaper circulating in the locality where the land is situated."

[84] Section 11(4) requires the Department to serve notice of its intentions to grant an MPL to government Departments and "every local authority within whose area the land, or any part of the land, in relation to which the right or power is proposed to be exercised is situated …; and (c) every public body which, in the opinion of the [Department], will be materially affected by any activity likely to be carried on in the exercise of the right or in consequence of the exercise of the power."

[85] Section 11(3) then sets out the documents which are to be provided to the consultees which essentially includes a map identifying the land to which the MPL relates.

[86] I consider the provisions of section 11 point to engagement by local members of the public (as the press notices were required to be placed in a local newspaper), local councils and public bodies whose interests may be affected by activities permitted under the MPLs. Accordingly, I consider the statutory purpose of the consultation is to allow these persons and bodies to make representations about whether the Department should grant an MPL and, if so, on what terms.

[87] The Department in its "MPL Applications Consultation Overview Document" accepts that this is the purpose of the consultation provisions of the 1969 Act as it states:

> "… the objective of the consultation is to ensure … that the Department receives a wide range of views and can make an informed decision on whether the granting, or not, of the MPL, and/or on any additional terms and conditions that should be included in the MPLs."

[88] Further, the Department's manual at paragraph 17 accepts that the drafting of the licence conditions is "informed by submissions as a result of consultation."

[89] Fairness must be mapped across the statutory provisions in light of the statutory purpose of consultation. Having regard to the statutory purpose I do not consider section 11 should be interpreted in the restrictive manner suggested by Mr McGleenan. Rather the nature and content of consultation must be such as to ensure the consultees are provided with sufficient information to enable them to make representations about whether the Department ought to grant the MPLs and if so on what terms.

[90] To fulfil this statutory purpose I consider the Department must provide information which lets:

> "…those who have a potential interest in the subject matter know in clear terms **what the proposal is**, and exactly **why it is under positive consideration**, telling them enough (which may be a good deal) to enable them to make an intelligent response." as per Lord Woolf in *Coughlan* at para [112]

What was under consideration by the Department?

[91] The Department was proposing to grant licences to Dalradian Gold Limited and Flintridge Resources Ltd in the terms of the draft licences. The licences contained several provisions relating to the duration of the licence, the particular activities which could be undertaken in years one and two and the locations at which these activities were to be undertaken and the conditions attached. It further set out the basis on which activities could be undertaken for the remaining term of the licence.

[92] The consultees were not given the draft licences. In the absence of the draft licences the consultees did not know in clear terms what the Department was intending to authorise and, accordingly, they therefore could not make meaningful representations about the terms of the licence, the duration of the licence or the need for further consultation in respect of proposed works in years three to six. It is not for this court to comment on the validity of such representations but representations about the terms of the licence were matters which the Department was required to take into account as accepted by its own manual. Accordingly, I consider that by failing to provide the draft licences to the consultees the consultation process was unfair as the consultees did not know what was under positive consideration.

The reasons why the Department was proposing to grant MPLs

[93] Before deciding to grant an MPL the Department assesses the application in accordance with its "How the Department assesses an MPL Application" manual. This sets out the documents which an applicant must provide, and it requires the

applicant to provide a proposed work programme for the first two years of the licence which according to the manual is "… a crucial part of the application and … is one of the main criteria the Department will use to judge between any competing applications."

[94] For each MPL the Department received a detailed work programme which identified the activities to be undertaken in years 1 and 2 and identified the locations where these activities were to be undertaken. For example, in DG3 the work programme identified that the primary goals of the first two years was to " continue detailed prospecting of streams…baseline stream sediment survey of ….Deer's Leap, west of Balix Hill and west of Stranisk…, carry out ground geophysics…follow up…with appropriate methods e.g. trenching or drilling."

[95] The consultees were not provided with the work programme for each MPL. Whilst the consultees would have been aware of the wide range of activities which can be included in an MPL, from reading the provisions of the 1969 Act; the "Common Methods" document and from the Dalradian Gold Limited presentation, in the absence of sight of the actual work programmes, consultees did not know what specific activities were being permitted and did not know where the activities were being undertaken.

[96] Whilst the council did have a slide presentation from Dalradian Gold Limited (it only provided generic information about activities, it did not provide details of the locations where specific activities were to be undertaken), a list of townlands and a summary of works for OM4, I do not consider this was sufficient to enable meaningful engagement as the consultees only knew the MPLs covered a very wide area and potentially permitted a wide range of activities. Without knowing where and what was being permitted by the licence, consultees who had an interest in how prospecting activities might affect their legal interests were unable to meaningfully engage as they did not know what activities were being permitted in or close to their land or residence or which would otherwise materially affect their interests.

[97] The information contained in the works programme was considered by the Department to be "the main criteria" for the award of a licence. Accordingly, I consider the absence of this material from the consultation process meant consultees were not able to engage meaningfully.

[98] In determining whether to grant an MPL the Department in accordance with section 12 of the 1969 Act had to be satisfied that the application passed technical and financial viability checks. Further, in accordance with its statutory duties under Article 4 of the Nature, Conservation and Amenity Lands (Northern Ireland) Order 1985, Article 38 of the Environment (Northern Ireland) Order 2002; and section 1(1) of the Wildlife, Natural Environment Act (Northern Ireland) 2011 and the Habitats Regulations, the Department had to take environmental matters into consideration when deciding whether to grant an MPL and, if so, on what terms.

[99] The GSNI on behalf of the Department carried out a "mineral licence application review and environmental overview" which comprised a technical assessment of the geological and financial viability of the proposal and also identified the environmental sites which fell within the boundary of each MPL, considered the work programme and carried out an assessment of whether the activities would impact on the environment and considered possible mitigation. It concluded with its assessment about whether the proposal was adequate to continue prospecting the area. In respect of each MPL it gave a positive assessment.

[100] Consultees were not given a copy of the "mineral licence review and environmental overview". This document was central to the Department's decision making as it related to matters set out in section 12 and the Department's duty to take environmental matters into account when deciding whether to grant a licence. Consultees were not provided with this information and accordingly did not know the central reasons why the Department was proposing to grant the MPL and were unable to make meaningful representations about the impact the grant of the licences would have on the environmental sites, as they did not know which sites would be affected and were unaware of any potential impacts flagged up by GSNI.

Conclusion

[101] The purpose of the consultation was to allow the public and other bodies to make representations about whether to grant the MPLs and if so, on what terms. The Department did not provide details of the work programmes, draft licences or GSNI review and environmental overview.

[102] I consider the Department failed to provide adequate information in respect of what they were proposing to grant or the reasons why they were granting the MPLs. Without information regarding the nature of the licences to be granted, or information regarding the reasons why the Department were minded to grant the MPLs which would have included the Department's views about the technical viability of the application, and its impact upon the environment, consultees could not give any intelligent response as they were unable to ascertain whether and, if so, to what extent the interests they represented might be affected.

[103] The consultees were only aware of a non-exhaustive list of activities covering a vast area and, in the absence of the works programme, the GSNI review and environmental overview and the draft licences, had only a limited ability to respond and were therefore, placed at a significant disadvantage in challenging the Department's proposal.

[104] Although the council were more informed than other consultees and did have the benefit of Dalradian Gold Limited's presentation and had historical knowledge of MPLs, I consider this does not remedy the procedural unfairness caused by the failure of the Department to provide the documents, namely the works programme, draft licences and the review and environmental overview. The fact the council did not

seek further information does not indicate the test of fairness was met. Whilst it is a factor to be taken into account, it is not decisive in this case given the reasons already set out and the fact other consultees did complain about the lack of information to enable a full response.

[105] I, therefore, consider the consultees ought to have been given the draft unredacted licences which, I note, have now been provided; the unredacted works programme which, again, I note has now been provided, the GSNI review and overview and the other documents required under section 11 of the 1969 Act.

[106] It is only with this information that I consider consultees would be able to provide representations capable of influencing the Department's decision to grant the MPLs and, if so, on what terms. I am therefore satisfied the consultation process was unfair and unlawful.

Did the confidentiality requirements prevent these documents being made available for consultation?

[107] The Department submits it could not disclose the draft licences, review and overview and the works programme as they all contained information provided by the licensees and under Regulation 4(4) of the Mineral Development Applications, Fees: Model Clauses Regulations, "all information comprised in or furnished to the Department in connection with an application made under these Regulations, shall be treated by the Department as confidential."

[108] In *R(On the application of Eisai Ltd) v National Institute for Health and Clinical Excellence* [2008] EWCA Civ 438, a pharmaceutical company which held the marketing authorisation for Aricept, a drug for healing Alzheimer's disease, challenged NICE's decision that Aricept was not cost efficient treatment of mild to moderate Alzheimer's Disease. The applicant alleged as a consultee it should have had access to a fully executable version of the economic model NICE used to determine cost effectiveness. The court declined to attach any weight to the argument advanced by NICE that it had a duty of confidentiality, based on a number of factual grounds including the fact that, if pressed, the owner of the economic model would have agreed to disclosure.

[109] Given the provision of the 1970 Regulations I consider that all the information given by the licensees in support of its application including the works programme had to be treated as confidential by the Department. The fact the information was reproduced by the Department in other documents does not remove its protection as confidential. Further, I consider that the Aarhus Convention does not mandate that such information must be provided in accordance with article 6(2) as the rights granted under article 6(2) are subject to article 6(6) which retains the right to refuse to disclose information which is of a confidential, commercial or industrial nature.

[110] The Department, however, never turned its mind to whether the documentation was necessary for consultation and never turned its mind to whether

the licensees would agree to disclosure of this information. I am satisfied the licensees would have agreed to the release of such information. Firstly, Dalradian Gold Limited had already given a very detailed presentation to the council. Secondly, as John Cowley in his affidavit sworn on 30 March 2013 at paras [186]-[187] and [194] sets out whilst the results of exploration may be commercially sensitive, the nature of the exploration activities and their location do not have the same commercial sensitivity. Accordingly, I consider the licensees if asked, would not have objected to disclosure of the works programmes.

[111] Additionally, in more recent applications including OM4, the Department, notwithstanding the confidentiality provisions have provided much more detailed information to consultees which included a consultation overview document, a redacted application form and an expanded Notice of Intention document.

[112] Accordingly, I consider the argument concerning confidentiality does not carry much weight in the present case. In *Eisai* it was noted at para 59;-

> "…Even if disclosure were prima facie in breach of confidence, Mr Griffin conceded that NICE would have a public interest defence available to it if disclosure were necessary in order to meet the requirements of procedural fairness."

This matter however does not arise for consideration in this case.

Were the consultation responses conscientiously taken into account?

[113] Under section 11(5), the Department is under a statutory duty to take into account representations made during the consultation process.

[114] Mark Wilson explains how the "issues raised" document summarised the issues raised during the consultation process and how these were then considered by the Department. In developing this document, he states that the Department and GSNI considered "in detail the responses received and the impact of these on their consideration whether or not to grant the licences".

[115] The applicant contends that the Department did not conscientiously take into account the points made in the consultation process and submits that the "issues raised" document failed to grapple with the substance of the representations and, in particular, failed to deal with the issues raised regarding the environmental effects of prospecting and argues that concerns expressed by CNCC and DEARA were not accurately reproduced in the "issues raised" document.

[116] I consider that it is not necessary for every response to be set out in detail and it is perfectly permissible for consultation responses to be summarised provided they convey the substance of all material points in a fair and accurate way.

[117] Having carefully considered the "issues raised" document, I am satisfied it was a fair and adequate summary of the consultation responses and that all material concerns raised including, in particular, the concerns raised about the environmental effect of prospecting were set out in this document.

[118] The Department, therefore, subject to irrationality, was free to disagree with the points made by consultees and, accordingly, I consider that this ground of challenge is not made out.

Habitats Directive and Regulations

Relevant legal provisions

[119] Council Directive 92/43/EEC of 21 May 1992 ("The Habitats Directive") provides for the conservation of natural habitats and of wild fauna and flora. It was implemented in Northern Ireland by the Conservation (Natural Habitats, etc) Regulations (Northern Ireland) 1995 ("The Habitats Regulations"). Sites designated under the Habitats Directive are labelled "SACs".

[120] Article 6(3) of the Habitats Directive imposes obligations regarding SACs. It provides:

> "3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site… the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned…"

[121] The requirements of article 6(3) are given effect under Regulation 43 of the Habitats Regulations. Regulation 43 provides:

> "(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—
>
> (a) is likely to have a significant effect on a European site in Northern Ireland or a European off sore marine site…
>
> (b) is not directly connected with or necessary to the management of the site,

> shall make an appropriate assessment of the implications for the site in view of that site's conservation objectives.
>
> …(3) In relation to a European site in Northern Ireland, the competent authority shall for the purposes of –
>
> (a) determining whether an assessment is required for plan or project under paragraph 1;
>
> (b) the assessment under paragraph 1 consult the Department and have regard to any representations made by it within such reasonable time as the authority may specify."

[122] The provisions of Regulation 43 apply only if a competent authority is giving consent/permission/authorisation for a "plan or project". If the authorisation constitutes a "plan or project", the authority must then consider whether the plan or project "is likely to have a significant effect on a European site in Northern Ireland and is not directly connected with or necessary to the management of the site." This is commonly referred to as stage 1 "screening". If such a plan "is likely to have a significant effect", then the competent authority must make a stage 2 "appropriate assessment" of the implications for the site in view of the site's conversation objectives.

The system operated by the Department

[123] As appears from the affidavit sworn by Mark Patton, Mineral Geologist, in GSNI, when a MPL application is made, GSNI identify the designated environmental areas which fall within the boundary of the application area, but no formal screening is carried out by GSNI prior to the grant of the licence. After the licence is awarded however, the licensee can only conduct activities in accordance with the licence conditions.

[124] The Department has confirmed that no habitats screening or assessment was carried out before the grant of the licences DG3, DG4 and OM4. The licences did however contain conditions in respect of the conduct of activities. For example Clause 5 of the MPL for DG3 licence provided "the licensee shall not carry out any work within or in close proximity to an ASSI or Natura 2000 site without the prior written consent of the Department". Further under schedule 2 the licensee was obliged to "provide the Department with a minimum of 28 days' notice before undertaking any exploration activity on or in close proximity to ASSI/SAC/SPA designated areas within the licence boundary".

[125] Mr Patton avers that once the Department was notified of the proposed activity screening was then carried out to assess whether the activity was likely to have a significant effect on the integrity of the designated site. At this stage DAERA

were also notified of the proposed activities and DEARA took into consideration the cumulative effects of the proposed activities. If screening results in a finding of no likely significant effect, the Department may authorise the specified activities. If however, the results indicate the proposed activity is likely to have a significant effect a stage 2 Habitats Regulation Assessment ("HRA") is initiated.

[126] Mr Patton avers that the system worked well in practice and he provided examples when the Department, after obtaining notification of proposed activities, carried out screening which led to habitats assessments in respect of some proposed activities. He averred that screening and or assessment had occurred more than 40 times. The applicant contends that the system does not work well in practice and in correspondence the Department stated that between October 2011 and 2017 three notifications had been made in respect of OM and DG licences. The applicant asked for copies of these notifications but the Department refused on the basis they were not relevant to the matters pleaded. The applicant asks the court to infer that only three notifications have been given. In response the Department submits that three HRA assessments have been completed but many more notifications have been given.

[127] The Department submits that the system it operates, namely one where screening and assessment takes place after the licence is granted, caters for the iterative nature of prospecting and complies with its HRA obligations. Mark Patton explains the Department's position at paras 93 and 95 as follows:

> "The activities are not defined in terms of method, timing or duration and therefore no screening or assessment can be meaningfully undertaken at the (licence) stage… only when these facts are known can an assessment of the potential impacts be carried out and a decision made as to whether they will be permitted with or without specific conditions or not permitted. Given the iterative nature of mineral prospect in the Department's view is that an MPL 'is not a project in itself, but an award of rights to explore which are then subject to a wide range of consents and permits including HR assessment… mineral exploration consists of an evolving series of time bounded and space limited activities'".

The Department therefore submits that given the iterative nature of mineral exploration a MPL was not a "project" in itself and thus screening or assessment did not need to take place before the grant of a licence.

The applicant's submissions

[128] The applicant submits that a MPL is a "plan or project" and the Department acted in breach of its duties under the Habitats Regulations as it failed to carry out screening. It submits that screening was possible as the Department was aware, from

the "work programme" set out in each licence application, of the activities to be undertaken and the targeted locations.

[129] Secondly the applicant further submits that the Department's scheme of granting licences and then conducting HRA of specific activities after the grant of the licence amounts to "salami slicing". Such a scheme it submits fails to take into account cumulative effects.

[130] Thirdly, the applicant submits that the scheme operated by the Department is flawed for the following reasons:-

(a) the Department applied the wrong test for screening;

(b) the licence conditions do not cover all prospecting activities and therefore do not give the Department power to ensure the activities carried out under the licence comply with the Habitats legislation; and

(c) The system does not work in practice as the Department does not require prior notification of proposed exploration activities and the applicant asks the court to draw an adverse inference from the Department's failure to provide the notifications provided by these licensees in respect of activities carried out under the licences for years 3 and 4.

Consideration

What constitutes a plan or project?

[131] The terms "plan" and "project" are not defined in the Habitats Regulations. The terms have however been the subject of consideration in several cases. In *Landelijke Vereniging tot Behoud van de Waddenzee* v *Staatssecretaris van Landbouw* [2005] 2 CMLR 31 the court had to determine whether mechanical cockle fishing fell within the concept of "plan or project" within the meaning of article 6(3) of the Directive. The court held that the definition of "project" in article 1(2) of Directive 85/337 on the assessment of the effects of certain public and private projects on the environment was relevant to defining the concept of "plan and project" under the Habitats Directive, as both sought to prevent activities which were likely to damage the environment from being authorised without prior assessment of their impact on the environment. In Directive 85/337 a "project" was defined as "execution of construction works or of other installations or schemes and other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources". The court held that mechanical cockle fishing which involves fishing for cockles by means of trawls or dredges in the form of metal cages dragged over the seabed by a vessel and which scraped 4 cm to 5 cm off the seabed was an activity "within the concept of project as it involved intervention in the natural surroundings and landscape".

[132] In *R (Akester) v Department for Environment, Food and Rural Affairs* [2010] Env. LR 33 the court had to determine whether the introduction of new ferries constituted a "plan and project" within the meaning of article 6(3). The court held that the terms "plan" and "project" were to be given a very broad definition and meaning, taking into account the broad objectives of the Habitats Directive, namely a high level of protection of the environment and the integration of the precautionary principle. Accordingly, it held that a plan and project would be caught by article 6(3) in the sense it would trigger "the requirement for an appropriate assessment of the environmental impact, if it was likely to have significant effect on the site". The court held that the proper approach was that the requirement for an appropriate assessment was triggered under article 6(3) unless the risk of significant adverse effects could be excluded. The court held that the introduction of larger ferries was a project within the ambit of article 6(3).

[133] Further assistance in determining whether particular activities constitute a "plan or project" is found in *Coöperatie Mobilisation for the Environment UA v College van gedeputeerde* [2019] Env LR 27. The referring national court asked the ECJ to determine whether grazing of cattle and the application of fertilisers on the surface of land in the vicinity of Natura 2000 sites could be classified as a "project" within the meaning of article 6(3). The court held at para [67] that;-

> "in order to determine whether the grazing of cattle and the application of fertiliser on the surface of land or below its surface may be classified as a "project" within the meaning of article 6(3) of the Habitats Directive, it is important to examine whether such activities are likely to have a significant effect on a protected site."

[134] In *Inter - Environnement Wallonie ASBL v Conseil des ministres* [2020] Env LR 9 the court had to determine whether work to upgrade a nuclear plant, which had been shut down, to enable the production of electricity amounted to a project. The AG advised at para [172] as follows:

> "[172] The definition of 'project' in Article 1(2)(a) of the EIA Directive therefore does not definitively delimit the concept of 'project' under the first sentence of Article 6(3) of the Habitats Directive. Rather, the crucial factor is whether the activity concerned is likely to have a significant effect on a protected site."

[135] Having regard to this jurisprudence I consider the test to be applied in determining whether activities constitute "a plan or project" under article 6(3) is to examine whether "the activity concerned is likely to have a ***significant effect*** on a protected site". If it does, then it constitutes a plan or project.

Did the Department's grant of MPLs constitute a "plan" or "project"?

[136] The Department granted three MPLs. OM4, DG3 and DG4 are all in similar terms.

[137] By way of example, DG3, dated 8 May 2019 granted Dalradian Gold a licence for six years and under the licence they were permitted to enter defined lands:-

> "for the purpose of searching for such mines and minerals except lignite in the said lands as are vested in the Department and there to do all such things as are necessary for or are reasonably incidental to those purposes and without prejudice to the generality of foregoing, in particular, to make borings, sink pits, remove water from old workings and take and remove reasonable quantities of any such minerals for analysis, test, trial or experiment".

Schedule 2 set out the terms under which the licensee could conduct exploration activities. It provided as follows:

> "The licensee shall carry out… the work programme as set out below…
>
> **Years 1 and 2:**
>
> …
>
> 1. Continue detailed prospecting of streams and outcrops across the licence area.
> 2. Complete the baseline stream sediment survey across the licence area following on from sampling completed in 2016. Targets identified north of Deers Leap, west of Balix and west of Stranisk to be completed in year one…
>
> 4. Follow up of 2016 results of Deers Leap, Owen Reagh Byrne and north of Bessy Bell in year one and two…
>
> 6. Carry up any broad geochemical anomalies…
>
> 7. Carry out ground geophysics over identified targets…
>
> 8. Follow up targets with trenching or drilling where appropriate."

[138] The common exploration methods document describes what is involved in these various activities.

(a) Stream sediment sampling is described as follows:

> "Samples are collected from first and second order streams as near the middle of the stream as possible. Approximately 50g of material is normally taken but larger samples may be required depending on the method used in target. Where heavy metal mineralisation is being targeted, samples are collected as close to the bedrock as possible. This may require digging down through the overlying material. The sediment is wet sieved through mesh screens to the required size and put in paper bags for drying."

(b) Drilling is described as follows:

> "Typically drill holes will be of the order of less than 200m… with rock core collected and placed in prefabricated core boxes… A drill rig will typically have a footprint of less than 10 x 10 metres and a height of 4 metres… Associated with the rig are a stable drill platform, fuel stores, drill fluid management systems, equipment stores etc. All rigs require some sort of lubrication at the drill bit with water being most commonly used. The water is circulated from the surface to flush the area of the drill bit and carry the pulverised rocks and chips back to the surface."

(c) Trenching is described as follows:

> "Mineral exploration trenching is carried out by mechanical excavator with a back hoe, with the aim of exposing a section of mineralised bedrock. Trenches can be over 100 metres long and a few metres wide."

The meaning of "significant effect"

[139] In determining whether these activities fall within the concept of "plan or project" it is necessary to determine whether they "*are likely to have* ***a significant effect*** *on a protected site*".

[140] The meaning of significant effect, as set out in article 6(3) was considered in *Waddenzee* and *Sweetman v An Bord Pleanála* [2014] PTSR 1092. In *Sweetman*, the Irish Planning Board decided to grant development consent for a road scheme that would result in the permanent and irreparable loss of a small part of a limestone pavement. The Supreme Court made a reference to the Court of Justice for a preliminary ruling, in essence on the question - In what circumstances would a project which resulted in

the loss of only a small proportion of priority habitat "adversely affect the integrity of that site" pursuant to article 6(3). The court held at paras [48]-[50] as follows:

> "[48] The requirement that the effect in question be "significant" exists in order to lay down a de minimis threshold…
>
> [49] The threshold at the first stage of article 6(3) is thus a very low one. It operates merely as a trigger, in order to determine whether an appropriate assessment must be undertaken of the application of the plan and project for the conversation objectives of that site…
>
> [50] …the threshold stage at this (the second) stage is notably higher than that laid down at the first stage. That is because the question (to use more simple terminology) is not "should be bothered to check?" (the question at the first stage) but rather "what will happen to the site if this plan or project goes ahead…"

[141] In *Waddenzee* the court held as follows at para [44]:

> "[44] In the light, in particular, of the precautionary principle which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first sub paragraph of article 174(2) EC, and by reference to which the Habitats Directive must be interpreted, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned… In case of doubt as to the absence of significant effects such as assessment must be carried out…"

[142] As appears from this jurisprudence the threshold for "significant effect" is low and will be passed if there is doubt or the risk of such cannot be excluded.

Did the MPL fall within the concept of plan or project?

[143] The common exploration methods' description of stream sediment sampling, drilling and trenching indicate that these activities involve physical intervention in the natural environment. The MPLs gave permission for these activities, and I am therefore satisfied that the grant of a licence permitting such activities falls within the concept of a "plan or project" under article 6(3).

[144] Additionally I am satisfied that all the activities authorised by the MPLs met the test of "significant effect" on a protected site as this is apparent from the Department's own evidence. Mark Patton accepts at para 95 of his first affidavit:

> "… mineral exploration… may have the potential to cause impacts on Natura 2000 and other environmentally designated sites."

Further at para 14 he states:

> "[14] …sediment sampling, … may have the potential to effect river, habitats and species; soil sampling, which may disturb nesting bird locations or plant life; and drilling, which may disturb species through noise and human activity and is a potential source of pollutants".

[145] In his second affidavit Mark Patton further avers at paras 21 and 23 that trenching, and borehole drilling could have a "significant impact" on designated sites. The Department further accepts in its environmental overview that certain works may require HRA for example stream sampling in tributaries of the river Foyle would require appropriate assessment and indeed previous HRAs carried out for similar prospecting activities supports the view that such activities are likely to have a significant effect on the designated sites.

[146] Given the accepted risks by the Department that protected areas could be affected by exploration activities permitted under the MPLs I am satisfied that the grant of the MPLs comes within the definition of plan or project as set out in article 6(3) of the Directive.

Did the Department comply with its HRA obligations?

[147] As outlined in *Waddenzee and Sweetman* Regulation 43 lays down a two-stage process once it is established that the authority has given permission for a plan or project. At the first stage it is necessary to determine whether the plan or project in question is likely to have a significant effect on the site. This is the so-called screening stage.

[148] The Department accepts that it did not carry out initial screening but submits that this was because it was impossible to do so given the iterative nature of exploration. The Department submits that it complied with its HRA obligations by carrying out HRA as and when activities and locations were notified to it. Mark Patton sets out the Departments case at para 18 when he states:

> "[18] It is the Department's view that, until a specific location and nature of exploration activity is known, it is

> not possible to carry out a detailed or meaningful HRA stage one screening or ASSI notification."

Further at para 94 he states:

> "[94] …at the time of application, these activities are not defined in terms of method, timing or duration and therefore no screening or assessment can be meaningfully undertaken at that stage."

[149] I do not accept the Department's averment that it is impossible to carry out screening prior to the grant of MPLs, on the basis that it is impossible for the applicants to provide information on the nature of activities to be undertaken and when and where such activities might take place.

[150] In accordance with the Department's mineral licence guidance the Department expects "an applicant to… submit a phased and costed work programme". In respect of all three MPLs the applicants set out details of their "work programme" in the licence application form and in respect of years one and two, each licensee identified not only the nature of activities to be undertaken but also identified target locations at which these activities would be undertaken. The application for DG3 identified for example that a stream sediment survey would take place north at Deer's Leap, west of Balix Hill and west of Stranisk. The application for DG4 identified that a baseline stream sediment survey would occur in areas south of Knockanbane Mountain, east of Aghabrack townland and Mullaghanimma. The application for OM4 identified in its work programme in the application form that trenching targets may be determined within the Magherangeeragh area. It further identified that a soil grid would be completed for the Garvetagh Hill area. Given that the applications identified activities and targets I am satisfied the Department could have carried HRA prior to the grant of the MPLs in respect of these activities.

[151] The Department however submits that it could not carry out a licence level HRA because the applicants were unable to provide information regarding the location, duration and nature of activities to be undertaken throughout the six-year licence period.

[152] I do not accept this contention for a number of reasons. Firstly, it is contrary to the jurisprudence of the European Court of Justice. In *Wallonie* in respect of the question whether an environmental impact assessment was required in respect of works to upgrade previously closed down nuclear power stations, the ECJ held at para [140] as follows:

> "[140] The competent national authorities are to 'agree' to the project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if

> appropriate, after having obtained the opinion of the general public.
>
> [141] It follows that the assessment must be conducted before agreement is given."

[153] The court also addressed the question whether an appropriate assessment was required in circumstances where subsequent acts had to be carried out in order to proceed with the project. At para [144] the court held as follows:

> "[144] …the fact that subsequent acts must be adopted in order to proceed with that project… does not justify the failure to conduct an appropriate assessment of those effects before the adoption of that legislation. Moreover, as regards the work that is inextricably linked to the measures at issue in the main proceedings, if its nature and potential effects on the protected sites are **sufficiently identifiable**, a finding which it is for the national court to make, an assessment must be conducted of that work at that stage of the consent procedure."

[154] In *Commission of the European Communities v United Kingdom* [2006] Env LR 29 the Commission brought proceedings claiming the UK Government had failed to comply with its obligations under the Habitats Directive. In respect of the argument by the UK Government that planning is an iterative process, the Advocate General opined at para [49]:

> "[49] The United Kingdom Government is admittedly right in raising the objection that an assessment of the implications of the preceding plans cannot take account of all the effects of a measure. Many details are regularly not settled until the time of the final permission. It would also hardly be proper to require a greater level of detail in preceding plans or the abolition of multi-stage planning and approval procedures so that the assessment of implications can be concentrated on one point in the procedure. Rather, adverse effects on areas of conservation must be assessed at every relevant stage of the procedure to the extent possible on the basis of the precision of the plan. ***This assessment is to be updated with increasing specificity in subsequent stages of the procedure.***"

[155] I consider *Wallonie* and *Commission v UK* contain statements of principle which can be mapped across to cases involving an iterative process. Accordingly, I consider the jurisprudence makes clear that, in respect of sequential activities, the authority is required to carry out an assessment before agreement is given in relation

to the project, not only of the identified activities but also of the potential effects on the protected sites of future activities which are "sufficiently identifiable". Thereafter the assessment is to be updated as specific activities and locations are notified.

[156] I consider the Department was in a position to identify the nature and location of activities which would be undertaken not only in years one and two of each licence but were also able to identify likely activities and locations within the six-year licence period from information contained within the "work programme" of each licence application and also from the Department's own expert and historical knowledge of exploration in the areas covered by the licences and the nature of prospecting carried out by Dalradian Gold Limited and Flintridge Resources Ltd as each company had been granted previous MPLs and had been prospecting in the area for some considerable time.

[157] Accordingly, I consider the Department was able to and ought to have conducted a stage one licence level HRA screening to the extent possible based on the precision of the plans presented by the licensees and the Department's assessment of "identifiable" future activities, prior to the grant of the MPL.

[158] The benefit of such a licence level HRA is that it ensures proper consultation. and prevents "salami slicing". As explained by the Advocate General in the *Commission v United Kingdom* at para [47]:

> "[47] …the first stages of a proposal regularly determine the realisation of the subsequent stages. If the effects of the entire proposal on areas of conservation not at issue until later are examined neither within the framework of the plan nor at the time of the first stages, each stage restricts the number of possible alternatives for subsequent stages, without an appropriate assessment of alternatives being carried out. Such a course of action is often derogatorily described as salami tactics."

[159] Given the iterative nature of prospecting, many of the details of exploration will not be settled at the time of application for the licence. In these circumstances as noted in the *Commission v United Kingdom* the assessment is to be updated with increasing specificity in subsequent stages of the procedures. Accordingly, the Department must after an initial level licence screening carry out HRA at the later stages when it notified of further activities by the licensees. The HRAs carried out after the grant of a licence do not however relieve the Department of its HRA obligations prior to the grant of a licence, namely, to carry out a licence level screening.

Conclusion on alleged breach of Habitats regulation

[160] For the reasons set out above, I find the Department failed to comply with its HRA obligations as follows:

(1) It erred in determining that HRA did not apply as the licenced activities did not constitute a plan or project.

(2) The Department erred in not carrying out initial licence level screening before the grant of a licence and I consider that the approach adopted by the Department prevented proper consultation in respect of environmental impacts.

(3) The Department's scheme for carrying out subsequent HRA assessment of specific activities as and when they were brought to their attention, is necessary and appropriate. Such subsequent screening and assessment must comply with the HRA obligations but does not negate the need to conduct an initial screening before the grant of a licence.

[161] The applicant submitted that the HRAs carried out by the Department were flawed and inadequate. In particular it submitted that the Department applied the wrong test for screening and further submitted that the licence conditions were not sufficient to enable the Department to comply with its HRA obligations as not all proposed activities were covered by the requirement for notification. It is further submitted that the Department did not in fact require licensees to provide notification of proposed works and accordingly works were carried out without proper HRA being conducted. Only two of these issues were set out in the Order 53 statement and accordingly the only two relevant issues are whether the Department applied the wrong legal test for assessment and secondly whether clause 5 which only referred to "work" undertaken "within or in close proximity" to a site of the licence meant notification of all prospecting activities was not required even though SACs could be effected hydrologically by activities undertaken other than in close proximity to the SAC.

[162] The applicant submitted the Department applied the wrong test for screening and refers to the "issues raised" document and states that the Department erred in saying the threshold for assessment was whether the activities are "likely to cause a significant disruption or disturbance to a protected… area".

[163] The Department accepts that it did not carry out screening which I have found amounts to a breach of HRA. Accordingly, the issue of the test it applied to screening does not arise for adjudication.

[164] In determining whether all licensing activities had to be notified to the Department it is necessary to consider the meaning of the word "work" as used in the licence. To do so it is necessary to look at the licence in its entirety. Clauses 3 and 4 reference the work programme. Further clause 4 refers to the Department requiring a detailed statement setting forth the expenditure for "work… in searching for mines and minerals". Each year the licensee must give evidence of such "work".

[165] I am satisfied that the same meaning is to be attributed to the word "work" in clause 5 and I therefore find it refers to works connected with searching for mines and minerals. In accordance with clause 1 this includes all things "necessary for or reasonably incidental" to searching for mines and minerals and includes making boring sink pits removing water from old workings taking and removing quantities of minerals for analysis test trial or experiment. Accordingly, I am satisfied that clause 5 covers all prospecting activities.

[166] Clause 5 provides that such work shall not be carried out "within or in close proximity" to an ASSI or Natura 2000 site without the prior written consent of the Department.

[167] It is uncontroversial that SACs which are not "within or in close proximity" to where the activities are being carried out can be affected by the activities. This is particularly so where water courses are affected.

[168] I therefore accept that clause 5 read in isolation would not be sufficient to ensure that the Department had power to control all activities which had the ability to affect a SAC. I consider however that the other clauses in the licence are sufficient to ensure that the Department has the power to ensure compliance with the Habitats legislation. Clause 3, sub-paras c and d impose a positive obligation on the licensee to reach agreement with the Department in respect of its future work programmes and these are then incorporated into the licence and governed by its terms and conditions. Under the licence terms and conditions, the Department has power to refuse to consent to activities that could adversely affect a Natura site or ASSI and can impose conditions before agreeing to any proposed activity. Accordingly, I am satisfied all prospecting activities had to be notified to the Department and under the licence terms and conditions it could ensure compliance with the HRA requirements.

[169] The dispute about whether the Department required notifications from the licensees in practice was not part of the pleaded case and I therefore do not comment on the operation of the scheme in respect of earlier licences, or these licences.

Other grounds of challenge

(i) Illegality: error of law

[170] The applicant contends that the Department made an error of law which resulted in it failing to take into account the environmental impacts of the prospecting activities. It is unnecessary to consider this ground further given my finding that the Department failed to consider the environmental impacts of the prospecting activities by conducting screening as required under the Habitats Legislation.

(ii) Breach of statutory duty

[171] The applicant alleges the Department failed to comply with its statutory duties including article 4 of The Nature Conservation and Amenity Lands (Northern Ireland) Order 1985; article 38 of The Environment (Northern Ireland) Order 2002 and section 1(1) of The Wildlife and Natural Environment Act (Northern Ireland) 2011.

[172] Whilst this is a freestanding ground, the applicant conceded that it related to its submission that postponement of assessment until after the grant of the licence was a breach of the Department's duties.

[173] This ground of challenge has been covered under the section dealing with breach of the Habitats Legislation.

(iii) Material/immaterial consideration

[174] This ground of challenge recasts issues already dealt with under the other grounds of challenge.

(iv) Failure to give reasons

[175] This ground similarly recasts arguments already dealt with under the consultation ground.

(v) Irrationality

[176] This ground was based on a culmination of all the other grounds of challenge. This ground was not actively advanced by the applicant at hearing, and I do not consider the high threshold was met.

Ultra vires

[177] The applicant submitted the Department had acted ultra vires in two respects:

(a) Permitting post consent variation of the terms of the licence which was in breach of section 11 of the 1969 Act and;

(b) Redacting the second schedule of the published licences contrary to the obligations under section 11 of the 1969 Act.

[178] The applicant submits that under the second schedule to the licence the Department can amend the works programme by agreement. The applicant submits that this is contrary to the provisions of section 11 which provides that any variation in the works programme involves the grant of a new "power" and under section

11(2)(b) before exercising a power the Department must consult by serving notice of its intention to do so on persons and bodies set out in section 11.

[179] I reject the submission that the Department must consult on new activities to be authorised under the six-year term of the licence. The use of the words "the power in question" in section 11(3) I find refers to the "power" conferred by para 1(b) which is the "power" to authorise a person to do anything the Department can do under para 1(a) namely to carry out "all things as are necessary" for the purposes of searching for mines and minerals. Therefore, a variation in the work programme does not involve the grant of a new "power". Accordingly, section 11 does not require consultation when new activities are authorised.

[180] I do not find the Department acted ultra vires by having a term in the licence which empowers the Department to authorise works after the grant of the licence. I find that the Department is entitled to do this without the need for further consultation. The fact that the Department can do this however makes it even more important that it carries out an initial licence level screening and provides details of this to the public for consultation at the outset, in advance of granting an MPL.

[181] The redaction of material for public consultation is dealt with under the consultation ground of challenge.

Was the application academic?

[182] Mr Beattie KC in his written submission filed on behalf of Dalradian Gold Limited submitted that the application for judicial review was academic as the Department had now agreed the works programmes for years five and six in respect of DG3 and DG4 and under the agreement prospecting activities cannot commence until the Department assesses and approves the proposed activities. Dalradian Gold Limited therefore submitted that the argument about whether an HRA assessment should be conducted before or after the grant of a licence is now academic.

[183] The Department did not support Dalradian Gold Limited's submission that the judicial review was academic.

[184] I rejected the argument that the application is academic for the following reasons:

(a) The hearing relates not only to DG3 and DG4 but also relates to OM4.

(b) The notice party's submission is that the application is academic in respect of breach of EU legislation. There are however a number of other grounds of challenge, including a failure to have operate a fair consultation process.

(c) I further consider that there is good reason, in the public interest to address all the grounds of challenge as future prospecting licences will be sought in this jurisdiction and it is therefore important that there is clarity in respect of the construction of the relevant legal provisions and clarity is provided in respect of what is required in the consultative process.

Remedies

[185] As indicated at the hearing of this matter, any submissions in respect of remedies should be made within 14 days of the date of judgment.

Conclusion

[186] I will hear the parties in respect of costs.