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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY FRANK McGURK FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE DECISION OF THE DEPARTMENT OF THE ENVIRONMENT for NORTHERN IRELAND MADE ON 23rd APRIL 2014

McBRIDE J

Application

[1] The applicant seeks to judicially review the decision of the Department of Environment for Northern Ireland ("the respondent") dated 23 April 2014 ("the impugned decision") whereby it granted consent to discharge ("Waste Order consent") to Northern Ireland Water Ltd ("NIW") for a Waste Water Treatment Works ("WWTW") at Magilligan Strand.

[2] Leave to apply for judicial review was granted by Deeny J subject to further consideration of delay at the substantive hearing. The respondent and NIW did not object to leave being granted on this basis.

[3] The applicant was represented by William Orbinson QC and Ms Fionnuala Connelly of counsel. The respondent was represented by Dr Tony McGleenan QC and Philip McAteer of counsel. NIW was represented by Mr Stephen Shaw QC and Jonathan Dunlop of counsel. I am grateful to all counsel for their submissions and skeleton arguments which were well-researched, concise and ably presented.

Introduction

[4] The applicant is the owner of several fisheries located in Magilligan Strand.

[5] Magilligan Strand is located in the North West corner of County Londonderry. On 28 November 1994 it was designated as an area of special scientific

interest ("ASSI") and in January 1996 was registered as a special area of conservation ("SAC"). It hosts an area of fixed dunes supporting populations of butterfly and Petalwort. The site is also of international importance for earth science as it has features which are important to understanding post-glacial sea level history.

[6] Magilligan Strand lies in close proximity to Lough Foyle which is designated as a special protection area ("SPA").

[7] The Foyle and Tributaries SAC, the Finn and Tributaries SAC, the River Roe and Tributaries SAC and the Faughan and Tributaries SAC ("the river SACs") are all river systems whose conservation features include the protection of Atlantic salmon.

Factual Background

[8] Magilligan Waste Water Treatment Works ("Magilligan WWTW") was a significant project undertaken to rationalise and upgrade the existing scheme for the Magilligan and Benone areas. Prior to its construction there were Waste Water Treatment Works at Benone, Aughil, Drumavalley together with the MOD and HMP facilities. These waste water treatment works all variously discharged into either Lough Foyle or the Magilligan SAC. These were all aging assets and were impacting on the Magilligan SAC or the water courses they discharged into and/or were in breach of EU Directives. As a result NIW devised a scheme to rationalise and improve the sewage network.

[9] The core of the solution devised by NIW was a waste water treatment facility which was built on a green field site off Point Road, Magilligan.

[10] As part of the scheme, pumps at Benone station were refurbished and new pumping stations were constructed to replace the existing waste water treatment facilities. The facilities at Benone and the MOD and HMP facilities were then decommissioned. New waste water pumping mains were laid to link the new and refurbished pumping stations to the new Magilligan WWTW.

[11] The treatment process at Magilligan WWTW comprises three stages. Stage 1 includes processes to remove non biological matter followed by sedimentation. Stage 2 is the biological stage when the bacteria are fed oxygen. Stage 3 involves application of UV treatment to kill pathogens.

[12] After treatment the effluent is then discharged into the Atlantic Ocean via an outfall pipe at Magilligan Point.

[13] The contract for the scheme was awarded in January 2012 and the construction of Magilligan WWTW was completed in July 2014.

[14] The scheme involved a number of elements all of which required separate planning permission. Planning permission was required for the construction of the

Magilligan WWTW. A marine construction licence was required for installation and use of the outfall pipe at Magilligan Point, and a Waste Order consent was required for discharge of effluent from Magilligan WWTW into the Atlantic Ocean.

Planning application process

[15] NIW submitted an initial planning application for construction of Magilligan WWTW on 13 December 2007. Marenco, consultants employed by NIW prepared an environmental statement which proposed discharge of the effluent into Big Drain. Loughs Agency was consulted by the respondent. It responded on 7 January 2009 expressing concern that the environmental statement made no reference to the potential impact on the shellfisheries and aquaculture industries of Lough Foyle and stated that this was a fundamental flaw with the environmental statement. Thereafter a meeting took place on 15 June 2009 involving all the stakeholders. At this meeting Loughs Agency objected to discharge into Big Drain but suggested discharge into the River Roe. NIW then made a pre-application based on discharge into the River Roe. Loughs Agency responded on 1 September 2009 stating it felt strongly the discharge should be into the sea and not into the River Roe, which was a European designated salmonid river.

[16] On 4 November 2009 NIW submitted a pre-application for discharge into the Atlantic Ocean. Loughs Agency's response to this pre-application was that suitable hydrodynamic modelling was to be undertaken to assess the potential impact on shellfish in the vicinity.

[17] The Northern Ireland Environmental Agency ("the NIEA") then responded to Loughs Agency and indicated modelling would not be required if bacterial reduction was undertaken. NIEA then advised NIW that modelling work should be undertaken:-

> "To demonstrate the impact of the proposed discharge in relation to the bathing water at Magilligan Strand and shellfish waters in Lough Foyle. In the absence of this modelling NIEA would require secondary treatment with bacterial reduction for the effluent discharge to the Atlantic Ocean".

[18] On 20 April 2010 NIW applied for a Waste Order consent. On 11 August 2010 NIEA proposed conditions for a Waste Order consent and stated as follows:

> "As previously stated, in the absence of disinfection, NIW must undertake modelling to demonstrate the impact of the proposed discharge in relation to the bathing water at Magilligan and the shellfish waters in Lough Foyle".

[19] In September 2010 NIW provided an addendum to the environmental statement which consisted of a test of likely significance ("Tols") on final effluent. Paragraph 8.5 of the addendum environmental statement stated as follows:

> "Given the conditions of the NIEA discharge consent the likelihood of any negative impact on water quality as a result of the project is extremely unlikely".

[20] On 6 October 2010 NIW applied for planning permission for the construction of Magilligan WWTW.

[21] After considering the addendum environmental statement NIEA confirmed that it was "robust and dependable".

[22] By email dated 13 June 2011 NIEA's Water Management Unit identified the need for discharge conditions in the absence of modelling and stated:

> "In the absence of modelling the faecal coliform standards would be 2,000 faecal coliform/100ml. The BOD and SS standards would be 30:50 but NIW will probably need to achieve better than this in order to provide UV disinfection. This would be an all year round standard as in order to protect the shellfish water and bathing water. Any discharge must be below MLWS in order to provide a 1 in 10 dilution."

[23] On 7 February 2012 NIW announced the Benone Area Sewerage Scheme.

[24] On 18 June 2012 NIEA issued a marine construction licence for the outfall pipe at Magilligan Point.

[25] On 20 June 2012 the applicant objected to the works and his solicitor sent an email to NIW on 20 August 2012. On 14 November 2012 NIW representatives and their legal representatives met the applicant and his solicitor Mr Hasson to discuss the matter. Thereafter discussions continued for some 12 months.

[26] On 21 November 2012 planning permission was granted for construction of Magilligan WWTW.

Planning Application process for consent to discharge

[27] On 19 September 2013 NIW made a full application for Waste Order consent. This was subjected to a three stage process of advertisement and consultation. At stage one various organisations were consulted including NIEA Conservation, Designation and Protection. No concerns were raised by any of the consultees at stage one.

[28] Stage two involved advertisement and public consultation. The application was advertised in the local papers thereby commencing a 42 day period of public consultation. Only one request for more information was received on 12 November 2013 from the applicant's solicitor. The information requested was forwarded by email the same day.

[29] At Stage three a secondary consultation process took place. As the discharge was to a marine environment close to the mouth of Lough Foyle a copy of the draft consent to discharge was forwarded to Loughs Agency and DOE Marine Division, for comment. Loughs Agency is a statutory body charged with the conservation, protection and development of inland fisheries within the Foyle and Carlingford systems, the promotion of development of Loughs Foyle and Carlingford and catchments for commercial and recreational purposes in respect of marine, fishery, and aquaculture issues and the development of marine tourism. DOE Marine Division is responsible for the marine environment.

[30] Loughs Agency did not respond or forward any comment during the consultation period save that it made contact on 27 November 2013 to state the applicant may have fishery interests in the area. DOE Marine Division in its response stated it had no comment to make on the proposed discharge.

[31] The applicant first made contact on 12 November 2013. On 15 November 2013 his solicitor sent a letter objecting to the consent to discharge on the grounds "that this will severely interfere with and/or cause damage to our client's operation of his Fishery and the Fishery itself".

[32] The applicant instructed Dr Henderson, Director of Pisces Conservation Limited and a specialist in fish ecology on 22 November 2013.

[33] On 6 December 2013 Ms Stewart, Senior Scientific Officer within the Northern Ireland Environment Agency with particular responsibility for the regulation of discharges both to freshwater and marine environments, responded to the applicant's solicitor's letter of objection dated 15 November and stated as follows:-

> "… The construction of the discharge pipe is subject to planning approval and in certain cases marine construction licensing. NIEA is only responsible for the consent to discharge under the Water (Northern Ireland) Order 1989. As part of this consent process NIEA consult with a number of other agencies. Loughs Agency is the competent authority for fishery interests in this area and they were consulted during the pre-application process in 2010. No negative comments were received from them in relation to this project".

[34] On 18 November 2013 NIEA extended the deadline for objections to 31 January 2014. On 12 February 2014 Dr Henderson sent an email to the applicant which he then forwarded to his solicitor. It stated as follows:

> "… As far as we can tell no analysis or study of the impacts of the outfall on salmon and fish in general was undertaken and there seems to have been no consideration given to fish and fishing in general. Further no modelling work was undertaken to show the dispersal or movement of the plume with the tide … what we would expect was a model of the plume movement and extent over a typical tidal cycle …"

[35] On 14 February 2014 the applicant's solicitors wrote to Ms Stewart setting out the grounds for objection to the grant of the discharge consent as follows:

> "1. At paragraph 10 of the application it is stated that the length of the discharge pipe from shore/river bank to the outlet point is 305 metres. From inspection and enquires (sic) by our client, we are satisfied that this statement is factually incorrect and that the actual length is substantially less than that stated. This would therefore call into question the stated depth of water above outlet.
>
> 2. There would appear to be no analysis or study of the impacts of the outfall on salmon and fish in general undertaken and there seems to have been no consideration given to fish and fishing in general.
>
> 3. It would further appear that no modelling work was undertaken to show the dispersal or movement of the plume with the tide. A proper approach would be to demonstrate a model of the plume movement and extent over a typical tidal cycle.
>
> 4. Proper environmental studies therefore were not undertaken and those that were could be considered flawed or even negligent".

[36] Ms Stewart responded by letter dated 28 February 2014. She confirmed that the pipeline had been confirmed as being 305 metres from the bank of the shore. NIEA did not stipulate a particular length of outfall as part of the project but required that the discharge was below Mean Low Water Spring. This condition was met. In relation to modelling she stated:

> "Where modelling of the discharge is not carried out, NIEA require that UV disinfection is put in place. The standards set on the discharge are to meet the bathing water standards outside of the mixing zone. There is to be UV disinfection throughout the entire year to provide maximum protection to the receiving water. Loughs Agency was consulted as part of this application process and did not highlight any concerns. Modelling of the discharge was not carried out but the standards put in place will afford appropriate protection for the nearby bathing water and shellfishery in Lough Foyle. At no point of this project did Loughs Agency raise any concerns with fishery interests in the area. …We find that no scientific evidence has been produced which would prevent the issuing of the consent to discharge from Magilligan Point WWTW"

[37] On 3 March 2014 NIEA prepared a draft Waste Order consent with conditions. This was sent to various statutory consultees for comment. Marine Division responded on 18 March 2014 stating it had no adverse comments. Loughs Agency did not respond or forward any comments.

[38] On 2 April 2014 Dr Henderson wrote to Ms Stewart requesting further information about the discharge and in particular how the mixing zone was defined.

[39] The Water Order consent issued on 23 April 2014. It was subject to certain conditions.

[40] On 28 April 2014, some 5 days after the Waste Order consent issued, NIEA replied to Dr Henderson's letter dated 2 April 2014.

[41] On 13 May 2014 Dr Henderson raised further queries and NIEA replied on 27 May 2014, stating:

> "You are correct that in the absence of modelling we cannot determine the dispersion of the plume for the discharge. As a result we requested year round disinfection to ensure the highest level of treatment for this discharge. There are two protected areas as defined under the Water Framework Directive, the bathing water at Benone, some 5.5kms away and the shellfish waters in Lough Foyle 8kms away. The faecal coliform standards have been set to protect these areas."

[42] On 10 July 2014 Dr Henderson prepared a report entitled, "Impacts on Salmon and Other Fish relating to the Benone area Sewage Discharge Scheme" which was sent to the applicant on 11 June 2014. His report concluded that:

> "There are strong grounds to believe that the discharge will affect the distribution of salmon … in the vicinity of the discharge and in the waters where salmon were traditionally fished. Salmon would likely avoid the plume. This is because salmon are sensitive to changes in oxygen, water temperature, suspended solids and chemical constituents that will likely occur within the plume."

Pre-action correspondence

[43] On 19 June 2014 the applicant sent a pre-action protocol letter to the Crown Solicitors Office rather than the Departmental Solicitors Office. On 18 July 2014 the Departmental Solicitors sent a holding response to the pre-action protocol letter.

[44] On 23 July 2014 the Order 53 Statement was lodged in the High Court with a covering letter advising the court that NIW had entered into discussions with the applicant. On 22 January 2015 NIW indicated to the applicant that it had no proposals to make and invited the applicant to continue with his judicial review. On 6 February 2015 the applicant asked for the judicial review to be listed. On 17 July 2015 the respondent replied to the pre-action protocol letter stating the discharge consent was appropriately granted and submitted that the applicant had delayed in bringing the application, lacked locus standi and had failed to avail of an alternative remedy.

The application

[45] The applicant seeks the following relief:

(a) An Order of Certiorari quashing the impugned decision.

(b) A declaration that the decision is unlawful, ultra vires and of no force or effect.

(c) An injunction restraining the operation of the Waste Order consent pending the redetermination of the consent application by the respondent.

[46] The grounds of challenge are that the respondent:

(a) Acted in breach of its duties under the Water (Northern Ireland) Order 1999.

(b) Failed to discharge its duty of inquiry.

(c) Was Wednesbury unreasonable.

(d) Acted in a procedurally unfair manner.

(e) Breached its duties under the Habitats Directive/Habitats Regulations.

(f) Acted in breach of its duties under Council Directive 200/60/EC.

(g) Acted in breach of Article 17 and 37 of the Charter of Fundamental Rights of the European Union (Environment Protection).

(h) Acted in breach of its obligations under Section 60 of the Human Rights Act 1998 as it acted incompatibly with the applicant's right to the peaceful enjoyment of his possessions pursuant to Article 1 of Protocol 1 of the European Convention on Human Rights, namely his several fisheries which are located at the relevant area in Magilligan.

[47] The applicant's case essentially is that in granting the Water Order consent the respondent acted in breach of both domestic and EU law.

[48] The respondent denies that it has breached either domestic or EU law. It further submits that relief should be denied on the grounds the applicant has delayed, lacks locus standi and has an alternative remedy.

[49] Before considering the substantive grounds of challenge it is necessary to first consider whether the application should be refused on the grounds of delay, lack of locus standi and/or the availability of an alternative remedy.

Delay: **Relevant legal principles**

[50] Maguire J in *Musgrave Partners (Northern Ireland) Limited's Application (Leave Stage)* [2012] NIQB 109 confirmed the applicable time limit for challenge in respect of EU grounds is 3 months. All the parties agreed the application had been made within the applicable time limit in respect of the EU grounds.

[51] In respect of the domestic grounds of challenge an application for leave must be made promptly and in any event within 3 months from the date when planning permission is granted. Whilst the requirement of "promptitude" applies to all judicial review cases it has been recognised that, in the planning context, there is a particular need for prompt challenges.

[52] The reason for that approach is primarily, as Maguire J noted in *Musgrave* at paragraph [13]:

> "… because decisions by public authorities will usually have impacts on the rights and interests of third parties who are affected by them."

[53] Richards J in *R v London Borough of Haringey ex parte Gavin* [2003] EWHC 2591 at paragraph [79] held:

> "The need to bring any challenge to a planning permission speedily has been emphasised repeatedly in the cases (although they must now be read subject to the qualifications in *R (Burkett) v Hammersmith and Fulham* LBC [2001] WLR 1593. Mr Goatley cites, by way of example, the reasons given by Pill LJ in *R v Newbury DC ex parte Chievely Parish Council* (Court of Appeal judgment dated 23 July 1998):
>
> > `A reason for that approach is that a planning permission is contained in a public document which potentially confers benefit on the land to which it relates. Important decisions may be taken by public bodies and private bodies and individuals upon the strength of it, both in relation to the land itself and in the neighbourhood. A chain of events may be set in motion. It is important to good administration that, once granted a permission should not readily be invalidated. As confirmed in the House of Lords … there is an interest in good administration independent of hardship, or prejudice to the rights of third parties. The court is entitled to look at the interest in good administration independently of those other matters. … In my judgment, weight should be given to this aspect of the case notwithstanding the absence of convincing evidence that the applicants for planning permission have been prejudiced by the delay … I have no doubt that interests of good administration, which, … extend beyond the interest of the parties to the litigation, should constitute an important factor in the decision."

[54] There is no rule of thumb as to what constitutes a timely application but normally it requires the application to be made well within the outer time limit for

judicial review applications of 3 months. This is especially so where the challenger is well aware of the application for planning permission, has objected to it, has engaged planning experts to monitor the progress of the application and was in correspondence with the planning service about them.

[55] If an application is not lodged promptly then, in accordance with Order 53 rule 4 of the Rules of the Supreme Court (Northern Ireland) the court can only extend time if the applicant satisfies the court there is "good reason" for extending the period within which the application shall be made. In such cases the applicant should in his affidavit evidence account for all the periods of delay.

[56] What constitutes "good reason" depends on all the circumstances of the case but typically includes consideration of:

> "…the likelihood of substantive hardship to or substantial prejudice to the rights of, any person and detriment to good administration. Also included would be whether there was a public interest in the matter proceeding" as per Weatherup J in *Laverty v PSNI & Ors* [2015] NICA 75 at paragraph 21."

[57] In *Musgrave Retail* Maguire J, at paragraph [43] held that when considering public interest factors the court should take into account:

> "….the object of the rule overall is to bar access to the court by late applications. This inevitably will entail the consequence that issues of the legality of public authority decision-making which could become the subject of legal argument and a full judicial review if raised in a timely manner, are not heard".

He held that the court should not extend time merely on the basis, that by failing to do so it may be permitting potential illegalities to be perpetrated. He accepted however that there might be circumstances where the desirability of hearing a challenge on public grounds "might be so compelling as to promote the extension of time". At paragraph [44] he indicated that if the court was of the view the issue was "one of sufficient weight or significance that the public interest requires it to be determined", in such circumstances the court would be likely to extend time.

[58] Weatherup J confirmed in *Laverty* at paragraph [21]:

> "(iv) At the leave hearing the court may grant or refuse leave and may also (a) defer leave for further consideration of delay or (b) grant leave subject to further consideration of delay, in each case either as a preliminary matter or at the substantive hearing.

…

(vi) On a substantive hearing delay may impact on the relief granted."

Delay: Submissions of the parties and Consideration

[59] The impugned decision was made on 23 April 2014 and the Order 53 Statement was lodged on 23 July 2014. Although leave was granted it was subject to further consideration of delay at the substantive hearing.

[60] The first question the court has to determine is whether the application has been made promptly. As appears from the affidavit of Mr McCurdy, chartered engineer and head of Wastewater Capital Delivery in NIW, sworn on 11 September 2015 the applicant was aware that relevant works were being carried out by NIW from August 2012. Although the applicant threatened to issue injunction proceedings he did not do so at that time. In addition he did not challenge the grant of planning permission dated 21 November 2012 for the construction of Magilligan WWTW.

[61] In respect of the impugned decision the applicant engaged in the consultation process and was aware from 6 February 2014 that discharge of effluent had commenced at Magilligan WWTW. Despite this no proceedings were issued by him until 23 July 2014.

[62] Given his knowledge of the works being carried out at the site and his engagement with planning services and correspondence with them about the works I am satisfied that the application was not made promptly.

[63] In these circumstances the court has then to consider whether it should extend time. The applicant submitted that the court should extend time because:

(a) NIW was engaged in discussions with the applicant. In accordance with the pre-action protocol in judicial reviews, proceedings should not be issued prematurely. In this case proceedings were not issued as a settlement was still actively being explored.

(b) The expert report of Dr Henderson was not available until 10 July 2014.

(c) The applicant was awaiting a response from the respondent to the pre-action protocol letter.

[64] The respondent submitted that the applicant had not set out a sufficient evidential basis to account for the delay and further submits that if permission was granted it would cause hardship and prejudice to third party rights and would be detrimental to good administration. Therefore the respondent submitted the public

interest dictated that the application should not be granted. NIW submitted that it has been prejudiced by the delay.

[65] The applicant incorrectly sent the pre-action protocol letter to the Crown Solicitors' Office. This caused a delay in response by the respondent. The judicial review proceedings however were issued by the applicant before the respondent's response to the pre action protocol letter. I am therefore satisfied that the delayed response to the pre-action protocol letter did not cause the applicant to delay issuing judicial review proceedings.

[66] Secondly I do not find that the delay in obtaining a report from Dr Henderson delayed the issuing of proceedings. Dr Henderson had been engaged since 22 November 2013 and had given advice to the applicant on 12 February 2014. The applicant proffers no reason for the delay of some 8 months by Dr Henderson in providing what was a short report. Further, the report provided did not contain any information which could not have been provided many months earlier. I therefore find that the applicant could have mounted the challenge in the absence of the report.

[67] I find that the real reason for the delay in issuing proceedings was because the applicant was engaged in discussion with NIW. Initially when proceedings were lodged with the court there was a note stating that NIW had entered into discussions with the applicant. The application thereafter remained in abeyance and the court was informed in August 2014 that discussions were ongoing. It was not until 22 January 2015 when NIW informed the applicant that it had no proposals to make that the applicant then took steps to have the judicial review proceedings listed. I am therefore satisfied that until 22 January 2015 there were live negotiations ongoing between the applicant and NIW and each party considered that there was a realistic prospect of a negotiated settlement. I therefore accept that delay arose in this case because there were ongoing discussions between the parties and in those circumstances the applicant did not want to issue proceedings prematurely.

[68] In determining whether there is "good reason" to extend time I have to consider whether the delay has caused hardship or prejudice to any third party and or detriment to good administration and then balance these factors against the factors which favour the matter proceeding.

[69] The respondent and NIW submit hardship and prejudice would be caused if the matter proceeds. This is because Magilligan WWTW has been built at a considerable cost and the other plants have been decommissioned. If relief is granted the discharge effluent would now have to be "tankered off" at a daily cost of £9,000.

[70] The applicant submits that there are public interest factors in having this matter heard especially as it involves matters relating to clean water and protection of Atlantic salmon. In addition the applicant submits that there is a public interest in proceedings not being issued prematurely when there is still a realistic prospect of

settlement and this public interest factor is reflected in the Judicial Review Pre-Action Protocol.

[71] In determining whether the court should exercise its discretion to hear the substantive issues I note that such a hearing does not adversely affect the functioning of Magilligan WWTW. It will continue to operate. In addition, hearing the application does not increase operating costs. I have no doubt for these reasons NIW did not object to leave being granted. In so doing, I find that it impliedly accepted the hearing of this application would not cause prejudice or hardship. I therefore find that there is no evidence before the court to show prejudice or hardship to NIW or any other person if the court were to extend time to hear the application.

[72] I accept that certainty is a weighty matter in public administration and generally the court would not extend time unless the desirability of hearing a challenge on public interest grounds is either compelling or the issues are of sufficient weight and/or significance that the public interest requires them to be determined in the proceedings. In the present case I have to balance the importance of certainty against the countervailing public interest factors of not having proceedings issued unnecessarily or prematurely and the public interest in ensuring that decisions which affect the provision of clean water and the protection of Atlantic salmon are properly and lawfully taken.

[73] Taking all the factors into account I find that the balance falls in favour of extending time to hear the application. In carrying out the balancing exercise I have given less weight to the factors of prejudice, hardship, good administration and certainty than might usually be the case. This is because there is to be a hearing on the EU grounds in any event and the respondent and NIW did not object to leave being granted. In such circumstances, I am satisfied a hearing on the domestic grounds of challenge would not cause any further uncertainty to public administration or prejudice or hardship to third parties and this appears to be impliedly accepted by the parties as they did not object to leave being granted. Against these factors I have balanced the public interest in ensuring decisions which relate to provision of clean water and protection of salmon are properly and lawfully taken and the public interest in proceedings not being issued unnecessarily or prematurely. Whilst I do not accept that the public interest in ensuring proper decision making about clean water and protection of salmon is of such weight that the public interest requires them to be determined when there has been significant delay, the public interest in proceedings not being issued prematurely has tipped the balance in favour of extending time in this case. I therefore find there is good reason to extend time to hear the domestic grounds of challenge in this application.

[74] This has been a finely balanced decision. Based on the specific facts of this case the balance is just tipped in favour of permitting the matter to proceed to hearing.

[75] As Weatherup J noted in *Laverty* delay is relevant both to the question whether the court should exercise its discretion to extend time to hear the grounds of challenge and to the question whether the court, in the event that the grounds of challenge are made out, should exercise its discretion to grant relief and if so the nature of the relief. In this case, the weight to be given to the impact of the substantial delay, and in particular the prejudice caused to third parties, in respect of the question whether to extend time is less than the weight which would be afforded to these factors by the court if and when it considers the question whether to exercise its discretion to grant relief and if so, the nature of the relief to be granted.

Locus Standi

[76] The applicant inherited two several fisheries located on Magilligan Strand from his father. These fisheries have existed since 1871. The fisheries gave the applicant the right to fix draft nets at two sites. The west draft net is situated 910 metres from the Martello tower and the east draft net is approximately 1560 metres from the Martello tower. The outfall pipe is located 152 metres east of the Martello tower.

[77] Although the operation of the fisheries was suspended under EU legislation since 2004, the applicant states in his affidavit that he intends to operate the fisheries, if and when the suspension is lifted, in the future. By letter dated 26 June 2012 Loughs Agency confirmed that the applicant had proprietary rights and stated "these property rights remain intact despite the current situation".

[78] In its skeleton argument the respondent submitted that as there is no evidence of interference with the applicant's proprietary rights the applicant lacked sufficient locus standi. At the hearing however, the issue of lack of locus standi was not actively pursued by the respondent.

[79] NIW also submitted that the applicant lacked locus standi because he had not utilised his fishing rights in recent times. NIW further submitted that given the physical distance between the outfall pipe and the fisheries there was no physical restriction on the applicant operating his fisheries. NIW denies that there was any risk to marine life arising from the discharge of the effluent given that it is of such a high quality.

[80] Order 53 Rule 3(5) of the Rules of the Supreme Court (Northern Ireland) 1980 requires that an applicant in judicial review proceedings has a "sufficient interest in the matter to which the application relates". The courts have developed a reasonably liberal approach to the requirement of standing. In *D's Application* [2003] NICA 14, Carswell LCJ said at paragraph [15] that the court:

> "…would tentatively suggest that the following propositions may now be generally valid:

(a) Standing is a relative concept, to be deployed according to the potency of the public interest content of the case.

(b) Accordingly, the greater the amount of public importance that is involved in the issue brought before the court, the more ready it may be to hold that the applicant has the necessary standing.

(c) The modern cases show that the focus of the courts is more upon the existence of a default or abuse on the part of a public authority than the involvement of a personal right or interest on the part of the applicant.

(d) The absence of another responsible challenger is frequently a significant factor, so that a matter of public interest or concern is not left unexamined."

[81] I am satisfied that the applicant has sufficient standing to bring these proceedings for the following reasons. First, he has proprietary rights to fish in the location. Loughs Agency has confirmed that these rights remain intact notwithstanding the fact the operation of the fisheries was suspended under EU legislation. I agree with this view. Although one of the early drivers for the application was concern that the applicant's nets would snag on the outfall pipe it is now clear that there is no concern about snagging given the physical distance between the outfall pipe and the location of the fisheries. Notwithstanding this, the applicant expresses concern that the quality of the effluent has the potential to affect marine life and in particular Atlantic salmon and therefore his fishing rights which are in an area close to the outfall pipe.

[82] Secondly, the case involves issues of public importance namely default or abuse by the respondent in relation to the provision of clean water and the protection of Atlantic salmon.

[83] Thirdly, there is no other challenger to the respondent's decision.

Alternative Remedy

[84] The respondent and NIW, in their respective skeleton arguments submitted that the applicant had an alternative remedy open to him, namely a claim for compensation for unlawful interference with his property rights. They further submitted that the present proceedings were being used as a tactic to secure monetary compensation and for this reason the applicant only belatedly sought an injunction in the present proceedings.

[85] I accept that the applicant may have an alternative remedy for compensation for interference with his fishing rights. I am not however satisfied that it is necessarily an effective alternative remedy given the defences which may potentially be available including a defence of lawful interference based on the fact the respondent has granted permission for the discharge. Further, I am not satisfied that such a remedy would be effective having regard to the delay, costs and inconvenience of pursuing such proceedings and it is unclear what remedies would be available to the applicant, in particular whether he could obtain injunctive relief. I therefore find that judicial review should be available to the applicant.

Substantive Grounds

Relevant legal principles in respect of judicial review of planning decisions

[86] In *Bow Street Mall Limited and Others' Application for Judicial Review* [2006] NIQB 28 Girvan J at paragraph [43] set out a number of clearly established principles governing the role of planners and the role of the courts in planning cases. In particular he noted that:

> "The Judicial Review Court is exercising a supervisory not an appellate jurisdiction. In the absence of a demonstrable error of law or irrationality the court cannot interfere. The court is concerned only with the legality of the decision making process. If the decision maker fails to take account of a material consideration or takes account of an irrelevant consideration the decision will be open to challenge."

Further in *Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government* [2014] EWHC 754, Lindblom J held at paragraph [19](3) as follows:

> "The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, 'provided that it does not lapse into Wednesbury irrationality' to give material considerations 'whatever weight [it] thinks fit or no weight at all' (as per Lord Hoffmann in *Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 WLR 759, at p.780F-H)."

[87] *In the Matter of an Application by Newry Chamber of Commerce and Trade for Judicial Review* [2015] NIQB 65 Treacy J reviewed the authorities referred to in

paragraphs [38] and [39] above and accepted the principles set out therein and added at paragraph [44] the following principle:

> "Planning authorities are obliged to collect the information they need to be able to exercise their discretion in a rational way. A court must be satisfied that the planner has asked himself the right question when addressing his task and that he took reasonable steps to find the information required to answer the question correctly."

[88] The Judicial Review Court's function is therefore not to conduct an appeal on the merits of the planner's decision but rather to review the procedural propriety, legality and rationality of the Department's decision-making process.

Grounds A & B – Breach of Section 4 of the Water (Northern Ireland) Order 1999 and Failure to Discharge duty of Inquiry

Relevant Legislative Provisions

[89] Article 4 of the Water (Northern Ireland) Order 1999 ("the Water Order") states as follows:

> "*General Duty of the Department*
>
> **Duty of Department to promote conservation and cleanliness of water resources**
>
> 4.—(1) The Department shall—
>
> (a) promote the conservation of the water resources of Northern Ireland;
>
> (b) promote the cleanliness of water in waterways and underground strata.
>
> (2) The Department shall, in exercising its functions in relation to the conservation of water resources and the cleanliness of water, have regard to—
>
> (a) the needs of industry and agriculture;
>
> (b) the protection of fisheries;
>
> …"

[90] Paragraph 4(6) of Schedule 1 provides that:

> "(6) It shall be the duty of the Department to consider any representations with respect to a discharge consent … as are made to it in such manner, and within such period, as may be prescribed and have not been withdrawn."

Grounds A & B: Submissions of the parties

[91] The applicant submits that the respondent breached the Water Order by:

(a) failing to have proper regard to the protection of the applicant's several fisheries; and

(b) failing to consider the representations made by the applicant through his solicitor.

[92] The applicant further submits that as the respondent failed to conduct modelling testing to determine the fate of the discharge plume it failed to discharge its duty of inquiry as it was not sufficiently informed about the size, shape and dimensions of the discharge plume to make the impugned decision.

[93] The respondent submits that it had regard to its duties under the Water Order. It further submits that modelling was not required due to the high level of disinfection put in place.

Grounds A & B: Consideration

[94] I am satisfied that the respondent did have regard to the protection of fisheries and did consider the representations made by the applicant as evidenced by the consultation with the statutory consultees including Loughs Agency; the correspondence entered into between the parties and their respective representatives; and, the imposition of a condition in the Water Order consent requiring year round bacterial reduction.

[95] The respondent engaged in a two stage consultation process with a number of statutory consultees. Loughs Agency, whose remit includes the protection of fisheries was consulted at the pre-consent stage. As appears from the planning application process, set out in paragraphs [15]–[42] above, it expressed concerns about the initial proposal which involved discharge into Big Drain. It then expressed concern about a later proposal which involved discharge into the River Roe. When the proposal changed to discharge to the Atlantic Ocean, Loughs Agency was again consulted at the secondary consultation stage, on 3 March 2014. It received a copy of the draft consent to discharge by NIEA which contained the condition requiring year round bacterial reduction in the absence of modelling.

Loughs Agency did not forward any objection to this. Therefore, throughout the process Loughs Agency was consulted and at no point did it raise any concern about the proposal to discharge effluent offshore at Magilligan Point. DOE Marine Division was also consulted and responded stating that it had no comment to make on the proposed application. In addition NIEA's Water Management Unit responded to the consultation by requiring discharge conditions in the absence of modelling in order to protect the shellfish and bathing waters. Further, the consultation responses by the Department of Agriculture and Rural Development Fisheries Division and Agri-Food and Bio-Sciences Institute Fisheries and Eco-Systems Branch in respect of the application for a marine construction licence in respect of the outfall pipe at Magilligan demonstrate that they did not raise any concern about the impact on fish by reason of the location of the outfall pipe. I am therefore satisfied the respondent did have proper regard to the protection of fisheries.

[96] As appears from the chain of correspondence set out at paragraphs [31]-[42] above the respondent considered and addressed the applicant's representations about potential damage to his fishing interests.

[97] I am further satisfied that the respondent's failure to conduct modelling does not mean that it failed in its duty of inquiry. Miss Millar in her affidavit sworn on 11 September 2015 at paragraphs [78] and [79] explains why modelling was not required:

> "78. Modelling of the discharge may have negated the need for this level of treatment but in its absence the water management unit applied the highest standards available.
>
> 79. In other words the water management unit would have required modelling of the discharged effluent dispersal had NIW not offered year round disinfection. NIW did however propose the use of UV disinfection which will all year round … to eliminate the risks to the shell fish and bathing waters. In doing so, this negated any reason to model as the risk element had been removed from the discharge."

The respondent was entitled to make the decision that disinfection negated the need for modelling. In making such a decision I do not find that the respondent failed in its duty of inquiry. This decision by the respondent is one which can only be challenged on Wednesbury grounds.

Ground C – Wednesbury Unreasonable: Submissions and Consideration

[98] The applicant submits that the respondent reached a conclusion which no reasonable decision-maker, properly directing itself could have reached on the evidence available, including the concerns expressed by the applicant through his solicitor, and the evidence of Dr Henderson.

[99] The applicant relies on the following conclusions reached in the report of Dr Henderson dated 10 July 2014:

(a) As a result of the lack of modelling no analysis or conclusions were reached by the respondent in respect of the fate of the plume of the discharge.

(b) There are strong grounds to believe that the discharge would affect the distribution of salmon and other marine life in the vicinity of discharge and in the waters where salmon were traditionally fished as salmon would likely avoid the plume because they are sensitive to changes in oxygen, water temperature, suspended solids and chemical constituents that are likely to occur in the plume.

[100] The respondent submits that there is no basis upon which the impugned decision is Wednesbury unreasonable as it took all relevant matters into account, did not take any irrelevant matters into account and acted rationally.

[101] The respondent had to determine the question whether the quality of the effluent was such that it would have an adverse impact on water quality and/or fisheries. In addressing that question the respondent obtained information from both Loughs Agency and NIEA which indicated that modelling was not required if the NIW provided a high level of bacterial reduction on a year round basis. Dr Henderson in his correspondence, report and affidavits, never challenged this thinking about plume analysis versus bacterial reduction. He simply did not address the issue whether the effluent was harmful as he was pre-occupied with the question where the discharge plume went.

[102] In all the circumstances I am satisfied that the respondent asked the right question and took reasonable steps to find the information required to answer that question. The decision that modelling was not required was one for the respondent to make subject to Wednesbury challenge. There is nothing to demonstrate that the respondent reached a decision which no reasonable authority could have reached. On the available evidence I am satisfied that it was entitled to conclude that modelling was not required provided a high level of bacterial reduction was undertaken on a year round basis. I am therefore satisfied that the respondent's decision to accept year round bacterial reduction instead of modelling was a rational one.

[103] Insofar as the applicant challenges the impugned decision generally on Wednesbury grounds, I am satisfied, having regard to my consideration of all the grounds of challenge, that the respondent: took all relevant factors into

consideration; did not take any irrelevant factors into account; applied a fair procedure; and, did not make any error of principle or act irrationally or perversely. I therefore find that the impugned decision cannot be said to be Wednesbury unreasonable.

Ground D - Procedural Unfairness: Submissions

[104] The applicant submitted that the respondent acted in a procedurally unfair manner as it did not reply to Dr Henderson's letter dated 2 April 2014 until 28 April 2014, some 5 days after the impugned decision was taken on 23 April 2014. The applicant submits that at the time the impugned decision was taken the applicant was still in the process of obtaining information from Dr Henderson which in turn informed his objection. The respondent submitted that it had adopted a fair procedure.

Ground D: Consideration

[105] In *Rowsome's Application* [2003] NIQB 61, Weatherup J at paragraph [19] underlined that the DOE had a duty to act in a procedurally fair manner when considering a planning application and that this duty extended to objectors "and may require the respondent to provide objectors with an opportunity to make additional representations".

[106] To determine whether there has been procedural unfairness it is necessary to consider the chain of correspondence between the respondent, the applicant, his advisors and his expert, Dr Henderson.

[107] The email from the applicant's solicitors dated 14 February 2014, which was based on input from Dr Henderson raised the issue of modelling. Ms Stewart from Water Management Unit replied on 28 February 2014 and specifically addressed the query about modelling and explained as follows:

> "Where modelling of the discharge is not carried out NIEA require that UV disinfection is put in place. The standards set on the discharge are to meet the bathing water standards outside of the mixing zone. There is to be UV disinfection throughout the entire year to provide a maximum protection to the receiving water, Loughs Agency was consulted as part of this application process and did not highlight any concerns. Modelling of the discharge was not carried but the standards put in place would afford appropriate protection for the nearby bathing water and shellfishery in Lough Foyle. At no point in this project did the Loughs Agency raise any concerns with fishery interests in the area."

[108] In his letter dated 2 April 2014 Dr Henderson requested information about the movement and extent of the discharge plume. The respondent replied on 28 April some 5 days after the consent was granted. In this letter it repeated that no modelling has been carried out and then provides details of the disinfection.

[109] Dr Henderson then writes to Ms Stewart on 13 May 2014, again seeking information about the orientation and fate of the plume and asking her to confirm that, as no modelling work carried out, she has "no understanding as to the shape and orientation of the plume". On 27 May 2014 Ms Stewart confirmed that in the absence of modelling she cannot determine the dispersion of discharge plume and again explained that the faecal coliform standards were set to meet the high standards required for the protection of the bathing waters at Benone and the shellfisheries in Lough Foyle.

[110] The applicant submits that the failure to reply to Dr Henderson's letter dated 2 April 2014 impeded him in formulating his objections. I do not accept this argument. I am satisfied that as of 28 February 2014 the applicant and his advisers knew that no modelling had been carried out as there was UV disinfection and therefore the respondent did not know, and felt it did not need to know, the extent and position of the discharge plume.

[111] Dr Henderson's letter dated 2 April 2014 raised issues about modelling. It did not raise any new matter. Similarly the letter dated 28 April 2014 merely repeated information previously provided to the applicant.

[112] The main point of contention between the parties was and remains whether there was a need to conduct modelling work. As the respondent had provided an explanation in the 28 February 2014 correspondence for not conducting modelling, I find that its failure to reply to the letter dated 2 April 2014 did not prevent the applicant from making any submission or objection that he wished to make as he already had sufficient information prior to the impugned decision to make all the objections he wished to make. In fact all the matters raised by the applicant in his grounding affidavit were raised by him prior to the impugned decision. Thus the failure to reply to the 2 April 2014 letter until after the impugned decision was taken did not cause any prejudice to the applicant. In the event, the applicant made his objections and the respondent replied to these objections. I therefore find there was a fair procedure.

[113] I note that the applicant has raised new grounds of challenge in the affidavit evidence, namely the impact of the discharge on the river SACs. I am satisfied that the applicant could have engaged these experts at an earlier stage if he had so wished and there is nothing to show the procedures adopted by the respondent were unfair.

Ground E: Breach of the Habitats Directive

[114] The heart of the applicant's challenge is that the respondent failed to comply with its obligations under EU Law, specifically Article 6(3) of the Habitats Directive and Regulation 43 of the Habitats Regulations.

Ground E: Relevant Legislative provisions

[115] Counsel directed 92/43/EEC ("the Habitats Directive") provides a mechanism for the conservation of natural habitats and of wild fauna and flora. The Habitats Directive was transposed into domestic law by the Conservation (Natural Habitats etc) Regulations (Northern Ireland) 1995 ("the Habitats Regulations").

[116] Article 6(3) of the Habitats Directive provides:

> "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 light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, 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 and, if appropriate, after having obtained the opinion of the general public."

[117] Regulation 43(1) of the Habitats Regulations provides:-

> "A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or a project which –
>
> (a) Is likely to have a significant effect on a European site in Northern Ireland or a European off-shore marine site (either alone or in combination with other plans or projects) and
>
> (b) Is not directly connected with or necessary to the management of the site,

> shall make an appropriate assessment of the implications for the site in view of that site's conservation objective.
> …
> (5) In the light of the conclusions of the assessment, and subject to Regulation 44, the authority shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site.
>
> (6) In considering whether a plan or project will adversely affect the integrity of the site, the authorities shall have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which it is proposed that the consent, permission or other authorisation should be given."

[118] Under Regulation 9(1)(a) a European site is defined as including a special area of conservation ("SAC").

[119] The interpretation of these provisions has been the subject of jurisprudence both in this jurisdiction and England and Wales. The following principles emerge from this jurisprudence:

(a) Regulation 43 reflects the requirements of Article 6(3) – *per* Treacy J in *Newry Chamber of Commerce* [2015] NIQB 65 at paragraph [46].

(b) Regulation 43 provides for a 2 stage process. At stage 1 the respondent has to ascertain whether the plan or project is likely to have a significant effect on the integrity of a European site ("Tols"). Stage 1 is set at a low threshold. At this stage the question is "should we bother to check?" It operates as a trigger to determine whether it is necessary to proceed to stage 2. A risk triggering the need for a stage 2 appropriate assessment 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 an assessment must be carried out" – as *per Waddenzee (Case 127/02)* [2004] ECR -1 7405 at paragraph [44].

(c) At stage 2 an 'appropriate assessment' must be carried out of the implications of the plan or project for the conservation objectives of the site. The question at stage 2 is, "What will happen to the site if this plan goes ahead and is that consistent with the site's conservation objectives?" "Thus where a plan or project not directly connected with or necessary to the management of a site is likely to undermine the site's conservation objectives, it must be considered likely to have a significant effect on that site. The assessment of that risk must be made in the light, inter alia, of the characteristics and specific environmental conditions on the site concerned by such a plan or project."–

per Weatherup J in *Sandale Developments* [2010] NIQB 43 at paragraph [20]. Similarly in *Sweetman & ors v Galway County Council* [2014] PTSR 1092 it was held that a plan or project not directly connected with or necessary to the management of a site would adversely affect the integrity of that site pursuant to Article 6 (3) if it was liable to prevent the lasting preservation of the constitutive characteristics of the site that were connected to the presence of a priority natural habitat whose conservation was the objective justifying the designation of the site."

(d) Thus the plan or project in question may be granted authorisation only on condition that the competent authority is convinced that the plan or project will not adversely affect the integrity of the site concerned – as *per* Lord Carnwath at paragraph [41] in *Champion v North Norfolk District Council* [2015] 1 WLR 3710. Where doubt remains as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorisation – as *per Waddenzee* at paragraphs [56] and [57].

(e) Although a strict precautionary approach is to be applied the competent authority can take mitigation measures into account- as *per Hart District Council v Secretary of State for Communities & Local Government* [2008] EWHC 1204.

(f) The relevant competent authority is entitled to place "great or considerable weight" on the views of the statutory consultees. "A departure from those views requires cogent and compelling reasons" – as per Beatson J in *Shadwell Estates v Breckland DC* [2013] EWHC 12 at paragraph [72]. This was quoted with approval in *Newry Chamber of Commerce* at paragraph [64] when Treacy J held that:

> "I am in agreement with the Respondent that these are matters of expert judgment which cannot legitimately be condemned as unreasonable. … The decision maker was entitled in the circumstances to accept and act upon the independent expert view of the statutory consultee. The NIEA, the Rivers Agency, and the Loughs Agency were all consulted on the planning application. Each confirmed that they had no objection to the development. The Respondent was entitled to give considerable weight to the non-objections of these statutory bodies."

(g) An applicant who alleges that there is a risk which should have been considered by the authorising authority so that it could decide whether the risk could be "excluded on the basis of objective information" must produce credible evidence that there was a real, rather than a hypothetical risk which

should have been considered. Sullivan LJ in *R(Boggis) v Natural England* [2010] PTSR 725 at paragraphs [37]-[38] stated:

> "[37] In my judgment a breach of Article 6(3) of the Habitats Directive is not established merely because, sometime after the "plan or project" has been authorised a third party alleges that there was a risk that it would have a significant effect on the site which should have been considered, and since that risk was not considered at all it cannot have been "excluded on the basis of objective information" that the plan or project will have a significant effect on the site concerned. Whether a breach of article 6 (3) is alleged in infraction proceedings before the ECJ by the European Commission …or in domestic proceedings before the courts in member states, a claimant who alleged that there was a risk which should have been considered by the authorising authority so that it could decide whether that risk could be "excluded on the basis of objective information", must produce credible evidence that there was a real, rather than a hypothetical, risk which should have been considered.
>
> [38] In the present case there was no such evidence prior to confirmation. It simply did not occur to anyone, including the claimants, that there was a risk to the SPA which required assessment under article 6(3). Nor was there any such evidence after confirmation. The question was not whether there might be …effects….but whether such effects were "likely to undermine the conservation objectives of the SPA…"

(h) Although the test at each stage under Regulation 43 is a demanding one, requiring a strict precautionary approach, it also requires evaluative judgments to be made having regard to the many varied factors and considerations. The assessment under each limb is primarily one for the competent authority to carry out and the relevant standard of review is the Wednesbury standard – as *per* paragraphs [78] – [80] of *Smyth v Secretary of State for Communities & Local Government* [2015] EWCA 174.

(i) In some cases, even if there is a flaw in the process, the court can form the view that quashing the decision on that ground is pointless. In *R(Buckinghamshire County Council) v Secretary of State for Transport* [2013] EWHC 481 Ouseley J held at paragraph [234] that Natural England's subsequent confirmation of its position justified the refusal of relief, even if there had been a prior deficiency in screening.

Ground E: Submissions of the parties

[120] The applicant submitted that the respondent acted in breach of Article 6(3) and Regulation 43, as it did not carry out any assessment in relation to the impact of the project on fish in general and salmon in particular and for this reason the Tols undertaken was defective. He submitted that the respondent could not simply say that as the project related to the Magilligan SAC and as it is not designated for the protection of salmon it did not have to consider the effects of the project on salmon. The applicant, relying on the principles set out in *Sandale*, submitted that the respondent ought to have carried out a Tols which considered the conservation features of the river SACs, which included salmon.

[121] The applicant submitted that even though the river SACs are physically far removed from the discharge at Magilligan there is an aquatic linkage between it and the river SACs. For this reason an assessment of the effects on the conservation objectives of the river SACs, which includes the protection of Atlantic salmon, was required and he submitted that there is no evidence that any of the statutory consultees applied their mind to the impact of the discharge on salmon. He further submitted that it was simply not sufficient to say that there were benefits in the scheme because of bacterial loadings, as this alone could not obviate the impact on salmon SACs as impacts arise from a wider range of factors including smell, temperature and the presence of suspended solids.

[122] The applicant further submitted that he brought the lacuna in the Tols to the attention of the respondent by way of Mr Hasson's letter dated 14 February 2014 and Dr Henderson's letter dated 2 April 2014 which advised the respondent, that given the lack of modelling showing the size, shape and direction of the discharge plume, there was a need to carry out an assessment of the impact of the project in respect of fish generally and salmon in particular, as the plume had the potential to impact on the river SACs. He submits that in view of this correspondence which highlighted risks, an appropriate assessment ought to have been carried out. The respondent's failure to do so was a breach of regulation 43.

[123] Further, the applicant submits that the expert evidence of Dr Henderson and Dr O'Neill, now provided to the court, is credible evidence that there is a real risk which should have been considered by the respondent.

[124] The respondent submitted that a detailed Article 6 assessment was provided by NIW. This was reviewed and considered by NIEA who concluded that there were no likely significant effects on the relevant features.

[125] The respondent submitted that none of the statutory consultees including Loughs Agency, raised any concerns and the respondent was entitled to give great

weight to their views. The respondent therefore submits that the Tols met the requirements of regulation 43 and that therefore there was no breach of the Habitats Regulations or Habitats Directive.

[126] The respondent further submitted that even if there was a flaw in the process overall the court ought to form the view that quashing the decision is pointless as the conclusion reached on the Tols by the respondent was correct in light of all the available evidence.

Ground E: Consideration

[127] In *Sandale* the DOE granted planning permission for a new school in Omagh. One of the grounds of objection was that this was in breach of Regulation 43 of the Habitats Regulations. The proposed development abutted a small water course which flowed into the Foyle. There was expert evidence before the court that young salmon were observed up and down stream in the watercourse. This was stated to confirm that Foyle catchment salmon were breeding and migrating within the watercourse catchment area and had the potential to be impacted by pollution from the proposed development. The Department had not carried out a Tols. Weatherup J held that the obligations under the Habitat's Directive required objective information about the risk to be sought as the concept of screening implied that some attempt had to be made by the department to become sufficiently informed. He found that as information on habitats issues had not been provided or requested and as research had not been sought or obtained, any objective information about the risk to habitats was unlikely to emerge. He found that one known feature was the presence of the watercourse adjacent to the site. He held that this known feature of the site demanded that Planning Service should have ensured that it was sufficiently informed about the potential impact of the development on the watercourse. Given the particulars furnished on behalf of the applicant in relation to the connection of Atlantic salmon to the watercourse and its link to the River Foyle SAC he held that the absence of any reference to habitats was striking. More particularly he found that the information that had emerged indicated that a risk existed that the proposed development would have significant effects on the River Foyle SAC as the salmon may be affected by discharges into the watercourse. In *Sandale* the total distance from the watercourse to the boundary of the Foyle SAC was some 30 kilometres. Notwithstanding this the court concluded that the proposed development could have had an adverse impact on the River Foyle SAC.

[128] S*andale* is authority for the proposition that a planning authority should investigate the impact of a plan or project on other SACs if there is some evidence or other reason to consider that the plan or project may affect them.

[129] Although the applicant submits that Mr Hasson's letter dated 14 February 2014 and the letter of Dr Henderson dated 2 April 2014 drew the respondent's attention to the need for assessment in respect of the impact of the proposal on salmon I am not satisfied that the correspondence did in fact do so. When one

considers the content of these letters, nothing is said about the discharge affecting salmon or its migratory pattern and the correspondence raises no scientific concerns. I am therefore satisfied that prior to the date of the impugned decision, the applicant never provided any objective evidence or information to the respondent that the project would have significant effects on the river SACs and salmon in particular. Indeed, the concern about salmon and its migratory pattern did not even feature in the pre-action protocol letter. The first time it was mentioned was in the affidavit evidence grounding the Order 53 Statement.

[130] Notwithstanding the fact that prior to the impugned decision, the applicant never provided any objective evidence or information to the respondent that the project would have significant effects on the river SACs and salmon in particular and whilst the Environmental Statement and the Tols carried out by NIW only considered the likely significant effects on the conservation features of the Magilligan SAC which did not include salmon and whilst Mr Finegan at paragraph 11 states that:

> "Salmon is not a feature of the SAC and therefore was not considered."

I am satisfied that, unlike in *Sandale,* the respondent did in fact obtain objective evidence about the risk to the river SACs and made appropriate steps to become sufficiently informed. Objective evidence about risk was obtained through the consultation process with the statutory consultees. Loughs Agency which is the statutory body charged with the conservation, protection and development of inland fisheries within the Foyle and Carlingford system, was consulted about the planning application. It initially expressed concern about the project when the discharge was to Big Drain and then to the River Roe. In its correspondence dated 18 July 2009 it expressed concern about shellfish in Lough Foyle and about the environmental impact on migratory and other fish species. When the plan changed to discharge to sea, Loughs Agency was sent the draft consent with the condition for disinfection and Loughs Agency did not respond with any concerns. In addition Marine Conservation Division was consulted and responded by stating that it had no concerns. I further note that the plans were assessed at marine licensing stage. No concerns were expressed by any statutory consultee at that stage and a marine licence issued. None of the statutory consultees therefore raised any concerns about the project. Given that Loughs Agency is the body responsible for fisheries and its remit is to protect and conserve salmon populations within the river SACs and given that it raised concerns when the discharge was to Big Drain and the River Roe and then raised no concerns when the discharge was to sea I am satisfied that if Loughs Agency had any concerns that the discharge to sea would have had an impact on the river SACs it would have raised these concerns during the consultation. The applicant submitted that the respondent failed to re-consult Loughs Agency when the information provided by Dr Henderson was provided and therefore the respondent could not rely on the out-dated responses of Loughs Agency. I find that there is no merit in this submission, given my finding, that Dr Henderson's

correspondence did not raise any concerns about salmon. I therefore do not accept the applicant's submission that the statutory consultees simply did not address their minds to the salmonid SACs.

[131] The applicant submits that he has now produced credible evidence that there is a real risk that the project would adversely affect the river SACs' conservation features. He relies on the expert evidence of Dr Peter Henderson, a specialist Environmental Consultant and Dr James O'Neill, Managing Director of Corvus Environmental Consulting Limited, who has 18 years' experience in ecological and environmental planning matters. Dr O'Neill in his first affidavit sworn on 16 November 2015 at paragraph [32] avers that:

> "The area impacted by the discharge plume of the proposal lies across the migration routes used by Atlantic salmon to reach these SACs and thence may create a barrier to salmon migration…"

[132] Dr O'Neill in his affidavit sworn on 5 May 2016 avers at paragraphs [16]-[19] that since the 1930s it has been known that some artificial chemicals could interact with the hormonal systems of animals. He refers to scientific papers in which the authors refer to a variety of assessments carried out in wild fish which show that synthetic hormones arising from waste water treatment works are likely to be the source of changes in the biology of wild fish populations. The source of the hormones is identified as the female contraceptive pill. Therefore, he concludes that the existence of a potential source of impact in the instant case (oestrogens arising from the Magilligan waste water treatment works) is irrefutably established. He further avers that the best available scientific evidence indicates that the efficacy of disinfection mitigation is unknown and concludes that there is no scientific evidence that such mitigation is effective. At paragraph [42] he states:

> "… the waste water treatment works was likely to give rise to potential impacts upon salmon in the event of consent being granted and that such changes had the potential (were likely) to impact upon the ability of Atlantic salmon to migrate to their natal rivers. Despite this, issues such as oestrogenic impact were not recognised by the Department at any time and no assessment of the said issues was carried out at any time."

[133] Dr Henderson in his report dated 10 July 2014 concludes that there are strong grounds to believe that the discharge would affect the distribution of salmon and other marine life in the vicinity of the discharge and in the waters where salmon were traditionally fished. Salmon would likely avoid the plume. This is because salmon are sensitive to changes in oxygen, water temperature, suspended solids and chemical constituents that will likely occur within the plume. In his third affidavit

sworn on 25 May 2016 Dr Henderson avers that there is significant scientific literature which demonstrates the adverse impact of waste water discharge on marine life and states that there is clear evidence that waste water discharges are known to cause environmental damage to marine life and fish in particular.

[134] The respondent relies upon the affidavits sworn by Keith Finegan, Higher Scientific Officer, in the Natural Heritage Directorate of the NIEA, on 1 September 2015,18 March 2016 and 7 December 2016, affidavits sworn by Stephanie Millar, Principal Scientific Officer with the NIEA on 11 September 2015 and 14 March 2016 and affidavit of Roslyn Stewart, Senior Scientific Officer with the NIEA sworn on 7 December 2016 to show that the risks identified by the applicant's experts are hypothetical and not real.

[135] As noted in *Boggis* the burden is on the applicant to produce credible evidence that there is a real, rather than a hypothetical, risk which should have been considered.

[136] Having read the reports and affidavits of Dr Henderson and Dr O'Neill and the affidavits filed on behalf of the respondent, I am satisfied that the applicant has not produced credible evidence of real risk to the integrity of the salmonid SACs.

[137] Dr Henderson's reports and affidavits do not claim that there will be an impact on the salmonid SACs, rather he reports on the potential impact on salmon fishing. For example he refers to "the potential impact of the discharge on the abundance of salmon in the vicinity of the discharge". Fishing however is not something that is related to conservation or protection of the species which is the reason for the designation of the SACs. Impacts on fishing in the vicinity of the discharge therefore is not evidence of an adverse impact on the conservation objectives of the salmonid SACs and therefore I find that there is no evidence of an adverse impact on the river SACs.

[138] I find that the evidence of Dr O'Neill does not amount to credible evidence that there is any real impediment to migration and therefore to the conservation of salmon in the river SACs. Dr O'Neill at paragraph [35] of his affidavit sworn on 16 November 2015 identifies that adult salmon require free access to the spawning grounds and that barriers to migration in fresh water and estuaries can block this access. At paragraph [36] he identifies that changes in water quality in estuaries may impact on the ability of adult salmon to migrate upstream. Mr Finegan avers that the estuaries of the River Foyle and the River Faughan end at Culmore Point which is some 25 kilometres from the discharge location and the estuary of the River Roe is 5 km from the discharge location and avers that the water quality status for Foyle and Portrush Bay from 2009-2015 demonstrates an improvement. Dr O'Neill's second affidavit deals with the impact of oestrogen. Mr Finegan avers that all the studies Dr O'Neill refers to into the impact of oestrogen deal with fresh water and not salt water. I therefore find that the evidence produced by Dr O'Neill does not demonstrate risk in the present case. Therefore, having regard to all the evidence I

am satisfied that the applicant has not discharged the burden of producing credible evidence that there was a real, rather than a hypothetical risk which should have been considered.

[139] I am therefore satisfied that the screening Tols carried out and relied upon by the respondent met the requirements of regulation 43.

[140] I am also satisfied that even if there was a flaw in the process the court should not quash the decision on this ground, as it is evident based on the best scientific knowledge available that NIEA was correct in its original conclusion that there are no conceivable effects on the salmonid SACs and therefore quashing the decision would be pointless.

[141] Mr Finnegan sets out evidence, collated from Loughs Agency, of annual fish counts which supports the view that the discharge plume has had no negative effect on migration of salmon. The data for Rivers Foyle, Faughan and Roe show figures which compare favourably to figures from the previous years. This data therefore demonstrates that the salmon populations are passing the discharge point unimpeded. The view that discharge to sea would not impact the salmon population was also confirmed by the Department of Agriculture and Rural Development Fisheries Division and Agri-Food and Bio-Sciences Institute Fisheries and Eco-Systems Branch as evidenced by their consultation responses in respect of the associated marine construction licence. No issue was raised by them with respect to any potential impact on salmon by virtue of the location of the discharge point.

Ground F: Breach of Council Directive 200/60/EC

[142] This ground was not pursued by the applicant at hearing.

Ground G: Breach of Article 17 (Right to Property) and 37 (Environmental Protection) of the Charter of Fundamental Rights

[143] This ground was not pursued as a separate head of challenge by the applicant at the trial.

Ground H: Breach of the applicant's Article 1 of Protocol 1 right to peaceful enjoyment of his possessions

[144] The applicant submits that in making the impugned decision the respondent interfered with his rights to property, namely his fishery rights at Magilligan Point.

[145] Article 1 of Protocol 1 states:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived

> of his possession except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provision shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[146] I accept that the applicant's fishery rights are a "possession". I do not however find that the respondent has acted in a manner that is incompatible with his rights pursuant to Article 1 to Protocol 1 of the ECHR or Article 17 of the Charter of Fundamental Rights of the European Union.

[147] Firstly, the impugned decision does not prevent the applicant from carrying out his right to fish. Secondly, I find that the applicant has still failed to establish that the discharge has had any real impact on salmon or his fisheries.

[148] Thirdly, even if there is an interference with the applicant's rights I find that in accordance with *Solomun v Croatia (Application No: 679/11, 2 April 2015)* the interference is lawful, is in the public interest and is proportionate. I therefore dismiss this ground of challenge.

Relief

[149] Given that I have found that none of the grounds is made out I do not need to consider whether to exercise my discretion to grant relief.

Conclusion

[150] The court's function is limited to reviewing the respondent's decision-making process. I am satisfied that the respondent acted legally, rationally and followed proper procedures. Accordingly, I find that none of the grounds of challenge has been established and the application must be dismissed.